



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

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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 = 76.5/100 - Very well done!

Commented [BB2R1]: Mark adjusted to 77/100

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)

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

Commented [BB3]: Question 1 - Sub-total = 16/20

(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.

Commented [BB4]: 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.

Question 1.12

Choose the **correct** statement:

If winding up proceedings are filed against a Cayman Islands company in the Cayman Islands and in a foreign country, which of the following statements is true?

- (a) The Cayman Islands Court will wish to ensure comity between courts in other jurisdictions so it will be deferential to whatever decision is reached by the foreign court.
- (b) The Cayman Islands Court will wish to ensure that Cayman Islands creditors have priority over foreign creditors.
- (c) The Cayman Islands Court will wish to ensure that secured creditors cannot prejudice unsecured creditors.

(d) The Cayman Islands Court takes into account a number of factors, but the starting point is that the main insolvency proceedings for a Cayman Islands company should take place in the Cayman Islands.

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

Question 1.13

Select the **correct** statement:

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

Question 1.14

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

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

Question 1.15

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

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

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

Question 1.16

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

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

Question 1.17

Select the **correct** statement:

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

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

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

Question 1.18

Choose the **correct** statement:

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

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

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

Question 1.19

Select the **correct** statement:

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

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

Question 1.20

Select the **correct** statement:

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

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

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

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

QUESTION 2 - LIQUIDATION (45 MARKS)

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

FACT PATTERN

BLUESEA DIGITAL CAPITAL LIMITED

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

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

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

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

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

Question 2.1

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

The required content of the consent to act signed by the proposed official liquidator(s) is set out in Order 3, r.4(1)(a-d) (1) and Regulation 5-7 of the Insolvency Practitioners' Regulations (2023 Consolidation).

Order 3, r.4(1) provides that every petition shall be supported by an affidavit which is sworn by the person or persons nominated for appointment as official liquidator confirming that –

As per Order 3, r.4(1)(a) that person is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5; (1) The residency requirement to be met and stated pursuant to Regulation 5(1) of the Insolvency Practitioners Rules is that a person is resident in the Islands; and (b) that person, or the firm of which that person is a partner or employee, or the company of which that person is a director or employee, holds a trade and business licence which authorises that person or that person's firm to carry on business as professional insolvency practitioners."

Order 3, r.4(1)(b) requires an enquiry to be made, and following which the circumstance is that person believes that that person and that person's firm satisfies the independence requirement contained in Regulation 6 (1); the requirement under Regulation 6(1) of the Insolvency Practitioners Rules is that the official liquidator is properly regarded as independent as regards that company.

Order 3, r.4(1)(c) that person and/or that person's firm are in compliance with the insurance requirement contained in Regulation 7 (1); the requirement under regulation 7(1) of the Insolvency Practitioners Rules is that that person and the firm of which that person is a partner or employee or the company of which that person is a director or 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\$1 million) applicable to the negligent performance or non-performance of the qualified insolvency practitioner's duties as an official liquidator generally.

Order 3, r.4(1) (d) that person is willing to act as official liquidator if so appointed by the Court.Type your answer here] (1)

5 marks

Question 2.2

Commented [BB8]: Question 2.1 - sub-total = 5/5

Commented [BB9]: Question 2.2 - sub-total = 4/5

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

Generally, and strictly speaking, the proposed liquidators will not be permitted to act as an official liquidator to act in relation to Bluesea as this would be a breach of the Insolvency Practitioners' Regulations (2023 Consolidation) in relation to independence. (1) Regulation 6(2) of the Insolvency Practitioners' Regulation provides that "A qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, that person, or the firm of which that person is a partner or employee, or the company of which that person is a director or employee, has acted in relation to the company as its auditor. (1) As Bodden & Ebanks Limited previously acted as auditors of Bluesea in 2021 which would be within 3 years prior to commencement of the liquidation, they are precluded from acting. (1)

Where this information comes to light after the proposed liquidators have already provided their consents to act, a declaration should be made to the Court without delay (1). Regulation 9 of the Insolvency Practitioners Regulations provide that the appointment by the Court of any person as official liquidator of a company made prior to the commencement date shall not be invalidated by reason of the fact that the appointee is not a qualified insolvency practitioner and does not meet the residency, independence or insurance requirements contained in these Regulations. [Type your answer here]

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)

Commented [BB10]: Question 2.3 - Sub-total = 5/5

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

Pursuant to Section 120 of the Companies Act (2023 Revision) "Any person, including a director or officer of the company, may be appointed as its voluntary liquidator."

Therefore, no particular qualification is necessary for Tom and Jerry to act as voluntary liquidators. Type your answer here] (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)

Pursuant to Section 123 of the Companies Act (2023 Revision), Tom and Jerry are required to within twenty-eight days of the commencement of a voluntary winding up to –

- (a) file notice of the winding up with the Registrar;
- (b) file the liquidator's consent to act with the Registrar;
- (c) file the director's declaration of solvency with the Registrar (if the supervision of the court is not sought);
- (d) in the case of a company carrying on a regulated business, serve notice of the winding up upon the Authority; and
- (e) publish notice of the winding up in the Gazette." (2)

And in the absence of Tom and Jerry, the directors shall carry out the requirements of this section. [Type your answer here]

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)

Pursuant to Order 13, r.9(2) a-d, the company may resolve to remunerate the Tom and Jerry on the basis of –

- (a) an hourly rate (or scale of rates) for the time reasonably and properly devoted to the liquidation;
- (b) a fixed sum;

- (c) a commission or percentage of the assets distributed or realised; or
- (d) a combination of these methods." [Type your answer here] (2)

Question 2.4 (0/2 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)

[Pursuant to section 95(3) of the Companies Act 2023 (Revision), the Court upon hearing the winding up petition may make -

- "(a) an order regulating the conduct of the company's affairs in the future;
- (b) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;
- (c) an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or
- (d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly."

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)

The Companies Act deals with removal of liquidators, and addresses who can apply to the Court to remove official liquidators. Pursuant to section 107 of the Companies Act (2023 Revision), "An official liquidator may be removed from office by order of the Court made on the application of a creditor or contributory of the company.

What circumstances? Pursuant to Order 5.r, 6(1), the application is made by a creditor or contributory by summons. It provides the procedural aspect in stating that, "An application by a creditor or contributory for an order that the official liquidator be removed shall be made by summons (referred to in this Rule as a "removal summons").
Type your answer here]

Commented [BB11]: Question 2.4 - sub-total = 0/2

Commented [ni12]: 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.

Your question only answers what alternative orders the court could make if it was satisfied that a J&E winding up order should be made.

Commented [BB13]: Question 2.5 - sub-total = 4/9

Commented [ni14]: good answer

With regard to who such an application must be served on, Order 5, r.6(2) of the Companies Winding Up Rules, sets out the requirements. According to the Rules, a removal summons shall be served upon the official liquidator; each member of the liquidation committee, or counsel for the liquidation committee, in circumstances where an attorney has been appointed by the liquidation committee with authority to act generally; and such other creditors or contributories as a Court may direct.

Question 2.5.2 (0/5 marks)

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

This would make sense as not all applicants when a company is solvent would require
[Type your answer here]

Commented [ni15]: incomplete answer that doesn't really address the question.

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)

The impact that the change in solvency would have on the liquidation committee, where one has been constituted, will have effect on meetings called by the liquidator. Pursuant to the Companies Winding Up Rules (2023 Consolidation) Order 8, r.1(4), if, and so long as the official liquidator determines that the company should be regarded as insolvent, the official liquidator shall convene meetings of its creditors only.

However, Order 8, r.1(4) provides that if, and so long as the official liquidator determines that the company is solvent, the official liquidator shall convene meetings of its contributories only. [Type your answer here]

For full marks needed to reference that the newly reconstituted LC will be comprised of not less than three, no more than five, contributories (Order 9, r.1 (3)).

Question 2.7

Commented [ca16]: Question 2.6 Subtotal =3.5/4 marks

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

Pursuant to Order 22, r.1 of the Companies Winding up Rules, "As soon as the affairs of the company have been completely wound up the official liquidator shall –

- (a) publish the official liquidator's final report and accounts in accordance with Order 10, rule 3 which requires the liquidators report to be filed with the Court, be sent to the to the company's creditors by pre-paid post or transmitted to them by facsimile or e-mail and shall be sent to contributories in whatever manner may be required or authorised by the company's articles of association, except where confidential, the court will give directions. In the case of a company which carried on a regulated business or was put into liquidation upon the petition of the Authority, the official liquidator shall send a copy of every report and accounts to the Authority. Reports may also be published on a website.
- (b) apply to the Court for an order under section 152 that the company be dissolved. Pursuant to section 152 of the Companies Act the Official liquidator is required to file the order for dissolution with the Registrar; and should the official liquidator fail to file the order for dissolution with the Registrar within fourteen days from the date, upon which it was perfected, he commits an offence.
- (c) Under Order 22, r.1(3) within 14 days prior to the date of the hearing, the official liquidator to publish a notice of the hearing of the application in one or more newspapers circulating in a country or countries in which the company appears most likely to have creditors. [Type your answer here]

The question asks for a response which considers post dissolution matters. A model answer would include references to the following:

- Upon the making of an order dissolving a company, the official liquidator's duties as officeholder cease save for any residual duties preserved by the order for dissolution, including for the preservation, storage and destruction of the company's remaining books and records, and dealings with unclaimed dividends. An order for discharge of the liquidators is often included in the order for dissolution.
- Following the dissolution of a company, the liquidator shall retain the liquidation files in safe custody for at least 3 years pursuant to O.26, r.2(3) of the CWR.
- Upon making an order for dissolution, the court shall give directions in respect of the preservation, storage and destruction of the company's remaining books and records pursuant CWR O.26, r.3(4) and in accordance with r.3(6), the cost of post-dissolution storage and destruction of a company's books and records shall be an expense of the liquidation for which provision must be made in the official liquidator's final accounts.

Question 2.8

Commented [ca17]: Question 2.7 Subtotal
1/5

Commented [BB18]: Question 2.8 - Sub-total
= 4/5

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

Pursuant to section 102(1) of the Companies Act (2023 Revision), (1) Official liquidators are empowered to investigate whether the company failed and if so, the causes of the failure; and generally, to investigate 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) - Cite case law to substantiate your answer- A liquidator is an officer of the court with certain general duties which were summarised in the Cayman Islands case *In the Matter of Citrico International Limited* [2004-05 CILR 435] (citing *Gooch's Case* 1872, 7 Ch App 207). Where a liquidator obtains directions of the Court the liquidator will be empowered to assist the Authority and the Royal Cayman Islands Police Service to investigate the conduct of persons referred to in section 101(3) namely. Those persons under section 103 are those who: (1)

- (a) has made or concurred with the statement of affairs;
- (b) is or has been a director or officer of the company;
- (c) is or was a professional service provider to the company;
- (d) has acted as a controller, advisor or liquidator of the company or receiver or manager of its property;
- (e) not being a person falling within paragraphs (a) to (c), is or has been concerned or has taken part in the promotion, or management of the company, and such person is referred to in this section as the "relevant person". And pursuant to section 102(1) the liquidator may institute and conduct a criminal prosecution of persons referred to in section 101(3). (1)

Question 2.9

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

For the purposes of a section 101 of the Companies Act (2023 Revision) notice served by a liquidator for the purpose of procuring a statement of affairs from persons listed in section 101(3), the "relevant date" means the commencement of the winding up. (1) However, under certain circumstances, this may be an earlier date (as per section 100(1), (1) where prior to the presentation of a petition for winding up of a company by the court, 1)

Commented [BB19]: Question 2.9 - Sub-total = 5/5

a resolution has been passed by the company for voluntary winding up; (½) 2) where a period has been fixed for the duration of the company by the Articles of Association has expired, (½) 3) an event occasioning the requirement to wind up the company has occurred in the articles of association has occurred, or (½) 4) and where a restructuring officer has been appointed, (½) (as per (91B or 91C) then the winding up will be considered to have started at the time of the relevant or the date of the presentation (1) of the petition to appoint a restructuring officer pursuant to section 91B. Type your answer here]

**** 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 [BB20]: Question 3.1 - sub-total = 2/5

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

The provisional liquidator could not be appointed by the Grand Court of the Cayman Islands in the circumstances outlined. (1) Pursuant to Regulation 7(1) of the Insolvency Practitioners' Regulations (2023 Consolidation) "A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of any company unless that person and the firm of which that person is a partner or employee or the company of which that person is a director or 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\$1 million) applicable to the negligent performance or non-performance of the qualified insolvency practitioner's duties as an official liquidator generally." Subsection 1 provides mandatory requirement. (1)

While Regulation 7(2) gives the Court discretion, this is in relation to either increasing the amount required, and procuring the issue of a security bond in certain circumstances. [Type your answer here]

2 marks - see 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 8 states that:

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

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

"A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of any company unless he and the firm of which he is a partner or employee or the company of which he is an employee, has professional indemnity insurance (up to a limit of at least US\$10 million in respect of each and every claim and at least US\$20 million in the aggregate, with a deductible of not more than US\$100,000) applicable to the negligent performance or non-performance of his duties as an official liquidator generally." (emphasis added). (1 mark)

Therefore, if the chosen liquidator by the 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)

There is a requirement of a two-stage test. Under section 91B(1) of the Companies (Amendment) Act, a company may present a petition to the Grand Court for the appointment of one or more restructuring officers on the grounds that

- a) it 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. See Grand Court in *Re Oriente Group Limited* (Unreported, Kawaley J, 9 December 2022) [Type your answer here] (1)

2 marks

Question 3.3

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

Order 1A, r1(3) of the Companies Winding Up Rules (2023 Consolidation) requires every petition for the appointment of a restructuring officer to be advertised once in a newspaper having a circulation in the Islands. (½) An advertisement published in accordance with this Rule shall be in CWR Form No. 3A.

Pursuant to Order 1A, r1(3) if the company is carrying on business outside the Islands, all petitions for the appointment of a restructuring officer will be advertised once in a newspaper having circulation in jurisdictions in which it is most likely to come to the attention of the company's creditors and contributories, (½) and the advertisement will be required to be published in the official language of such jurisdictions. This requirement can only be dispensed with if the Court directs otherwise. Where advertised, the advertisement must be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court (½) and not less than 7 business days before the hearing date. (½) [Type your answer here]

Question 3.4

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

1. Order 1A provides that restricting petitions must be heard within 21 days. This allows relief to be sought promptly and will protect creditors in circumstances where a debtor may try to utilize the statutory moratorium without genuinely intending to restructure the company or seek to use the statutory moratorium

Commented [BB21]: Question 3.2 - sub-total = 2/2

Commented [BB22]: Question 3.3 - Sub-total = 2/2

Commented [BB23]: Question 3.4 - sub-total = 4/6

without a substantive application. (1)

2. There is a requirement to advertise locally in a newspaper which will allow local creditors to be aware of a restructuring petition affecting them. (1)
3. Order 1A also states that unless the Court otherwise orders, where a company conducts business outside the Islands, every petition for the appointment of a restructuring officer must be advertised once in a newspaper having circulation in a country which it is most likely to come to the attention of the company's creditors. This will safeguard creditors not resident or present in the islands at the time of the petition to be notified.
4. Pursuant to Order 1A,, r.7(3). Following the appointment of a restructuring officer under section 91B or 91C, there is a requirement for the restructuring officer to give notice to the companies creditors of the appointment, and, where the company is carrying on a regulated business, the Authority, that a winding up petition has been presented. The directors have discretion as to the means used to notify such creditors, unless the Court directs for the advertisement to take place otherwise. (1)
5. The Act gives discretion to Court to Order the convening of meetings of the company's creditors and members, which allows the creditors to be involved and aware of relevant matters affecting the restructuring of the company.
6. Pursuant to Order 1A,, r.8(1). Requires the restructuring officer, within 28 days of that restructuring officer's appointment to send a report to every creditor of the company of whose address the restructuring is aware and, in respect of a company carrying on a regulated business, the Authority. [Type your answer here] (1)

4 marks - see model below for additional scoring points

- The default position is that a Restructuring Petition will be heard on notice to stakeholders while the prior statutory framework provided that applications for appointment of provisional liquidators were to be made *ex parte* by default. (1 mark)
- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- A requirement for the ROs to report – open and transparent process (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs (1 mark)
- A creditor or contributory may apply for an order discharging the appointment (1 mark)
- Secured creditors remain entitled to enforce their security (1 mark)

Question 3.5

Commented [BB24]: Question 3.5 - sub-total = 5/5

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

The Court may, on hearing a petition –

- (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 other order as the Court thinks fit **(1)**, except an order placing the company into official liquidation **(1)**, which the Court may only make in accordance with sections 92 which provides the circumstances in which a company may be wound up by the Court and 95, which provides for the power of the court in hearing a winding up petition, if a winding up petition has been presented in accordance with sections 91G and 94 which gives direction on the application to the court for a winding up of a company by petition.
[Type your answer here]

5 marks

**** 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)

The main statutes governing the formation and operation of ELP's is the Exempted Limited Partnership Act (2021 revision) (1) and the Partnership Act (2013 Revision), (1) and also the common law. Section 3 of the ELP provides that the rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision) (1) but excluding sections 31, 45 to 54 and 56 to 57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of the ELP. [Type your answer here]

Commented [BB25]: 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)

There are certain circumstances where the Grand Court will have jurisdiction to wind up a foreign company. Pursuant to section 91 of the Companies Act (2023 Revision) the Court has jurisdiction to wind up a foreign company in circumstances where the foreign company – (i) has property located in the Islands; (ii) is carrying on business in the Islands; (iii) is the general partner of a limited partnership; or (v) is registered overseas or foreign company under Part IX of the companies Act. [Type your answer here]

Commented [sp26]: 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)

The judgement of a foreign Court does not have direct legal effect in the Cayman Islands. The judgement is not enforceable on its own, and will require certain steps to be taken for such foreign judgement to have legal effect.

In the matter of Guoan International Limited Kawaley J confirmed that a creditor may rely upon a foreign judgement as the basis of seeking a winding up order without the need to first obtain recognition and/enforcement orders in respect of such foreign judgement from the Cayman Islands Court.

In addition, the Foreign Judgement Reciprocal Act (1996 Revision) provides that foreign judgements given in certain Courts (Courts of Australia and its external territories) may be registered in the Cayman Islands and enforced in the same manner as a domestic

Commented [sp27]: Question 4.3 - Sub-total = 3/3

judgement of the Cayman Court. Registration is therefore only provided for under this Act in the specified jurisdiction. [Type your answer here]

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)

Section 38 of the Bankruptcy Act (1997 Revision) provides that until the provisional order is made absolute, it shall be the duty of the Trustee to preserve all such property in such state as to permit of its being returned to the debtor in the condition in which it was when it was seized, in the event of the revocation of the provisional order." (1)

Section 79 of the Bankruptcy Act provides that the Trustee may sell all or any part of the property of the debtor (1) (including the goodwill of the business, if any, and the debts growing due to the debtor) by public auction or tender or private contract, and transfer the whole thereof to any person or company, or sell the same in parcels, and accept as the consideration for such transfer and sale a sum to be paid or secured to be paid at such time and in such manner as he thinks fit.

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

Section 87 of the Bankruptcy Act provides that the Trustee shall receive and decide on proof of debts. (1) One example is where the Trustee at meeting will receive and decide upon proof of debts for the purpose of determining the right of voting at such meeting as per section 43 of the Bankruptcy Act. [Type your answer here]

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****

Commented [BB28]: Question 4.4 - Sub-total = 4/4