



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 82/100 -
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)

EXAMINERS

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

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

All candidates are expected to comply with ALL the instructions.

INSTRUCTIONS

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

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

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

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

Commented [BB2]: Question 1 - Sub-total = 20/20

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.

Question 1.13

Select the **correct** statement:

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

Question 1.14

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

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

Question 1.15

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

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

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

Question 1.16

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

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

Question 1.17

Select the **correct** statement:

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

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

Question 1.18

Choose the **correct** statement:

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

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

Question 1.19

Select the **correct** statement:

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

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

Question 1.20

Select the **correct** statement:

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

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

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

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

QUESTION 2 - LIQUIDATION (45 MARKS)

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

FACT PATTERN

BLUESEA DIGITAL CAPITAL LIMITED

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

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

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

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

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

Question 2.1

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

The content required of the consent to act which is to be signed by the proposed official liquidators is contained within Order 3, Rule 4 of the Companies Winding Up Rules, which shall be in the form of an affidavit, sworn by the proposed official liquidators, stating: (1)

- a) The proposed official liquidators are qualified insolvency practitioners and meet the residency requirement contained in Regulation 5 of the Insolvency Practitioners' Regulations; (1)
- b) The proposed official liquidators, having made due enquiry, believe that they, and their firm, meet the independence requirement contained in Regulation 6 Insolvency Practitioners' Regulations; (1)
- c) The proposed official liquidators and / or their firm are in compliance with the insurance requirement contained in Regulation 7 of the Insolvency Practitioners' Regulations; and (1)
- d) The proposed official liquidators are willing to act as official liquidators if so appointed by the Court. (1)

In the absence of evidence to suggest that both nominees are qualified insolvency practitioners, should the petition seek an order for the appointment of a qualified insolvency practitioner jointly with a foreign practitioner, as per Order 3, Rule 4 of the Companies Winding Up Rules, the petition shall be supported by an affidavit sworn by the foreign practitioner, stating:

- a) The foreign practitioner's professional qualifications;
- b) The country in which the foreign practitioner is qualified to perform the functions equivalent to those performed by official liquidators;
- c) The foreign practitioner's professional experience;
- d) The foreign practitioner will have professional indemnity insurance in respect of their acts and omissions done in their capacity as official liquidator, meeting the requirements of Regulation 7 of the Insolvency Practitioners' Regulations;
- e) Particulars of the foreign practitioner's appointment should they have been appointed by a foreign court or authority as a liquidator, trustee, receiver or administrator of the company, or a related party of the company; and
- f) Having made due enquiry, the foreign practitioner and their firm meet the independence requirement contained in Regulation 6 Insolvency Practitioners' Regulations.

5 marks

Question 2.2

The proposed liquidators are employees of the accountancy practice Bodden & Ebanks

Commented [BB3]: Question 2.1 - sub-total = 5/5

Commented [BB4]: Question 2.2 - sub-total = 2/5

Limited. Shortly prior to the hearing of the winding up petition of Bluesea, it transpires that Bodden & Ebanks Limited previously acted as auditors of Bluesea in 2021. Are the proposed liquidators still able to act in relation to Bluesea? Please provide an explanation for your answer. This information came to light after the proposed liquidators had already provided their consents to act; what should the proposed liquidators do in respect of the same? (5)

Regulation 6 of the Insolvency Practitioners Regulations deals with the independence requirements required of someone to be eligible to act as an official liquidator. (1) Under Regulation 6, a qualified insolvency practitioner will not be regarded as independent if, within a period of three years immediately preceding the commencement of the liquidation, they, or the firm of which they are partners or employees, has acted in relation to the company as its auditor. (1)

In the case of the proposed official liquidators, as they are employees of Bodden & Ebanks Limited, which previously acted as auditors of Bluesea, they would not meet the independence requirements as their firm's engagement as auditors was less than three years prior to the commencement of Bluesea's liquidation. (1)

The affidavit, supporting the petition, which would have been sworn by the proposed official liquidators in accordance with Order 3, Rule 4 of the Companies Winding Up Rules, would have had to include the declaration that the proposed official liquidators, having made due enquiry, believed that they and their firm meet the independence requirement contained within Regulation 6 of the Insolvency Practitioners Regulations. It subsequently transpired that due enquiry was not made and the proposed official liquidators should therefore withdraw their consents as without doing so they would be making a false declaration as to their independence. (1)

4 marks

Question 2.3

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

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

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

Using the facts above, answer the questions that follow:

Question 2.3.1 (1/1 mark)

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

Tom and Jerry do not require any qualifications to act as voluntary liquidators. Any person, including a director or officer of Cheese Limited, may be appointed as 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)

Within 28 days of Tom and Jerry's appointment as voluntary liquidators, and in accordance with Section 123 of the Companies Act (2023 Revision), and Order 13, Rule 2 of the Companies Winding Up Rules, they shall:

- a) File notice of the winding up of Cheese Limited with the Registrar. This shall be in the form of CWR Form No 19;
- b) File Tom and Jerry's consent to act as voluntary liquidators with the Registrar. This shall be in the form of CWR Form No 20;
- c) File the director's declaration of solvency with the Registrar, which shall be signed by all of Cheese Limited's directors. This shall be in the form of CWR Form No 21;
- d) Had Cheese Limited been carrying on a regulated business, serve notice of the winding up upon the Cayman Islands Monetary Authority; and
- e) Publish notice of the winding up in the Cayman Islands Gazette, which shall be in the form of CWR Form No 19. (2)

Should Tom and Jerry fail to comply with these requirements, they will be liable to a fine of ten thousand dollars.

Question 2.3.3

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

In accordance with Order 13, Rule 9 of the Companies Winding Up Rules, the basis and amount of Tom and Jerry's remuneration as voluntary liquidators of Cheese Limited shall be authorized by resolution of company. The basis of this remuneration can be:

- a) Hourly fixed rate (or scale) for the time reasonably and properly devoted to the liquidation of Cheese Limited by Tom and Jerry;
- b) A fixed sum;

- c) A commission or percentage of the assets distributed / realized; or
- d) A combination of the above methods. (2)

Tom and Jerry are not entitled to receive payment of their remuneration out of Cheese Limited's assets without the prior approval of a resolution which has passed at a general meeting of Cheese Limited, except in circumstances whereby the remuneration specified in their final report may be paid if Cheese Limited's final general meeting has been duly convened and no member attends and votes, either in person or by proxy. Further their remuneration may be paid with the approval of the Court.

Question 2.4 (0.5/2 marks)

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

Should the contributories wish to seek the appointment of a provisional liquidator, a winding up petition must first be filed with the Court, pursuant to Section 92 of the Companies Act (2023 Revision) on just and equitable grounds. Only then, but prior to the making of a winding up order, must an application for the appointment of a provisional liquidator be made by way of a summons, in accordance with Section 104 of the Companies Act (2023 Revision).

Upon hearing of the application for the appointment of a provisional liquidator, which generally would be heard on the first return date of the winding up petition, the court may appoint a provisional liquidator whereby it is satisfied that both the prima facie hurdle and necessity hurdle have been met, in accordance with Section 104 of the Companies Act (2023 Revision), being:

- a) There is a prima facie case for making a winding up order; and
- b) The appointment of a provisional liquidator is necessary in order to:
 - a. Prevent the dissipation of the company's assets;
 - b. Prevent the oppression of a minority shareholder; or
 - c. Prevent mismanagement or misconduct of the company's directors.

With regards to the prima facie hurdle, the application must satisfy the Court that more likely than not a winding up order would be made on the hearing of the winding up petition, however, this test is more difficult to assess whereby the petition is presented on just and equitable grounds, as would be the case for a contributories' application. Should the prima facie hurdle not be passed, then the Court may dismiss the application.

Should the prima facie test be passed but the applicant be unable to satisfy the Court with regards to the necessity hurdle, the Court may make an alternative order to regulate the company's affairs.

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

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

Should both hurdles be passed, the Court may then make an order for the appointment of a provisional liquidator.

Question 2.5

Commented [BB8]: Question 2.5 - Sub-total = 7/9

Question 2.5.1 (4/4 marks)

Commented [ni9]: good 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)

Both creditors and contributories of a company may, by way of a removal summons, apply for an order of the Court for the removal of official liquidators, which is provided for in Section 107 of the Companies Act (2023 Revision). However, the determination of solvency of the liquidation is of importance in establishing who may make such an application. In the case of an insolvent liquidation, only the company's creditors may, by application to the Court, remove an official liquidator. Whereas in the case of a solvent liquidation, only the company's contributories may, by application to the Court, remove an official liquidator. In either instance, these bodies of stakeholders represent the parties with the ultimate economic interest in the liquidation of the company. Good reason must be presented by the applicant for the removal of the official liquidator, which could include a conflict of interest, misconduct, or impropriety on the part of the official liquidator.

The applicant's removal summons must be served upon the official liquidator and each member of the liquidation committee, or counsel for the liquidation committee should one be appointed with authority act generally, and all other creditors and contributories as the Court may direct. This requirement is dealt with under Order 5, Rule 6 of the Companies Winding Up Rules.

Question 2.5.2 (3/5 marks)

Commented [ni10]: The question sought an answer that identified the true economic stakeholders, which are:

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

- 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

Given the solvency of a company in official liquidation can vary, meaning it can be deemed to be insolvent, solvent or of doubtful solvency, the economic interests in the liquidation and the realization / distribution of the company's assets are held by varying groups of stakeholders. In the case of a solvent liquidation, the company's contributories are deemed to hold the main economic interest in the liquidation, and it is ordinary for creditors to be paid by the official liquidators in the performance of their duties. As such, it would be improper for a creditor to apply, by way of a removal summons, for the removal of an official liquidator. Alternatively, in the case of an insolvent company, the company's contributories retain no economic interest in the liquidation, with the statutory function of the official liquidator being the collection, realization and distribution of the

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

One mark awarded for the reference to BTU in question 2.5.1 and half a mark for correctly answering that the distinction is based on the differing interests of creditors and contributories.

company's assets to its creditors. Therefore, it would make sense that the contributories have no standing to present a removal summons and their interests are no more and cannot be affected by the actions or inactions of the official liquidator. Lastly, and in the case of a company which is of doubtful solvency, both the creditors and contributories would be deemed to retain an economic interest in the liquidation. Therefore, it is proper that both may serve as applicants in the scenario whereby a removal of an official liquidator is sought.

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)

In accordance with Order 9, Rule 1 of the Companies Winding Up Rules, a liquidation committee is to be established in respect of every company being wound up by the court. This committee, in accordance with the provisions of Order 9, should be comprised of no less than three and no more than five creditors (in the case of an insolvent liquidation) or contributories (in the case of a solvent liquidation). Should the company be of doubtful solvency, the committee should be comprised of no less than three and no more than six members, the majority of whom should be creditors, and containing at least one contributory.

In accordance with Order 9, Rule 3 of the Companies Winding Up Rules, in the event that an official liquidator changes their certification of the company's solvency from insolvent to solvent, as is the case in this instance, the creditor members of the liquidation committee automatically cease to be members. The official liquidator must then convene a meeting of the company's contributories for the purpose electing new members to the liquidation committee from this body.

Noting the requirements for no less than three and no more than five contributories to form the liquidation committee, it is possible that the company may not have a sufficient number of contributories to fulfil this requirement. In this instance, the official liquidator will apply to the court to dispense with the requirement to form a liquidation committee and may form an ad hoc committee in lieu, should this be something the contributories wish to participate in.

Question 2.7

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

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

Commented [ca12]: unless the court waives the requirement

Commented [ca13]: Question 2.7 Subtotal = 4/5 marks

Following the making of an order for dissolution, the official liquidator must, within 14 days from the date upon which the order was perfected, pursuant to Order 22, Rule 2 of the Companies Winding Up Rules, file the order with the Registrar.

The Court must give directions, pursuant to Order 26, Rules 3(4) & 3(6) of the Companies Winding Up Rules, with regards to the preservation, storage and destruction of the company's books and records for which official liquidator will need to make the appropriate provisions and which must be retained for at least three years.

The official liquidator's duties cease upon the making of the order for dissolution; however, the order may contain residual duties for which steps will need to be taken.

For full marks needed to reference:

- Liquidation Files (O.26, r.2)
- Unclaimed dividends and undistributed assets (O.23)

Question 2.8

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

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

Section 102 of the Companies Act (2023 Revision) provides the official liquidator with the following investigative powers:

- a) If a company has failed, the power to investigate the causes of its failure; and
- b) Powers to investigate generally the promotion, business, dealings and affairs of the company. (1) cite relevant case law to substantiate your answer - see model answer below.

The official liquidator may, as they see fit, report these investigations to the court.

The official liquidator may also, in accordance with Section 101 of the Companies Act (2023 Revision), require relevant individuals, by way of a properly executed affidavit, to furnish statements as to the affairs of the company. Additionally, the official liquidator may, in accordance with Section 103 of the Companies Act (2023 Revision), seek the sanction of the Court to examine persons or demand delivery of any property or documents belonging to the company. (1)

The official liquidator's duties, or their function, is provided for under Section 110 of the Companies Act (2023 Revision). These duties are a dual function pertaining the recovery of assets and reporting obligations, being:

- a) The collection, realization and distribution of the company's assets to creditors, and contributories should a surplus exist; and
- b) Reporting to the company's stakeholders (creditors and contributories) upon the affairs of the company and the manner in which it has been wound up.

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 course of his investigation, which is material to ascertain the exact truth in every case before the Court". **(1 mark)** In addition to this general duty, section 102(1) of the Companies Act expressly empowers the liquidator to investigate (a) if the company has failed, the causes of the failure; and (b) generally the promotion, business, dealings and affairs of the company, and to make such report if any to the court as the liquidator thinks fit **(1 mark)**. Additionally, the liquidator is also empowered (subject to obtaining directions from the court) to assist the CIMA and the RCIPS to investigate the conduct of persons, and institute and conduct a criminal prosecution of person referred to in section 101(3) of the Act. Those persons include existing or former directors or officers of the company; (b) professional service providers to the company; and (c) employees of the company, during the period of one year immediately preceding the relevant date. **(2 marks)**

Question 2.9

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

The definition of "relevant date" for the purposes of a Section 101 of the Companies Act (2023 Revision) notice varies depending on the circumstances of each company.

Under Section 101, the relevant date is deemed to be the commencement of the winding up, **(1)** which is ordinarily the date on which the winding up petition was presented to the court, or should a provisional liquidator be appointed, the date of such an appointment.

Section 100 of the Companies Act (2023 Revision) expands on the definition of the commencement of the winding up of a company and provides for instances whereby a winding up is deemed to have commenced prior to the presentation of a petition for the winding up. **this is the presentation of the winding up petition (pursuant to section 100(2))** These are instances whereby:

- a) A resolution has been passed by the company to be wound up voluntarily; **(½)**
- b) A fixed period, as provided for in the company's articles of association has expired; **(½)**
- c) Following the occurrence of an event provided for in the company's articles of association; or **(½)**
- d) A restructuring officer has been appointed and an order for their discharge has not yet been made. **(½)**

Commented [BB15]: Question 2.9 - Sub-total = 3/5

If any of these events occur then the winding up is deemed to have commenced at the time of the relevant aforementioned event

In these instances, the official liquidator's scope to require a statement of affairs can vary as the relevant date will be impacted by the above factors.

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

QUESTION 3 FOLLOWS ON NEXT PAGE / ...

QUESTION 3 - CORPORATE RESCUE (20 MARKS)

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

FACT PATTERN

SMB TECH CORPORATION

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

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

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

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

Question 3.1

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

Commented [BB16]: Question 3.1 - sub-total = 3.5/5

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

SMB Tech's chosen provisional liquidator is notably located in Hong Kong. (1) Whilst the appointment of a foreign practitioner is permitted, the appointment must be made jointly with a proposed provisional liquidator who is resident in the Cayman Islands and meets the requirements set out in the Insolvency Practitioners' Regulations. (½)

Assuming the consent for a joint resident appointee can be obtained, the foreign practitioner must then ensure they meet the professional indemnity requirements of the Insolvency Practitioners' Regulations. Regulation 7 requires that professional indemnity insurance be maintained by the practitioner, up to a limit of at least US\$10 million in respect of each claim, and at least \$20 million in aggregate, with a deductible of not more than US\$100,000. (1)

As the chosen provisional liquidator is unwilling to increase their insurance liability limited, they would be unwilling to take the appointment as their current cover is below the amounts required, irrespective of whether a resident was to consent to act as a joint appointee. (1)

3 ½ marks - see model answer below.

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

Foreign practitioners are permitted to be appointed as official liquidators, but they must be appointed jointly with a qualified insolvency practitioner per section 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 contributories of SMB isn't prepared to or cannot

increase his professional indemnity insurance from US\$5 million per each and every claim to US\$10 million per each and every claim – then he would be unable to act as an official liquidator. (1 mark)

Question 3.2

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

Before the Court will appoint a restructuring officer, the company must demonstrate, pursuant to Section 91B(1) of the Companies Act (2023 Revision), that:

- a) The company is, or is likely, to become unable to pay its debts; and (1)
- b) It intends to present a compromise or arrangement to its creditors. (1)

2 marks

Question 3.3

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

Unless ordered otherwise by the Court, upon the presentation of a restructuring petition, advertisement is required in accordance with CWR Form No 3A. This notice, in accordance with Rule 1A of the Companies Winding Up Rules, shall be advertised:

- a) Once in a newspaper having circulation in the Cayman Islands; and (½)
- b) In a newspaper having circulation in a country (countries) in which the petition is most likely to come to the attention of the company's creditors and contributories. (½)

These advertisements are to appear no later than seven business days after the filing of the petition (½) and no less than seven business days before the hearing date. (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)

The new restructuring officer regime and the appointment of a restructuring officer offers a multitude of ways in which the interests of creditors are safeguarded. These are as follows:

1. The appointment of a restructuring officer, being a qualified insolvency practitioner, is an officer of the Court. Therefore, their appointment ensures

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

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

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

appropriate oversight, independence and professionalism. (1)

2. The restructuring officer, throughout their appointment, will provide reports pertaining to the financial condition of the company and will provide creditors with information which they may not previously have been privy to. This will afford greater transparency to creditors and allow for a more informed decision-making process on their part. (1)
3. The restructuring officer, depending on the order made by the Court, may be required to validate certain transactions. This will provide protection for creditors insofar as ensuring they have not been prejudiced.
4. Creditors may, by way of summons in the form of CWR Form No 16B, apply for a variation or discharge of an order. Similarly, creditors may, by way of summons in the form of CWR Form No 16C, apply for the removal or replacement of a restructuring officer. This ensures that may pursue variations to the restructuring officer's appointment should they deem necessary. (1)
5. In accordance with Section 91H of the Companies Act (2023 Revision), secured creditors will remain entitled to enforce their security without leave of the court and without reference to the restructuring officer. (1)
6. The restructuring officer regime provides a path for a company to emerge as a going concern. Creditors in many circumstances rely on the debtor companies for the performance of their own business and ensuring that the debtor company is not impacted reputationally, for example by the appointment of a provisional liquidator, helps protect the business interests of the creditor. (1)
7. Creditors may still make a winding up petition following the presentation of a winding up petition, albeit with the leave of the Court.

5 marks

Question 3.5

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

Upon the making of a restructuring petition, the Court may, pursuant to Section 91B(3) of the Companies Act (2023 Revision):

- a) Make an order appointing a restructuring officer; (1)
- b) Adjourn the hearing conditionally or unconditionally; (1)
- c) Dismiss the petition; or (1)
- d) Make any order as the Court sees fit. (1)

However, the Court may not, pursuant to Section 91B(3) of the Companies Act (2023 Revision), place the company into official liquidation. (1)

5 marks

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

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

Question 4.1

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

In addition to the LPA, ELPs are governed by the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021 Revision) (1) and the principles of common law and equity applicable to partnerships (1 mark). Further, as it relates to the liquidation of ELP's, Section 36(1) of the Exempted Limited Partnership Act (2021 Revision) renders Part V of the Companies Act (2023 Revision) applicable to ELP's and by extension, the Companies Winding Up Rules; however, in the event of any inconsistency with the Companies Act (2023 Revision), the Exempted Limited Partnership Act (2021 Revision) will prevail.

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

Question 4.2

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

The Court has jurisdiction to wind to wind up a foreign company in the following circumstances, pursuant to Section 91(D) of the Companies Act (2023 Revision):

1. The foreign company has property located in the Cayman Islands;
2. The foreign company is carrying on business in the Caymans Islands;
3. The foreign company is a general partner of an ordinary limited partnership or an ELP; or
4. The foreign company is registered under Part IX of the Companies Act (2023 Revision).

Commented [sp22]: 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)

Judgements of a foreign court have no legal standing or direct effect in the Cayman Islands and are not automatically enforceable, with steps required to have the judgement enforced. However, any judgement which is final, conclusive on the merits, and not impeachable, is entitled to recognition at common law and may be relied upon in Cayman Islands proceedings. This was confirmed by Kawaley J in the matter of Guoan International Limited, whereby it was confirmed that a creditor may rely on a foreign judgment as its basis for the seeking of a winding up order, without first obtaining

Commented [sp23]: Question 4.3 - Sub-total = 3/3

recognition or enforcement of the judgement by the Court.

Question 4.4

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

The main statutory powers and duties of the trustee in bankruptcy are as follows:

1. The trustee must, until the provisional order is absolute, preserve the property of the debtor so that in the event the provisional order is revoked, the property may be returned to the debtor. (1) **section 38 of the Act**
2. The trustee may carry on the business of the debtor should it be necessary for the beneficial winding up / sale of the debtor's business. (1)
3. The trustee has the power to bring and or defend any legal proceedings relating to the property of the debtor. (1)
4. The trustee must receive and adjudicate proof of debts, filed in accordance with the Grand Court (Bankruptcy) Rules 2021.
5. Following the making of an absolute order, the trustee must administer the estate of the debtor for the benefit of its creditors.
6. In accordance with Section 67(1) of The Bankruptcy Act (1997 Revision), the trustee must, as soon as possible, following the close of the public examination of the debtor, prepare a report which states the debtor's affairs, in addition to the conduct of the debtor before and during the bankruptcy.

For a further mark, you must refer, in one of your examples to the relevant section of the Bankruptcy Act.

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****

Commented [BB24]: Question 4.4 - Sub-total = 3/4