



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 82/100 -
Excellent, well done!

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)

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.

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)

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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.

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)

Based on CWR, O.3, r .4,(1) Whitestand's petition will need to be supported by an affidavit sworn by the nominated OLs (if resident in Cayman) stating that: (1)

- they are a qualified insolvency practitioner and meet the residency requirements set out in Regulation 5; (1)
- having made due enquiry, the nominated OL believes that they and their firm meet the independence requirement contained in Regulation 6; (1)
- the nominated OL, and/or their firm are in compliance with the insurance requirement contained in Regulation 7; and (1)
- the nominated OL is willing to act as official liquidator if so appointed by the Court. (1)

Given the nexus to other countries in the Caribbean and Latin America, the appointment of a foreign practitioner may be sought alongside a Cayman-resident OL. If so, the foreign OL will need to provide a consent to act which contains the following information (taken from CWR, O.3m r 4(2):

- that person's professional qualifications;
- the country in which that person is qualified to perform functions equivalent to those performed by official liquidators under the Law or by trustees under the Bankruptcy Act (as amended and revised);
- that person's professional experience;
- that person will have the benefit of professional indemnity insurance in respect of that person's acts and omissions done in that person's capacity as an official liquidator of the company meeting the requirements of Regulation 7;
- if that person has been appointed by a foreign court or authority as a liquidator, trustee, receiver or administrator of the company or a related party of the company, full particulars of such appointment; and that person's professional qualifications;
- that, having made due enquiry, that person and that person's firm meet independence requirement contained in Regulation 6.

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 [BB3]: Question 2.1 - Sub-total = 5/5

Commented [BB4]: 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)

No, Bodden & Ebanks Ltd (BEL) do not meet the independence requirements under regulation 6 of the Insolvency Practitioners Regulations. (1)

Regulation 6 provides that a person cannot be appointed unless they are properly independent, and that they will not properly independent if they have ...“acted as an auditor of the company within a period of three years immediately preceding the commencement of the liquidation“ (1)

In the case of BEL, they audited Bluesea in 2021 – i.e. two years ago – they are caught within the three year window and are ineligible. (1) They should file further affidavits/affirmations with the Court withdrawing their consent and updating the Court as to the situation. (1)

4 marks

Question 2.3

Commented [BB5]: 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)

None. (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)

Tom and Jerry must take the following steps:

1. file a notice of the winding up with the Registrar;
2. file their consents to act with the Registrar;
3. file the directors' declarations of solvency with the Registrar; and
4. publish the notice of the winding up in the Gazette (2)

If Cheese Ltd is CIMA regulated, they should also serve the notice of the winding up on CIMA.

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)

The Company could remunerate Tom and Jerry in a number of ways - either based on hourly rates for time reasonably and properly devoted to the liquidation, a fixed sum, a commission or percentage of the assets, or any combination of the above. (2)

Question 2.4 (0.5/2 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)

The Court has a broad range of powers to issue when confronted with a petition to appoint a provisional liquidator and can tailor them to the needs of the company in question.

If satisfied that a provisional liquidator is a necessary and appropriate step for Cheese Ltd, the Court can sanction such powers as it deems necessary to protect the company's assets. It will set out these powers in the terms of the appointment order and the provisional liquidator will be expected to comply with this order.

Question 2.5

Question 2.5.1 (4/4 marks)

Commented [BB6]: Question 2.4 - Sub-total = 0.5/2

Commented [ni7]: this question asks what the Court's powers are 'upon the hearing of a winding up petition' not upon the hearing of a PL application. Therefore you have not answered the question correctly I'm afraid. I am giving you 0.5 marks for what would have been a good answer to the question "what would have been the court's powers upon the hearing of a PL application?"

Commented [BB8]: Question 2.5 - Sub-total = 8/9

Commented [ni9]: great answer

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)

In cases of insolvent liquidation, creditors exclusively hold the authority to apply for the removal of an OL, while contributories are the rightful applicants in solvent liquidation scenarios. The Court holds a discretionary power to issue an order for the removal of an OL, but it will only do so where such action is for the benefit for the majority of interested persons. Such rights and powers are set out in s 107 of the Companies Act.

The grounds for removal include instances such as conflicts of interest, pursuing litigation contrary to a creditor's wishes, impropriety, misconduct, or a failure to adequately investigate matters such as misfeasance by former directors. A creditor's preference for an alternative liquidator or personal dissatisfaction will generally fall short of justifying an OL's removal.

A summons to remove an OL must be served on the OL with a minimum of 14 days notice per CWR O.5, r 6 (2). It must also be served on all members of the liquidation committee, if any, legal counsel for the committee, if any, and any other creditors or contributories specified by the Court.

Question 2.5.2 (4/5 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 because the company's solvency distinctly shapes the interests and roles of creditors and contributories in the liquidation process. In an insolvent liquidation, contributories stand to gain nothing. Therefore, the exclusive right for petitioning the removal of an official liquidator is granted to creditors. The situation shifts in a solvent liquidation, where there are surplus assets after settling creditor claims. In this scenario, it is logical for contributories to become the primary stakeholders in the distribution, as creditors are already assured full payment. The idea is to ensure that those with a direct interest in the asset distribution have a say in the conduct of the liquidation.

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)

Commented [ni10]: Good answer. The 5th mark was reserved for those answers that mentioned *BTU Power Company* (which is cited in the course notes under section 4.2.6.2 removal).

with the court. What impact will the change in solvency have on the liquidation committee, assuming one has been constituted? (4)

The change in solvency status means the official liquidator must reconstitute the committee, assuming there is one. The creditor members will cease to be members, and the liquidator will need to call a meeting of contributors to decide upon the new members of the committee. In keeping with CWR Order 9, r.1, the committee should have at least three and at most five shareholder members, and these members will be chosen during the first shareholders' meeting. This process makes sure that the committee's makeup reflects the company's new financial situation.

Question 2.7

Discuss the steps that a liquidator will need to take following the making of an order for dissolution. (5)

Following the making of an order for dissolution, the official liquidator's duties as an officeholder conclude, except for any residual responsibilities specified in the dissolution order. These may include tasks such as preserving, storing, and managing the destruction of the company's remaining books and records, along with addressing matters related to unclaimed dividends.

After the order for dissolution is made, the official liquidator must file the order with the registrar within 14 days from the date of its perfection. This step ensures the proper documentation and communication of the dissolution.

The official liquidator must adhere to the supplementary directions outlined in the dissolution order. This involves complying with provisions regarding the retention of the liquidation file beyond the statutory minimum of three years and managing the preservation, storage, and destruction of the company's books and records.

In instances where unclaimed dividends or undistributed assets exist, the official liquidator must, for a period of one year, establish a trust account for unclaimed dividends, transfer title of undistributed assets to be held in trust, disburse funds/assets to beneficiaries once located and confirmed, and cover the former official liquidator's trustee fees and expenses. At the conclusion of this 1 year period, any remaining funds or assets are to be transferred to the Cayman Islands' Financial Secretary.

Question 2.8

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

Under section 102 of the Companies Act, an official liquidator possesses expansive authority to investigate the cause of the company's failure and the overall promotion,

Commented [ca11]: Question 2.6 - Subtotal = 4/4 marks

Commented [ca12]: Question 2.7 Subtotal 5/5 marks

Commented [BB13]: Question 2.8 - Sub-total = 2.5/5

business, dealings, and affairs of the company. (1) Cite case law to substantiate your answer, see model answer below.

A liquidator can compel relevant individuals, including past and present directors, professional service providers, and recent employees, to furnish statements about the company's affairs. (1) These statements, verified by affidavit, must include specific details outlined in section 101(2) of the Act. They should be provided within 21 clear days of the request.

A liquidator may seek court permission to assist authorities in investigating certain individuals' conduct. Additionally, they can apply for a court order to examine relevant persons or mandate the delivery of property or documents belonging to the company, as stipulated in section 103(3) of the Act. (½) - see model answer below

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)

The "relevant date" for the purposes of Section 101 of the Companies Act (2023 Revision) refers to either: (a) the date of the provisional liquidator's appointment (if a provisional liquidator is appointed); or (b) in any other case, the commencement of the winding up. (1)

The date of the provisional liquidator's appointment in (a) should be clear and easily identified. The commencement of the winding up in (b) is more nebulous. It may occur in

Commented [BB14]: Question 2.9 - Sub-total = 4/5

any of the following circumstances: (In many cases, this is the presentation of the winding up petition pursuant to section 100(2)) when a resolution for voluntary winding up is passed, (½) when a fixed period in the company's Mems/Arts expires, (½) when a specific triggering event occurs, (½) or on the date of the presentation of the petition to appoint the restructuring officer (assuming they are appointed). (½)

If none of these have occurred, then s100(2) provides that the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up. (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 [BB15]: Question 3.1 - Sub-total = 2/5

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 cannot be appointed by the Grand Court of the Cayman Islands with professional indemnity insurance limited to US\$5 million. (1) The basis for this lies in Regulation 7 (1) of the Insolvency Practitioner Regulations, which mandates a minimum insurance limit for qualified IPs of US\$10 million for each claim and \$20 million in the aggregate (with a deductible of not more than \$100,000).

This is because provisional liquidators are treated in the same way as OLs under Cayman Islands Law. s89(1) of the Companies Act defines an official liquidator as including a provisional liquidator; therefore the same insurance standard applies. The chosen PL does not meet the minimum threshold for a qualified IP.

2 marks - main issues to pick up on for the extra marks was acknowledging from the fact pattern that the chosen liquidator was based in HK so likely be deemed a foreign practitioner. There's a model answer below for your benefit.

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 108 (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

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

Before the Court will appoint a restructuring officer, a company must demonstrate two key elements under section 91B(1):

The company needs to establish that it is likely to become unable to pay its debts as they fall due. (1) The legal test for solvency is based on a cash flow perspective.

The company must demonstrate an intention to present a compromise or arrangement with its creditors. (1) It's important to note that the company does not need to have a fully formulated plan, however it does need to establish that there is a real prospect of a refinancing and/or sale being achieved for the general body of the creditors.

2 marks

Question 3.3

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

The advertising requirements, outlined in CWR Form 3A, necessitate local and international publication no more than 7 business days after the filing of the restructuring petition (½) and no less than 7 business days before the hearing date. (½)

Commented [BB16]: Question 3.2 - Sub-total = 2/2

Commented [BB17]: Question 3.3 - Sub-total = 2/2

Local publication means publishing in a newspaper with circulation within the Cayman Islands. (½) International publication means publishing in a newspaper circulating in a country (or countries) where the petition is most likely to reach the company's creditors and contributories. (½)

Question 3.4

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

First, creditors have the right to appear and be heard during the hearing of a restructuring officer petition. They can either support or oppose the appointment of a restructuring officer and nominate alternative candidates proposed by the company. (1)

Second, secured creditors are not bound by the moratorium on proceedings, preserving their ability to take action to enforce security interests without regard for the RO. (1)

Third, dissatisfied creditors can apply to the court for a variation or discharge of an order appointing restructuring officers. Additionally, they can seek the removal and replacement of a restructuring officer. (1)

Fourth, creditors dissatisfied with the restructuring officer's appointment or progress have the option to seek leave to present a winding-up petition.

Fifth, there is greater structure and formality to the process which increases certainty.

Sixth, the mandated advertising of the restructuring petition ensures broad dissemination, bringing the application to the attention of all relevant stakeholders. (1)

4 marks, additional points below

- The default position is that a Restructuring Petition will be heard on notice to stakeholders (while the prior statutory framework provided that applications for appointment of provisional liquidators were to be made ex parte by default) (1 mark)
- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- The hearing must be heard within 21 days of presentation (1 mark)

Commented [BB18]: Question 3.4 - Sub-total = 4/6

- A requirement for the ROs to report - open and transparent process (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs (1 mark)
- The ROs must report within 28 days of appointment (1 mark)

Question 3.5

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

The Court, on hearing a restructuring officer petition, can appoint a restructuring officer, (1) adjourn the hearing as needed, (1) dismiss the petition if necessary, (1) and exercise broad discretionary powers to make fitting orders for the specific case. (1)

The Court lacks the authority to order the company into official liquidation (1) during a restructuring petition hearing. Such an order is only within the Court's powers if a separate winding-up petition adhering to specified requirements has been presented.

5 marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

Commented [BB19]: 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)

the operation of ELPs is governed by the Partnership Act (½) (2013 Revision), the Exempted Limited Partnership Act (½) (2021 Revision), and the principles of common law and equity as applicable to partnerships. (1)

Part V of the Companies Act and the Companies Winding Up Rules also apply, with appropriate modifications, in relation to winding up and dissolution.

Question 4.2

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

A Cayman Islands Court has jurisdiction to wind up a foreign company where (1) a company owns property located within these islands; (2) a company is actively carrying on business within these islands; (3) a company serves as the GP of an ordinary limited partnership or an ELP; or (4) a company is registered under PART IX of the Companies Act (which captures foreign companies using Cayman as a place of business or companies carrying on business here).

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)

The Cayman Islands is not part of the Hague Convention on the Recognition and Enforcement of Foreign Judgments, nor has it entered into any international treaties for reciprocal recognition or enforcement of foreign judgments. Therefore it does not automatically recognize foreign judgments.

There is a special exception for judgments from Australia. These can be registered and enforced, similar to local judgments, under the Foreign Judgments Reciprocal Enforcement Act (1996 Revision).

For judgments from other places, the common law process must be followed, which means starting a new action in the Cayman Courts and treating the foreign judgment like a debt.

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Commented [sp21]: Question 4.2 - Sub-total = 5/5

Commented [sp22]: Question 4.3 - Sub-total = 0/3

Refer to Kawaley J's first-instance judgment in *In the matter of Guoan International Limited* (unreported, 29 October 2021) which confirms that a creditor may rely upon a foreign judgment as the basis for seeking a winding up order without first obtaining recognition and / or enforcement orders in respect of such foreign judgment from the Cayman Islands Court

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)**

One statutory duty involves safeguarding the debtor's property until a provisional order is either made absolute or revoked, as specified in the Bankruptcy Act. Beyond this, the trustee is entrusted with the continuation of the debtor's business operations ($\frac{1}{2}$), the management of legal proceedings related to the debtor's assets ($\frac{1}{2}$), the evaluation of proof of debts following prescribed rules ($\frac{1}{2}$), and the overarching administration of the debtor's estate for the benefit of the creditors once an absolute order has been made. ($\frac{1}{2}$)

One example of the trustee in bankruptcy exercising their powers would be simply managing the day-to-day operations of the debtor pending the evaluation of debts and the administration of the estate. Considerable work may be involved to minimise asset losses.

See model answer below:

Answer is at 7.7 of the course notes. Preserve / collect property. **(1 mark)** Adjudicate proofs of debt. **(1 mark)** Administer the estate. **(1 mark)** For example ... **(1 mark for examples)**

Until the provisional order is made absolute, it is the duty of the Trustee to preserve the property such that it may be returned to the debtor in the event the provisional order is revoked (section 38 of the Act).

The Trustee may carry on the trade of the debtor so far as may be necessary or expedient for the beneficial winding up or sale of the business (section 79).

The Trustee may bring or defend any legal proceedings relating to the property of the debtor (section 80).

The Trustee must receive and adjudicate the proof of debts (section 87).

Once an absolute order has been made, the Trustee must proceed to administer the debtor's estate for the benefit of the creditors (section 65).

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TOTAL MARKS: [100]

**** END OF ASSESSMENT ****