



INSOL
INTERNATIONAL



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

Formative Assessment (Practice Examination)

Date: 9 - 10 November 2023

Time limit: 24 hours (from 13:00 on 9 November to 13:00 on 10 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.

MODEL ANSWER

INSTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) Cayman time on Thursday 9 November 2023** and must be returned / submitted by **13:00 (1 pm) Cayman time on Friday 10 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.
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.FormativeAssessment**. An example would be something along the following lines: 202223-336.FormativeAssessment. **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.
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 prior to the deadline for the submission of the assessment.**
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. If for any reason the submission / upload portal for your assessment is not available (ie it shows the deadline for the assessment has already passed), please e-mail your assessment to **david.burdette@insol.org**.
10. **The model answer to this practice assessment will be uploaded to the course web pages once the closing date for submission has passed at 1 pm Cayman time on Friday 10 November 2023.**
11. 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.

ANSWER ALL THE QUESTIONS

QUESTION 1

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

Choose the **correct** statement:

Which of the following IS NOT a relevant country for an individual to be qualified to act as official liquidator in the Cayman Islands?

- (a) Canada
- (b) Australia
- (c) Northern Ireland
- (d) South Africa**

Question 1.2

Choose the **correct** statement:

What is the lookback period for an Insolvency Practitioner's independence in accordance with the Insolvency Practitioner Regulations?

- (a) 3 years from commencement of the liquidation**
- (b) 3 years from the date of the winding up order
- (c) 3 years from the date of a special resolution
- (d) None of the above

Question 1.3

Select the **correct** statement:

To whom does a privately-appointed receiver owe their primary duties?

- (a) The debtor.
- (b) The appointing creditor.
- (c) Other creditors.
- (d) All of the above.

Question 1.4

Choose the **correct** statement:

Which of the following is a ground for making a statutory receivership order in respect of a segregated portfolio?

- (a) It is just and equitable that an order be made.
- (b) The assets are or are likely to be insufficient to discharge the claims of the segregated portfolio's creditors.
- (c) The shareholders in respect of the segregated portfolio have passed a resolution to appoint a receiver.
- (d) All of the above.

Question 1.5

Choose the **correct** statement:

When an official liquidator is appointed over a company, what is the lookback period for challenging a secured parties security as a voidable preference?

- (a) Within the six (6) months immediately preceding the commencement of the winding up.
- (b) Within the six (6) months immediately preceding the granting of a winding up order.
- (c) Within the two (2) years immediately preceding the commencement of the winding up.

- (d) Within the two (2) years immediately preceding the granting of a winding up order.

Question 1.6

Choose the **correct** statement:

Which sections of the Companies Act governs the voluntary winding up of a company?

- (a) Sections 111-115.
- (b) Sections 116-130.
- (c) Sections 123-130.
- (d) Sections 123-133.

Question 1.7

Choose the **correct** statement:

Which of the following IS NOT considered a ground for the voluntary winding up of a company:

- (a) If the company resolves by special resolution that it be wound up voluntarily.
- (b) If the company resolves by ordinary resolution that it be wound up voluntarily because it is unable to pay its debts as they fall due.
- (c) If the company resolves by ordinary resolution that it is just and equitable that the company should be wound up.
- (d) When any duration or period of the company fixed by its memorandum or articles of association expires.
- (e) If any event of winding up, as set by the memorandum or articles of association, occurs.

Question 1.8

Choose the **correct** statement:

In accordance with her orders of appointment, an official liquidator engages a Cayman attorney to provide legal advice concerning a potential claim against the company's former auditor. The legal advice is received, along with the attorney's invoice for their fees incurred. Upon the liquidators' review of the attorney's invoice, she considers that the fees charged are excessive. Whilst there is an engagement letter in place, there was no budget

set or amounts otherwise agreed in respect of the liquidator's fee expectations. What option is available to the liquidator to contest the fees charged?

- (a) There is no recourse. The official liquidator should have agreed the fees when instructing the attorneys.
- (b) The terms relating to legal fees are a matter for the liquidation committee to set (if one is constituted) and for the ultimate approval of the court.
- (c) The official liquidator can apply to have the fees taxed.

Question 1.9

Choose the **correct** statement:

Which of the below statements is true in relation to an insolvent liquidation estate?

- (a) Ordinary creditor claims are always paid *pari passu*, regardless of any contractual terms validly entered into by the creditor and company regarding the priority of payment, prior to the company's liquidation.
- (b) The official liquidator must convene meetings of both creditors and contributories during the liquidation.
- (c) Official liquidators are not required to provide their reports to the contributories, even when a contributory request a copy of the official liquidators' reports.
- (d) The official liquidators do not need to settle the list of contributories.

Question 1.10

Choose the **correct** statement:

Which of the following statements most accurately describes the circumstances in which Cayman Islands Monetary Authority (CIMA) may appoint a controller of a licensed entity?

- (a) Where CIMA identifies evidence indicating that the entity's management have been engaged in negligent activities.
- (b) Where CIMA identifies serious concerns regarding the solvency or lawfulness of a licensee or registrant's business.
- (c) Where CIMA considers that the entity is insolvent.
- (d) Where CIMA concludes that the entity has failed to pay requisite fees to the relevant regulatory authorities.

Question 1.11

Choose the **correct** statement:

If a creditor seeks to appeal a decision of the official liquidator in relation to its proof of debt, when must any application to the court appealing that decision be made?

- (a) Within 30 days of becoming aware of the official liquidator's decision.
- (b) Within three (3) months of becoming aware of the official liquidator's decision.
- (c) Within 14 days of the date on which the creditor received the official liquidator's notification under O.16, r.6 of the Companies Winding Up Rules.
- (d) Within 21 days of the date on which the creditor received the official liquidator's notification under O.16, r.6 of the Companies Winding Up Rules.

Question 1.12

Choose the **correct** statement:

Which of the following WILL NOT constitute the commencement of the winding up of an exempted limited partnership (ELP)?

- (a) Order of the Court upon presentation of a winding up petition.
- (b) The proposal of a resolution for the winding up of the ELP.
- (c) Expiry of the period fixed for the duration of the partnership.
- (d) The automatic wind up date.

Question 1.13

Choose the **correct** statement:

Which of the following activities, if undertaken by a limited partner, may constitute participation in the conduct of the business of the exempted limited partnership (ELP), jeopardising its limited liability?

- (a) Calling a meeting of the partners.
- (b) Presenting a winding up petition.
- (c) Acting as guarantor for the ELP.
- (d) None of the above.

Question 1.14

Choose the **correct** statement:

The Court may make an order for the appointment of provisional liquidators at any time:

- (a) Before a winding up order is made.
- (b) Before a winding up petition is filed.
- (c) After a winding up petition has been filed but before a winding up order is made.
- (d) After a company has been struck off.

Question 1.15

Choose the **correct** statement:

Who may apply for the appointment of provisional liquidators to a corporate debtor?:

- (a) The company and its creditors.
- (b) The Cayman Islands Monetary Authority (CIMA) and the company.
- (c) The company and its contributories.
- (d) All of the above.

Question 1.16

Choose the **correct** statement:

To be sanctioned, a creditor's scheme:

- (a) Must apply to all of the company's creditors.
- (b) Must also take account of shareholder interests.
- (c) Must have extraterritorial affect.
- (d) Must provide a better outcome than liquidation.

Question 1.17

Choose the **correct** statement:

From which country can judgments of certain courts be registered and enforced within the Cayman Islands under the Foreign Judgments Reciprocal Enforcement Act (1996 Revision)?

- (a) Canada
- (b) Australia
- (c) England
- (d) All countries within the Commonwealth

Question 1.18

Choose the **correct** statement:

In general, a foreign money judgment will not be recognised and enforced in the Cayman Islands as a debt against the judgment debtor if:

- (a) The judgment is subject to an appeal.
- (b) The judgment was obtained in a court of law which had jurisdiction over the judgment debtor, but the judgment debtor elected not to participate.
- (c) The judgment was in respect of taxes, fines or penalties.
- (d) All of the above.

Question 1.19

Choose the **correct** statement:

In a personal bankruptcy, which of the following actions does not amount to an "act of bankruptcy"?

- (a) That the debtor has, in the Islands or elsewhere, made any conveyance or transfer of his property or any part thereof, or created any charge thereon, which would under any law relating to bankruptcy, be void as a fraudulent preference if he were adjudged bankrupt.
- (b) That the debtor has presented a bankruptcy petition against himself.

- (c) That the debtor has, in the Islands or elsewhere, made a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof.
- (d) That execution issued outside the Islands against the debtor on any legal process for the obtaining payment of any sum of money has been levied by seizure and sale of his goods or enforced by delivery of his goods.

Question 1.20

Choose the **correct** statement:

In a personal bankruptcy, which of the following debts is not a preferential debt, payable in priority to other debts, and ranking equally between themselves?

- (a) Wages of any workman in respect of services rendered to the debtor during four months next preceding the date of the provisional order.
- (b) Rental payments due to the debtor's landlord at the date of the provisional order.
- (c) Salary of any servant in respect of services rendered to the debtor during four months next preceding the date of the provisional order, not exceeding one hundred dollars.
- (d) Public taxes imposed by law due from the debtor at the date of the provisional order not exceeding in the whole one year's taxes.

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

QUESTION 2 FOLLOWS ON THE NEXT PAGE / ...

QUESTION 2 - LIQUIDATION

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.

Seven Mile Master Fund (the Master Fund) is a Cayman Islands incorporated hedge fund. Its capital was raised through investments by two feeder funds, Seven Mile Feeder Fund (also incorporated in the Cayman Islands) (the Cayman Feeder) and Seven Mile (US) Feeder Fund (incorporated in Delaware, USA) (the US Feeder).

On 1 October 2023, the US Feeder received several redemption requests from its investors. As 100% of the US Feeder's assets were invested into the Master Fund, a corresponding redemption request was made by the US Feeder to the Master Fund to allow the US Feeder to pay its own investor redemptions. It can be assumed that all redemption requests were properly made and effected in accordance with the companies' governing documents.

Contrary to the Master Fund's investment objectives, it had invested most of its capital into a real estate project in Panama, which is not expected to generate any returns until at least 1 January 2025. Unable to satisfy the redemption claim in full as it fell due, the Master Fund's directors (two based in Panama and a non-executive Cayman Islands resident director) recommended that the Master Fund be placed into voluntary liquidation. A resolution to this effect was passed by the Master Fund's shareholder on 22 October 2023 and a voluntary liquidator was appointed on the same day. Despite requests from the voluntary liquidator, none of the Master Fund's directors are willing to provide a Declaration of Solvency.

During the liquidator's enquiries, it has been established that the Master Fund transferred US\$ 900,000 into a bank account held in the name of one of the Panama based directors on 5 October 2023. This account is held with Trusted Bank Corp in the USA. The Master Fund's directors based in Panama are no longer responding to the voluntary liquidator's requests for information and the Cayman Islands resident director claims he has access to very few of the Master Fund's records.

The liquidator has been in office for 18 days and is considering next steps as regards the liquidation strategy.

Question 2.1

The investors in the US Feeder wish to consider appointing a US-based practitioner as either a Joint Voluntary Liquidator or Joint Official Liquidator of the Master Fund and the Cayman Feeder.

Draft a memo to the investors of the US Feeder, outlining:

- who can act as a Voluntary Liquidator of the Master Fund / the Cayman Feeder; and
- who can act as a Joint Official Liquidator of the Master Fund / the Cayman Feeder.

(4)

[Type your answer here]

Answer:

To: Investors of US Feeder

From: Proposed Liquidators

Topic: Who can act as a Voluntary Liquidator or Official Liquidator of the Master and Cayman Feeder

In accordance with section 120 of the Companies Act (2023 Revision), any person, including a director or officer of the Master Fund and Cayman Feeder may be appointed as voluntary liquidator. The US Practitioner is therefore eligible to act in this capacity. **(1 mark)**

In terms of official liquidations, the ability and criteria for the appointment of a foreign practitioner is laid out in accordance with the Insolvency Practitioners' Regulations and the Companies Act.

Section 108(1) of the Companies Act states as follows: "A foreign practitioner may be appointed to act jointly with a qualified insolvency practitioner" (emphasis added).

The terms "**foreign practitioner**" and "**qualified insolvency practitioner**" are set out in the definitions contained at section 89 of the Companies Act that states as follows:

"**foreign practitioner**' means a person who is qualified under the law of a foreign country to perform functions equivalent to those performed by official liquidators under this Act."

"**qualified insolvency practitioners**' means a person holding the qualifications specified in the regulations made by the Insolvency Rules Committee under section 155 or such other qualifications as the Court considers appropriate for the conduct of the winding up of a company."

Regulation 8 of the Insolvency Practitioners' Regulations states:

"Regulation 8. Foreign practitioners

- (1) A foreign practitioner who meets the independence and insurance requirements of Regulations 6 and 7 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).
- (2) A foreign practitioner need not meet the residency requirement of Regulation 5."

Accordingly, so long as the US Practitioner meets the independence and insurance requirements set out in regulations 6 and 7 of the Insolvency Practitioners Regulations then they should be able to act as Joint Official Liquidators of the Master Fund and Cayman Feeder if so appointed jointly with a Cayman Islands qualified insolvency practitioner and approved by the Court.

If the US Practitioner does not meet these tests, then they are not permitted to act as a joint official liquidator. (3 marks)

Question 2.2

The Master Fund proceeds into official liquidation, following a successful Court Supervision application. Given the Panamanian real estate project isn't expected to generate any liquidity for at least 12 months, the respective estates of the Master Fund, Cayman Feeder and US Feeder are currently impecunious and devoid of liquid assets. At the first meeting of stakeholders of the Master Fund convened pursuant to Order 8 of the Company Winding Up Rules, a liquidation committee (LC) was formed comprising of five (5) members. The LC have heard that litigation funding, conditional fee arrangements and contingency fee agreements are all now permissible in the Cayman Islands. The LC are keen for the Liquidators to consider claims against, *inter alia*, the investment manager, Panamanian directors and Trusted Bank Corp, but are aware external funding will likely be required in order to instigate any investigations / claims.

Draft a memo to the liquidation committee outlining the following:

- The types of litigation funding arrangements permitted in Cayman;
- What a conditional fee arrangement is as opposed to a contingency fee agreement;
- What the maximum success fees are permitted under a conditional fee arrangement;
- What the maximum percentage of recoveries are permitted under a contingency fee agreement; and
- What practical information you think a potential litigation funder will need in order to consider whether or not they will provide funding to the estate. (5)

[Type your answer here]

Answer:

To Liquidation Committee
From JOLs
Regarding Funding options

Litigation funding agreements are expressly permitted by section 16(1) of the Private Funding of Legal Services Act 2020 (PFLSA), which came into force on 1 May 2021.

Set out below for your consideration are further details as to the litigation funding agreements permitted in Cayman, differences between contingency and conditional arrangements as well as the permitted fees.

Third-party funding agreements are where a third party (usually a commercial litigation funder or, in a liquidation context, a stakeholder) agrees to fund all or some of the client's legal costs and / or other costs in exchange for payment based on contractual terms.

Section 16(2) of the PFLSA provides that a litigation funding agreement must be in writing and must comply with prescribed requirements, if any.

There are as yet no prescribed requirements for funding agreements and it appears that, for now, they are intended to be largely self-regulated between stakeholders and commercial funders. **(1.5 marks)**

Conditional fee agreements (sometimes referred to as “no win, no fee”) are where lawyers are paid an hourly rate plus a success fee if the claim succeeds, and nothing if the claim fails.

Section 4 of the PFLSA provided that the maximum success fee permitted cannot exceed 100% of normal hourly rates.

All agreements must be in writing, include a cooling-off period, deal with the impact on costs and be signed by the client.

Contingency fee agreements (sometimes referred to as damages-based agreements) are permitted under section 3 of the PFLSA, and find application where lawyers are paid a percentage of recoveries if the claim succeeds, and nothing if the claim fails.

Regulations in terms of the PFLSA provide that the maximum percentage of recoveries permitted to be paid under such an arrangement is 33.3% of the total amount awarded. This percentage can be increased to 40% via application to the Cayman Islands courts.

All agreements must be in writing, include a cooling-off period, deal with the impact on costs and be signed by the client.

Agreements signed by a client in a fiduciary capacity (for example an official liquidator) must be approved by the Cayman Islands court.

Liquidators will require court sanction to enter into a funding agreement, and if such agreement involves a disposition of the company’s property (for example, by way of payment of interest or granting of security) then a validation order will be required to ensure it is not void pursuant to section 99 of the Companies Act, which provides that:

“When a winding up order has been made, any disposition of the company’s property and any transfer of shares or alteration in the status of the company’s members made after the commencement of the winding up is, unless the Court otherwise orders, void.”

Liquidation funding is classed as an expense of the liquidation and is therefore repayable ahead of ordinary unsecured creditors under Order 20 of the CWR. **(2.5 marks)**

A number of practical considerations to support any Court sanction application are as follows:

- Is the funder able to provide the financing sought?;
- Ensuring the JOLs retain control of the litigation being funded;
- Ensuring the JOLs maintain the decision making capability as regards to any settlement;
- Cost budget / forecast of the litigation being contemplated / pursued;
- Merits of opinion as regards to the strength of the claim; and
- Jurisdiction of where the claims will be brought and financial standing of proposed defendants.

Question 2.3

The voluntary liquidator of the Master Fund is considering whether to take legal action against the Panama-based director who received US\$900,000 into their bank account, including to obtain a freezing injunction. Assuming that the action is brought in the Cayman Islands (and that appropriate jurisdiction is established), provide advice to the voluntary liquidator on whether a receiver in aid of the freezing injunction should be sought at the same time, including reference to any additional evidence that may be necessary. **(5)**

[Type your answer here]

Answer:

- (a) The main purpose of a receivership in aid of a freezing injunction is to buttress the mandatory powers of the freezing injunction **(0.5 marks)**, [which prevents the defendant from dealing with or dissipating his assets by appointing a third party to take possession of and control the assets to "hold the ring" and preserve those assets] (wording in square brackets not necessary to get the mark).
- (b) The Grand Court may appointed a receiver "in all cases in which it appears to the Court to be just and convenient to do so" **(1 mark)**
- (c) *In JSC BTA Bank v Ablyazov (No 3)* **(0.5 marks)** the English Court of Appeal held that (i) the appointment of a receiver will only be appropriate where an injunction is insufficient on its own, and (ii) in cases where there is a measurable risk that, if a receiver is not appointed, a defendant will act in breach of the injunction or otherwise seek to ensure that his assets will not be available to satisfy any judgment which may in due course be made against him **(1 mark)**
- (d) Any answer that indicates, on the facts of this case, either that (i) it is difficult / impossible to tell whether a receivership order would be granted; or that (ii) it is unlikely that such an order would be granted without more evidence in support, should be awarded **(0.5 marks)**
- (e) References to any of the below should be granted another 0.5 marks (up to a maximum of 1.5 mark)

- It is unclear whether the Master Fund would obey a freezing order obtained from the Cayman Court; **(0.5 marks)**
- The Master Fund has one Cayman-based director, who would be likely to obey a freezing order obtained from the Cayman Court; and / or there is no reason on these facts to doubt that he / she would do so; **(0.5 marks)**
- The account is held by a Bank, which is likely to obey a freezing order obtained from the Cayman Court; and / or there is no reason on these facts to doubt that it would do so; **(0.5 marks)**
- The date of the transfer of the US\$ 900,000 might be helpful in demonstrating to the court that the transfer was intended to defeat the Master Fund's obligations, and such that there is a risk that the Master Fund might take steps to act in breach of any injunction; **(0.5 marks)**
- The fact that the Panama-based directors are ignoring the liquidators' requests might be helpful in demonstrating to the court that the transfer was intended to defeat the Master Fund's obligations, and such that there is a risk that the Master Fund might take steps to act in breach of any injunction; **(0.5 marks)**
- [any similar observations that show that the candidate has (i) correctly understood the nature of the legal test; and (ii) correctly understood the fact pattern]. **(0.5 marks for each such observation)**

Question 2.4

The Master Fund has proceeded into Official Liquidation, following a supervision application by its joint voluntary liquidators (JVLs).

Gamboa Leverage LLC ("Gamboa") has written to you in your capacity as one of the JOLs, providing details of its alleged fixed charge security over the Panamanian real estate project. Gamboa are claiming they are owed US\$ 5m in respect of leverage provided to the Master Fund to assist with completion of the real estate project, in return the Master Fund granted a fixed charge. The monies and security were provided by Gamboa on 1 July 2023. You have recovered as part of your investigations to date a valuation report which provides the "as is" value in the region of US\$ 3m and a "completed project" value of US\$ 20m. The governing law of the security contract is the Cayman Islands. For the purposes of this question, assume that the fixed charge is valid.

Draft an internal file note outlining the options available to Gamboa, where it will rank in order of priorities within the liquidation in respect of their secured creditor claim, what would happen to any shortfall or surplus upon a sale of the real estate project and whether Gamboa can appoint a Receiver if they so wished. **(5)**

[Type your answer here]

Answer:

A secured creditor's right of enforcement with respect to the secured property will be outlined in the relevant agreement between Gamboa and the Master Fund. Generally

speaking, these provisions will provide that if the Master Fund defaults on its payment obligations, a secured creditor holding a legal mortgage (ie Gamboa) will be permitted to take the following actions with respect to the secured real property:

- (a) take possession and exercise its power of sale with respect to the real property; or
- (b) appoint a receiver to realise the real property. **(1 mark)**

In the context of a liquidation of the Master Fund, the secured creditor may also permit the liquidator to sell the property on its behalf. An option for Gamboa, is therefore to work with the liquidators to either consider selling the property as is where is, or exploring options to complete the project and try to maximise the potential value of the completion valuation of US\$ 20m, which would allow repayment to Gamboa in full. **(1 mark)**

Order 17 of the Companies Winding Up Rules (As Amended), allows a secured creditor to enforce its security without recourse to the JOLs. Subject to understanding Gamboa's rights per its security documentation, there would be nothing to prevent Gamboa from appointing a receiver over the Panamanian real estate project. Any receivers' powers would be governed and set out in the security documentation. **(0.5 marks)**

Secured creditors rank in priority to all other creditors and can realise their security outside of the liquidation process as they see fit. In the Cayman Islands, secured creditors are always permitted to take enforcement actions against the collateral once there is an event of default. There is no stay on enforcement by secured creditors that is similar to the impact of Chapter 11 proceedings in the United States. **(0.5 marks)**

If Gamboa proceed down the enforcement route and there remains a shortfall owed to them after the realization of the asset, Gamboa can prove in the liquidation for the shortfall on an unsecured basis.

Similarly, if there remains a surplus following payment to Gamboa the net proceeds will form part of the liquidation estate and available to the other creditors of the Master Fund. **(0.5 marks)**

The liquidator may at any time give notice to a creditor whose debt is secured that he proposes, at the expiration of 28 days from the date of the notice, to redeem the security at the value put upon it in the creditor's proof.

The creditor then has 21 days in which (if he so wishes) to apply to the Court for leave to alter the value of his security.

If the liquidator redeems the security, the costs incurred in doing so are payable out of the assets of the company as an expense of the liquidation.

Question 2.5

Gamboa has elected to enforce its security rights by way of the appointment of a fixed charge receiver over the real estate project. However, before Gamboa completes the process, a number of the investors of the Cayman Feeder provide you with credible evidence that the ultimate beneficial owners of Gamboa are the same two Panamanian directors of the Master Fund. The investors believe the purported security was a front and a mechanism to transfer ownership of the potentially valuable real estate project to the Panamanian directors for no consideration and away from the legitimate interests of investors. Upon a detailed review of the Master Funds bank statements obtained from Trusted Bank Corp you cannot locate the receipt of the purported US\$5m supposedly loaned to the Master Fund by Gamboa.

What remedies / actions / investigations would you propose to take given this new evidence? **(max 6)**

[Type your answer here]

Answer:

A grant of a security interest can be challenged by a liquidator (or other parties with a sufficient interest) on the following bases:

- (1) avoidance of dispositions of property from the date of the winding up order;
- (2) voidable preferences; and
- (3) fraudulent dispositions at an undervalue.

These are outlined further below. However, as a general proposition, if security is granted by a debtor in exchange for a further advance of funds in an arms-length transaction with a third-party, the validity of the grant of security will be difficult to challenge. **(1 mark)**

It would appear that investigations should be explored to ascertain based on the date of the security whether options 2 and 3 above are relevant. Option 1 does not appear relevant in this case, as the security given isn't post-commencement of the winding up and prior to the winding up order being made. **(0.5 marks)**

Voidable Preference

The granting of security in favour of a purportedly secured creditor will be invalid if the Court can be satisfied of the following, namely that it is made:

- (1) at a time when the company is unable to pay its debts (following the definition contained within section 93 of the Companies Act 2023 Revision);

- (2) with a view to giving such creditor a preference over the other creditors; and
- (3) within the six months immediately preceding the commencement of a winding up. (The commencement of the winding up will be deemed to be the date on which the petition seeking the winding up order was filed, rather than the date on which the Court's order was ultimately made.)

A grant of security will be made "with a view" to giving a preference if it can be established that the transferor's dominant intention was to prefer the creditor - that is, to put the creditor in a better position than it would otherwise have been. A dominant intention may be inferred by the Court in accordance with the general principles of inference from the available evidence. If the company's primary purpose in granting the security was to achieve something else, then it will not be a voidable preference, even if preferring the creditor was an obvious collateral effect of that transaction. For example, if the security was granted to an existing creditor in good faith under legitimate commercial pressure to prevent the company from being sued or wound up, or in order to benefit the company by keeping on good terms with an essential supplier or service provider, the security is unlikely to be a voidable preference.

Security provided to a related party of the company will be deemed to have been made with a view to giving such creditor a preference. A creditor will be treated as a "related party" for this purpose if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions. Here where Gamboa has the same UBOs as the Master Fund's directors there would appear to be prima facie evidence to suggest the security is given to a related party. **(1.5 marks)**

Transactions at an undervalue

The granting of security, made (i) with an intent to defraud and (ii) at an undervalue, will be voidable at the instance of a creditor prejudiced as a result of the purported grant of /security (regardless of whether the company is in liquidation) or the official liquidator of the company. The burden of establishing an intent to defraud rests with the creditor or liquidator seeking to have the grant of security set aside.

In this regard:

- "intention to defraud" means an intention of a transferor to wilfully defeat an obligation; and
- "undervalue" is defined to mean the provision of no consideration or a consideration which in money or money's worth is significantly less than the value of the property, the subject of the grant of security.

The existence of a transaction at an undervalue with respect to a grant of security is not enough on its own to invalidate the transaction. The intention to defraud is a pre-requisite of a claim under this provision.

There are saving provisions to protect a purported secured creditor that was granted the security in good faith and was unaware of the position that the transferor was in before the transaction. These provisions are intended to put the innocent creditor back in the same position that it was in before the transaction giving rise to the grant of security took place.

Any proceeding to avoid a transaction at an undervalue must be commenced within six years from the date of the relevant grant of security.

Given that the security was given to a related party, it will strengthen the Liquidators case that the statutory tests for proving a transaction at an undervalue can be met. **(1.5 marks)**

In terms of actions / investigations, the Liquidators may:

- Establish the solvency position of the Master Fund at the time the security charge was granted in favour of Gamboa;
- Consider whether any protective liens or caveats can be placed on the property to prevent its sale by Gamboa;
- Investigate the financial position of the UBOs of Gamboa / Master Fund directors;
- Explore funding options in respect of any of the above claims;
- Obtain legal advice as to the merits of the potential claims;
- Check the US Feeder and Cayman Feeder bank statements, to ascertain if the monies purportedly advanced from Gamboa were advanced to those entities instead; and
- Consider whether there is any injunctive relief available to prevent Gamboa from proceeding with the receivership appointment **(1.5 marks)**

Question 2.6

As soon as the company's affairs are fully wound up, the liquidator is required to make a report and an account of the winding up. Summarise the form and content of the report. **(5)**

[Type your answer here]

Answer:

- The form and content of the voluntary liquidator's report is set out at Order 13, Rule 8 of the Companies Winding Up Rules. **(1 mark)**
- The voluntary liquidator's report must constitute a narrative description and analysis of the steps taken and, in the case of an interim report, the further steps intended to be taken in the liquidation. **(1 mark)**
- The voluntary liquidator's report and accounts are required to be provided to the company's members with all the information necessary to enable the members to make informed decisions about the company's financial condition. **(1 mark)**
- The voluntary liquidator's accounts are required to be presented in the company's functional currency and are required to include details of the following: **(0.5 marks per point, maximum 2 marks)**

- the nature of the company's assets;
- any security over the company's assets;
- the amount realised upon sale of the company's assets and the estimated realisable value of any unsold assets;
- the nature of the company's liabilities, including contingent liabilities, the amounts paid in satisfaction of the liabilities and the amount remaining unpaid;
- the nature and amount of the company's income;
- the expenses of the liquidation;
- the amount of the liquidator's remuneration; and
- the amount distributed and the amount available for distribution to members.

Question 2.7

Set out the form and content of an application for a supervision order. (8)

[Type your answer here]

Answer:

- An application for a supervision order under section 124 of the Companies Act must be made by petition. **(1 mark)**
- The application is required to contain the following: **(0.5 marks per point, maximum 2 marks)**
 - o particulars of the company's incorporation;
 - o particulars of the method by which the company was put into voluntary liquidation;
 - o particulars of the persons who are or were directors of the company on the date on which its voluntary liquidation commenced;
 - o a statement that the voluntary liquidator did not receive, within 28 days of the commencement of the liquidation, a declaration of solvency in the prescribed form signed by all the company's directors; and
 - o if the voluntary liquidator is a qualified insolvency practitioner, a statement that they consent to being appointed as official liquidator; or
 - o if the voluntary liquidator is not a qualified insolvency practitioner or is unable to comply with the independence requirements of the Insolvency Practitioners' Regulations, 2018 (as amended), or is unwilling to be appointed as official liquidator, the name and address of a qualified insolvency practitioner nominated for appointment as official liquidator.
- A petition is required to be verified by an affidavit that the statements in the petition are true or are true to the best of the deponent's knowledge, information and belief and must be sworn by the voluntary liquidator personally. **(1 mark)**
- If the voluntary liquidator is a qualified insolvency practitioner who has sworn as affidavit verifying that they are willing and properly able to accept appointment as official liquidator, a Judge may make a supervision order without the need for any hearing **(1 mark)** if the Judge is satisfied that: **(0.5 marks per point, maximum 1 mark)**

- o notice of the petition has been given to the company's creditors and, if it appears to the voluntary liquidator that the company may in fact be solvent, to its shareholders; and
 - o there is no reason to believe that any creditor or, if applicable, any shareholder objects to the appointment of the voluntary liquidator as official liquidator.
- In any other case, the voluntary liquidator must apply to fix a date for hearing the petition in open court **(1 mark)** and: **(0.5 marks per point, maximum 1 mark)**
- o give notice of the hearing of the petition to the company's creditors and, if applicable, to its shareholders in whatever manner is likely to bring it to their attention; and
 - o advertise the hearing of the petition once in a newspaper having a circulation within the Cayman Islands and, if the company is carrying on business outside the Cayman Islands, once in a newspaper having a circulation in a country in which the company appears most likely to have creditors, in which case the advertisement must be published in the official language of such country.

Question 2.8

Following the commencement of the voluntary liquidation, the Cayman Feeder submits a redemption request to the Master Fund for the entirety of its investment in the Cayman Feeder. Assuming that the redemption was made in accordance with the Master Fund's governing documents, how will the Cayman Feeder's redemption request be treated in terms of the priority? It should be assumed that the voluntary liquidators applied to the court for the liquidation to continue under the supervision of the court pursuant to section 124(1) of the Companies Act. **(5)**

[Type your answer here]

Answer:

The redemption request was made after the commencement of the voluntary liquidation. **(1 mark)** Accordingly, the Feeder Fund will be entitled to participate in the liquidation as a shareholder of the Master Fund. **(1 mark)**

As set out in the Privy Council decision in *Pearson (Appellant) v Primeo Fund (Respondent)*, **(1 mark)** the debts and liabilities of a company fall, as a matter of general principle, to be ascertained as at the date of its winding up - "the tree must lie as it falls" **(1 mark)**: see eg *In re Dynamics Corp of America* [1976] 1 WLR 757, 762G-H, per Oliver J, quoting *In re Humber Ironworks and Shipbuilding Co* (1869) LR 4 Ch App 643, 646, per Selwyn LJ.) **(1 mark)**

Question 2.9

Following the introduction of the restructuring regime by the Companies (Amendment) Act 2022, on what basis (if any) can a company still seek the appointment of provisional liquidators? **(2)**

[Type your answer here]

Answer:

Where the Court considers it necessary (1 mark). The scope an application of this provision has not yet been judicially considered (1 mark).

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

QUESTION 3 FOLLOWS ON THE NEXT PAGE / ...

QUESTION 3 - CORPORATE RESCUE

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

Maritime Sea Ventures Ltd (the Company), incorporated in the Cayman Islands, is the parent entity of a group which is engaged in international maritime transportation. Through its subsidiaries, it owns and operates a fleet of cargo ships in Singapore. With government support during the COVID-19 pandemic, it was able to remain financially stable, however a general decline in global shipping demand, soaring inflation and higher operating costs has caused the Company to default on several of its secured and unsecured loans.

The Company is on the verge of insolvency and its directors are considering the corporate rescue options available to it. One of the Company's creditors, BlueWave Financial, has threatened to issue a statutory demand, adding to the mounting pressure the directors are experiencing, including the potential liability they may face if they continue to conduct business whilst the Company is unable to meet its liabilities.

The Company's management has initiated discussions with potential investors interested in injecting new capital into the Company, however the negotiations are ongoing and have not yet reached any conclusion. BlueWave Financial, a steadfast unsecured creditor, has indicated it will not be satisfied unless it receives full repayment of its debt, together with contractual interest.

Question 3.1

Considering the fact that Maritime Sea Ventures (MSV) is on the verge on insolvency, broadly evaluate the restructuring options that are presently available to the company. **(3)**

[Type your answer here]

Answer:

MSV is in financial distress and on the verge of insolvency. In circumstances where stakeholders of the company may be willing to make a further investment the directors have a number of options available to them: (i) consensual restructuring; (ii) appointment of provisional liquidators; or (iii) appointment of restructuring officers.

Question 3.2

When does the statutory moratorium accompanying a restructuring petition come into effect and what is its effect? **(3)**

[Type your answer here]

Answer:

The statutory moratorium comes into effect at the time of filing the restructuring petition under section 91G of the Companies Act (**1 mark**) and prevents the commencement or continuation of proceedings against the company without leave of the court (**1 mark**). The moratorium also purports to have extra-territorial effect (**1 mark**).

Question 3.3

Once appointed, when must the restructuring officers (ROs) file their first report to the Court, and what should this report contain? **(4)**

[Type your answer here]

Answer:

28 days (**1 mark**).

The report should contain the following information:

- steps taken in the restructuring and the further steps intended to be taken in the restructuring generally; (**1 mark**)
- the financial position of the company at the latest practicable date; (**1 mark**)
- the work done by or on behalf of the restructuring officer and the amount of remuneration claimed by that restructuring officer; (**1 mark**)

Can also get a bonus mark each if they answer either of the following (in the CWR, but not replicated in the course manual), but only up to the maximum of three for the question as a whole.

- such other information which is required in order to provide the contributories and creditors (and, where the company is carrying on a regulated business, the Authority) with a proper understanding of the company's affairs, financial position and proposed restructuring; and (**1 mark**)
- such other matters as the Court may direct. (**1 mark**)

Question 3.4

What is the “appropriate comparator” for creditor schemes (the fundamental test for the scheme being viable), and how is it applied? **(4)**

[Type your answer here]

Answer:

The appropriate comparator is the projected outcome of the scheme compared to a liquidation (**1 mark**). The relevant question is whether the outcome for creditors under the

proposed scheme is significantly more favourable to creditors than would be the case in an official liquidation **(1 mark)**.

A liquidation analysis must be undertaken (usually by external financial advisers) to assess this question. **(1 mark)**

In all cases where creditor schemes are approved by creditors and sanctioned by the court, the outcome for creditors under the scheme is judged to be better than would be achieved if the company simply went into liquidation. **(1 mark)**

Question 3.5

What information must be provided to shareholders / creditors in advance of the vote on a scheme? What is the minimum period between the dispatch of scheme documents and the extraordinary general meeting (EGM) and why? **(max 6)**

[Type your answer here]

Answer:

Logistics: date, time, place and electronic voting arrangements for the meeting **(1 mark)**

Forms: a proxy form to allow a stakeholder to appoint another party as their representative for the meeting **(1 mark)**

Context: a summary of the current position of the company and why the scheme is required **(1 mark)**

Arrangement: identification of the scheme shareholders / creditors (those affected and entitled the vote) **(1 mark)**, full details of the terms of the proposed scheme and what compromises it entails **(1 mark)**, details of special committees and external advisers and their recommendations in relation to the scheme **(1 mark)**

Period: the minimum period between dispatch of scheme documents and the EGM, in most cases, is 21 days **(1 mark)**. Why?: 21 days is considered the minimum amount of time that shareholders/creditors need to receive, read, understand and take advice on the proposed scheme **(1 mark)**

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

QUESTION 4 FOLLOWS ON THE NEXT PAGE / ...

QUESTION 4 - GENERAL QUESTIONS

The questions below deal with secured parties and receivership, exempted limited partnerships (ELP's) and consumer insolvency

Question 4.1

The receivership regime for segregated portfolios lacks key protections for stakeholders that would otherwise exist in a company liquidation. Indicate whether you agree or disagree with this statement, and explain why. (5)

[Type your answer here]

Answer:

Answers should note the key differences between SP receiverships and a company winding up, including the more limited grounds for making a receivership order (no just and equitable jurisdiction) (1 mark), the flexible balance sheet test for solvency (1 mark), lack of a comprehensive statutory remuneration regime for receivers (1 mark), the express right for receivers to apply for directions from the court (1 mark), and that a receivership order terminates automatically if a winding up order is made in respect of the SPC (1 mark). The quality of the candidate's reasoning should be assessed and considered appropriately in awarding marks.

Question 4.2

What laws govern the liquidation and dissolution of exempted limited partnerships (ELPs) and what prevails in the event of a conflict? (3)

[Type your answer here]

Answer:

Part V of the Companies Act and the Companies Winding Up Rules (CWR) apply, with modifications, to the court-ordered winding up and dissolution of ELPs (1), and to a limited extent to a voluntary winding up (1). Where there are inconsistencies, the ELP Act will take priority over the Companies Act (1).

Question 4.3

In the event that an automatic wind up date is triggered by the death or removal of the general partner (GP), the exempted limited partnership (ELP) will be wound up 90 days after notice is given to limited partners. What, if anything, can limited partners do to prevent the winding up? (3)

[Type your answer here]

Answer:

The business of the ELP may be resumed and continued if, before the automatic winding up date **(1)**, the requisite majority of the partners elect a new eligible general partner **(1)**. The necessary majority is such majority specified in the partnership agreement as being entitled to vote to elect a new general partner, or if no such majority is specified in the partnership agreement, a simple majority of the partners (determined by reference to capital contributions) **(1)**.

Question 4.4

When may a consumer debtor be discharged, and what is the effect of a discharge? **(4)**

[Type your answer here]

Answer:

The answer is found at 7.24 of the study guide / course notes.

A debtor may, at any time after the filing of the Trustee's report, apply for an order of discharge (per section 68(1) of the Act) **(1 mark)**. The Trustee or any creditor may oppose the discharge and may show cause why it should be refused, postponed, or made subject to conditions (section 68(2)) **(1 mark)**. The Court may grant the discharge unconditionally or conditionally or it may suspend or refuse the discharge (section 68 and 70) **(1 mark)**. The key point is that the discharge, if made, releases the debtor from their debts, subject to any conditions set out by the Court and subject to the caveat that it must not release a bankrupt from any liability incurred by means of fraud (section 71). **(1 mark)**

TOTAL MARKS: [100]