



INSOL
INTERNATIONAL



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

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

EXAMINERS

Mr John Royle Mr Mark Russell Mr Nicholas Fox Ms Corinne Celliers
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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.

Commented [BB1]: TOTAL = 53.5/100

Commented [BB2R1]: Mark adjusted
upwards to 54/100

INSTRUCTIONS

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

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

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

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

Commented [BB3]: Question 1 - Sub-total = 14/20

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.

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

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.

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

- (d) Within 7 days of the appointment.

Question 1.7

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

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

Question 1.8

Choose the **correct** statement:

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

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

Question 1.9

Choose the **correct** statement:

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

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

Question 1.10

Choose the **correct** statement:

A scheme of arrangement:

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

Commented [BB6]: The correct answer is (c)

Question 1.11

Select the **incorrect** statement:

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

Commented [BB7]: The correct answer is (c)

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.

Commented [BB8]: 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.

Commented [BB9]: The correct answer is (b)

Question 1.18

Choose the **correct** statement:

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

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

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 winding up petition by Whitesand (commenced in May 2023) would have required an affidavit sworn by the person or persons nominated for appointment as official liquidator(s). It is likely that provisional liquidators may have been appointed by the company in the interim until the winding-up Order of 22nd August 2023.

Under s.105(1) of the Companies Act there may be one or more official liquidators appointed.

In most instances any provisional liquidator(s) in place will be appointed subsequently as the official liquidator(s).

The provisional liquidator / proposed official liquidator will have provided a Consent to Act in the form of an affidavit and the Consent to Act would need to conform to the requirements of Companies Winding Up Rules Order 3 rule 4. (1)

The content differs between an application by a local insolvency practitioner (Ord. 3 r.4(1)) and an application by a qualified insolvency practitioner jointly with a foreign practitioner (Ord. 3 r.4(2)).

The local insolvency practitioner needs to state,

- a. That he/she is a qualified Insolvency Practitioner within the meaning of the Insolvency Practitioner's Regulations (1)
- b. That he/she complies with the residency requirements under Reg. 5 (1)
- c. That he/she confirms after due enquiry they meet the independence requirements under Reg. 6 (1)
- d. That he/she confirms they are in compliance with the insurance requirement under Reg. 7 (1)
- e. That he/she confirms they are willing to act as official liquidator, if so appointed. (1)

The foreign insolvency practitioner needs to,

- a. State his/her professional qualifications (Ord. 3 r.4(2)(a)) and experience (Ord. 3 r.4(2)(c))
- b. Give details of the country in which he/she is qualified to perform functions equivalent to those of an official liquidator under the Companies Act
- c. Confirm that having made due enquiry he/she or his/her firm meet the independence requirements under Reg. 6
- d. Confirm that he/she or will have the benefit of professional indemnity insurance in compliance with the Insolvency Practitioner's Regulations, Reg. 7

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 [BB10]: Question 2.1 - sub-total = 5/5

Commented [BB11]: Question 2.2 - Sub-total = 1/5

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)

This is governed by the code of ethics / professional conduct. Assuming that the accountancy practice of Bodden & Ebanks Ltd. is a Cayman Islands entity, the likelihood is that the proposed liquidators are local insolvency practitioners who are regulated by the Cayman Islands Institute of Professional Accountants. The CIIPA requests that all of its members comply with the IESBA Code of Ethics ('CoE').

Under the CoE the 'objectivity' fundamental principle is called into question on the present facts.

Bodden & Ebanks acted as auditors in 2021, within three years (1) of the date of the winding-up proceedings in 2023 (this is not a voluntary liquidation). That is likely to amount to a significant professional relationship and had that been known beforehand the proposed liquidators ought not to have taken up the appointment.

These liquidators have already been appointed - that would have happened at the making of the winding up order on 22nd August 2023 in respect of Bluesea.

They are under a duty to evaluate the threat to compliance with the fundamental principles - on a qualitative and quantitative basis. The test is whether a reasonable and informed third party would likely conclude that that the liquidator as an insolvency practitioner complies with the fundamental principles. Any threats identified may be addressed by eliminating them or reducing them to an acceptable level - in this instance probably with consideration of safeguards. If that is not possible, they must decline or end the appointment.

If the threat can be reduced to an acceptable level, the liquidators may seek to continue in their roles subject to the supervision of the Grand Court if there are no circumstances that give rise to an unacceptable threat to compliance with the fundamental principles. All threats, actual or perceived, should be brought to the attention of the Grand Court and to all creditors as part of an application to the Court. They should not promote their own appointment.

1 mark - what about the IPRs... Model answer below.

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

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

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

A qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, he, or the firm of which he is a partner or employee, has acted in relation to the company as its auditor. (1 mark)

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

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

Question 2.3

Commented [BB12]: 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)

s.120 Companies Act (2023 Revision) provides that any person (including a director or officer of the company) may be appointed as a voluntary liquidator. No specific qualifications are necessary. (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)

s.123 Companies Act (2023 Revision) provides that Tom & Jerry shall within 28 days of the commencement of a winding-up,

- File notice of the winding-up with the Registrar of Companies
- File notice of the liquidator's consent to act with the Registrar
- File the Director's declaration of solvency with the Registrar

- d. Serve notice of the winding-up on CIMA (if Cheese Limited carries on any regulated business), and
- e. Publish notice of the winding-up in the Gazette. (2)

Question 2.3.3 (2/2 marks)

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

This is governed by the Companies Winding Up Rules (2023 Consolidation) Order 13 rule 9.

Rule 9(2) stipulates that Cheese Limited may resolve to remunerate the voluntary liquidators on,

- a. An hourly rate (or scale of rates) for time reasonably and properly devoted to the liquidation;
- b. A fixed sum;
- c. A commission or percentage of the assets distributed or realized; or
- d. A combination of these methods. (2)

Question 2.4 (2/2 marks)

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

s.95 Companies Act (2023 Revision) provides that the Court may:

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

The provisional liquidator's functions are limited to what the Court may confer (s.104(4) Companies Act).

Question 2.5

Question 2.5.1 (4/4 marks)

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

Removal of an official liquidator is governed by s.107 Companies Act (2023 Revision) and CWU Rules Order 5 rule 6.

Only a creditor or a contributory of the company may apply. Essentially the applicant must have legitimate interest in making the application - for an insolvent liquidation that means the creditors and for solvent liquidation that means a contributory as 'proper persons' to

Commented [BB13]: Question 2.4 - sub-total = 2/2

Commented [BB14]: Question 2.5 - sub-total = 8.5/9

Commented [ni15]: great answer

make the application because they had the ultimate interest in the distribution of the company's assets – see *In the matter of BTU Power Company* (in official liquidation) [2019 (1) CILR Note 7].

The same case authority indicates that 'good reason' needs to be demonstrated to remove a liquidator (who is an officer of the Court for these purposes – it is sufficient to satisfy the Court that the removal of the liquidator would be for the general advantage of the majority of persons interested in the liquidation, except where impropriety is shown in which case the Court may override their interests).

The application is made by a Removal Summons (CWU Rules Order 5 rule 6) with supporting affidavit containing all the facts and matters relied upon, and must be served (as per Ord. 5 r. 6(2)) on:

- a. The Official Liquidator; and
- b. Each member of the liquidation committee; or
- c. Counsel for the liquidation committee (if any attorney is appointed with authority to act generally); and
- d. Such other creditor or contributory as the Court may direct.

Question 2.5.2 (4.5/5 marks)

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

The rationale for this is set out in *Deloitte & Touche A.G. v Johnson and Dinan* 1999 CILR 297 – a decision of the Privy Council.

The Companies Act itself provides no guidance on who may be a 'proper person' to make an application to remove an official liquidator. The Court has jurisdiction not by statute, but under its inherent power and the above referenced case authority determined that to have legal standing to make an application the person applying has to have "sufficient interest" (see judgment of Lord Millett at page 304 lines 30-40).

In an insolvent company the only persons with a such 'legitimate interest' are the creditors – as the persons entitled to participate in the ultimate distribution of the company's assets and who may be affected by the actions of the official liquidator.

With a solvent company there are plainly sufficient assets to meet the company's debts, so the preference shareholders have the corresponding 'legitimate interest' as the contributories.

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 [ni16]: The question sought an answer that identified the true economic stakeholders, which are:

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

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

I think that you understood this, but the explanation could have been a touch clearer.

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

Commented [ca17]: Question 2.6 Subtotal
0/4 marks

A liquidation committee must be appointed unless the Court orders otherwise. In this instance the Court may retrospectively waive the need for the liquidation committee if one has been appointed.

If there is no application to waive the appointment, the committee is expected to consult with the liquidator; presenting the wishes of the creditors and contributories. That role may be partially redundant if the creditors' claims are satisfied in full including interest.

The members of the liquidation committee have an interest in the estate and must discharge their function in the best interests of the stakeholders.

The committee may still have a role in considering and approving the liquidators' remuneration.

Model answer shown below:

As the liquidation was previously deemed to be insolvent the LC membership would have been comprised of creditors. Order 9, rule 8 (b) where a creditors claim has been paid in full the creditor(s) membership will be automatically terminated. Accordingly, the LC will need to be reconstituted and a revised certificate (CWR Form No 15) filed with the court so that the committee is comprised of not less than three, no more than five, contributories (Order 9, r.1 (3)).

Question 2.7

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

Commented [ca18]: Question 2.7 Subtotal
5/5 marks interesting insights from case work

After an order for dissolution (i.e. after the liquidator has prepared a final report and given notice of the date when the application will be heard by the Court under s.152 of the Companies Act and CWU Rules Order 10 r.3 (the report) and Order 22), the liquidator must,

- a. Retain liquidation files in safe custody for at least three years (Order 26 r. 2(3))
- b. Comply with the order of the Court in relation to the post-dissolution storage and destruction of the company's books and records in accordance with Ord. 26 r.3 - that will typically a dissolution expense (see Ord 26 r.3(6)) that should have been catered for in the final report.
- c. Cease to act, save in relation to dealing with any unclaimed dividends or undistributed assets in accordance with s153 of the Companies Act and CWR Ord. 23 by setting up a trust account as a trustee for the benefit of the contributories or creditors to whom the funds are owed. Under s.153(2) after one year of the dissolution of the company the former liquidator must transfer any funds held or other assets held on trust to the Minister of Finance who will manage them in accordance with Part VIII of the Public Management and Finance Act (2020 Revision).

It is possible to recover those funds belatedly on behalf of the trustees (I know

because I have made a successful application in respect of a company that had been wound up four years prior).

Question 2.8

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

[Type your answer here]

No answer provided. See model answer below:

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

Question 2.9

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

[Type your answer here]

No answer provided. See model answer below:

In the context of an official liquidation (noting that this section also applies to provisional liquidators), the relevant date for the purposes of section 101 means the commencement of the winding up. (1 mark) In many cases, this is the presentation of the winding up petition (pursuant to section 100(2)). (1 mark) However, this is subject to section 100(1), which provides that the commencement of the winding up may be an earlier date if, before the presentation of a petition for the winding up of a company by the court, a resolution was passed by the company for voluntary winding up; any period fixed for the duration of the

Commented [BB19]: Question 2.8 - Sub-total = 0/5

Commented [BB20]: Question 2.9 - Sub-total = 0/5

company by the articles of association has expired; an event giving rise to a requirement to wind up the company in the articles of association has occurred; or a restructuring officer has been appointed. **(2 marks)** If any of these events occur then the winding up is deemed to have commenced at the time of the relevant aforementioned event. **(1 mark)**

**** 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 [BB21]: Question 3.1 - Sub-total = 0/5

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

[Type your answer here]

No answer provided 0 marks - model answer below

The chosen provisional liquidator of SMB by contributors 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 6 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 contributors 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)

[Type your answer here]

No answer provided - 0 marks see below

The company must demonstrate that (i) the company is or is likely to become unable to pay its debts as they fall due (1 mark) and (ii) the company intends to present a compromise or arrangement to its creditors (1 mark)

Commented [BB22]: Question 3.2- sub-total = 0/2

Question 3.3

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

[Type your answer here]

You did not attempt this question. The model answer is:

It must be advertised once in a newspaper having circulation in the Cayman Islands (1/2 mark), in a newspaper having circulation in a country (or countries) in which the petition is most likely to come to the attention of the company's creditors and contributories (1/2 mark) no more than seven business days after the filing of a Restructuring Petition (1/2 mark) and not less than seven business days before the hearing date (1/2 mark).

Commented [BB23]: Question 3.3 - Sub-total = 0/2

Question 3.4

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

[Type your answer here]

0 marks, no attempt made.

Any 6 of the following

- There are a number of provisions which prescribe specific notice and reporting requirements for the benefit of creditors. (1 mark)
- 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)
- The same advertising requirements are imposed as applicable to a winding up petition (the prior regime did not require advertisement of an application to appoint JPLs) - no more than seven business days after the filing of a Restructuring Petition and not less than seven business days before the hearing date (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)
- A requirement for the RCOs to report - open and transparent process (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs (1 mark)
- The RCOs must report within 28 days of appointment (1 mark)
- A creditor or contributory may apply for an order discharging the appointment (1 mark)
- Secured creditors remain entitled to enforce their security. (1 mark)

Commented [BB24]: Question 3.4 - sub-total = 0/6

Question 3.5

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

[Type your answer here]

0 marks, no attempt made.

Upon the hearing of a Restructuring Petition the Grand Court may: (i) make an order appointing a restructuring officer **(1 mark)**; (ii) adjourn the hearing conditionally or unconditionally **(1 mark)**; (iii) dismiss the petition **(1 mark)**; or (iv) make any other order as the Grand Court thinks fit **(1 mark)** except an order placing the company into official liquidation **(1 mark)**

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

Commented [BB25]: Question 3.5 - sub-total = 0/5

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)

Aside from the terms of the Limited Partnership Agreement, there is a statutory code applicable to ELP's with three statutes that apply in the Cayman Islands:

- The Partnership Act (2013 Revision) (1)
- The Exempted Limited Partnership Act (2021 Revision) and Exempted Limited Partnership Regulations (2021 Revision), (1) and
- The Companies Act (2023 Revision) and the Companies Winding Up Rules (2023 Consolidation).

The Exempted Limited Partnership Act is not derived from any equivalent UK legislation and instead is modelled on legislation from Delaware, USA. In case of inconsistency with the Companies Act (as to liquidation and dissolution or voluntary winding up under Part V), the Exempted Limited Partnership Act takes precedence.

The rules of common law and equity in relation to partnerships (excluding some specific statutory provisions under the Partnership Act) (1) are also expressly preserved and applied by s.3 of the Exempted Limited Partnership Act.

Commented [BB26]: Question 4.1 - Sub-total = 3/3

Question 4.2

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

The Grand Court has jurisdiction under s.91 of the Companies Act (2023 Revision) to wind up a foreign company where:

- The foreign company was incorporated elsewhere but has subsequently registered in the Cayman Islands
- The foreign company - (defined under s.183 of the Act) as at 1st December 1961 has property located in the Cayman Islands, or
- Is carrying on business in the Islands, or
- Is the general partner of a limited partnership, or
- Is registered under Part IX of the Companies Act (2023 Revision) as an overseas company (ss.183 to 195 of the Act).

Commented [sp27]: Question 4.2 - Sub-total = 4/5

Question 4.3

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

Commented [sp28]: Question 4.3 - Sub-total = 3/3

The basic premise is that a judgment or order of a foreign court has no direct legal effect in the Cayman Islands. Such a foreign judgment or order has to be legally enforced in Cayman.

The Cayman Islands have not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments (and the UK has not extended its ratification of any such treaties by Order in Council in Cayman Islands save for some limited exceptions) nor are the islands a signatory to the Hague Convention of July 2019.

There is one statutory code that applies - the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) that in theory allows specific foreign judgments to be recognised in Cayman in the same way as domestic judgments and orders but that has so far only been applied to Australia and its territories. The rules appear under GCR Order 71.

At common law in Cayman, to enforce a foreign judgment a new action must be commenced in Cayman using the foreign judgment as evidence of a debt. By this method, money judgments and non-money judgments (including declaratory judgments) can be recognized locally provided that the foreign judgment or debt is 'final and conclusive', was obtained in a Court of law which had jurisdiction over the judgment debtor, was not obtained by fraud, was not in respect of taxes, fines or penalties, was obtained in accordance with the rules of natural justice, and the enforcement of the foreign judgment would not contravene public policy in the Cayman Islands.

Justice Kawaley in 2021 determined in the case of *In the matter of Guoan International Limited* [unreported, 29th October 2021] that a judgment is 'final and conclusive' even where an appeal is pending, and that a statutory demand properly sought in the Cayman Islands under s.93(a) of the Companies Act could validly result in a successful winding up petition.

Question 4.4

Commented [BB29]: Question 4.4 - Sub-total = 3/4

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)

Broadly, the duties of the Trustee in Bankruptcy are:

- a. Under s.74 of the Bankruptcy Act (1997 Revision) to administer the debtor's estate for the benefit of the creditors (and under the control of the Court).
- b. Under s.75 of the same Act to take possession of the debtors' property (real and personal) and all books, papers, and documents of the debtor as soon as possible after the making of a provisional bankruptcy order.
- c. Under s.38 of the same Act, pending a provisional bankruptcy order being made absolute (or final) the Trustee is under a duty to preserve property so that if the provisional order is revoked the property can be returned to the debtor. (1)
- d. To examine and verify the books, papers, and vouchers relating to the debtors' affairs (s.77).

The powers of the Trustee include,

- a. The power to 'discover' and to recover all debts due to the debtors' estate under s.76.
- b. To sell property (s.78)
- c. To carry on the debtors' trade so far as necessary or expedient to wind up or sell the

same, and for general management and realization of property, and to employ the debtor or other persons. (s.79) (1)

- d. To bring or to defend legal proceedings (s.80) and to arbitrate or compromise the claims of the debtor or against the debtor including executing deeds (ss.82-85). (1)

The rules governing bankruptcy in the Courts are the Grand Court (Bankruptcy) Rules (2021 Revision). One example of an application seemingly under ss.38 and 80 of the Act was In the Matter of a Debtor [2020(2) CILR 305] where the trustee in bankruptcy obtained injunctive relief (a freezing injunction) of the debtors' assets in the Cayman Islands including CAN\$20 million. The wife of the debtor made an application for 'reasonable' living expenses and was successful against the Trustee in Bankruptcy to the tune of US\$5,000 per week requiring the freezing injunction to be amended.

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).

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****