



**INSOL**  
INTERNATIONAL



---

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

Commented [BB1]: TOTAL 95/100 - EXCELLENT, very well done!

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

---

**EXAMINERS**

Mr John Royle Mr Mark Russell Mr Nicholas Fox Ms Corinne Celliers  
Ms Cassandra Ronaldson Mr Adam Crane Ms Gemma Lardner Ms Jennifer Fox  
Ms Jennifer Colegate Mr Tony Heaver-Wren Mr Paul Smith Mr Spencer Vickers  
Mr Benjamin Tonner

**MODERATORS**

Mr John Royle Mr Nicholas Fox Ms Cassandra Ronaldson  
Mr Spencer Vickers Dr David Burdette

---

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

All candidates are expected to comply with ALL the instructions.

---

## INSTRUCTIONS

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

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

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

## ANSWER ALL THE QUESTIONS

### QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

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

Questions 1.1 - 1.20 are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question. Each of the 20 questions count 1 mark.

#### Question 1.1

What is the date for Financial Institutions to submit its common reporting standard (CRS) Return in respect of reportable accounts?

- (a) 1 January (annually)
- (b) 1 April (annually)
- (c) 1 July (annually)
- (d) 1 October (annually)

#### Question 1.2

What is the maximum success fee permitted pursuant to Conditional fee agreements?

- (a) 50%
- (b) 33.33%
- (c) 66.66%
- (d) 100%

#### Question 1.3

Choose the **correct** statement:

How many forms of security interests are recognised in the Cayman Islands?

- (a) 3

(b) 5

(c) 6

(d) None of the above

**Question 1.4**

Who may **not** petition for the winding up of a Company?

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

**Question 1.5**

Choose the **correct** statement:

What is the minimum sum required to be owed, to enable a statutory demand to be used?

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

**Question 1.6**

Choose the **correct** statement:

A Restructuring Officer is required to report to the Court following their appointment:

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

(c) At such intervals as the Restructuring Officer considers appropriate.

- (d) Within 7 days of the appointment.

**Question 1.7**

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

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

**Question 1.8**

Choose the **correct** statement:

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

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

**Question 1.9**

Choose the **correct** statement:

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

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

**Question 1.10**

Choose the **correct** statement:

A scheme of arrangement:

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

**Question 1.11**

Select the **incorrect** statement:

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

**Question 1.12**

Choose the **correct** statement:

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

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

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

**Question 1.13**

Select the **correct** statement:

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

**Question 1.14**

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

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

**Question 1.15**

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

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



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

**Question 1.16**

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

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

**Question 1.17**

Select the **correct** statement:

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

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

**Question 1.18**

Choose the **correct** statement:

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

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

**Question 1.19**

Select the **correct** statement:

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

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

**Question 1.20**

Select the **correct** statement:

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

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

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

**QUESTION 2 FOLLOWS ON NEXT PAGE / ...**

## QUESTION 2 - LIQUIDATION (45 MARKS)

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

### FACT PATTERN

#### BLUESEA DIGITAL CAPITAL LIMITED

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

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

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

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

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

**Question 2.1**

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

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)

**Every winding up petition must be supported by an affidavit sworn by the official liquidator giving their consent to act (Order 3, rule 4 of the CWR). (1) It is not clear on the facts whether the official liquidators are Cayman-based or both Cayman and foreign-based, although given the nexus of the company to Latin America, Singapore and other jurisdictions in the Caribbean, it is possible that at least one of the liquidators will be foreign based.**

**For the Cayman based liquidator(s), pursuant to Order 3, rule 4(1), the consent to act affidavit is required to state:**

- (a) that person is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5; (1)***
- (b) having made due enquiry, that person believes that that person and that person's firm meet the independence requirement contained in Regulation 6; (1)***
- (c) that person and/or that person's firm are in compliance with the insurance requirement contained in Regulation 7; and (1)***
- (d) that person is willing to act as official liquidator if so appointed by the Court. (1)***

**For the foreign liquidator(s) (if any), pursuant to Order 3, rule 4(2), the consent to act affidavit is required to state:**

- (a) that person's professional qualifications;***
- (b) the country in which that person is qualified to perform functions equivalent to those performed by official liquidators under the Law or by trustees under the Bankruptcy Act (as amended and revised);***
- (c) that person's professional experience;***
- (d) that person will have the benefit of professional indemnity insurance in respect of that person's acts and omissions done in that person's capacity as an official liquidator of the company meeting the requirements of Regulation 7;***
- (e) if that person has been appointed by a foreign court or authority as a liquidator, trustee, receiver or administrator of the company or a related party of the company, full particulars of such appointment; and***
- (f) that, having made due enquiry, that person and that person's firm meet independence requirement contained in Regulation 6.***

**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)

**The proposed liquidators are subject to the independence requirement contained in Regulation 6 of the Insolvency Practitioners' Regulations (2023 Consolidation) which provides: (1)**

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

***(2) 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)***

**The commencement of the liquidation of Bluesea occurred at the time of the winding up order on 22 August 2023. As such, since the prior engagement of Bodden & Ebanks as auditors was less than 3 years ago in 2021, they do not satisfy the independence requirements and cannot act as liquidators of Bluesea. (1)**

**Since Bodden & Ebanks have not yet been appointed, they should:**

- **advise Whitesand that they are unable to act as official liquidators as they do not meet the independence requirements in the Insolvency Practitioners' Regulations; and**
- **notify the Court that their consent to act affidavits contained incorrect information via a supplementary affidavit. (1)**

**For completeness, if Bodden & Ebanks had already been appointed as official liquidators, they should resign their position as soon as they discovered the conflict by following the resignation procedures and steps set out in Order 5, rule 4(4) of the CWR. If Bodden & Ebanks were to refuse to resign, they could be removed by a creditor as a conflict of interest may be considered impropriety that could justify an application for their removal pursuant to section 107 of the Companies Act (see *Re BTU Power Company* [2019] (1) CILR Note 7).**

Commented [BB4]: Question 2.2 - sub-total = 4/5

Commented [jo5]: careful, commencement reverts back to the petition date. Not critical in this case, but be mindful of that.

**4 marks**

**Question 2.3**

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

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

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

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

Using the facts above, answer the questions that follow:

**Question 2.3.1 (1/1 mark)**

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

**There are no qualification requirements for Tom and Jerry to act as voluntary liquidators. Any person, including a director or officer of the company, may be appointed as its voluntary liquidator: Companies Act, s 120. (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, within 28 days of the commencement of Tom and Jerry's appointment as voluntary liquidators, they (or in their absence, the directors of Cheese Limited) must:**

- (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)**

**See also the statutory steps set out in Order 13, rule 2 of the CWR.**

**Question 2.3.3**

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

**The basis of Tom and Jerry's remuneration of voluntary liquidators and the amount shall be authorised by resolution of Cheese Limited (Order 13, rule 9(1) of the CWR). A voluntary liquidator shall not be entitled to receive payment of any remuneration out of the company's assets without the prior approval of a resolution passed at a general meeting except in limited circumstances set out in Order 13, rule 9(3).**

**Pursuant to Order 13, rule 9(2) of the CWR, Cheese Limited may resolve to remunerate 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. (2)**

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

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

**Before a provisional liquidator is appointed, the contributories must present a winding up petition (section 104(1)).**

**The powers of the Court on a winding up petition are set out in section 95 of the Companies Act and include the power to:**

- (a) dismiss the petition;**
- (b) adjourn the hearing conditionally or unconditionally;**
- (c) make a provisional order; and**
- (d) any other order that it thinks fit.**

**Once the petition is presented, the contributories may then make an application for the appointment of a provisional liquidator which the Court may grant if it considers it appropriate to do so taking into account the statutory criteria in section 104(2).**

**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)

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

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

Commented [ni9]: superb answer



Pursuant to section 107 of the Companies Act, an official liquidator may be removed from office by order of the Court upon the application of a creditor or a contributory of the company. In *Re BTU Power Company* [2019 (1) CILR Note 7] ("*BTU*"), the Court found that a former director has no standing to make an application for removal and only a creditor or contributory may make such an application.

The Court has a broad discretion to remove an official liquidator. However, in *BTU*, Parker J applied the decision of *AMP Enterprises Ltd (t/a Total Home Entertainment) v Hoffman* [2002] BCC 996 where the Court found that good reasons needed to be demonstrated to remove a liquidator. Although impropriety or misconduct such as a conflict of interest may constitute good reasons, the Court may remove a liquidator in the absence of misconduct. The headnote of *BTU* records that Parker J found in that case:

*"Care needed to be exercised when removing generally effective and honest liquidators. It should not be seen as easy to remove a liquidator so as to encourage applications by creditors who had not had their preferred liquidators appointed or who were for some other reason disgruntled. It was sufficient to satisfy the court that the removal of the liquidator would be for the general advantage of the majority of the persons interested in the liquidation; in the absence of impropriety, the court would have regard to the wishes of the majority of those interested but, where impropriety was shown, the court might override their interests (citing Johnson v Deloitte & Touche A.G. [1999 CILR 297])."*

In terms of the procedure for doing so, pursuant to Order 5, rule 6(1) and (2) of the CWR, in order to remove an official liquidator, or appoint a new one, the creditor or contributory must file a summons (a "removal summons") which must be served on:

- (a) the official liquidator; and
- (b) each member of the liquidation committee; or
- (c) counsel for the liquidation committee, if an attorney has been appointed by the liquidation committee the authority to act generally; and
- (d) such other creditors or contributories as a Court may direct.

**The removal summons must:**

- be supported by an affidavit containing all of the facts and matters relied upon (Order 5, rule 6(3); and
- nominate a qualified insolvency practitioner whom the Court can appoint in succession to the removed liquidator (Order 5, rule 6(4)).

**The official liquidator is entitled to at least 14 days' notice of a removal summons (Order 5, rule 6(5)).**

**If the official liquidator is removed, then they must: (a) deliver the company's books and records and a copy of the official liquidator's files to their successor; and (b) prepare a report and accounts within 28 days (Order 5, rule 6(6)).**

**Question 2.5.2 (5/5 marks)**

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

**Section 107 of the Companies Act provides that a liquidator can be removed by a creditor or contributory. However, although section 107 does not specifically state this, the overall scheme of the Companies Act is to provide creditors with the standing to make applications in the case of insolvent companies and for contributories to make applications in the case of solvent companies. As an example, pursuant to section 110(4) of the Companies Act, in the case of a solvent company, only a contributory may apply with respect to the exercise of a liquidators' powers and creditors have no standing to make such an application, whilst in the case of an insolvent company, only creditors may apply and contributories have no standing.**

The rationale for this is because, when a company is insolvent, the contributories are 'out-of-the-money' and are unlikely to have any economic interest in the liquidation estate (since it is doubtful that creditors of an insolvent company would receive payment of their debts in full). This rationale is reflected in the recent landmark decision of the UK Supreme Court in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 which confirmed that directors of a company may owe duties to take into account the interests of creditors when a company was insolvent or bordering on insolvency.

By contrast, in a solvent liquidation, it is the shareholders as the owners of the business who should have standing to make applications, and permitting creditors (who will be paid in full) to make applications would impermissibly give certain creditors leverage to improve their position outside of their agreed contractual arrangements with the company.

**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)

**For reasons outlined in the answer to question 2.5 above, if the liquidation is now a solvent liquidation, then the creditors no longer have an interest in the liquidation (as they will be paid in full). In a solvent liquidation, the liquidation committee shall be comprised of between 3 and 5 contributories of the company (cf creditors in an**

Commented [ni10]: Spot on.

I don't think Sequana is the best illustration here, but the points still read across well and this doesn't detract from the overall very high quality of the answer.

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

insolvent liquidation) (see Order 9, rule 1(3) of the CWR).

As such, the liquidation committee will need to be reconstituted to include contributories rather than creditors. The steps for reconstitution are set out in Order 9, rule 3 of the CWR as follows:

*(1) If, during the course of the liquidation, the official liquidator changes the official liquidator's certification of the company's solvency or insolvency (as the case may be), the official liquidator shall take the following steps to reconstitute the liquidation committee.*

*(2) If the company is certified to be solvent, any creditor members of its liquidation committee shall automatically cease to be members and the official liquidator shall convene a meeting of contributories for the purpose of electing new members from amongst the company's contributories.*

As such, the present members of the liquidation committee will automatically cease to be members and the liquidator will need call a meeting of contributories to elect new members of the committee.

#### Question 2.7

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

**An order for dissolution is made once the affairs of the company have been completely wound up and is an order that the company be dissolved from the date of that order or such other date as the Court thinks fit (section 152 of the Companies Act). An order for dissolution must comply with Order 22, rule 2 of the CWR.**

**Following the making of an order for dissolution:**

- The liquidator must retain the liquidation files in safe custody for three years (Order 26, rule 2(3) of the CWR);
- The Court must give directions in respect of the preservation, storage and destruction of the company's remaining books and records and the costs of storage and destruction are costs of the liquidation for which provision is to be made in the final accounts (Order 26, rule 3(4), (6) of the CWR); and
- The liquidator or former liquidator in possession or control of unclaimed dividends or undistributed assets shall hold them on trust for the benefit of the creditors or contributories to whom such funds are owed (section 153 of the Companies Act, Order 21, rule 1 of the CWR). The former liquidator shall be responsible for dealing with all claims and shall be authorised to make payment or transfer title to those persons who appear to be unpaid creditors or members of the company prior to its dissolution (Order 23, rule 4 of the CWR).

Commented [ca12]: Question 2.7 Subtotal  
5/5 marks

**Upon the making of an order for dissolution, the official liquidator's duties as officeholder cease save for any residual duties preserved by the order for dissolution.**

#### Question 2.8

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

**It is assumed that this question relates to the powers and duties of an official liquidator, as a voluntary liquidator is not required to conduct any investigations.**

**A Cayman official liquidator is an officer of the court and is required to "make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, (1) which is material to ascertain the exact truth in every case before the Court" (*Gooch's Case* (1972) 7 Ch App 207 as applied in *Re Citrico International Limited* [2004-05 CILR 435]. (1)**

**Section 102(1) of the Companies Act empowers an official liquidator to investigate:**

- If the Company has failed, the causes of the failure; and
- Generally, the promotion, business, dealings and affairs of the company. (1)

**In addition:**

- The official liquidator has the power to assist both CIMA and the Royal Cayman Islands Police Service to investigate the conduct of persons and institute a criminal prosecution (section 102(2) of the Companies Act); (1) Those persons include existing or former directors or officers of the company; (b) professional service providers to the company; and (c) employees of the company, during the period of one year immediately preceding the relevant date.
- Official liquidators have the power to require certain persons involved with the company to prepare a statement of affairs for the company (section 100 of the Companies Act);
- Official liquidators may apply to the Court for an order for the examination of a relevant person (being someone involved in the company as defined in subsection (1)) or for that relevant person to transfer or deliver up documents belonging to the company (section 103(3) of the Companies Act). The Court may order that the relevant person swear an affidavit in answer to written interrogatories, attend for oral examination at a specified time and place or do both (section 103(5) of the Companies Act). The liquidator is obliged to conduct an examination or make a document request if requested to do so by one-half in value of the company's creditors or contributories (section 103(4)).

**Section 110 of the Companies Act provides for the function and powers of official liquidators as follows:**

- The function of an official liquidator is to: (a) collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and (b) report

Commented [BB13]: Question 2.8 - Sub-total = 4/5

to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up (section 110(1) of the Companies Act); and

- The official liquidator has certain powers set out in: (a) Part I of Schedule 3 of the Companies Act which are exercisable with sanction of the Court; and (b) Part II of Schedule 3 which are exercisable without sanction of the Court (section 110 (2) of the Companies Act).

**It is the duty of liquidators to take possession or control of all of the company's books and records including those maintained in electronic form (Order 26, rule 3 of the CWR).**

**In addition, an official liquidator must conduct their investigations in the broader context of their role as an officer of the court (section 108(2) of the Companies Act) and in light of the fiduciary duties they owe to the company and its creditors (including the duty to avoid conflicts of interest, to not profit from their position and to act in good faith in the best interests of the company).**

#### 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)

**When a winding up order or provisional liquidator appointment has been made, a liquidator can require some or all of the persons identified in section 101(3) of the Companies Act to prepare and submit a statement in the prescribed form as to the affairs of the company. These individuals include:**

- (a) persons who are or have been directors or officers of the company;*
- (b) persons who are or have been professional service providers to the company; and*
- (c) persons who are or have been employees of the company, during the period of one year immediately preceding the relevant date.*

**The term "relevant date" for the purposes of section 101(3)(c) is defined in subsection (6) as follows:**

- "relevant date" means –**
- (a) in a case where a provisional liquidator is appointed, the date of that person's appointment; and*
  - (b) in any other case, the commencement of the winding up. (1)*

Commented [BB14]: Question 2.9 - Sub-total = 5/5

**In many cases, the commencement of the winding up is the date that the winding up petition was presented. However, pursuant to section 100(1) of the Companies Act, this may be an earlier date if, before the presentation of the petition: (1)**

*(a) a resolution has been passed by the company for voluntary winding up; (½)*

*(b) the period, if any, fixed for the duration of the company by the articles of association has expired; (½)*

*(c) the event upon the occurrence of which it is provided by the articles of association that the company is to be wound up has occurred; or (½)*

*(d) a restructuring officer has been appointed pursuant to section 91B or 91C and the order appointing the restructuring officer has not been discharged. (½)*

In the above cases, the winding up is deemed to have commenced upon the occurrence of the above events. (1)

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

**QUESTION 3 FOLLOWS ON NEXT PAGE / . . .**

### QUESTION 3 - CORPORATE RESCUE (20 MARKS)

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

#### FACT PATTERN

##### SMB TECH CORPORATION

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

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

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

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

#### Question 3.1

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

Commented [BB15]: Question 3.1 - sub-total = 4/5

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

**In order for the contributories' preferred provisional liquidator to be appointed, section 104(1) of the Companies Act requires that they first present a winding up petition against SMB Tech on the just and equitable ground on the basis of a loss of trust and confidence in SMB Tech's directors (see *Re Global Cord Blood Corporation* (Unreported, Kawaley J, 28 September 2022)).**

**Since the contributories' preferred provisional liquidator is a foreign liquidator, they would need to be appointed along with a Cayman liquidator: Companies Act, s 108(2). (1)**

**However, even before the liquidators are appointed, the winding up petition must be accompanied by a liquidators' consent to act affidavit. Given that the preferred liquidator will be a foreign liquidator they must file an affidavit in compliance with Order 3, rule 4(2) of the CWR including by deposing pursuant to subrule (d):**

***"that person will have the benefit of professional indemnity insurance in respect of that person's acts and omissions done in that person's capacity as an official liquidator of the company meeting the requirements of Regulation 7"***

**Regulation 7 of the Insolvency Practitioner Regulations (2023 Consolidation) provides: (1)**

***"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." (1)***

**Given that the contributories preferred provisional liquidator is unwilling to increase their indemnity inductance up to \$10 million, they would not be able to provide the required consent to act and, therefore, could not be appointed by the Grand Court. (1)**

**4 marks - reference to Regulation 8 of the IPRs would have got you the missing mark**

**Question 3.2**

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

Commented [BB16]: Question 3.2 - sub-total = 2/2



In order for SMB Tech to seek the appointment of a restructuring officer, it must present a petition pursuant to section 91B(1) of the Companies Act on the grounds that it:

(a) is or is likely to become unable to pay its debts within the meaning of section 93; and (1)

(b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Law, the law of a foreign country or by way of a consensual restructuring. (1)

This two limb test was considered in *Re Oriente Group Limited* (Unreported, Kawaley J, 8 December 2022) who held at [11]:

*"The jurisdiction to appoint restructuring officers is a broad discretionary jurisdiction to be exercised where the Court is satisfied that:*

- *the statutory preconditions of insolvency or likely to become insolvent are met by credible evidence from the company or some other independent source;*
- *the statutory precondition of an intention to present a restructuring proposal to creditors or any class thereof is met by credible evidence of a rational proposal with reasonable prospects of success; and*
- *the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to a winding-up of the company petitioning for the appointment of restructuring officer."*

On the facts of the present case:

- It is possible that SMB Tech will be able to satisfy the first limb of the test under section 91B(1), as it may be able to provide credible evidence from the 'reputable advisory firm' that the company is or is likely to become unable to pay its debts.
- However, SMB Tech may have difficulties in satisfying the second limb as: (a) there is no evidence that it has a rational restructuring proposal with reasonable prospects of success; and (b) many of the creditors, including TCS and the creditors holding guarantee liabilities seem to have lost confidence in SMB Tech and may be unlikely to support any restructuring plan.

2 marks

Question 3.3

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

Commented [BB17]: Question 3.3 - Sub-total = 2/2

In relation to the advertising for restructuring petitions, Order 1A, rule 1 of the CWR provides as follows:

- Unless the Court otherwise directs, every petition for the appointment of a restructuring officer shall 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 (Order 1A, rule 1(3));
- Unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised 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 (½) (in which case the advertisement must be published in the official language of such country or countries) (Order 1A, rule 1(4));
- The advertisements shall 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) (Order 1A, rule 1(5));

If SMB Tech were to file a restructuring petition, since it operates in a number of different jurisdictions (and may have creditors in all of those jurisdictions), it is likely that the CWR would require that SMB Tech advertise the petition in the Cayman Islands, the United States, the United Kingdom and Hong Kong.

#### Question 3.4

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

The restructuring officer provisions introduce a debtor-friendly regime into the Companies Act which represents a slight departure from the usual creditor-friendly approach of the Cayman Courts. Nevertheless, the interests of debtor creditors of companies that have filed a restructuring petition are safeguarded in a number of key respects:

- One of the two threshold requirements is that the debtor company establish that it intends to present a compromise or arrangement to creditors (section 91B(1)(a) of the Companies Act). However, per *Re Oriente Group Limited* (Unreported, Kawaley J, 8 December 2022), this is not an easy hurdle to surmount and requires that the debtor company: (a) provide credible evidence of a rational proposal with reasonable prospects of success; and (b) establish that the proposal has or will potentially attract the support of a majority of creditors as a more favourable outcome than winding up. This threshold prevents debtor companies from using restructuring petitions to take advantage of the stay of proceedings and create delay to the timely

Commented [BB18]: Question 3.4 - sub-total = 4/6

payment of creditor debts. (1)

- A creditor retains standing to apply to the Court for the determination of any question arising in the course of carrying out the restructuring officer's function (section 91D(7) of the Companies Act); (1)
- A creditor may apply by way of summons for an order varying or discharging the order of appointment (section 91E(1)(c) of the Companies Act); (1)
- A creditor may make an application to remove or replace a restructuring officer (section 91F(1)(b) of the Companies Act);
- A secured creditor retains the ability to enforce their security over the whole or part of the assets of the debtor company without leave of the Court or reference to the restructuring officer (section 91H of the Companies Act); and (1)
- A compromise or arrangement between the creditors is only binding if it is agreed by 75% in value of the creditors or class of creditors, present and voting either in person or by proxy at the meeting of creditors (section 91I of the Companies Act).

4 marks, other suggested marks set out below

any 6 of the following

- There are a number of provisions which prescribe specific notice and reporting requirements for the benefit of creditors. (1 mark)
- The default position is that a Restructuring Petition will be heard on notice to stakeholders (while the prior statutory framework provided that applications for appointment of provisional liquidators were to be made *ex parte* by default). (1 mark)
- The same advertising requirements are imposed as applicable to a winding up petition (the prior regime did not require advertisement of an application to appoint RPLs) - no more than seven business days after the filing of a Restructuring Petition and not less than seven business days before the hearing date. (1 mark)
- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors. (1 mark)
- The hearing must be heard within 21 days of presentation. (1 mark)
- A requirement for the ROs to report - open and transparent process. (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs. (1 mark)
- The ROs must report within 28 days of appointment. (1 mark)
- A creditor or contributory may apply for an order discharging the appointment. (1 mark)
- Secured creditors remain entitled to enforce their security. (1 mark)

Question 3.5

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

Commented [BB19]: Question 3.5 - sub-total = 5/5

**On the hearing of a restructuring petition, per section 91B(3) of the Companies Act, the Court may:**

- (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)**

**However, the broad wording in subsection (d) has a key limitation, in that the Court may not make an order placing the company into official liquidation (1) unless the petitioner has obtained leave of the Court (subject to such terms as the Court may impose) to lift the stay of proceedings pursuant to section 91G(1).**

In addition, the Court:

1. may appoint a restructuring officer on an interim basis pending a hearing under section 91B (section 91C);
2. may fix the restructuring officer's remuneration (section 91D(6));
3. retains the power to grant the relief upon the application of interested parties such as the restructuring officer, the company, creditors, contributories and CIMA (see section 91D(7), 91E(3) and 91F(1)).
4. may grant leave to lift the stay for other legal proceedings (section 91G(3)); and
5. may sanction a compromise or arrangement (section 91I) including an amalgamation of two or more companies (section 91J).

**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)

- (1) statute, being the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021 Revision); (1)
- (2) common law (see section 3 of the ELP Act); and
- (3) equity (see section 3 of the ELP Act). (1)

##### Question 4.2

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

**Under section 91(d) of the Companies Act, the Cayman Court has jurisdiction to wind up a foreign company that:**

- has property located in the Cayman Islands
- is carrying on a business in the Cayman Islands;
- is the general partner of an ordinary limited partnership or ELP; or
- is registered as a foreign company under Part IX of the Companies Act.

**Part XI of the Companies Act requires a foreign company to register in the Cayman Islands where it establishes a place of business, or commences carrying on a business within 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)

**A judgment of a foreign court is not enforceable in the Cayman Islands in and of itself and it must be registered. However, in the first instance decision of Kawaley J in *Re Guoan International Limited* (Unreported, 29 October 2021), his Lordship found that a creditor may rely on 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 judgments from the Cayman Court. His Lordship dismissed arguments made by the judgment debtor that there was a disputed debt on the basis of a pending appeal.**

**Therefore, a petitioner can file a creditors' petition on the basis of an unregistered**

Commented [BB20]: Question 4.1 - Sub-total = 3/3

Commented [sp21]: Question 4.2 - Sub-total = 5/5

Commented [sp22]: Question 4.3 - Sub-total = 3/3

**and unenforced foreign judgment which has not been satisfied by arguing that the judgment debtor is unable to pay its debts either because the judgment creditor has served a statutory demand in relation to that foreign judgment which has been unpaid for three weeks (Companies Act, s 93(a)) or because it is proof that the judgment debtor is unable to pay its debts (Companies Act, s 93(c)).**

#### 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)

Commented [BB23]: Question 4.4 - Sub-total = 4/4

**The powers and duties of trustees in bankruptcy include the following:**

- **the trustee may appoint a person to act as his agent (Bankruptcy Act, s 13);**
- **until a provisional order is made absolute, it is the duty of the trustee to preserve the property such that it may be returned to the debtor in the event that the provisional order is revoked (Bankruptcy Act, s 38); (1)**
- **once the absolute order has been made, the trustee must proceed to administer the debtor's estate for the benefit of the creditors (Bankruptcy Act, s 65). (1)**
- **the trustee may carry on the trade of the debtor so far as may be necessary or expedient for the beneficial winding up or sale of the business (Bankruptcy Act, s 79); (1)**
- **the trustee may bring or defend any legal proceedings relating to the property of the debtor (Bankruptcy Act, s 80); (1)**
- **the trustee must receive and adjudicate the proofs of debt (Bankruptcy Act, s 87); and**

**An example of the power of the trustee to carry on the trade of the debtor for the beneficial winding up under section 79 of the Bankruptcy Act includes the ability to disclaim onerous and unprofitable property in certain prescribed circumstances set out in section 105. Allowing a trustee to do this is in the best interest of the estate as it enables liquidators to avoid continuing liabilities in respect of onerous property and the adverse effect of such liabilities on the assets of the estate whilst also allowing liquidators to realise the company's property and pay a dividend to creditors at the earliest possible time.**

TOTAL MARKS: [100]

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