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**INTRODUCTORY CERTIFICATE IN INSOLVENCY LAW AND  
PRACTICE IN THE CAYMAN ISLANDS 2023**

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

Time limit: 24 hours (from 13:00 Cayman time on 23 November to 13:00 Cayman time on 24 November 2023)

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**EXAMINERS**

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It is imperative that all candidates read and take cognisance of the examination instructions on the next page.

All candidates are expected to comply with ALL the instructions.

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Commented [BB1]: TOTAL = 90.5/100 - Excellent results, well done!

Commented [BB2R1]: Mark adjusted to 91/100

## INSTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) Cayman time on Thursday 23 November 2023** and must be returned / submitted by **13:00 (1 pm) Cayman time on Friday 24 November 2023**. Please note that assessments returned late will not be accepted.
2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the Arial font). This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. Please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.
4. You must save this document using the following format: **studentID.SummativeAssessment**. An example would be something along the following lines: 202223-336.SummativeAssessment. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. **If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to david.burdette@insol.org.**
6. Enquiries during the time that the assessment is written must be directed to David Burdette at **david.burdette@insol.org** or by WhatsApp on +44 7545 773890 or to Brenda Bennett at **brenda.bennett@insol.org** or by WhatsApp on +27 66 228 2010. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm GMT, or 11 am to 7 pm SAST).
7. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate’s own words; answers that are copied and pasted from the text of the course notes (or any other source) will be treated as plagiarism and persons who make themselves guilty of**

**this will forfeit the assessment and disciplinary charges will follow.** When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited. If you submit your assessment by e-mail, a statement to this effect should be included in the e-mail.

8. Once a candidate's assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.
9. You are required to answer this paper by typing the answers directly into the spaces provided (indicated by text that states [Type your answer here]). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.
10. If a candidate is unable to complete this summative assessment (examination), please note that a re-sit assessment will only be given if there are exceptional circumstances that prevent the candidate from completing or submitting it (such as illness). Feedback on this final assessment will be provided within four weeks of the paper having been written - please do not enquire about your marks before four weeks have elapsed. **However, please note that it is our intention to send out the results on this course by Friday 22 December 2023 at the latest.**
11. Please note that this document will probably reformat in line with the default settings of your printer or PC. Please do not be concerned if the formatting of this document changes in line with your printer or PC settings.

## ANSWER ALL THE QUESTIONS

### QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

Commented [BB3]: Question 1 - Sub-total = 19/20

Questions 1.1 - 1.20 are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question. Each of the 20 questions count 1 mark.

#### Question 1.1

What is the date for Financial Institutions to submit its common reporting standard (CRS) Return in respect of reportable accounts?

- (a) 1 January (annually)
- (b) 1 April (annually)
- (c) 1 July (annually)
- (d) 1 October (annually)

#### Question 1.2

What is the maximum success fee permitted pursuant to Conditional fee agreements?

- (a) 50%
- (b) 33.33%
- (c) 66.66%
- (d) 100% of hourly rates

#### Question 1.3

Choose the **correct** statement:

How many forms of security interests are recognised in the Cayman Islands?

- (a) 3

(b) 5

(c) 6

(d) None of the above

**Question 1.4**

Who may **not** petition for the winding up of a Company?

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

**Question 1.5**

Choose the **correct** statement:

What is the minimum sum required to be owed, to enable a statutory demand to be used?

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

**Question 1.6**

Choose the **correct** statement:

A Restructuring Officer is required to report to the Court following their appointment:

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

(c) At such intervals as the Restructuring Officer considers appropriate.

- (d) Within 7 days of the appointment.

**Question 1.7**

Which of the following is **not** required to be included in an affidavit filed in support of a restructuring petition:

- (a) A statement that, having made due enquiry and taken appropriate advice, the board believes that the company is or is likely to become unable to pay its debts.
- (b) An explanation of how the company will be funded during the restructuring period.
- (c) A statement as to why the directors believe that the appointment of a restructuring officer will be in the bests interest of the company.
- (d) A detailed outline of the proposed restructuring plan.

**Question 1.8**

Choose the **correct** statement:

A petition for the appointment of a Restructuring Officer can be brought by:

- (a) the company.
- (b) any creditor;
- (c) any contributory; or
- (d) all of the above

**Question 1.9**

Choose the **correct** statement:

Unless the Court otherwise directs, when must the petition for the appointment of a Restructuring Officer be heard?

- (a) within 14 days of the petition being filed.
- (b) within 21 days of the petition being filed.
- (c) within 28 days of the petition being filed.
- (d) within 56 days of the petition being filed.

**Question 1.10**

Choose the **correct** statement:

A scheme of arrangement:

- (a) can be sanctioned by the Court with the consent of all affected parties.
- (b) requires a special resolution in accordance with the company's Articles.
- (c) can only proceed if there are shareholders / creditors who may not agree with it.
- (d) Only needs to be approved by a majority in value.

Commented [BB4]: The correct answer is (c)

**Question 1.11**

Select the **incorrect** statement:

- (a) The Cayman Islands adopts the principle of universalism and the principle of assistance in respect of cross-border insolvency.
- (b) Foreign representatives can apply for assistance under Part XVII of the Companies Act.
- (c) The Cayman Islands has implemented the UNCITRAL Model Law on Cross-Border Insolvency.
- (d) There are no automatic rights in the Cayman Islands based on the centre of main interests of the debtor.

**Question 1.12**

Choose the **correct** statement:

If winding up proceedings are filed against a Cayman Islands company in the Cayman Islands and in a foreign country, which of the following statements is true?

- (a) The Cayman Islands Court will wish to ensure comity between courts in other jurisdictions so it will be deferential to whatever decision is reached by the foreign court.
- (b) The Cayman Islands Court will wish to ensure that Cayman Islands creditors have priority over foreign creditors.
- (c) The Cayman Islands Court will wish to ensure that secured creditors cannot prejudice unsecured creditors.

- (d) The Cayman Islands Court takes into account a number of factors, but the starting point is that the main insolvency proceedings for a Cayman Islands company should take place in the Cayman Islands.

**Question 1.13**

Select the **correct** statement:

- (a) A voluntary liquidator will automatically cease to hold office if a conflict of interest arises during the liquidation.
- (b) A voluntary liquidator will automatically cease to hold office as such upon the appointment of an official liquidator following a supervision order.
- (c) A sole voluntary liquidator can resign at any time without reference to the shareholders or the court.
- (d) A voluntary liquidator can be removed by the company's creditors.

**Question 1.14**

Select the **correct** statement relating to the adjudication, quantification and distribution of claims during an official liquidation:

- (a) An official liquidator acts in *quasi*-judicial capacity in respect of the adjudication of claims, meaning that the liquidator's determination will be final and is not capable of dispute.
- (b) A proof of debt is always required in order for an official liquidator to adjudicate on a creditor's claim.
- (c) Only creditors with a contractual right to interest have an entitlement to interest.
- (d) A valid contract (agreed between the company and the creditor) can have the effect of changing the otherwise statutory ranking of that creditors' claim, such that the claim is subordinated.

**Question 1.15**

Select the **correct** statement relating to the appointment of inspectors:

- (a) The report of an inspector can be used in any legal proceeding as evidence of the opinion of the inspectors.



- (b) Upon the appointment of an inspector the directors' powers will automatically cease.
- (c) Upon the appointment of an inspector there is a stay of proceedings such that a winding up application cannot be brought.
- (d) Only CIMA has the power to appoint an inspector.

**Question 1.16**

Select the **correct** statement relating to exempted limited partnerships (ELPs):

- (a) Limited Partners have an unfettered statutory right to petition the court to wind up the relevant ELP / General Partner.
- (b) Where there are inconsistencies in relation to the dissolution of ELPs, the ELP Act will take priority over the Companies Act.
- (c) An ELP is required to have more than one limited partner.
- (d) An ELP formed under the Exempted Limited Partnership has a separate legal personality.

**Question 1.17**

Select the **correct** statement:

Which of the following statements in relation to informal workouts pursuant to the Cayman Islands law is correct:

- (a) The restructuring officer regime is an example of an Informal workout process under Cayman Islands law.
- (b) A stay of proceedings is not available in the Cayman Islands for informal creditor workouts.
- (c) A qualified insolvency practitioner is required to oversee an informal workout under the Insolvency Practitioners Regulations.
- (d) Under Cayman Islands law, any new financing advanced during an informal creditor workout will be provided with priority status in the event the company is later liquidated.

**Question 1.18**

Choose the **correct** statement:

Which of the following statements is true regarding a provisional liquidation application?

- (a) The company has the statutory power to commence the proceedings.
- (b) There is a worldwide moratorium (stay) upon the presentation of the provisional liquidation application.
- (c) A winding up petition must be presented as a precursor to the application for the provisional liquidation.
- (d) Following the implementation of restructuring officer regime, a company can no longer seek the appointment of a provisional liquidator if it intends on presenting a restructuring proposal.

**Question 1.19**

Select the **correct** statement:

An official liquidator can set aside dispositions that seek to prefer one creditor over other creditors within how many months / years before the deemed commencement of the company's liquidation.

- (a) Three months
- (b) Six months
- (c) Six years
- (d) There is no time limit

**Question 1.20**

Select the **correct** statement:

Which of the following is **not a** fundamental principle of ethics for Insolvency Practitioners per the Cayman Islands Institute of Professional Accountants:

- (a) Conflicts of interest
- (b) Integrity
- (c) Confidentiality
- (d) Professional behaviour

**\*\* END OF QUESTION 1 \*\***

**QUESTION 2 FOLLOWS ON NEXT PAGE / ...**

## QUESTION 2 - LIQUIDATION (45 MARKS)

Where appropriate, refer to the fact pattern below when answering the questions that follow. Please note that not all questions relate to the fact pattern.

### FACT PATTERN

#### BLUESEA DIGITAL CAPITAL LIMITED

Bluesea Digital Capital Limited (Bluesea) was established in 2018 in the Cayman Islands as a digital asset management platform. Bluesea operated multiple online cryptocurrency trading platforms across the Caribbean and Latin America, known as OTPs. Investments made into these OTPs were held in secure brokerage accounts under Bluesea's own name. Bluesea's clientele comprised a diverse mix of institutional investors, high-net-worth individuals, and consumers.

On 24 June 2022, one of Bluesea's prominent OTPs, eTrade Wave (eTrade), abruptly disabled its buy / sell functionality without prior notice. At the time of suspension, eTrade had amassed over 2,500 users who had collectively invested approximately \$125 million. This sudden suspension of the trading platform created widespread apprehension among investors, resulting in an overwhelming surge of withdrawal requests. Notably, Whitesand Capital (Whitesand) sought to withdraw its entire deposit of \$32 million but faced insurmountable challenges in recovering the funds.

Unable to retrieve its deposit, Whitesand initiated winding up proceedings against Bluesea in May 2023. The petition faced vehement opposition from Bluesea, which asserted that deposits had been transferred to its joint venture partner. Bluesea claimed it needed additional time to resolve a "cordial disagreement" to facilitate the return of deposits. Amid allegations that investor deposits had not been segregated as promised and due to Bluewave's inability to meet its financial obligations, the Grand Court of the Cayman Islands saw fit to make a winding up order on 22 August 2023.

Following the appointment of the official liquidator, Bluesea's joint venture partner, based in Singapore, became the subject of several press reports. These reports alleged that its director had previously been involved in a fraudulent investment scheme in the early 2000s. Furthermore, the official liquidator had discovered that only one audit had ever been conducted in respect of Bluesea's financial statements, with Bluesea's auditors resigning shortly thereafter.

The official liquidators have called for creditor claims, and among the submissions received, a claim amounting to \$0.5 million has surfaced, relating to leasing obligations tied to office space that was utilised by the joint venture partner. Bluesea's documented records fail to substantiate any historical evidence of rental payments being disbursed by the company, nor do they reveal any corresponding liabilities recorded within its financial statements.

### Question 2.1

As part of Whitesand's petition to wind up Bluesea, Whitesand obtained sworn consent(s) to act from the proposed official liquidators. Set out the required content of the consent to act signed by the proposed official liquidator(s). (5)

[Assuming that the nominees are resident in the Cayman Islands, under Order 3, rule 4(1) of the Companies Winding Up Rules, a consent to act for a Cayman Islands resident Official Liquidator must be a sworn affidavit which states that: (1)

- The nominee is a qualified insolvency practitioner and meets the residency requirements contained in Regulation 5 of the Insolvency Practitioners Regulations; (1)
- Having made due enquiry, the nominee believes that they and their firm meet the independence requirement contained in Regulation 6 of the Insolvency Practitioners Regulations; (1)
- The nominee or the nominee's firm are in compliance with the insurance requirement contained in Regulation 7 of the Insolvency Practitioners Regulations; and (1)
- The nominee is willing to act as Official Liquidator if so appointed by the Court. (1)

If one of the nominees is a foreign practitioner, Order 4, rule 3(2) of the CWR requires that their consent to act be a sworn affidavit which states:

- The nominee's professional qualifications;
- The country in which the nominee is qualified to perform functions equivalent to those performed by official liquidators or bankruptcy trustees under the applicable Cayman Islands laws;
- The nominee's professional experience;
- That the nominee will have the benefit of professional indemnity insurance meeting the requirements of Regulation 7 of the Insolvency Practitioners Regulations; and
- If the nominee has been appointed by a foreign court or authority as a liquidator, trustee, receiver or administrator of the Company, full particulars of their appointment; and
- That having made due enquiry, the nominee and the nominee's firm meet the independence requirement in Regulation 6 of the Insolvency Practitioners Regulations]

**5 marks**

### Question 2.2

The proposed liquidators are employees of the accountancy practice Bodden & Ebanks Limited. Shortly prior to the hearing of the winding up petition of Bluesea, it transpires that Bodden & Ebanks Limited previously acted as auditors of Bluesea in 2021. Are the proposed liquidators still able to act in relation to Bluesea? Please provide an explanation

Commented [BB5]: Question 2.1 - Sub-total = 5/5

Commented [BB6]: Question 2.2 - Sub-total = 4/5

for your answer. This information came to light after the proposed liquidators had already provided their consents to act; what should the proposed liquidators do in respect of the same? (5)

[The proposed liquidators are not able to act in relation to Bluesea. (1) Regulation 6(1) of the Insolvency Practitioners Regulations provides that a qualified insolvency practitioner shall not be appointed by the Court as an official liquidator of a company unless that person can properly be regarded as independent as regards that company. (1) Regulation 6(2) provides that a qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, that person, or the firm of which that person is a partner or employee, or the company of which that person is a director or employee, has acted in relation to the company as its auditor. (1)]

As they have not yet been appointed as Official Liquidators by the Court, the nominees should withdraw their consents to act, and take steps to ensure that the Court, and any other party on which the consents were served, are aware of their withdrawal.] (1)

**4 marks**

### Question 2.3

Commented [BB7]: Question 2.3 -Sub-total = 5/5

Tom and Jerry have been appointed as joint voluntary liquidators of Cheese Limited, a Cayman Islands exempted company, upon the passing of a special resolution of the shareholders of Cheese Limited, dated 1 March 2023.

On 1 April, Tom decides to retire from his career as voluntary liquidator and leave his firm, leaving Jerry to act as sole voluntary liquidator.

On 1 June, one of the shareholders reads that Jerry has been named in an Offshore Alert article suggesting that he has been defrauding companies in liquidation. They wish to remove him as liquidator immediately, but do not have the support of the other shareholders to take that action.

Using the facts above, answer the questions that follow:

#### Question 2.3.1 (1/1 mark)

List the qualifications Tom and Jerry need to act as voluntary liquidators. (1)

[No specific qualifications are required to act as a voluntary liquidator of a Cayman Islands company, and any person may do so.] (1)

**Question 2.3.2 (2/2 marks)**

List the statutory steps Tom and Jerry must take within 28 days of their appointment, as set out in the Companies Act. (2)

[Section 123(1) of the Companies Act requires Tom and Jerry to:

- File notice of the winding up with the Registrar;
- File their consent to act with the Registrar;
- File the director's declaration of solvency with the Registrar (assuming a supervision order is not sought);
- If Cheese Limited was carrying on a regulated business, service notice of the winding up on CIMA; and
- Publish notice of the winding up in the Gazette. (2)

**Question 2.3.3 (2/2 marks)**

Describe the basis upon which the company may resolve to remunerate Tom and Jerry in their capacity as the voluntary liquidators. (2)

[Under Order 13, rule 9 of the CWRs, Cheese Limited may resolve to remunerate Tom and Jerry on the basis of:

- An hourly rate (or scale of rates) for the time they reasonably and properly spend on the liquidation;
- A fixed sum;
- A commission or a percentage of the assets of Cheese Limited they distribute or realise; or
- A combination of these methods.] (2)

**Question 2.4 (2/2 marks)**

Assuming that the contributories petition the Grand Court of the Cayman Islands for an appointment of a provisional liquidator, what are the Court's powers upon the hearing of a winding-up petition? (2)

[Under section 95(1) of the Companies Act, on the hearing of a winding-up petition the court may:

- Dismiss the petition;
- Adjourn the hearing conditionally or unconditionally;
- Make a provisional order; or
- Make any other order that it thinks fit.

However, the court may not refuse to make a winding up order only because the

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company's assets have been mortgaged or charged to an amount that is equal to or greater than its assets, or that it has no assets.

The Court has these powers whether or not the contributories have petitioned for an appointment of a provisional liquidator.]

### Question 2.5

#### Question 2.5.1 (4/4 marks)

In a brief essay, explain who can apply to the Court to remove official liquidators, and in what circumstances. Who must such an application be served on? (4)

[Under section 107 of the Companies Act, a creditor (if the company is insolvent) or a contributory (if the company is solvent) of a company may apply to the Court for an order removing an Official Liquidator from office. The Companies Act does not prescribe the circumstances in which such an application can be made. However, the Grand Court has ruled that an application to remove an official liquidator will be granted only if there are good reasons to remove them (see *In Re BTU Power Company* [2019 (1) CILR Note 7 at (2)]. Although, it is also sufficient if the court is satisfied that removing an official liquidator would be to the general advantage of the majority of those persons who have an interest in the liquidation (being the contributories or creditors of the company, depending on whether it is solvent or insolvent) (Ibid). The Court has held that good reasons would include the liquidator having a conflict of interest (see *Deloitte v Johnson* [1999 CILR 297]), or if the liquidator has engaged in impropriety (see *In Re BTU Power Company* [2019 (1) CILR Note 7]).

Under CWR Order 5, rule 6, such an application must be made by summons, and that summons must be served on the official liquidator in question, each member of the liquidation committee or, if the liquidation committee has appointed counsel with authority to act generally, that counsel, and such other creditors or contributories of the company as the Court may direct. The summons also needs to nominate a qualified insolvency practitioner who can replace the removed official liquidator, and that replacement must swear a consent to act. The official liquidator to be removed must be given at least 14 days' notice of the summons.]

#### Question 2.5.2 (5/5 marks)

Briefly explain why it makes sense that the class of potential applicant varies in accordance with the solvency of the company. (5)

[The class of person who may apply for the removal of official liquidators differs between

Commented [BB9]: Question 2.5 - Sub-total = 9/9

Commented [ni10]: great answer

Commented [ni11]: spot on. Another great answer



solvent companies (for which contributories may apply) and insolvent companies (for which creditors may apply). In the case of a solvent company, the creditors will be paid in full, and so only contributories will have an interest in the distribution of the company's assets in the liquidation. Conversely, for insolvent companies, it would ordinarily be the case that there are insufficient assets to pay the creditors in full. Accordingly, there will be no residual assets which can be distributed to contributories, and so only the creditors will have an interest in the distribution of what assets the company does have in the liquidation. In order to apply for the removal of an official liquidator, the applicant must have an interest in their removal (see *Deloitte v Johnson* [1999 CILR 297 at (1)]. As the primary function of an official liquidator is to gather in and distribute the assets of the company, only a person with an interest in those assets can have an interest in the identity of the official liquidator(s) of the company. For this reason, it makes sense that only contributories can make such an application in respect of a solvent company, and only creditors can apply in respect of an insolvent company.]

#### Question 2.6

During a liquidation there is an expected recovery into the liquidation estate. The amount is such that the liquidation estate is no longer deemed to be insolvent and the official liquidator can settle all of the outstanding creditor claims (including interest) in full. The official liquidator has subsequently filed a revised certificate of solvency (CWR Form No 14) with the court. What impact will the change in solvency have on the liquidation committee, assuming one has been constituted?

(4)

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[Where the company was previously insolvent, only creditors could be members of its liquidation committee (CWR Order 9, rule 1(3)). Where the liquidator has changed their certification of the company's solvency from insolvent to solvent, CWR Order 9, rule 3(2) provides that any creditor members of its liquidation committee (which in this case would be all members of the liquidation committee) automatically cease to be members. The liquidator is then required to convene a meeting of the company's contributories for the purpose of electing new members of the committee from amongst the contributories. ]

For full marks needed to reference that the newly reconstituted LC will be comprised of not less than three, no more than five, contributories (Order 9, r.1 (3)).

#### Question 2.7

Discuss the steps that a liquidator will need to take following the making of an order for dissolution.

(5)

Commented [ca13]: Question 2.7 Subtotal 5/5 Insightful response

[Where the Court makes an order for the dissolution of a company, the liquidator is required to file a copy of that order with the Registrar within 14 days (see *Companies Act*, sections 152(3) and (4) and CWR Order 22, rule 2(3)). The liquidator must also retain the liquidation files for a minimum period of 3 years, or any longer period of time ordered by

the Court (see CWR Order 22, rule 2(4)(a)). They must retain, store or destroy the company's books and records as directed by the Court (see CWR Order 22, rule 2(4)(b) and Order 26, rule 3(4)), but must keep the books and records in safe custody unless and until the time the Court has authorized or directed them to destroy them (see CWR Order 26, rule 3(2)). The liquidator should apply for a certificate of dissolution, and is required to maintain the company's records (as a relevant entity) and respond to the Tax Information Authority's information requirements under the Economic Substance Act, for six years following the date of the certificate of dissolution (see Economic Substance for Geographically Mobile Activities Guidance, version 3.2, pages 14 and 15).]

**Question 2.8**

Describe the general investigative powers and duties of a liquidator.

(5)

[The functions and powers of a provisional liquidator are those conferred on them by the Court (Companies Act section 104(4)). The function of an official liquidator is to collect, realise and distribute the assets of the company to its creditors and to report to the company's creditors and contributories regarding the affairs of the company (Companies Act, section 110).. A liquidator is empowered to investigate, if the company has failed, the causes of the failure, and generally, the promotion, business, dealings and affairs of the

**Commented [BB14]:** Question 2.8 - Sub-total = 2/5

company (Companies Act, section 102). (1) It is the duty of a liquidator to take possession or control of all the company's books and records (CWR Order 26, rule 3(1)), and a liquidator is empowered, as agent of the company, to collect, take possession, retain, manage and realise the company's property (CWR Order 18, rule 1(2)). Liquidators may require any person who has been a director, officer, professional service provider of a company or an employee during the year before the commencement of the winding up or appointment of the provisional liquidator to provide a statement of the company's affairs, (1) verified by affidavit (Companies Act section 101). Liquidators may also apply to the Court for an order for the examination (by interrogatories or orally) of relevant persons, which are broadly any former director, officer, service provider, advisor or person that has been concerned or taken part in the promotion or management of the company, or requiring a relevant person to deliver to the liquidator any property or documents belonging to the company (Companies Act, sections 103(1) and (3)). The liquidator must seek such an order if requested to do so by one half, in value, of the company's creditors or contributories, unless the court orders otherwise (Companies Act section 103(4)). A liquidator also has the power with sanction of the Court to bring legal proceedings in the name and on behalf of a company, which would include investigatory proceedings (Companies Act section 110(2)(a)).]

Please see model answer below:

A liquidator is an officer of the court with certain general duties which were summarised in the Cayman Islands case *In the Matter of Citrico International Limited* [2004-05 CILR 435] (citing *Gooch's Case* 1872, 7 Ch App 207), (1 mark) as requiring the liquidator "to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the courts of his investigation, which is material to ascertain the exact truth in every case before the Court". (1 mark) In addition to this general duty, section 102(1) of the Companies Act expressly empowers the liquidator to investigate (a) if the company has failed, the causes of the failure; and (b) generally the promotion, business, dealings and affairs of the company, and to make such report if any to the court as the liquidator thinks fit (1 mark). Additionally, the liquidator is also empowered (subject to obtaining directions from the court) to assist the CIMA and the RCIPS to investigate the conduct of persons, and institute and conduct a criminal prosecution of person referred to in section 101(3) of the Act. Those persons include existing or former directors or officers of the company; (b) professional service providers to the company; and (c) employees of the company, during the period of one year immediately preceding the relevant date. (2 marks)

#### Question 2.9

Explain what is meant by the "relevant date" for the purposes of a section 101 of the Companies Act (2023 Revision) notice served by a liquidator in order to procure a statement of affairs from persons listed in section 101(3). (5)

[As set out above, liquidators have the power to require a person to provide a statement of the Company's affairs. Liquidators can only exercise this power in relation to employees where the relevant person is an employee of the company, or was an employee of the

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company during the period of one year immediately preceding the relevant date (Companies Act section 101(3)(c). For a provisional liquidator, the relevant date is the date on which they were appointed as provisional liquidator by the Court, and for an official liquidator, the relevant date is the date of the commencement of the winding up (1) (Companies Act section 101(6). The date of the commencement of the winding up is, for a company which was in a voluntarily winding up, (½) **In many cases, this is the presentation of the winding up petition (pursuant to section 100(2))** but for which a supervision order was subsequently made, (½) the date on which the resolution for the winding up was passed by the Company, (½) or the expiry of the period or the occurrence of the event specified in the company's memorandum and articles of association (½) (Companies Act section 117(1)). The date of the commencement of the winding up of a company following a winding up petition is the date of the presentation of the petition (Companies Act section 100(2)).(1)

**\*\* END OF QUESTION 2 \*\***

**QUESTION 3 FOLLOWS ON NEXT PAGE / ...**

### QUESTION 3 - CORPORATE RESCUE (20 MARKS)

Where appropriate, refer to the fact pattern below when answering the questions that follow.

#### FACT PATTERN

##### SMB TECH CORPORATION

SMB Tech Corporation (SMB Tech), a Cayman Islands-based company operating in the technology sector, boasts a global presence with subsidiaries spanning various jurisdictions, including the United States, the United Kingdom, and Hong Kong. However, SMB has recently encountered significant financial challenges stemming from an economic downturn and heightened competition within its industry. Considering these difficulties, SMB sought the advice of a reputable advisory firm, which cautioned that SMB Tech teetered on the brink of insolvency and urgently required a financial restructuring.

While exploring its strategic alternatives, SMB Tech found itself confronting mounting pressure from its creditors. One particularly assertive creditor, Tech Credit Systems (TCS), threatened to initiate winding-up proceedings against SMB Tech. In a bid to secure some respite, SMB Tech entered into a three-month standstill agreement with TCS. However, as the three-month period lapsed without concrete restructuring proposals in place, TCS exhibited signs of growing impatience.

The delay and indecision on the part of SMB Tech's management have further exacerbated tensions among certain contributories of the company. These contributories, expressing their dissatisfaction, have indicated an intent to petition the Grand Court of the Cayman Islands for the appointment of a provisional liquidator. Their chosen provisional liquidator is based in Hong Kong, and their motivation is grounded in a perceived loss of trust and confidence in SMB's directors.

SMB Tech's financial obligations include unsecured debt governed by English law, amounting to GBP 6 million, owed to three creditors situated in the United Kingdom. The company hopes to negotiate a compromise on these liabilities as part of its restructuring efforts. Additionally, SMB Tech has undertaken guarantees for certain financial obligations of several subsidiaries. Notably, the creditors holding these guarantee liabilities have indicated a reluctance to endorse any proposed restructuring scheme.

#### Question 3.1

The chosen provisional liquidator by the contributories of SMB has professional indemnity insurance up to a limit of US\$5 million in respect of each and every claim. The chosen provisional liquidator is unwilling to increase his professional indemnity liability insurance limit due to the increasing cost of insurance products in the market. Along with your

Commented [BB16]: Question 3.1 - Sub-total = 4/5

reasons, provide an explanation as to whether the chosen provisional liquidator could be appointed by the Grand Court of the Cayman Islands. (5)

[The chosen liquidator cannot be appointed by the Grand Court. (1) The term "official liquidator" for the purposes of the Companies Act includes a provisional liquidator (Companies Act section 89). As a foreign practitioner, the chosen provisional liquidator is required to swear a consent to act, in which they must state that they have the benefit of professional indemnity insurance meeting the requirements of Regulation 7 (1) (CWR Order 3, rule 4(2)). Regulation 7 provides that the Court may not appoint an insolvency practitioner as an official liquidator (as set out above, including a provisional liquidator) unless they have professional indemnity insurance with a limit of at least US\$10 million in respect of each and every claim, and at least US\$20 million in the aggregate, with a deductible of not more than US\$1 million. (1) The chosen liquidator's insurance coverage does not meet this requirement. In addition, the chosen liquidator cannot be appointed as a provisional liquidator, as they do not meet the residency requirement (IPR Regulation 5(1)), unless they are appointed jointly with a qualified insolvency practitioner who does meet the relevant requirements (Companies Act section 108(1)).] (1)

4 marks - make reference to Regulation 8 of the IPRs and you probably get the missing mark.

#### Question 3.2

What must the company demonstrate to the Court before the Court will appoint a restructuring officer? (2)

[The Company must demonstrate that it is or is likely to become unable to pay its debts (1) and that it intends to present a compromise or arrangement to its creditors (Companies Act section 91B(1)).] (1)

2 marks

#### Question 3.3

What are the advertising requirements for a restructuring petition? (2)

[Unless the Court directs otherwise, a restructuring petition must be advertised once in a newspaper having a circulation in the Cayman Islands, (½) in the form set out in CWR Form No. 3A (CWR Order 1A, rule 1(3)). In addition, if the company carries on business outside the Cayman Islands, unless the court directs otherwise, a restructuring petition must be advertised once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors and contributories (½) (CWR Order 1A, rule 1(4)). These advertisements must appear no more than 7 days after the petition is filed with the Court, (½) and no less than 7 days before the hearing date of the petition (½) (CWR Order 1A, rule 1(5)).]

Commented [BB17]: Question 3.2 - Sub-total = 2/2

Commented [BB18]: Question 3.3 - Sub-total = 2/2

#### Question 3.4

Describe at least six (6) elements of the new restructuring officer regime that assist in safeguarding the interests of creditors. (6)

[Restructuring petitions should be heard within 21 days of presentation, which protects creditors from debtor companies who may otherwise seek to obtain the benefit of the statutory moratorium on commencing proceedings, without a bona fide intention to restructure or liquidate the company (CWR Order 1A, rule 1(6)). (1) The advertisement requirements set out above also ensure that creditors are notified of restructuring petitions in sufficient time to appear that the hearing if they wish to do so. (1) Any appointed restructuring officer is required to be independent of the company, which protects creditors' interests by ensuring that any restructuring takes place under the control of a restructuring officer which is not beholden to the company's existing management or contributories (CWR Order 1A, rule 10(5)). Restructuring officers are required to give notice of their appointment, which provides transparency, and gives creditors the opportunity to intervene or make applications to the Court if they wish to do so (Companies Act section 91B(5)(a)(i)). (1) The restructuring regime specifically allows secured creditors to enforce their security without leave of the court and without reference to the restructuring officer, which protects the interests of secured creditors (Companies Act section 91H). (1) Creditors of a company may apply to the court for the discharge of the order appointing a restructuring officer (Companies Act section 91E(1)(c) and may apply for the removal or replacement of a restructuring officer (Companies Act section 91F(1)(b), both of which enable creditors to take steps to protect their interests if they consider it necessary to do so. (1) Finally, the restructuring regime allows creditors to present a winding up petition in respect of the company notwithstanding the statutory moratorium it imposes, should they consider that a proposed restructuring is not in their interests, or that a liquidation of the company would better protect their interests, although they require leave of the Court to do so (GCR Order 1A, rule 5). Where a creditor does so, the restructuring officer is required to notify the company's other creditors, so that they can take steps to protect their interests (GCR Order 1A, rule 5(6)).]

5 marks

#### Question 3.5

Outline the relief **that is and is not** available to the Court upon a restructuring petition. (5)

[On hearing a winding up petition, the Court can appoint a restructuring officer; (1) adjourn the hearing conditionally or unconditionally, (1) dismiss the petition, (1) or make any other the court sees fit. (1) However, the Court cannot make an order placing the company into official liquidation (Companies Act section 91B(3)).] (1)

5 marks

Commented [BB19]: Question 3.4 - Sub-total = 5/6

Commented [BB20]: Question 3.5 - Sub-total = 5/5

**\*\* END OF QUESTION 3 \*\***

**QUESTION 4 FOLLOWS ON NEXT PAGE / ...**



#### QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

The questions below deal with exempted limited partnerships (ELP's), cross-border insolvency, the recognition of foreign judgments and consumer insolvency.

##### Question 4.1

In addition to the Limited Partnership Agreement, what governs the operation of ELPs? (3)

[In addition to the Limited Partnership Agreement, the operation ELPs is governed by the Partnership Act (2013 Revision), (½) the Exempted Limited Partnership Act (2021 Revision), (½) the Exempted Limited Partnership Regulations, and common law and equitable principles applicable to partnerships (1) which are not inconsistent with the ELP Act (Exempted Limited Partnership Act, section 3). In addition, Part V of the Companies Act and the Companies Winding Up Rules govern the liquidation of ELPs, subject to provisions of the ELP Act which provide to the contrary, and subject to the ELP Act prevailing to the extent of any inconsistency (Exempted Limited Partnership Act section 36(3)).]

Commented [BB21]: Question 4.1 - Sub-total = 2/3

##### Question 4.2

When does the Cayman Islands court have jurisdiction to wind up a foreign company? (5)

[The Cayman Islands Court has jurisdiction to make a winding up order in respect of a foreign company when that company has property in the Cayman Islands, is carrying on business in the Cayman Islands, is the general partner of a limited partnership registered under the Partnership Act or the Exempted Limited Partnership Act, or is registered as an overseas company as required by section 184 of the Companies Act (Companies Act, section 91 and 89).]

Commented [sp22]: Question 4.2 - Sub-total = 5/5

##### Question 4.3

Does a judgment of a foreign court need to be registered and / or enforced within the Cayman Islands before it is relied upon as the basis for seeking a winding up order? Provide reasons. (3)

[A judgment of a foreign court does not need to be recognized or enforced in the Cayman Islands before it can be relied upon as the basis for seeking a winding up order, even if the judgment is subject to an appeal, provided that the relevant judgment has not been stayed by the foreign court. A foreign judgment which has not been stayed is final and binding notwithstanding an appeal has been filed, and the mere existence of an appeal does not make the judgment debt a disputed debt such that the Court may decline to grant a petition (see *In Re Guoan International Limited*, Unreported, FSD 153 of 2021, 29 October 2021, Kawaley J, at [12] to [13], and [21] to [24]). However, where the

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judgment debtor seeks a stay of execution of the foreign judgment from the foreign court, the Cayman Court may adjourn the petition pending determination of that stay application (Ibid, at [34] to [35], and [40] to [41]). ]

#### Question 4.4

State the main statutory powers and duties of the trustee in bankruptcy, and provide at least one example with reference to a section of the Bankruptcy Act. (4)

[The main statutory duties of the Trustee in Bankruptcy are to receive and adjudicate proofs of debt against the debtor (Bankruptcy Act, section 87), preserve the property of the debtor in the period between the Court making a provisional bankruptcy order, and the Court making that order absolute (Ibid, section 38) (1) and, once an absolute order has been made, administer the debtor's estate for the benefit of their creditors (Ibid, section 65) (1). Following an absolute order, and the examination of the debtor, the Trustee must prepare a report on the state of the debtor's affairs, and the conduct of the debtor before and during the bankruptcy (Ibid, section 67).

The main statutory powers of the Trustee are to carry on the trade of the debtor, so far as doing so is necessary or expedient for the beneficial winding up or sale of the relevant business (1) (and may employ the debtor in doing so), (Ibid, section 79), to bring, institute or defend legal proceedings relating to the property of the debtor (1) (Ibid, section 80), to recover dividends in respect of any debt due to the debtor (Ibid, section 81), to refer to arbitration, or compromise all debts between the debtor and any person who may have incurred liability to the debtor (Ibid, section 82), and to compromise any debts provable under the bankruptcy petition, or arising out of or incidental to the property of the debtor (Ibid, sections 83 and 84).]

TOTAL MARKS: [100]

**\*\* END OF ASSESSMENT \*\***

Commented [BB24]: Question 4.4 - Sub-total = 4/4