



**INSOL**  
INTERNATIONAL



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

Commented [BB1]: TOTAL = 73/100

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**

Mr John Royle Mr Mark Russell Mr Nicholas Fox Ms Corinne Celliers  
Ms Cassandra Ronaldson Mr Adam Crane Ms Gemma Lardner Ms Jennifer Fox  
Ms Jennifer Colegate Mr Tony Heaver-Wren Mr Paul Smith Mr Spencer Vickers  
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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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## 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 [BB2]: Question 1 - Sub-total = 17/20

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%

#### 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.

**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.

Commented [BB3]: The correct answer is (d)

#### 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.

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

**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.

Commented [BB5]: The correct answer is (c)

#### 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)

Order 3, rule 4(1) of the CWR sets out the required content of a Consent to Act for IPs (1) residing within Cayman and Order 3, rule 4(2) sets out the requirements for foreign IPs. Under 4(1), the Consent to Act must include statements that: he/she is a qualified insolvency practitioner and meets the residency requirements (1); having made due inquiry, he/she believes that he/she and their firm meet the independence requirements (1); he/she and/or their firm are in compliance with the insurance requirement (1); and that he/she is willing to act as official liquidator if so appointed by the court. (1) 4(2) states that the affidavit must include: professional qualifications; the country in which he/she is qualified to perform equivalent functions; professional experience; state that he/she will have professional indemnity insurance in respect of his/her acts and omissions done in his/her capacity as an official liquidator of the company in compliance with the requirements; the full particulars of the appointment if they have been appointed by a foreign court or authority as liquidator, trustee, receiver or administrator of the company or a related company; and that having made due enquiry, he/she and their firm meet the independence requirements in the Regulations.

**5 marks, but had to spend an inordinate amount of time searching for them, suggest in future exams you space out each of your points**

### 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 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)

Here, according to the facts, we have a situation where the creditor, Whitesand, initiated the winding up proceedings against Bluesea, who objected vehemently. The Grand Court made the winding up order. Pursuant to the Insolvency Practitioners' Regulation 6(2) (1), if B&E acted as auditors of Bluesea within the three years prior to the commencement of the winding up, they are not permitted to act as an official liquidator as they would not be regarded as independent (1). An audit results in a significant professional relationship and it is unlikely that action can be taken to reduce the threat to compliance with the fundamental principles to an acceptable level. Therefore, B&E should not have provided consent to act.

However, this restriction does not apply if the insolvency appointment is in a members'

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Commented [BB7]: Question 2.2 - Sub-total = 2/5

voluntary liquidation (if Bluesea were solvent and there were the appropriate board resolutions and shareholder approvals). If this had been the case here, the IPs could take the appointment, but they must consider whether there are any other circumstances that would give rise to an unacceptable threat to compliance with the fundamental principles and they must satisfy themselves that the directors' declaration of insolvency is sufficiently likely to be substantiated by events. If both liquidators resign, they must prepare a report and accounts and convene a general meeting of the company to have the report and accounts approved as well as to accept their resignation and release them from the performance of any further duties and to appoint a successor. If the company doesn't pass the resolution, then they may apply to the Court for an order releasing them from their duties.

Official liquidators that wish to resign must take steps in accordance with Order 5, rule 4 of the CWR. These are:

- 1) Preparing a report and accounts (wouldn't be required if one of the liquidators was remaining in office, but based on the facts it seems both would be resigning)
  - a. Including details and analysis of steps taken and further steps that would have been taken in the liquidation generally, along with other matters set out in CWR Order 10, rule 2(2)
  - b. Accounts must be presented in the currency of the liquidation and include the details set out in CWR Order 10, rule 2(4)
- 2) Giving notice of their resignation to the liquidation committee
- 3) Applying to the court for an order that they be released from performance of any further duties, the application for which also being served on the members of the liquidation committee, the liquidation committee's counsel (if applicable), and any other creditors or contributories as directed by the court

Here, I would also be concerned that according to the facts, Bluesea was only audited once, which must have been B&E, and the auditors resigned shortly after. I would also be concerned that they failed to meet the requirement of independence in Regulation 6 and that they may have falsely sworn their affidavit that stated that having made due enquiries, they believe that they and their firm meet the independence requirement.

### **2 marks - see model answer for feedback**

Unfortunately based upon this new information coming to light, the proposed liquidators put forward by Whitesand would not be able to act as official liquidators. (1 mark)

Regulation 6 of the Insolvency Practitioners Regulations set out the independence requirements (1 mark) and state:

A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of a company unless he can be properly regarded as independent as regards that company.

A qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, he, or

the firm of which his is a partner or employee, has acted in relation to the company as its auditor" (1 mark)

In this scenario the winding up petition date is in May 2023, the proposed liquidators or their firm have acted as auditors within the 3 years immediately preceding the commencement of the liquidation, given Bodden & Ebanks Limited acted as auditors as recently as 2021 the proposed liquidators would not be regarded as independent. (1 mark)

In respect of the already provided consents to act, they should be withdrawn and rescinded as a matter of urgency. (1 mark)

### Question 2.3

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)

Any person can be appointed as a voluntary liquidator, there are no qualification requirements for the role. (Companies Act §120) (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 of the Companies Act sets out the steps that Tom and Jerry must take within 28 days of their appointment. In accordance with this section, they shall: "(a) file notice of the winding up with the Registrar; (b) file the liquidator's consent to act with the Registrar; (c) file the director's declaration of solvency with the Registrar (if the supervision of the court is not sought); (d) in the case of a company carrying on a regulated business, serve

Commented [BB8]: Question 2.3 - Sub-total = 3/5

notice of the winding up upon the Authority; and (e) publish notice of the winding up in the Gazette." (Companies Act §123(1)) (2)

**Question 2.3.3 (0/2 marks)**

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

Tom and Jerry's remuneration in their capacity as the voluntary liquidators shall be set and payment authorised by a resolution of the company. If the company does not approve their remuneration, or they are dissatisfied with the company's decision, they may apply to the Court and the Court will set the rate and amount of their remuneration and expenses. (Companies Act §130)

The correct answer is:

Answer: (0.5 marks per point, maximum 2 marks)

- an hourly rate (or scale of rates) for the time reasonably and properly devoted to the liquidation; (0.5 marks)
- a fixed sum; (0.5 marks)
- a commission or percentage of the assets distributed or realised; or (0.5 marks)
- a combination of these methods. (0.5 marks)

**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)

Upon hearing a winding up petition, the Court has the power to dismiss the petition, adjourn the hearing conditionally or unconditionally, make a provisional order, or make any other order it thinks fit. Additionally, if a shareholder seeks the winding up on just and equitable grounds, the Court also has the power to make various alternative orders, such as:

- A) an order regulating the future conduct of the company's affairs;
- B) an order that requires the company not to do or continue to do an act that the petitioner has complained of, or to require the company to do an act that the petitioner has complained the company has not done;
- C) an order that authorises civil proceedings be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or
- D) an order that provides for any members of the company, or the company itself, to purchase the shares of any members of the company and if the company purchases the shares itself, a corresponding reduction of the company's capital.

Commented [BB9]: Question 2.4 - Sub-total = 2/2

Commented [ni10]: very good answer



### Question 2.5

#### Question 2.5.1 (2/4 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 or contributory of the company may apply to the Court to have an official liquidator removed. In the case of an insolvent liquidation, only creditors may apply to remove an official liquidator, and in the case of a solvent liquidation, only the contributories may make such an application. This is on the basis that they are the only parties that have the ultimate interest in the distribution of the assets of the company. (See *Johnson and Deloitte & Touche AG* [1997 CILR 120] and *BTU Power Company 2019* (1) CILR.) According to the decision in *BTU Power Company*, a former director of a company did not have standing to make, or a legitimate interest in making, an application for removal of the joint official liquidators and only the preference shareholders had a legitimate interest as contributories.

A creditor or contributory that wants to remove an official liquidator must apply to the Court for the relevant orders by way of a Removal Summons. The Removal Summons must be supported by a sworn affidavit that sets out the facts and matters that the removal application relies on and must also nominate a qualified insolvency practitioner that can be appointed to replace the removed liquidator.

There must be compelling reasons to remove the liquidator. For example, the Court may do so in situations where there is a conflict of interest, impropriety, misconduct, failing to investigate misfeasance by former directors, or the official liquidator pursuing litigation against the wishes of a creditor. The Court will also consider removal of an official liquidator if it determines it would be to the general advantage of the majority of the persons interested in the liquidation.

#### Question 2.5.2 (2/5 marks)

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

It makes sense that the class of potential applicant varies in accordance with the solvency of the company because this protects the interests of the different stakeholders and ensures that the appropriate process is followed, depending on the company's specific situation. For example, the process for proving debts, as set out in Order 16 of the CWR, also depends on the solvency of the company.

### Question 2.6

**Commented [BB11]:** Question 2.5 - Sub-total = 4/9

**Commented [ni12]:** good answer, but you didn't reference CWR O.5, r. 6 and I'm afraid you didn't answer the question 'who must such an application be served on?'

**Commented [ni13]:** This answer slightly missed the mark.

I'm giving you two points because you correctly observe, above:

*This is on the basis that they are the only parties that have the ultimate interest in the distribution of the assets of the company*

And you also mentioned BTU above.

But to score more highly, this question sought an answer that identified the true economic stakeholders, which are:

- in the case of a solvent liquidation, only the contributories (as creditors would all be paid in full and therefore have no interest in who is the OL); and

- in the case of an insolvent liquidation, only the creditors (as no contributories will be paid anything).

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)

Commented [ca14]: Question 2.6 Subtotal = 0/4

The liquidation committee is formed to consult with the official liquidator and to review the official liquidator's remuneration. In an insolvent company, the official liquidator will ordinarily require proof of debt but in a solvent company, the official liquidator has discretion to require proof of debt. If the estate is solvent, it may have an impact on the matters that the official liquidator puts before the liquidation committee. The liquidation committee may also have a different view or role in terms of reviewing the official liquidator's remuneration as well as the consultation on the distribution of the recovered assets.

This question seeks to highlight the changes to the LC composition upon the change of solvency. Acceptable answers are as follows:

- As the liquidation was previously deemed to be insolvent the LC membership would have been comprised of creditors.
- Order 9, rule 8 (b) where a creditors claim has been paid in full the creditor(s) membership will be automatically terminated.
- Accordingly, the LC will need to be reconstituted and a revised certificate (CWR Form No 15) filed with the court so that the committee is 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 [ca15]: Question 2.7 Subtotal 3/5

Once the order for dissolution has been made, the official liquidator's duties cease, other than any residual duties that were preserved by the order for dissolution, such as the preservation, storage and destruction of the company's remaining books and records and dealing with unclaimed dividends. The liquidator is required to **retain** the liquidation files in safe custody for at least three years following the dissolution of a company.

Commented [ca16]: Benefit of the doubt given that this is a typo

### Question 2.8

Describe the general investigative powers and duties of a liquidator. (5)

Commented [BB17]: Question 2.8 - Sub-total = 2/5

Under section 102(1) of the Act, liquidators have general powers to investigate a company's affairs and collect information. They can investigate the promotion, business dealings and affairs of the company, including the cause of the company's failure (if applicable). (1) Additionally, the official liquidator may request the Court's permission to assist the RCIPS or the Authority in investigating the conduct of certain directors, officers, professional service providers, and recent employees of the company as well as institute and conduct criminal prosecution of those same persons. (1)

More detail would have improved the mark awarded. Ensure your response is commensurate with the mark allocation, this question is for 5 marks.

See model answer:

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)

For the purposes of section 101 of the Companies Act (2023), the "relevant date" is the commencement of the winding up (1). In most cases, this is the presentation of the winding up. However, but can be an earlier date, subject to section 100(1). (1) The winding up may be deemed to be commenced at the time of certain events, (1) such as: if, before the presentation of a petition for the court to wind up a company, the company passed a resolution for voluntary winding up, (1/2) the period fixed for the duration of the company by the articles of association has expired, (1/2) an event has occurred that gives rise to the requirement to wind up the company in the articles of association, (1/2) or a restructuring officer has been appointed. (Companies Act, section 7.) (1/2)

Commented [BB18]: Question 2.9 - Sub-total = 5/5

**\*\* 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 [BB19]: Question 3.1 - Sub-total = 3/5

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 provisional liquidator could not be appointed by the Grand Court of the Cayman Islands. Firstly, a foreign practitioner cannot act as a sole official liquidator of a Cayman Islands company. This restriction also applies to provisional liquidators. Additionally, due to the fact that this chosen provisional liquidator's professional indemnity insurance does not meet the requirements of Regulation 7 (1). Regulation 7 requires him or her and the firm of which he or she is a partner or employee of, or the company he or she is an employee of, to have professional indemnity insurance 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\$ 100,000. (1) A limit of US\$5 million in respect of each and every claim is insufficient to meet the standard. (1)

3 marks, see model any below

The chosen provisional liquidator of SMB by contributories is based in Hong Kong and would therefore be deemed a foreign practitioner. (1 mark)

Foreign practitioners are permitted to be appointed as official liquidators, but they must be appointed jointly with a qualified insolvency practitioner per section 158 (1) of the Companies Act (2023 as revised). (1 mark)

In addition, the Insolvency Practitioners Regulations (IPRs), in particular regulation 8 states that

A foreign practitioner who meets the independence and insurance requirements of Regulations 6 and 7 of the IPRs may be appointed by the Court as an official liquidator of a company jointly with a qualified insolvency practitioner (but not as sole official liquidator). A foreign practitioner need not meet the residency requirement of Regulation 5. (1 mark)

The insurance requirements contained within regulation 7 of the IPRs states (amongst other things)

A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of any company unless he and the firm of which he is a partner or employee or the company of which he is an employee, has professional indemnity insurance (up to 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\$100,000) applicable to the negligent performance or non-performance of his duties as an official liquidator generally. (emphasis added). (1 mark)

Therefore, if the chosen liquidator by the contributories of SMB isn't prepared to or cannot increase his professional indemnity insurance from US\$5 million per each and every claim to US\$10 million per each and every claim – then he would be unable to act as an official liquidator. (1 mark)

Question 3.2

Commented [BB20]: Question 3.2 - Sub-total = 2/2

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

Pursuant to section 91B(1) of the Companies (Amendment) Act, a company must demonstrate that it is or is likely to become unable to pay its debts (1) and it intends to present a compromise or arrangement to its creditors (Restructuring Petition) before the Court will appoint a restructuring officer. (1)

In the *Re Orient* judgment, Kawaley J held that the Grand Court may exercise its jurisdiction to appoint restructuring officers when: 1) there is credible evidence from the company or some other independent source that the company is insolvent or likely insolvent; 2) there is credible evidence of a "rational proposal with reasonable prospects of success" relating to the intention to present a compromise or arrangement to its creditors; and 3) a majority of the creditors has, or potentially will, support the proposal as a "more favourable commercial alternative to the winding up of the company."

2 marks

#### Question 3.3

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

The Restructuring Petition (once presented, and unless the Grand Court otherwise orders), is required to be advertised: "(i) once in a newspaper having circulation in the Cayman Islands; (½) and in a newspaper having circulation in a country (or countries) in which the petition is most likely to come to the attention of the company's creditors (½) and contributories" pursuant to Form Number 3A of the CWR. The advertisements must also appear no more than 7 business days after the date on which a Restructuring Petition was filed (½) and not less than seven business days before the hearing date. (½) Companies Winding Up Rules, Order 1A rule 1(3),(4),(6)

#### Question 3.4

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

The new restructuring officer regime protects creditors in a number of ways. One change in the new regime is that the restructuring officer regime is a separate statutory process to the winding up regime. This means that it is no longer painted with the same "liquidation" brush and protects creditors by making it clearer, whereas under the old regime the fact that there was a perception that the company was being liquidated rather than restructured could be misleading to creditors. (1) Additionally, since the process is now streamlined by no longer requiring the commencement of separate proceedings to seek court approval of a scheme of arrangement under the Companies Act, which protects creditors since this reduces the time and expense involved. (1)

Commented [BB21]: Question 3.3 - Sub-total = 2/2

Commented [BB22]: Question 3.4 - Sub-total = 5/6

There is a requirement that creditors be convened to class meetings, for the Court to sanction a Scheme, which gives creditors a say in the process and protections that the Court is involved in overseeing it. Restructuring officers must liaise with creditors, which also helps ensure that their interests are taken into account. (1) Creditors have a right to appear and be heard at the restructuring petition hearings and can apply to the court to vary or discharge an order that appoints a restructuring officer as well as apply to remove and replace a restructuring officer. (1) Secured creditors can enforce that security without needing the court's permission. (1) There is now an automatic stay included in the new regime which allows for a moratorium on creditor action, which protects creditors by keeping them from losing out to one another in a race to collect. (1) Companies must intend to present a compromise or arrangement to the creditors as part of the requirements for the appointment of a restructuring officer, which should help facilitate negotiation and agreement between the company and its creditors.

6 marks

#### Question 3.5

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

Upon hearing a restructuring petition, the Court may make an order appointing a restructuring officer; (1) adjourn the hearing conditionally or unconditionally; (1) dismiss the petition; (1) or make any other order that it thinks fit, (1) other than an order that places the company into liquidation. (1) The Grand Court has no power to windup a company based on a Restructuring Petition, that relief is not available.

5 marks

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

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

Commented [BB23]: Question 3.5 - Sub-total = 5/5



#### 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 of ELPs in Cayman are governed by The Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021) revision (1) and the principles of common law and equity applicable to partnerships (1 mark) as modified by the Partnership Act (2013 Revision). (1 mark)  
. The Companies Act also contains provisions relating to ELPs.

Commented [BB24]: 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)

Pursuant to section 91(d) of the Companies Act, the Cayman Islands court has jurisdiction to wind up a foreign company if the company has property located in the Cayman Islands, it is carrying on business in the Cayman Islands, it is the general partner of an ordinary limited partnership or ELP, or the company is registered under Part XI of the Companies Act (which is required under Part XI if the foreign company establishes a place of business, or commences carrying on business in the Cayman Islands).

Commented [sp25]: 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)

No, although a judgment or order of a foreign court has no direct legal effect in the Cayman Islands, a judgment of a foreign court does not 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. This was confirmed in Kawaley J's first instance judgment in *In the Matter of Guoan International Limited* (unreported, 29 October 2021).

Commented [sp26]: Question 4.3 - Sub-total = 3/3

##### 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)

Commented [BB27]: Question 4.4 - 3/4

The main statutory powers and duties of the trustee in bankruptcy are preserving the property of the debtor, carrying on the trade of the debtor as necessary (§79 Bankruptcy Law), bringing or defending legal proceedings (§80), and receiving and adjudicating proof of debts (§87).

**TOTAL MARKS: [100]**

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