



**INSOL**  
INTERNATIONAL



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

Commented [BB1]: TOTAL = 88.5/100 -  
Excellent results, 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)

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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  
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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.

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

#### 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.

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)

The required content of an Official Liquidator's consent to act is set out in O.3, r.4(1) Companies Winding-Up Rules (CWR). This rule provides that the Consent to Act must be contained in an affidavit sworn by the person nominated for appointment as official liquidator stating that: (1)

- (a) that person is a qualified insolvency practitioner and that they meet the residency requirement contained in Regulation 5 of the Insolvency Practitioners Rules (IPR). The residency requirement is that the nominated individual is a person that is resident in the Cayman Islands and that the firm that the nominated individual works for holds a trade and business licence that entitles the nominated person to work as a professional insolvency practitioner. (1)
- (b) The nominated individual meets the independence criteria set out in Reg.6 IPR. Reg. 6 IPR provides that the nominated person should be properly regarded as independent of the company. Secondly, Reg. 6(2) also provides that the nominated individual will not be regarded as independent if that person, or their firm have been appointed as the auditor of the relevant company within the previous three years. (1)
- (c) that nominated individual and / or their firm complies with the requirement to hold sufficient professional indemnity insurance as set out in Reg.7 IPR. (1)
- (d) that the nominated individual is willing to act as official liquidator if they are appointed by the Court. (1)

O.3, r.4(2) Companies Winding-Up Rules also sets out requirements for the Consent to Act for a foreign practitioner if the petition seeks the appointment of a foreign practitioner jointly with the qualified insolvency practitioner. A foreign practitioner cannot act as a sole official liquidator. The foreign practitioner's affidavit must contain:

- (a) that foreign practitioner's professional qualifications;
- (b) the country in which that foreign practitioner is qualified to act as an insolvency practitioner
- (c) that foreign practitioner's professional experience;
- (d) that the nominated foreign practitioner will have equivalent professional indemnity insurance.
- (e) whether the foreign practitioner has been appointed to act as a liquidator, receiver etc by a foreign court and to provide details of that appointment.
- (f) that they are independent, within the meaning of Reg. 6 IPR as set out above.

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

Commented [BB6]: Question 2.1 - Sub-total = 5/5

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

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)

Bodden & Ebanks Limited are not able to act as Official Liquidators of Bluesea because they do not meet the independence criteria set out in Regulation 6 Insolvency Practitioners Rules. (1)

Reg. 6(2) IPR provides that the nominated individual will not be regarded as independent if that person, or their firm have been appointed as the auditor of the relevant company within the previous three years. (1)

Bodden & Ebanks Limited acted as auditors of Bluesea in 2021. The liquidation will be deemed to have commenced in May 2023, being the date of the presentation of the petition for winding up Bluesea (s.100(2) Companies Act (2023 Revision)). (1) Accordingly, Bodden & Ebanks Limited acted as auditors within three years of the commencement of the winding up and so they shall not be regarded as independent. (1)

In those circumstances, Bodden & Ebanks Limited should withdraw the Consent to Act and refuse to be appointed as official liquidators. (1)

5 marks

#### Question 2.3

Commented [BB8]: 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)

There are no qualification requirements to be appointed as a voluntary liquidator. S.120 Companies Act provides that any person, including a director or officer of the company can be appointed as a voluntary liquidator. (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)

By s.123(1) Companies Act, Tom and Jerry must, within 28 days of their appointment:

1. File a notice of the winding up with the Cayman Islands registrar of companies.
2. File their consents to act with the registrar.
3. File Cheese Limited's director's declaration of solvency with the registrar.
4. Serve a notice of the winding up with CIMA, if Cheese Limited was carrying out a regulated activity.
5. Publish a notice of the winding up in the Gazette. (2)

By s.124(1) Companies Act, Tom and Jerry must also apply to the Court for an order that the liquidation continue under the supervision of the Court unless the directors have within 28 days of the commencement of the winding up, signed a declaration of solvency in the prescribed form. That application should be made within 7 days after the 28 day deadline for the directors to make the declaration of solvency (O.13, r.1(4) CWR).

**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)

O.13, r.9 CWR provides for the remuneration of voluntary liquidators.

The remuneration will be authorised by resolution of the company. Cheese Limited can resolve to remunerate Tom and Jerry on the basis of:

1. Their hourly rates for the time they reasonably spent as voluntary liquidators,
2. A fixed fee arrangement
3. A commission or proportion of the assets distributed or realized.
4. A combination of the above. (2)

Tom and Jerry, as voluntary liquidators are not permitted to be paid out of Cheese Limited's assets without the prior approval of a resolution passed at a general meeting except where:

- a. Nobody attends and votes in the final general meeting (as long as it has been properly convened) they may be paid the amount of remuneration specified in their final report; and
- b. The Court approves the payment of the remuneration.

In accordance with s.126 Companies Act, if a voluntary winding up continues for more than 1 year, the voluntary liquidator must hold a general meeting of Cheese Limited at the end of the first year from the commencement of the winding up and every year thereafter. One of the issues that can be approved at such meetings is Tom and Jerry's remuneration.

**Question 2.4 (0.5/2 marks)**

**Commented [BB9]:** Question 2.4 - Sub-total = 0.5/2

**Commented [ni10]:** 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?"

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)

By s.104(1) Companies Act, the Court has the power to appoint a provisional liquidator at any time before making a winding up order to a.) prevent dissipation of assets, b.) prevent oppression of a minority shareholder or c.) prevent mismanagement of the company.

By s.104(4) Companies Act, the Court will confer whatever functions it considers appropriate on the provisional liquidator

Alternatively, the Court has the power under s.95(3) Companies Act to make alternative orders to winding up, including:

- An order regulating the company's future affairs;
- An order preventing the company from doing an act, or continuing to do an act
- An order authorizing civil proceedings to be brought in the name of the company, or
- An order providing for the purchase of shares of any members by other members, or by the company itself.

#### Question 2.5

Commented [BB11]: Question 2.5 - Sub-total = 8/9

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

Commented [ni12]: superb 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)

S.107 Companies Act stipulates that either creditors or contributories may apply for a Court Order to remove an official liquidator of the company. However, the Cayman Islands Court of appeal in *Johnson v Deloitte & Touche AG* [1997] CILR 120 has clarified that the power to remove an official liquidator in an insolvent liquidation rests with the creditors whereas the power to remove an official liquidator in a solvent liquidation is held by the contributories. This is because, in each case, these are the only individuals with the ultimate interest in the distribution of the assets of the company. Further, in *BTU Power Company* [2019] CILR Note 7, the Grand Court followed the decision in *Johnson* and held that the applicant (a director of the company in liquidation) did not have standing to bring the application. Indeed, his interests were adverse to the shareholders' interests.

In this case, the shareholders would therefore have standing (*locus standi*) to apply to remove Jerry (assuming that the voluntary liquidation is a solvent liquidation) as a liquidator.

In *AMP Enterprises (t/a Total Home Entertainment) v Hoffman* [2002] BCC 996, the Court held that there must be a "good reason" to remove a liquidator. This decision was considered in *BTU Power Company*. In part, this was for the practical reason that the Court should not encourage disgruntled creditors to apply to remove liquidators. The Court also noted that the removal of a liquidator should be for the benefit of the majority of the persons interested in the liquidation. If there was evidence of impropriety by the liquidator, then the Court may override the interest of the majority.

In this case, although the sole shareholder has the right to apply to remove Jerry as a liquidator, they do not have the support of the majority of the shareholders. Following *BTU Power Company*, the Court is therefore unlikely to grant the application unless some



impropriety can be shown. If it is the case that Jerry, as the sole official liquidator, is defrauding Cheese Limited, that would be a sufficient basis for a finding of impropriety and therefore for the Court to grant the application. At present however, there is only an article in Offshore Alert, which is unlikely to be sufficient to persuade the Court of impropriety.

O.5, r.6 CWR provides that an application by a creditor or contributory to remove an official liquidator will be made by summons. That summons must be served on:

1. the official liquidator (in this case Jerry)
2. each member of the liquidation committee
3. counsel for the liquidation committee (if appointed by the liquidation committee with authority to act generally)
4. Any other creditors or contributories as directed by the Court. In this case, it would be the other shareholders.

**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)

As the Cayman Islands Court held in *Johnson v Deloitte & Touche AG* [1997] CILR 120, the only relevant parties that have standing to bring an application to remove a liquidator is the class of individuals who had the ultimate interest in the distribution of the company's assets at the end of the liquidation process. In a solvent liquidation, that is the contributories and in an insolvent liquidation, that is the creditors. In each case, the company itself has ceased to exist and the liquidators are ultimately conducting their duties in gathering in and realizing the assets of the company with a view to distributing them to the parties that are entitled to receive them. It makes sense for the parties for whom the liquidators ultimately act to have a power to remove the liquidators should there be good reason to do so. By the same token, the Court has rightly imposed a limit on the basis on which such applications can be made by stipulating that, unless impropriety by the liquidator can be demonstrated, the liquidators should only be removed if it can be shown that this would benefit the majority of the relevant class of applicants.

As mentioned above, there is also a practical reason why the Court would wish to limit the class of persons who might apply to remove a liquidator so as to reduce the volume of satellite litigation that could overburden the Court and an insolvent company with limited resources.

**Question 2.6**

During a liquidation there is an expected recovery into the liquidation estate. The amount is such that the liquidation estate is no longer deemed to be insolvent and the official liquidator can settle all of the outstanding creditor claims (including interest) in full. The official liquidator has subsequently filed a revised certificate of solvency (CWR Form No 14) with the court. What impact will the change in solvency have on the liquidation committee, assuming one has been constituted? (4)

By O.8, r.1 CWR, the official liquidators must make an initial determination of whether the

**Commented [ni13]:** You got really close, and this was a very detailed and thoughtful answer. There was not quite enough in there, though, to make it plain that you understood the reason that class of individuals who had the ultimate interest in the distribution of the company's assets at the end of the liquidation process varies in the case of solvent and insolvent liquidation is that

- 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).

**Commented [ca14]:** Question 2.6 Subtotal 4/4 marks

company in liquidation is a.) solvent, b.) insolvent or c.) of doubtful solvency. That initial determination should be certified on form CWR No. 13 and filed at Court.

In this case, the official liquidators determined that the company is insolvent, and therefore the official liquidator should convene a meeting of the company's creditors only (O.8, r.1 (4) CWR).

The first meeting, which must be convened within 28 days of the date of the winding up, shall be convened for the purpose of electing the winding up committee (O.8, r.2 (1) CWR)).

The liquidation committee shall consist of not less than three and not more than five members in an insolvent liquidation such as this (O.9, r.1 (3)).

In this case, when the company is redesignated from insolvent to solvent, all the creditor members of the liquidation committee automatically cease to be members. The official liquidator shall convene a meeting of the contributories instead in order to elect a new liquidation committee comprising the company's contributories (O.9, r.3 (2)).

#### Question 2.7

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

The liquidator shall:

1. File the Order for dissolution with the Cayman Islands registrar of companies within 14 days of the date on which the Order was perfected (CWR O.22, r.2).
2. Establish an interest bearing bank account in the liquidator's name as trustee of the dissolved company. Any unclaimed dividends will be transferred to this account and administered by the liquidator for the benefit of the creditors / contributories (as appropriate) (O.23, r.2 CWR).
3. Any assets that should have been distributed *in specie* but which remain in the possession of the former liquidator shall be transferred into the former liquidator's own name and administered by the liquidator for the benefit of the creditors / contributories (as appropriate) (O.23, r.3 CWR and s.153(1) Companies Act).
4. Advertise for claims and take reasonable steps to identify claimants. Thereafter, to deal with claims and make payments / transfers of assets (as appropriate) to such persons as appear to be entitled to receive them (O.23, r.4).
5. Pay the former liquidator's own reasonable fees and expenses (O.23, r.5 CWR).
6. After one year following the Order for dissolution, transfer any remaining money or assets in the former liquidator's possession to the Financial Secretary (O.23, r.6 CWR).
7. Retain the liquidation filed for at least three years (O.26, r.2(3) CWR).

For full marks needed to also reference CWR O.26, r.3 ie "upon making an order for dissolution, the court shall give directions in respect of the preservation, storage and destruction of the company's remaining books and records"

#### Question 2.8

Commented [ca15]: Question 2.7 Subtotal  
4/5 marks

Commented [BB16]: Question 2.8 - Sub-total  
= 2/5

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

By s.101 Companies Act, the liquidator has the power to require the following persons to prepare and submit a statement in the prescribed form as to the affairs of the company:

1. Current and former directors and current and former officers of the company
2. Current and former service providers to the company (note that this excludes auditors).
3. Current and former employees of the company (up to one year preceding the "relevant date" (as defined in s.101(6) Companies Act)).

The statement of affairs must be verified on affidavit and must provide details of, inter alia, details of the company's assets and liabilities, including contingent liabilities. The names and addresses of persons having possession of the company's assets, details of the company's creditors and details of security held by creditors.

Anyone who fails to comply with this obligation without a reasonable excuse is liable for a fine of CI\$10,000 (s.101(7) Companies Act).

By s.102 Companies Act, a liquidator is empowered to investigate:

- a. If the company failed, the causes of the failure; and
- b. Generally the promotion, business dealing and affairs of the company (1)

This may include assisting CIMA and RICPS (subject to obtaining directions from the Court) to investigate the above mentioned categories of persons and to institute and conduct criminal prosecution of such persons. (1)

Any "relevant person" as defined in s.103(1) Companies Act, is required to co-operate with the liquidator. The official liquidator may apply to Court for an order for the examination of any "relevant person" or that the "relevant person" transfer or deliver up property or documents to the liquidator.

The Court can, on the application of the liquidator, make an order that the "relevant person" swears an affidavit in answer to written questions, attends for oral examination or both (s.103(5) Companies Act).

Please see model answer below:

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

prosecution of person referred to in section 101(3) of the Act. Those persons include existing or former directors or officers of the company; (b) professional service providers to the company; and (c) employees of the company, during the period of one year immediately preceding the relevant date. (2 marks)

#### Question 2.9

Commented [BB17]: Question 2.9 - Sub-total = 5/5

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

As set out above, by s.101 Companies Act, the liquidator has the power to require certain persons to prepare and submit a statement in the prescribed form as to the affairs of the company.

S.101(3)(c) provides that one such category of persons is persons who are or were employees of the company during the period of one year immediately preceding the “relevant date” (s.101(3) Companies Act).

The “relevant date” is defined in s.101(6) as being either:

- a. The date of the appointment of a provisional liquidator; or
- b. In all other cases, the date of the commencement of the winding up. (1)

Pursuant to s.100(1) Companies Act, the date of the commencement of the winding up can refer to the date of (1)

1. That a resolution was passed by the company for voluntary winding up (½)
2. The period fixed for the duration of the company by its articles of association (see s.7 Companies Act) (½)
3. The event provided for in the company’s articles of association that provides for the company to be wound up. (½)
4. A restructuring officer has been appointed pursuant to s.91B or 91C and the order appointing the restructuring officer has not been discharged. (½)

In all other circumstances, the “relevant date” will be the date of the presentation of the winding up petition (s.100(2) Companies Act). (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 [BB18]:** 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 cannot be appointed by the Grand Court (1) for two reasons.

First, the nominated provisional liquidator is based in Hong Kong and is therefore a foreign practitioner (Reg 4(2) IPR). IPR 4 provides that a person shall be qualified to accept an appointment as an official liquidator if they are licensed to act as an insolvency practitioner in a relevant country. Hong Kong is not a "relevant country" for these purposes (Reg 4(2) IPR).

A foreign practitioner can only be appointed jointly with a qualified insolvency practitioner (O.3, r.4(2) CWR) and cannot be appointed as the sole liquidator (O.5, r.1(3) CWR). (1)

Second, the foreign practitioner's professional indemnity insurance does not meet the minimum criteria set out in Reg. 7 IPR of US\$10 million in respect of each and every claim. He cannot therefore provide a valid consent to act pursuant to O.3, r.4(2)(d). A valid consent to act is required as part of the application by the contributories of SMB Tech (O.4, r.2 CWR). (1)

3 marks – see model answer below for feedback

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)

By s.91B(1) Companies Act, the Company must demonstrate that:

- a. It is or is likely to become unable to pay its debts (as defined in s.93 Companies Act); and
- b. That it intends to present a compromise or arrangement to its creditors pursuant to Cayman Islands law, foreign law or a consensual restructuring.

The term "unable to pay its debts" is defined in s.93 Companies Act. Of the three definitions in that section, s.93(c) is likely to be the most applicable in this instance, which provides that the company must prove to the Court's satisfaction that it is unable to pay its debts.

In *Re Oriente Groupe Limite*, [2022], Unreported, the Cayman Islands Court confirmed that the caselaw on the test for the appointment of provisional liquidators (under s.104 Companies Act) applied equally to the appointment of restructuring officers.

2 marks

### Question 3.3

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

O.1A, r.1(3) CWR provides that, unless the Court orders otherwise, every petition for the appointment of a restructuring officer must be advertised in a newspaper in circulation in the Cayman Islands. (½) The advertisement must be published in accordance with CWR Form No.3A.

In addition, by O.1A, r.1(4) CWR, unless the Court orders otherwise, if the company is conducting business outside of the Cayman Islands, the petition for the appointment of a restructuring officer must be advertised once in a newspaper that is in circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors (including contingent or prospective creditors) and contributories (½) (in which case the advertisement must be published in the official language of such country or countries).

In this case, SMB Tech is said to have a global presence with subsidiaries in various jurisdictions, including the United States, the United Kingdom, and Hong Kong. It also has three creditors situated in the United Kingdom. It is not specified where TCS is domiciled. SMB Tech should therefore advertise in, at least, the UK, the USA and Hong Kong, in addition to the Cayman Islands.

O.1A, r.1(5) CWR provides that the advertisements shall be made to appear not more than 7 business days after the petition for the appointment of the restructuring officer is filed in Court (½) and not less than 7 business days before the hearing date of the petition. (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)

Commented [BB19]: Question 3.2 - Sub-total = 2/2

Commented [BB20]: Question 3.3 - Sub-total = 2/2

Commented [BB21]: Question 3.4 - Sub-total = 6/6

1. The restructuring petition is required to be advertised in such a way that it is more likely to bring the petition to the attention of creditors (including contingent and prospective creditors) (O.1A, r.1(4) CWR. (1) As a result, in the normal course, the restructuring petition will be heard on notice to the creditors. Under the previous statutory regime, applications for the appointment of provisional liquidators were heard *ex-parte*. (1)
2. A creditor has standing to appear at the hearing of a restructuring petition and may oppose the appointment of a restructuring officer (O.1A, r.3). Alternatively, the creditor may oppose the appointment of the company's nominated restructuring officer and may nominate an alternative officer. (1)
3. Similarly, the order appointing a restructuring officer must also be sent to all creditors so that they are on notice of the appointment (O.1A, r.7(3) CWR). (1)
4. The restructuring petition will be heard within 21 days of the petition being filed at Court unless the Court orders otherwise (O.1A, r.1(6)). This ensures that companies progress the restructuring and are not able to abuse the statutory moratorium to delay having to address their obligations to creditors. (1)
5. Similar to the above, O.1A, r.8(1) requires the restructuring officers to send a report to all of the creditors within 28 days. The report should contain details of the steps taken to restructure the company and the financial position of the company. This ensures that creditors have a clear understanding of the financial status of the company and the proposed method to save it. Further, the fact that the report is required (unless the Court orders otherwise) within 28 days means that the company does not get bogged down in protracted and extensive efforts to restructure, which is not in the creditors' interests. (1)
6. Restructuring officers are required to be qualified insolvency practitioners and officers of the Court (s.91D Companies Act). The Insolvency Practitioners rules on qualifications, independence and insurance therefore apply equally to them (O.1A, r.10 CWR) Creditors therefore benefit from the fact that suitably qualified, independent individuals are appointed to restructure the company for the benefit of creditors.
7. Restructuring officers' remuneration is fixed by the Court (s.91D Companies Act). The Court therefore retains oversight of the restructuring officer's fees to ward against excessive fees being charged to the detriment of creditors' interests.
8. A creditor has the right to apply for a variation or a discharge of the order appointing a restructuring officer to protect its interests (O.1A, r.9 CWR).
9. Furthermore, a creditor also has the right to apply to remove or replace a restructuring officer, particularly if they believe that there are grounds to say that the restructuring officers are not independent. There must be confidence in the independence of the restructuring officers (see *Global Fidelity Bank Limited*, Unreported 20 August 2021).
10. Where a restructuring petition has been presented or a restructuring order made, a creditor that has security over some or all of the assets of the company may still enforce that security without the leave of the Court and without reference to the restructuring officer (s.91H Companies Act).



Superb answer – 6 marks, apologies I couldn't give you more as I think you had 3 of the other main points from the model answer!!

**Question 3.5**

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

By s.91B(3) Companies Act, The Court has the power to:

1. Make an order appointing a restructuring officer **(1)**
2. Adjourn the hearing conditionally or unconditionally or **(1)**
3. Dismiss the petition, **(1)**

The Court can also make any other order that it thinks fit **(1)**, save that it cannot make an order placing the company into official liquidation **(1)**, unless a winding up petition has been presented in accordance with sections 91G and 94 Companies Act.

**5 marks**

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

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

**Commented [BB22]:** 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 Partnership Act (2013) Revision governs the operation of ELPs. (1)

In addition, pursuant to s.3 ELPA, the principles of common law and equity that apply to partnerships will also apply to ELPs (as modified by the Partnership Act). (1)

The operation of the ELP itself will be governed by the terms of the limited partnership agreement between the general partner and the limited partners.

Certain statutory powers or prohibitions in the ELPA are subject to the express provisions of the LPA.

The Exempted Limited Partnership Regulations (2021 Revision) also govern the operation of ELPs. (1)

##### Question 4.2

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

S.91(d) Companies Act gives jurisdiction to the Cayman Islands Court to wind up a foreign company where:

- i. It has property located in the Cayman islands
- ii. It is carrying on business in the Cayman Islands
- iii. It is the general partner of a limited partnership or
- iv. It is registered under Part IX of the Companies Act.

Part IX of the Companies Act defines a foreign company as an overseas company which after 1 December 1961 establishes a place of business or commences carrying on business in the Cayman Islands (s.183 Companies Act). A foreign company, as defined, is required to register with the registrar of companies of the Cayman Islands within one month of becoming a foreign company (s.184 Companies Act).

##### 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.

In the ordinary course, a foreign judgment must first be recognised in the Cayman Islands

Commented [BB23]: Question 4.1 - Sub-total = 3/3

Commented [sp24]: Question 4.2 - Sub-total = 5/5

Commented [sp25]: Question 4.3 - Sub-total = 3/3

before it can be enforced.

However, in *Guoan International Limited* [2021] Unreported, the Cayman Islands Grand Court held that a creditor that had served a statutory demand pursuant to a judgment debt of a judgment of the Hong Kong Court (i.e. a foreign court) was entitled to apply for a winding-up order without first obtaining recognition of the judgment itself. This was subject to the usual requirements at common law that the judgment should be final and conclusive in the foreign court, it was obtained by in a foreign Court of competent jurisdiction, was not obtained by fraud and did not contravene public policy of the rules of natural justice. The Court in the *Guoan* case rejected the company's argument that the petition should be dismissed on the basis that the debt was disputed. This argument appears to have been predicated on the fact that the company was appealing the judgment in Hong Kong but at Common Law, this did not make the Hong Kong judgment not final. The petitioner also relied on the earlier decision of the Cayman Islands Court in *Re China Hospitals* which further supported the position that a foreign judgment need not be recognized before it is used as a the basis for a winding up petition.

#### Question 4.4

Commented [BB26]: Question 4.4 -Sub-total = 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)

S.38 Bankruptcy Act (1997 Revision) provides that until the provisional order is made absolute, a trustee in bankruptcy is required to preserve property in such a state as to permit of it being returned to the debtor in the condition in which it was seized, in the event that the provisional order is revoked. (1)

When an absolute order of bankruptcy has been made against the debtor, the Trustee must proceed to administer the debtor's estate for the benefit of the creditors (s.65 Bankruptcy Act).

S.74 Bankruptcy Act provides that the Trustee must administer the debtor's estate for the benefit of creditors.

S.75 Bankruptcy Act states that the Trustee must take and retain possession of all of the debtor's property (subject to the directions of the Court) as soon as possible after the making of the provisional order

Further to the above the Trustee must collect debts of the debtor to the best of his power (s.76 Bankruptcy Act)

S.79 Bankruptcy Act provides that the Trustee may call on the trade of the debtor as far as may be necessary or expedient for the beneficial winding up or sale of the business. (1)

S.80 Trustee Act provides that the Trustee may bring, institute or defend any action or other legal proceedings relating to the property of the debtor. (1)

S.87 Bankruptcy Act states that the Trustee must receive and decide on proofs of debts. (1)

TOTAL MARKS: [100]

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