



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 = 78.5/100 - Very well done!

Commented [BB2R1]: Mark adjusted upwards to 79/100

INSTRUCTIONS

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

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

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

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

Commented [BB3]: Question 1 - Sub-total = 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)

ANSWER

In accordance with the Companies Winding Up Rules ("CWR") Order 3, rule 4, the affidavit of the proposed official liquidator(s) must clearly indicate the following: (1)

- i. Confirmation of the proposed official liquidator(s) being qualified insolvency practitioner(s). In this regard Regulation 5 of the Insolvency Practitioners' Regulations 2018 ("IPRs") issued by the Insolvency Rules Committee would apply. (1)
- ii. Confirmation that the proposed official liquidator(s) are independent of the company having regards to their enquiries into same, per Regulation 6. (1)
- iii. Confirmation that the proposed official liquidator(s), or the firm with which they are associated with, maintains adequate professional indemnity insurance as prescribed by Regulation 7. (1)
- iv. Confirmation that they are willing and would accept their appointment by the Court as official liquidator(s). (1)

In circumstances where a foreign practitioner is proposed to be appointed, that person must comply with the foregoing and indicate the country(ies) in which they are qualified to act in a capacity comparable to an official liquidator. They would also provide details on any appointment they may have with respect to the company or a related entity.

5 marks

Question 2.2

The proposed liquidators are employees of the accountancy practice Bodden & Ebanks Limited. Shortly prior to the hearing of the winding up petition of Bluesea, it transpires that Bodden & Ebanks Limited previously acted as auditors of Bluesea in 2021. Are the proposed liquidators still able to act in relation to Bluesea? Please provide an explanation 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)

ANSWER

In light of the proposed liquidators' association with Bodden & Ebanks Limited, who acted as auditors of Bluesea within the last 3 years, (1) they would be expressly forbidden by Regulation 6 of the IPRs. (1) They would be deemed not independent of Bluesea and there

Commented [BB4]: Question 2.1 - sub-total = 5/5

Commented [BB5]: Question 2.2 - sub-total = 2/5

is a risk that their objectivity could be impaired.

The proposed liquidators should immediately withdraw their consents (1) so that the Whitesands (or another creditor) may proposed liquidator(s) who are in full compliance with the requirements of the CWR (O.3, r.4) and all the IPRs.

3 Marks - additional text below

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

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

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

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

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

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

Question 2.3

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)

ANSWER

In accordance with Section 120 of the Companies Act, there are no statutory requirements

Commented [BB6]: Question 2.3 - Sub-total = 5/5

or qualifications to act as a voluntary liquidator and even a director of the company may perform such a role. (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)

ANSWER

In accordance with section 123 of the Companies Act, Tom and Jerry would be required to file within 28 days of their appointment their consents to act as voluntary liquidators with the Registrar for their appointment to take effect. They would also concurrently, or during this time, file the Notice of the Winding Up with the Registrar as well as the Declaration of Solvency executed by the directors of Cheese Limited (assuming the Court's supervision is not being sought).

Another requirement during this 28-day window is to have the Notice of the Winding Up published in the Gazette. (2)

The foregoing may also be filed by the directors of Cheese Limited, in lieu of the liquidators.

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)

ANSWER

In accordance with CWR (O. 13, r. 9), the following are the permitted bases for the determination of remuneration for Tom and Jerry:

- I. The hourly charge-out rates for Tom and Jerry and their team members, if any, who would reasonably discharge the statutory liquidation tasks;
- II. A Flat or Fixed Fee;
- III. A performance or outcome basis calculated as a commission or percentage of the assets realised or distributed; or
- IV. A combination of the foregoing methods (2)

It is most likely that the resolution for the appointment of Tom and Jerry as liquidators would specify the basis.

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)

ANSWER

The Court may dismiss the petition and refuse the order for appointment of provisional liquidator.

The Court may grant an order appointing a provisional liquidator and stipulate the reporting requirements; period for the provisional liquidation, and any other conditions it wishes to impose. The court may also adjourn the hearing conditionally or unconditionally.

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)

ANSWER

In appropriate circumstances, official liquidators may be removed from that office. The primary legislation that provides for this is Section 107 of the Companies Act which enables a creditor or a contributory to make an application in the Grand Court for an order to remove the official liquidators. This is buttressed by CWR Order 5 rule 6 which specifies that such an application must be by way of a Removal Summons. It is mandatory for the

Commented [BB7]: Question 2.4 - sub-total = 0.5/2

Commented [ni8]: 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 fairly good answer to the question "what would have been the court's powers upon the hearing of a PL application?"

Commented [BB9]: Question 2.5 - sub-total = 8/9

Commented [ni10]: good answer

Removal Summons, which must be supported by an affidavit with supporting facts and matters being relied upon, to be served on the following:

- The official liquidator;
- Each member of the Liquidation Committee
- General Counsel on record for the Liquidation Committee, where so appointed;
and
- Where the Court directs, such other creditors or contributories.

Commented [ni11]: there is a missing 'or' here

Question 2.5.2 (4/5 marks)

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

Commented [ni12]: Good answer. The 5th mark was reserved for those answers that mentioned *BTU Power Company* (which is cited in the course notes under section 4.2.6.2 removal).

ANSWER

Given the gravity of an action to remove an official liquidator, who would have been appointed by and be under the supervisor of the Court, a creditor or contributory must have a legitimate interest and reason(s) for doing so. The primary duty of the official liquidator is to gather in the assets of company and from their realisation distribute the net proceeds as applicable in accordance with the order of priorities established in Sections 140 to 142 of the Companies Act and abiding by the *pari passu* principle. This distribution function and the impact of solvency on it means that only creditors may make the application with respect to an insolvent liquidation as contributories would be "out of the money". Conversely, only a contributory may petition in a solvent liquidation since the claims of creditors are to be settled in full and their position is unlikely to be prejudiced by who are the office holders.

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)

Commented [ca13]: Question 2.6 Subtotal 2/4 marks

ANSWER

The primary function of a Liquidation Committee is to act as a sounding board for the official liquidator to gauge the perspective of the creditors and/or contributories on important (non-routine) issues.

Importantly, it is required to review, and as appropriate approve, the liquidators'

remuneration. It is expected that membership of a Liquidation Committee will be comprised of people with an interest in the estate and as such for an insolvent estate, it will be composed of only representatives of creditors.

With the change in status of the solvency of the company and the expectation that the creditors will receive their full dividend with interest, there is now an expectation that the official liquidator will also make a distribution to the shareholders. In such a situation, if the maximum of five members had not been appointed to the Liquidation Committee the members could be increased to include representative(s) of the contributories. Otherwise, one or more creditors representative could resign and allow for representative(s) of the contributories to be appointed.

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

Question 2.7

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

Commented [ca14]: Question 2.7 Subtotal 5/5 marks

ANSWER

At the completion of the winding up phase of a liquidation, a final report is required to be published by the official liquidator. As critical matters which are contingent on having a hearing date are to be included in this report, an application for the dissolution of the company will be made ahead of finalizing such a report.

In keeping with Order 22m rule 2 of the CWR, once the Dissolution Order (Form 36) has been obtained, the official liquidator must file it with the Registrar of Companies within 14 days of the date of perfection of such order. The perfection date being the date upon which the order was granted or such later date as ordered by then Court.

Among the tasks that the former liquidator will be required to undertake post dissolution are:

- Retention in safe custody for three year the liquidation files
- In accordance with Order 25, rule 2 of the CWR deal with the retention, storage and destruction of the company's books and records.
- Acting as Trustee, for a period of 1 year, for any unclaimed dividends or undistributed assets remaining in his custody for the applicable creditors and /or contributories (CWR O23, r1)
- Establishing Trust Account - interest bearing account for unclaimed dividend. (CWR O23, r.2)
- Making relevant Payment out of the Trust Account and Transfer of Undistributed Assets (CWR O.23, r4)
- Transferring to the Financial Secretary any money or assets that remain in his custody at the end of one year for the date of dissolution (CWR O.23, r. 6)

The liquidator would have made appropriate financial provisions for these post dissolution tasks (CWR O. 23, r5).

Question 2.8

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

Commented [BB15]: Question 2.8 - Sub-total = 5/5

ANSWER

Of necessity a liquidator will need to enquire into the financial status of the company and may require relevant individual to furnish with him with a Statement of Affairs supported by an affidavit detailing amongst other things:

- I. Assets of the company, where they are located and in whose custody;
- II. Liabilities of the company, including contingent and prospective along with the names and addresses of creditors and details of any securities held by them;

An official liquidator is also given general investigative powers by Section 102 of the Companies Act as regards the cause of failure of the company, its promotion, business, and dealings. (1)

Where appropriate, an official liquidator with permission of the Court may provide assistance to the Cayman Islands Monetary Authority and/or the Royal Cayman Islands Police Service (1) in investigating the conduct of directors, officers, professional advisors and former employees. These persons may also be criminally prosecuted. (1)

As was noted in Gooch's Case 1872, 7 Ch App 207, (1) the liquidator being an officer of the court is required to "**make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which as 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)

The support this a liquidation may per section 103(3) of the Companies Act seek an order of the Court to formally examine relevant persons with information on, document or property of the company, whether orally under oath or by written affidavit.

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)

ANSWER

In the context of Section 101 of the Companies Act, specifically subsection 6, the "relevant date" is the deemed date of the commencement of the winding up (1) or the date of appointment of a provisional liquidator.

As part of a liquidator enquiry and investigations into the state of affairs of the company, he may require relevant persons, including the following, to provide such details on the assets and liabilities of the company as of that relevant date:

- I. Current and former directors and officers of the company;
- II. Current or former professional service providers of the company; and
- III. Current or former employees during the 12 months immediately preceding the relevant date.

Commented [BB16]: Question 2.9 - Sub-total = 1/5

Please read the question carefully when preparing your answer to make sure that you are addressing what is asked. Please see model answer below:

In the context of an official liquidation (noting that this section also applies to provisional liquidators), the relevant date for the purposes of section 101 means the commencement of the winding up. **(1 mark)** In many cases, this is the presentation of the winding up petition (pursuant to section 100(2)). **(1 mark)** However, this is subject to section 100(1), which provides that the commencement of the winding up may be an earlier date if, before the presentation of a petition for the winding up of a company by the court, a resolution was passed by the company for voluntary winding up; any period fixed for the duration of the company by the articles of association has expired; an event giving rise to a requirement to wind up the company in the articles of association has occurred; or a restructuring officer has been appointed. **(2 marks)** If any of these events occur then the winding up is deemed to have commenced at the time of the relevant aforementioned event. **(1 mark)**

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

QUESTION 3 FOLLOWS ON NEXT PAGE / . . .

QUESTION 3 - CORPORATE RESCUE (20 MARKS)

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

FACT PATTERN

SMB TECH CORPORATION

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

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

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

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

Question 3.1

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

Commented [BB17]: 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)

ANSWER

Section 104 (1) of the Companies Act make it's a prerequisite for the appointment of a Provisional Liquidator that a winding up petition is under consideration of the Court which is yet to make a winding up order.

For such a winding up petition to be put forward, consent must have been received from a "qualified insolvency practitioner" to so act as official liquidator along with their supporting affidavit.

Sections 155 (1)(c) of the Companies Act, empowers The Insolvency Rules Committee (IRC) "to make rules for the purpose of specifying -

1. *The qualifications which must be held by a person holding office as official liquidator;"*

The IRC has in turn established in the Insolvency Practitioners Regulations 2018, the Regulations applicable to such qualified insolvency practitioners. Specifically, Regulation 7, part 2 sets the minimum professional indemnity insurance that an Official Liquidator must maintain by themselves or through the firm with which they are associated with (e.g. partner or employee). The current limit is "**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 in respect of the negligent or non-performance of their duties as a liquidator.**" (1)

It therefore follows that the proposed Provisional Liquidator, whose limit is "**US\$5 million in respect of each and every claim**", could not be put forward in the winding up petition as he is not qualified for appointment by the Grand Court as an Official Liquidator. (1)

2 marks - 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 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 IFRs 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 SM8 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)

ANSWER

With the amendments to the Companies Act, specifically section 91B(1), it is now permissible for a company to petition the Court to appoint (a) Restructuring Officer(s) if it is able to demonstrate the following grounds in support of the application:

- i. It is or is likely to become unable to pay its debts. and (1)
- ii. It intends to present a compromise or arrangement to its creditors, i.e., the Restructuring Petition. (1)

In the recent case of *Re Oriente Group Limited* (Unreported, Kawaley J, 9 December 2022) the following were note:

- i. "The solvency test for restructuring purposes is the same as that applied to winding-up proceedings well as (section 93 of the Act, "Definition of Inability to pay debts")"
- ii. "The Grand Court followed the dicta of Smellie CJ (as he then was) in *Re Sun Cheong Holdings* [2020 (2) CLR 942] and in doing so noted that the old statutory scheme (being provisional liquidation under section 104(3)) applies with equal force to the restructuring officer regime".

2 marks

Commented [BB18]: Question 3.2 - sub-total = 3/3

Question 3.3

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

ANSWER

In accordance with the Companies Winding Up Rules, unless the Court otherwise directs, a Restructuring Petition must be advised using CWR Form No. 3A:

- i. once in a newspaper circulating in the Cayman Islands (½) - per CWR O 1A, r 1(3); and
- ii. "once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (in which case the advertisement must be published in the official language of such country or countries) - per CWR O 1A, r 1(4).

Further, per CWR O1A, r 1(5) such advisement is to be published no more than seven business days after filing the Restructuring Petition (½) and not less than seven business days before it is to be heard, (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)

ANSWER

Among the provisions of the new Restructuring Officer (RO) regime that protect the interest of creditors are:

- a) It is a Court supervised process which generally must be held in open court unless otherwise directed; (1)
- b) By CWR Form No. 8A the powers of the RO are made explicit along with any modifications to the powers of the directors;
- c) Reporting requirements, wherein the RO is required to report to the Court within 28 days of their appointment; (1)
- d) ROs must be qualified insolvency practitioners in accordance with section 91D of the Companies Act;
- e) Creditors have standing to appear and be heard on the Restructuring Petition; (1)
- f) Creditors may apply for variation or discharge of the order by which the RO was appointed; (1)
- g) The removal and replacement of a RO is permissible via a summons on behalf of a creditor using the CWR Form No. 16C; and (1)
- h) The rights of secured creditors are preserved and not affected by the appointment

Commented [BB19]: Question 3.3 - Sub-total = 2/2

Commented [BB20]: Question 3.4 - sub-total = 6/6

of the RO. (1)

6 marks

Question 3.5

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

ANSWER

Restructuring Petitions are generally heard in open court and while the court's general discretion is maintained with respect whether or not to appoint the RO and making appropriate orders as the Court deems fit, Section 91B(3) of the Companies Act expressly prohibits it from making:

"an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94."

This particularly in the context where Section 91G imposes on stay of proceeding where *"no resolution shall be passed for the company to be wound up and no winding up petition may be presented against the company, except with the leave of the Court and subject to such terms as the Court may impose."*

0 marks - the question is asking what the Court can order at the hearing of a RO petition. Model answer per the below

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

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

Commented [BB21]: Question 3.5 - sub-total = 0/5

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

Question 4.1

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

ANSWER

In addition to their Limited Partnership Agreement, an ELP's operations are governed by the Partnership Act (2013) Revision (1) and the Exempted Limited Partnership Act (2021) Revision (the ELP Act. (1)

As a guiding framework, Section 2 of the ELP Act stipulates that the established common law principles and equity with respect to partnerships will apply to an ELP. (1)

As regards the dissolution of an ELP, the provision of the Companies Act would also apply to, but if there is a conflict with the ELP Act, the latter would prevail.

Question 4.2

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

ANSWER

The Cayman Island court will have jurisdiction to wind up a foreign company, permitted by Section 91(d) of the Companies Act where that foreign company -

- owns property located in the Cayman Islands;
- has business operations in the Cayman Island;
- is the general partner of an ELP or ordinary limited partnership; or
- is registered under Part IX of the Companies Act, that is the company has an established place of business and had commenced carrying on business with the Cayman Islands.

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)

ANSWER

Commented [BB22]: Question 4.1 = 3/3

Commented [sp23]: Question 4.2 - Sub-total = 5/5

Commented [sp24]: Question 4.3 - Sub-total = 0/3

There is no automatic right of enforcement of a foreign judgement and the appropriate steps must be taken before any such judgement could be enforced. The first step would be to get the recognition of the foreign judgement. Currently, only certain judgements from Australia (and its external territories) are capable of recognition in accordance with the Foreign Judgements Reciprocal Enforcement (Australia and its External Territories Order) 1993.

On the premise that there is an applicable judgment, it will be recognised and enforced as a debt against the judgment debtor if it is unimpeachable on any of the following grounds:

- It is not final and conclusive in the foreign court;
- The court had no jurisdiction over the debtor;
- It was obtained by fraudulent means;
- It relates to taxes, fines and penalties;
- It is against the public policy of the Cayman Islands; or
- It breached the rules of natural justice.

Once the criteria are met, the foreign judgment could be relied on in seeking a winding up order against the judgment debtor company.

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

Question 4.4

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

ANSWER

In accordance with Section 12 of the Bankruptcy Act (BA):

"The Governor may, from time to time, appoint an officer to be called "Trustee in Bankruptcy" who shall be attached to the Court and shall administer the estates of debtors in bankruptcy subject to this Law, and any law relating to bankruptcy."

The general principle starts with the principle that once there is either a provisional or absolute bankruptcy order, the property of the applicable debtors immediately passes to and vests in the Trustee in Bankruptcy per BA Section 35(2).

The Trustee would, upon the granting of a provisional order, take appropriate steps to preserve the property of the debtor, as such property would have to be returned to the debtor should the order be revoked. (1)

Commented [BB25]: Question 4.4 - Sub-total = 4/4

The Trustee is further empowered to:

1. carry on the trade of the debtor to the extent that is beneficial to wind up or sell the debtor's business per BA s79; (1)
2. bring of defend any legal actions related to the debtor's property per BA s80; and (1)
3. receiving and adjudicating claims which are submitted proof of debt per BA s87 and in accordance with the Grand Court (Bankruptcy) Rules 2021. (1)

Finally, upon the granting of the absolute order, the Trustee is empowered to administer the debtor's estate for the benefit of the creditors (BA Section 65).

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****