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FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 5G - Guidance Text

The Bahamas

2022 / 2023



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Published: September 2022

1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN THE BAHAMAS

Welcome to **Module 4D**, dealing with international insolvency law in **The Bahamas**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of insolvency law in The Bahamas;
- a relatively detailed overview of the Bahamian insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of The Bahamas.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2023**. Please consult the Foundation Certificate in International Insolvency Law web pages for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2023 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in the Bahamas:

- the background and historical development of insolvency law in The Bahamas;
- the various pieces of primary and secondary legislation governing Bahamian insolvency law;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in The Bahamas;
- the rules relating to the recognition of foreign judgments in The Bahamas.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of Bahamian insolvency law; and
- be able to answer questions based on a set of facts relating to Bahamian insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO THE BAHAMAS

The Commonwealth of The Bahamas (The Bahamas) is an archipelago in the Atlantic Ocean consisting of more than 700 islands and cays and has a population of approximately 397,000 people. Nassau is the capital and is located on the island of New Providence.

The Bahamas became a British crown colony in 1718 and remained so for over two and a half centuries until it became an independent nation on 10 July 1973. Despite its independence, The Bahamas remains a member of the Commonwealth of Nations. As a member of the Commonwealth of Nations (the Commonwealth), The Bahamas recognises Her Majesty Queen Elizabeth II as Head of State. A Governor-General is appointed by Her Majesty and is Her Majesty's representative in The Bahamas.¹

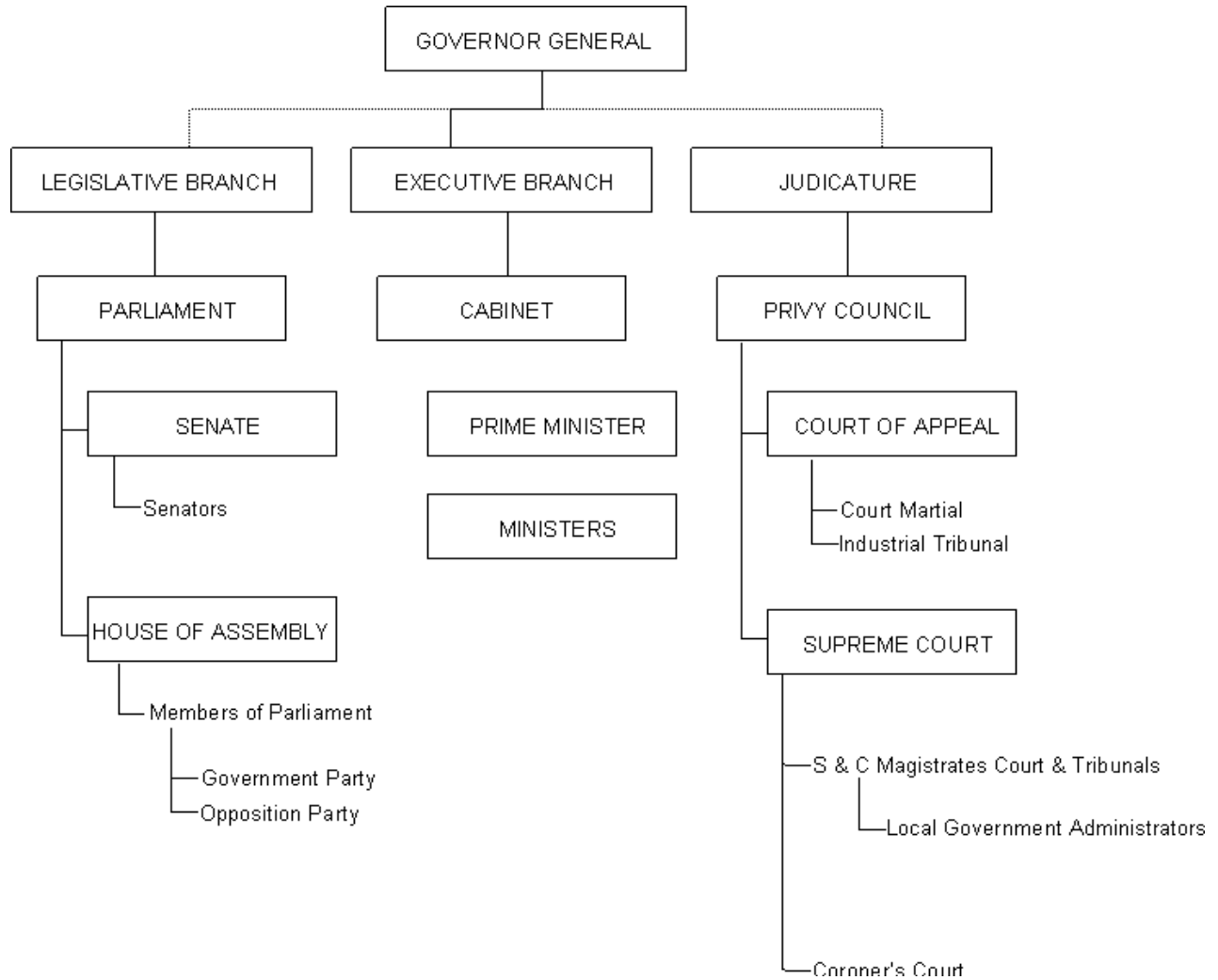
The Bahamas has a written Constitution, which is the supreme law of the land. If any other Bahamian law is inconsistent with the Constitution, the Constitution will prevail.² The Constitution of The Bahamas is based on the Westminster Model. There are three branches of Government, namely the Executive Branch, the Legislative Branch, and the Judicial Branch.

The structure of the Government of The Bahamas is set out in the below diagram.³

¹ Constitution of The Bahamas, Art 32.

² *Idem*, Art 2.

³ The source can be found [here](#).



The Executive Branch establishes policies, drafts bills and enforces and administers the law. The Cabinet constitutes the Executive Branch and provides general direction and has control of the Government of The Bahamas.⁴ The Cabinet must comprise at least nine ministers inclusive of the Prime Minister and Attorney General.⁵

Parliament is the Legislative Branch of the Government and comprises the House of Assembly and the Senate.⁶ Subject to the Constitution's provisions, Parliament may make laws for the peace, order and good government of The Bahamas.⁷ Additionally, Parliament is also responsible for making laws, examining, debating and voting on bills.

The Bahamas is a democratic nation resulting in democratically-elected parliamentarians who form the House of Assembly. General elections for the election of parliamentarians are held every five years. The House of Assembly is required to consist of a minimum of thirty-eight

⁴ Constitution of The Bahamas, Art 72(1).

⁵ *Idem*, Art 72(2).

⁶ *Idem*, Art 38.

⁷ *Idem*, Art 52.

members.⁸ In addition to the House of Assembly, Parliament also consists of Senators,⁹ nine of whom are appointed by the Governor-General acting under the advice of the Prime Minister; four of whom are appointed by the Governor-General following the advice of the Leader of the Opposition; and three of whom are appointed by the Governor-General acting per the advice of the Prime Minister after consultation with the Leader of the Opposition.

In addition to democratically-elected parliamentarians who hold office for five years, local Government exists in The Bahamas.¹⁰ Local Government is currently present on all inhabited islands, save for New Providence, and regulates activities in their district through five statutory boards and acts as first-line regulators working with national regulators concerning infrastructure development. Local government elections are held every three years.

The Judiciary applies and interprets the law. Judicial Authority is vested in the Judicature, which comprises the Privy Council, Court of Appeal,¹¹ Supreme Court (that is, the High Court),¹² Magistrates' Courts and tribunals.

Further, from a gross domestic product (GDP) per capita perspective, The Bahamas is one of the richest countries in the Americas, with an economy based on tourism and offshore finance. In 2021, The Bahamas ranked 13th in North America for nominal GDP.¹³

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

The Bahamas adopted a common law legal system from England. Like England, there are two primary sources of law in The Bahamas, namely statute and common law. If there is any inconsistency between statute and common law, statute prevails.

Any legislation passed by the Legislative Branch of the Bahamian Government is known as statute (also called Acts). As previously stated, the Bahamian Legislative Branch of Government consists of a Senate and a House of Assembly (that is, Parliament).

The common law is case law, namely the law as set out in past judgments of courts and tribunals. Past judgments of Bahamian higher courts are binding on Bahamian lower courts. Also, past judgments of higher courts in England and Wales are frequently relied upon in the Bahamian courts and referred to in Bahamian judgments.

Maintaining the separation of powers and the independence of the Judiciary is fundamental to the constitutional arrangements of The Bahamas. Further, the Judiciary has an essential role in

⁸ *Idem*, Art 46(1).

⁹ *Idem*, Art 39(1).

¹⁰ Local Government is not empowered under the Constitution of the Bahamas, but by the Local Government Act 1996, Ch 37 Statute Laws of The Bahamas (as amended).

¹¹ Constitution of The Bahamas, Art 98.

¹² *Idem*, Art 93.

¹³ <https://worldpopulationreview.com/countries/countries-by-gdp>.

securing the protection of the law and due process to all persons in The Bahamas. On that basis, the Judiciary is perceived to be independent and unbiased.

4.2 Brief overview of Bahamian insolvency laws

There is a separation between personal bankruptcy for individuals and the corporate insolvency regime for companies in The Bahamas.

Individual bankruptcy is governed by the Bankruptcy Act, Ch 69, Statute Laws of The Bahamas (Bankruptcy Act), and the Bankruptcy Rules 1958 (Bankruptcy Rules). Per the Bankruptcy Rules, the provisions of the First and Second Schedules to the Bankruptcy Act 1914 of Great Britain apply in any bankruptcy proceedings subject to any formal alterations or modifications required to make the Schedules adequately applicable to the circumstances of The Bahamas. The Bankruptcy Act is based substantially on the Bankruptcy Act 1869 of Great Britain.

The Bankruptcy Act was passed in 1870, with minor amendments over the years. The most recent amendment occurred in 2012¹⁴ and concerned the inclusion of provisions addressing the protection of transactions within designated systems,¹⁵ and the non-recognition of insolvency orders of a foreign court.¹⁶ The Bahamian personal bankruptcy laws are outdated and require modernisation.

Since 1992, Bahamian corporate insolvency has been governed by the Companies Act 1992 (Companies Act) and the International Business Companies Act 2000 (IBC Act). While these acts in their original unamended form were applicable for a period, there was a need to modernise the law. The Companies Act was originally modelled after the United Kingdom's Companies Act of 1948 and it repealed the Companies Act of 1866 and the Foreign Companies Act of 1891.

In December 2011 the Companies (Winding Up Amendment) Act 2011 was enacted. It replaced the provisions contained in Part VII (entitled "Winding up of Companies") of the Companies Act and introduced a new Part VIIA (entitled "International Cooperation"). This new law came into force on 30 April 2012.

Three pieces of subsidiary legislation¹⁷ were promulgated in 2012, specifically the Companies Liquidation Rules 2012; the Insolvency Practitioners Regulations 2012; and the Foreign Bankruptcy Proceedings (International Co-operation) Rules 2012.

The modernisation of Bahamian corporate insolvency laws, to some extent, features provisions from various jurisdictions, including the Cayman Islands' Companies (Amendment) Law 2007 and the companies' insolvency regimes from Bermuda, The British Virgin Islands and Australia.

With the modernisation of the Bahamian corporate insolvency regime, several improvements were introduced, including:

¹⁴ The Bankruptcy Act was amended with the insertions of ss 75A and 75B.

¹⁵ Bankruptcy Act, s 75A.

¹⁶ *Idem*, s 75B.

¹⁷ Subsidiary legislation refers to rules and regulations.

- expanding the definition of insolvency to include a balance sheet test;
- expanding the Supreme Court’s jurisdiction over the winding-up of a foreign company that has property located within The Bahamas, or is carrying on business in The Bahamas;
- giving local regulators¹⁸ standing to petition for the winding-up of a regulated entity whose licence has been suspended or revoked;
- introducing the concept of shadow directors;¹⁹
- expanding priorities of claim to include employees’ entitlements;
- allowing recovery of liquidators’ costs allocable to trust assets against the trust assets;
- allowing a liquidator to disclaim onerous property;²⁰
- expanding claw-back provisions from three months to six months;
- incorporating law on the avoidance of undervalued dispositions;
- introducing insolvent trading;
- introducing fraudulent trading liability;
- permitting the automatic netting-off of mutual dealings;
- introducing international co-operation;
- providing regulations for insolvency practitioners; and
- adding flexibility to regime rule-making for ongoing revisions.

4.3 Institutional framework

4.3.1 Court system

As previously stated, the Judiciary is one of three branches of Government and consists of the Privy Council, Court of Appeal, Supreme Court, Magistrates Court and tribunals.

¹⁸ Central Bank of The Bahamas or The Securities Commission of The Bahamas.

¹⁹ Any person who exercises influence over the board without being formally appointed as a director, in order to avoid the legal duties, is now recognised as a “shadow director”.

²⁰ Being an unprofitable contract or assets of the company which are unsaleable or not readily saleable, or which may give rise to a liability to pay money or perform an onerous act.

The highest court in The Bahamas is the Judicial Committee of the Privy Council in London, England. This is the ultimate Court of Appeal for the Bahamian Judiciary in matters where an appeal is permitted.

In addition to the Judicial Committee of the Privy Council, the Bahamian Judiciary also comprises of The Bahamas' Court of Appeal, Supreme Court, Industrial Tribunal, the Stipendiary and Circuit Magistrates Courts, and Coroner's Court. Usually, a right of appeal from a lower court lies to the court immediately above it in the court structure.

The Court of Appeal is the highest court in the country. The justices of the Court of Appeal are the President; the Chief Justice (by his office as head of the Judiciary, is an *ex officio* member of the Court of Appeal and only sits on the invitation of the Court of Appeal's President); and such other Justices of Appeal as may be prescribed by Parliament.²¹ To qualify as a Justice of Appeal, one must either hold or have previously held a judicial office.²² The Court of Appeal has jurisdiction to hear and determine appeals from judgments, orders and sentences made by the Supreme Court.²³ The Court of Appeal also has jurisdiction to hear and determine appeals from matters in a magisterial court in respect of indictable offences triable summarily if:²⁴

- the magisterial court had no jurisdiction or exceeded its jurisdiction in the matter;
- the decision was unreasonable, could not be supported by the evidence or was erroneous in point of law;
- the decision of the magistrate, or the sentence passed, was based on a wrong principle;
- some material illegality occurred affecting the merits of the case; or
- the sentence was too severe or too lenient.

The Supreme Court is the second-highest court in the country and consists of a Chief Justice and such justices as may be prescribed by Parliament.²⁵ The Governor-General appoints the Chief Justice on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.²⁶ The Governor-General appoints justices of the Supreme Court on the advice of the Judicial and Legal Service Commission.²⁷ The Supreme Court has unlimited original jurisdiction in civil and criminal cases and matters, and has an appellate jurisdiction conferred on it by the Supreme Court Act 1996 or any other law, including appeals from the Magistrates' Court.

²¹ Constitution of The Bahamas, Art 98.

²² *Idem*, Art 99.

²³ Court of Appeal Act, Ch 52, s 10.

²⁴ *Idem*, s 14.

²⁵ Constitution of The Bahamas, Art 93(2).

²⁶ *Idem*, Art 94(1).

²⁷ *Idem*, Art 94(2).

A Justice of the Supreme Court:

- must be a counsel and attorney and must have been a member of the Bahamas Bar for a period of at least ten years; or a member of the bar of a Commonwealth country and have practised for at least ten years;²⁸ and
- may hold office until the age of sixty-five years, which may be extended to no later than sixty-seven years with the permission of the Governor-General²⁹ on the recommendation of The Prime Minister after consultation with the Leader of the Opposition.

The Industrial Tribunal³⁰ comprises of three members appointed by the Governor-General acting on the advice of the Judicial and Legal Service Commission. The Industrial Tribunal's jurisdiction includes the power to hear and determine trade disputes, register industrial agreements, hear and determine matters relating to the registration of such agreements, make orders or awards, and award compensation on complaints brought and proved before it.

The Magistrates' Court is the court of the first instance. Stipendiary and Circuit Magistrates must have been English, Irish, Scottish or Bahamian Bar members and have practised for at least five years. The Governor-General acting on the advice of the Judicial Legal Service Commission, appoints the Chief Magistrate and two Deputy Chief Magistrates.³¹ Stipendiary and Circuit Magistrates are *ex officio* Magistrates of The Bahamas.

Magistrates' Courts have jurisdiction to try all summary offences, investigate all charges of indictable offences and hear and determine any civil cause where the amount to be recovered or the property value in the dispute does not exceed BSD 5,000 (unless a statute provides jurisdiction concerning a higher amount). Further, various juvenile and domestic matters are also heard in the Magistrates' Court.

4.3.2 **Enforcement system for creditor rights**

Generally, and in its insolvency regime, The Bahamas is considered a creditor-friendly jurisdiction.

4.3.2.1 *Unsecured creditors*

An unsecured creditor generally has no special rights over the property and assets of a debtor until he or she obtains and enforces a judgment. Claims up to BSD 5,000 should be commenced in the Magistrates' Court, and claims over BSD 5,000 are to be initiated in the Supreme Court.

In an insolvency context, if an individual cannot pay a debt of not less than BSD 200, a creditor may petition to the court seeking the adjudication of the debtor as bankrupt.³²

²⁸ Supreme Court Act, Ch 53, s 4.

²⁹ Constitution of The Bahamas, Art 96(1).

³⁰ <https://industrialtribunal.org/home/about>.

³¹ Magistrates Act, Ch 54, s 13.

³² Bankruptcy Act, s 4.

As it concerns a corporate entity, under the Companies Act, the creditor may in the first instance serve a statutory demand³³ in the prescribed form on the debtor requiring the corporate entity to satisfy the debt. If the company fails to satisfy the debt (unless it applies for the statutory demand to be set aside on valid grounds),³⁴ the creditor may petition the Supreme Court for the company's winding-up on the ground that it is insolvent. However, it is essential to note that a creditor is not precluded from filing a petition for the winding-up of a company if it did not, in the first instance, serve the company with a statutory demand.

An automatic stay of actions brought against a debtor arises upon:

- the appointment of a provisional liquidator;
- the commencement of liquidation in a compulsory liquidation;
- the court supervision of a voluntary liquidation; or
- by application to the Supreme Court in a voluntary liquidation.

Additionally, any stay would arise in the circumstances of a contractually agreed standstill. The contractual rights of an unsecured creditor remain available to be applied against a debtor in a restructuring, except to the extent of any restraint as may be agreed. Accordingly, an unsecured creditor may disrupt an informal restructuring or voluntary liquidation in which a stay of application to the court has not been obtained and may force the compulsory liquidation of the debtor.

A Mareva injunction is available to an unsecured creditor in the circumstances where he or she believes that the assets will be dissipated. A Mareva injunction does not convert the unsecured creditor into a secured creditor, nor does it establish a priority in the event of insolvency.

Subject to preferential creditors' rights, unsecured creditors participate in the distribution of the company's assets of the company *pari passu*.

Moreover, in an insolvency context, the Supreme Court should take cognisance of the wishes of the creditors regarding all matters concerning the winding-up of a company.

4.3.2.2 Secured creditors

In an insolvency context, despite the fact that a winding-up order has been made, a secured creditor is permitted to enforce and realise its security without leave of the Supreme Court or with reference to the liquidator.³⁵ A restructuring or liquidation does not impede secured creditors' contractual rights to enforce their security.

³³ Companies Act, s 188 and Companies Liquidation Rules, O 2.

³⁴ Companies Act, s 189.

³⁵ *Idem*, s 238.

If the debtor still owes a secured creditor after the debtor realises the security, the secured creditor may prove a claim in the liquidation for the unsecured balance.

Apart from a foreign secured creditor requiring approval from The Bahamas Investment Authority to acquire an interest in real property, there is no particular procedure or regime for foreign creditors.

4.3.2.3 Creditors' rights in insolvency

Under Bahamian personal bankruptcy and corporate insolvency, the primary focus is the protection of the creditors.

In corporate insolvency proceedings, all creditors' claims are ranked *pari passu* (that is, equally), subject to considering and giving effect to the rights of preferred and secured creditors, which take priority. The legal rights of secured creditors holding mortgages or charges over a company are unaffected by creditors' ranking since secured creditors are entitled to enforce their security without the leave of the court.

Self-Assessment Exercise 1

Question 1

What is the governing legislation in The Bahamas for personal bankruptcy and corporate insolvency respectively?

Question 2

In the context of insolvency, is The Bahamas a debtor-friendly or creditor-friendly jurisdiction? Explain.

[For commentary and feedback on self-assessment exercise 1, please see APPENDIX A](#)

5. SECURITY

A secured creditor may obtain security interests over land (that is, immovable) or personal property (that is, movable) and such interest should be registered in the Registry of Records, if applicable. The Registry of Records is accessible at the Registrar General's Department³⁶ or online.

³⁶ Located in the nation's capital, Nassau and in Freeport, Grand Bahama.

In The Bahamas, the primary forms of security over moveable and immoveable property are:

- mortgages;
- debentures;
- pledges;
- charges;
- liens; and
- promissory notes.

Failure to register a security interest³⁷ could result in other security taking priority over the unregistered interest and may result in loss of a security interest, as security interests registered take first priority over later-registered security interests.

5.1 Security over land

Under the Companies Act,³⁸ “security interest” means any actual or contingent interest in or charge upon any property of a company, by way of mortgage, bond, lien, pledge, or other means, that is created or taken to secure the payment of an obligation of the company.

A legal mortgage is the main form of security obtained over land. It involves the transfer of the whole of the mortgagor’s legal interest in the real property to the mortgagee, subject to the mortgagor’s right to equity of redemption (the right to redeem legal title of the real property after satisfying the debt).

An equitable mortgage may be obtained over land. The distinction between a legal mortgage and an equitable mortgage is that the latter does not concern any transfer of title, but is created by an agreement that gives the charge a right to realise the charged assets and apply the proceeds in discharging its obligations to the charger.

A charge does not involve any transfer of title and is created by an agreement that gives the chargee a right to realise the charged asset and apply the proceeds in discharging the obligations of the chargor. Charges are either fixed or floating. A fixed charge attaches immediately over specific property.

In contrast, a floating charge does not relate to any particular property. Still, it exists over a fluctuating body of assets whereby the chargor is free to deal with and dispose of the charged assets unless and until the charge crystallises and is converted into a fixed charge.

³⁷ Registration requirements are found in the Conveyancing and Law of Property Act, the Companies Act and / or the Registration of Records Act.

³⁸ Companies Act, s 111(3).

5.2 Security over personal property

Mortgages and charges are also frequently taken over movable property, including vessels, aircraft, vehicles and shares.

An assignment is more commonly used for creating security interests in intangible property. Legal assignments of choses in action are also common in the context of receivables and insurance policy proceeds.

A debenture is a long-term security issued by a company and secured against its assets. Debentures (incorporating both fixed and floating charges) are commonly used over both specific assets and assets that may be changed from time to time, including furniture, office equipment and raw materials.

A pledge involves the transfer of possession of an asset in circumstances where title to the asset remains with the pledger. The right to property or goods pledged vests in the creditor to the extent necessary to secure the obligation. Share pledges are commonly used under Bahamian law.

A lien is a legal right that usually arises where a creditor is legally entitled to possess an asset, and monies are due to the creditor for services carried out. The creditor is entitled to keep possession of the asset until the monies are paid. A lien arises by operation of law based on the right to lawful possession.

A promissory note is a written order by one party to another to pay a sum accepted or endorsed on behalf of a company by a person acting under the company's authority, or if expressed to be made, accepted or endorsed on behalf or account of the company by a person acting under the company's authority.

Self-Assessment Exercise 2

What types of security may be created under Bahamian law?

[For commentary and feedback on self-assessment exercise 2, please see APPENDIX A](#)

6. INSOLVENCY SYSTEM

6.1 General

As already stated, in The Bahamas, there is a bifurcation between the corporate insolvency regime for companies and the personal bankruptcy regime for individuals. The corporate insolvency regime is contained in Part VII of the Companies Act, while the personal insolvency regime is contained in the Bankruptcy Act.

6.1.1 *Relevant legislation*

In addition to being bifurcated, the Bahamian corporate insolvency and personal bankruptcy regimes are spread across multiple pieces of legislation. In the case of corporate insolvency:

- Part VII of the Companies Act (entitled “Winding up of Companies”);
- Part VIIA of the Companies Act (entitled “International Cooperation”);
- Companies Liquidation Rules;
- Insolvency Practitioners Regulations, 2012; and
- Foreign Bankruptcy Proceedings (International Co-operation) Rules, 2012.

The primary aim of the corporate liquidation regime is to process failures as opposed to facilitating rescues. The 2011 legislative reforms introduced, amongst other things, the power of a liquidator to “promote a scheme of arrangement under section 158 of the Companies Act”.

In the case of personal bankruptcy, the provisions of the regime are spread across the following legislation:

- Bankruptcy Act;
- Bankruptcy Rules; and
- The First and Second Schedules to the English Bankruptcy Act, 1914.

6.1.2 *Management of insolvency proceedings*

In The Bahamas, insolvent companies are wound up compulsorily or with the Supreme Court’s supervision. For the former, the Supreme Court, on the application of a petitioner,³⁹ appoints an official liquidator. For the latter, the liquidator is appointed by members’ resolution; however, due to the company’s insolvency, the liquidator must apply to have the company’s liquidation continued under the supervision of The Supreme Court.

Voluntary liquidations are extra-judicial (that is, the Court is not involved). However, the voluntary liquidator or any contributory may apply to the Supreme Court to determine any question arising in the voluntary winding-up of a company.⁴⁰

As it concerns personal insolvency, the provisions of the Bankruptcy Act are infrequently used. There are a handful of bankruptcy cases annually. However, when used, creditors are seeking to declare a debtor as bankrupt by the court process.

³⁹ Per s 190 of the Companies Act, an application to wind up a company must be presented by the company, any creditor, any contributory or contributories or a relevant regulator.

⁴⁰ Companies Act, s 223.

6.2 Personal bankruptcy

The Bahamian individual insolvency regime applies to individuals only and provides three different alternative insolvency processes as follows:

- (1) bankruptcy proceedings;⁴¹
- (2) liquidation by arrangement;⁴² and
- (3) composition with creditors.⁴³

6.2.1 Application of regime

As previously stated, the provisions relating to individual insolvency in The Bahamas are contained in the Bankruptcy Act, the Bankruptcy Rules,⁴⁴ and the preceding may be supplemented by acts of the United Kingdom's Parliament applying in or affecting The Bahamas otherwise than under an enactment of the Legislature of The Bahamas.⁴⁵ Additionally, the common law of The Bahamas applies.

6.2.1.1 Bankruptcy proceedings

Bankruptcy proceedings may be voluntary or involuntary.

Acts of bankruptcy necessary to ground adjudication in bankruptcy⁴⁶ are that, within six months before the presentation of the petition and in respect of unsecured debt:

- the debtor has, in The Bahamas or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally;
- the debtor has, in The Bahamas or elsewhere, made a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof;
- the debtor has, with intent to defeat or delay his creditors, departed The Bahamas or being out of The Bahamas, remains out of The Bahamas, or being a trader absented himself;
- the debtor has filed, in the prescribed manner in the court, a declaration admitting his inability to pay his debts;
- execution issued against the debtor on any legal process to obtain payment of not less than BSD 200 has, in the case of a trader, been levied by seizure and sale of his goods; or

⁴¹ Bankruptcy Act, Pts 1 - 5.

⁴² *Idem*, s 96, Pt VI.

⁴³ *Idem*, s 97, Pt VII.

⁴⁴ Chapter 69 of the 2009 Revised Statute Laws of The Bahamas, applying the First and Second Schedules to the English Bankruptcy Act, 1914.

⁴⁵ Declaratory Act, Chapter 4, 2009 Revised Statute Laws of The Bahamas, Table of Statutes, Supplementary Volume.

⁴⁶ Bankruptcy Act, s 4.

- the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons, requiring the debtor to pay a sum due of not less than BSD 200, and the debtor has for more than three weeks neglected to pay such sum or to secure or compound for the same.

A single creditor or multiple creditors may bring a petition for adjudication in bankruptcy if the debt due to a single creditor, or the aggregate amount of debts due to several creditors, from a debtor is BSD 200 or more.⁴⁷ A debtor may also petition for an order against himself.⁴⁸

The Bankruptcy Act does not define the word "debtor". It should be noted that, per English case law⁴⁹ on a corresponding provision of the then existing Bankruptcy Act 1869 of Great Britain (persuasive as to the common law of The Bahamas), a restrictive meaning was applied to the word "debtor" as it relates to founding jurisdiction in the court over a foreigner. The foreigner must:

- come to the jurisdiction;
- contract debts in the jurisdiction; and
- commit an act of bankruptcy in the jurisdiction.

The bankruptcy proceedings bind creditors to the effect that no unsecured creditor will have any remedy against the debtor's property except as provided under the Bankruptcy Act.⁵⁰

6.2.1.2 Stay of proceedings

After the presentation of the petition, the court may restrain further proceedings in any action, suit, execution, or another legal process against the debtor in respect of any debt provable in the bankruptcy, or allow proceedings on such terms as the court thinks just. The court may also appoint a receiver or manager of the property or business of the debtor.⁵¹

6.2.1.3 Dividing the debtor's property amongst his or her creditors

Following an order adjudicating a debtor bankrupt, the bankrupt's property will become divisible amongst its creditors in proportion to the debts proved by them in bankruptcy and a general creditors meeting will be summoned by the court to appoint a trustee and a committee of inspection.⁵²

6.2.2 Creditors' meetings

Rules govern the holding of creditors meetings, including providing for an "ordinary resolution", being a majority in value of the creditors present personally or by proxy at the meeting and voting on a resolution; and a "special resolution", being a majority in number, and three-fourths

⁴⁷ *Ibid.*

⁴⁸ *Idem*, s 94.

⁴⁹ *In re Crispin, ex parte Crispin* (1873), L.R. 8 Ch. 374.

⁵⁰ Bankruptcy Act, s 10.

⁵¹ *Idem*, s 11.

⁵² *Idem*, s 12.

in value of the creditors present personally or by proxy at the meeting and voting on a resolution.⁵³

6.2.3 *Appointment of a debtor to superintend the management of property*

It may also be noted that a debtor may be appointed to superintend the property management for the benefit of creditors or otherwise aid the administering of property.⁵⁴

With the consent of creditors reflected in a resolution passed in a general meeting, the trustee in bankruptcy may make such allowance as may be approved by the creditors to the bankrupt out of his property to support the bankrupt and his family.⁵⁵ The bankruptcy is closed when the whole of the property of a bankrupt has been realised for the benefit of creditors.⁵⁶

6.2.4 *Declaration of dividend by trustee*

The trustee can, from time to time, when the committee of inspection determines, declare a dividend amongst the creditors who have proved to his satisfaction debts provable in bankruptcy and shall distribute the same accordingly. If the trustee does not declare a dividend for six months, the trustee should summon a meeting of creditors to explain the reasons for not declaring a dividend.⁵⁷

6.2.5 *Set-off*

If there are mutual credits, mutual debts or mutual dealings between the bankrupt and any other person proving or claiming to prove a debt in the bankruptcy, an account shall be taken of what is due from the one party to the other, respecting such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party and the balance of such account, and no more shall be claimed or paid on either side; however, a person will not be entitled to claim the benefit of set-off against the property of a bankrupt in any case where he had at the time of giving credit to the bankrupt, a notice of an act of bankruptcy committed by the bankrupt and available against him for adjudication.⁵⁸

6.2.6 *Discharge of bankrupt*

A bankrupt is discharged when it is proved to the court that a dividend of at least 50 cents in the dollar has been paid out of the debtor's property, or that a special resolution of the creditors has been passed discharging the bankrupt.⁵⁹ The order releasing the trustee discharges him from all liability concerning any act done or default made by him in administering the bankrupt's affairs.⁶⁰

Once the bankruptcy is completed, the trustee must call a meeting of the creditors to consider applying to the Supreme Court for his release. At the meeting, the trustee must inform the creditors attending how he conducted the bankruptcy, and the completion of the bankruptcy

⁵³ *Idem*, s 14.

⁵⁴ *Idem*, s 24.

⁵⁵ *Idem*, s 36.

⁵⁶ *Idem*, s 45.

⁵⁷ *Idem*, s 39.

⁵⁸ *Idem*, s 37.

⁵⁹ *Idem*, s 46.

⁶⁰ *Idem*, s 51.

following the realisation and distribution of the debtor's assets. On application for the trustee's release, the Supreme Court must grant or deny such application on such terms as it deems fit.⁶¹

6.2.7 Unclaimed dividends

Unclaimed dividends and other monies arising from the bankrupt's property, remaining under the trustee's control at the close of the bankruptcy, shall be accounted for and paid over to such account as may be directed by the rules. Any party entitled may claim the same in the manner directed by the rules.⁶²

6.3 Non-bankruptcy proceedings

The following are available as alternatives to bankruptcy proceedings leading to a bankruptcy adjudication of the debtor:

- a debtor unable to pay his debts may pursue liquidation by an arrangement of his affairs;⁶³ or
- the creditors of a debtor unable to pay his debts may resolve by the requisite majority that a composition shall be accepted in satisfaction of the debts due to them by the debtor.⁶⁴

6.3.1 Availability of liquidation by arrangement and its requirements

Liquidation by arrangement requires a general meeting of creditors to be convened by a debtor and a requisite majority of the creditors determining to pursue liquidation by arrangement.⁶⁵

The debtor may summon a general meeting of his creditors. By special resolution, such a meeting may declare that the affairs of the debtor are to be liquidated by arrangement and not in bankruptcy. Further, at that meeting or a subsequent meeting convened within one week, a trustee with or without a committee of inspection is appointed.⁶⁶ The rules relating to the convening of meetings in the bankruptcy case apply similarly to liquidation by arrangement, except that an elected chairperson will chair meetings. No creditor may vote until it has proved its debt in the prescribed form.

The liquidation by arrangement is deemed to commence from the date of the appointment of the trustee.⁶⁷

6.3.2 Process of composition with creditors and its requirements

The process of composition with creditors requires an extraordinary resolution to be passed at a general meeting of the debtor's creditors resolving to accept a composition in satisfaction of the debts due to them by the debtor. This is to be followed by a subsequent general meeting at which the resolution is confirmed.⁶⁸

⁶¹ *Idem*, s 49.

⁶² *Idem*, s 50.

⁶³ *Idem*, s 96.

⁶⁴ *Idem*, s 97.

⁶⁵ *Idem*, s 96.

⁶⁶ *Idem*, s 96(1).

⁶⁷ *Idem*, s 96(4).

⁶⁸ *Idem*, s 97, 1st para.

To qualify as an extraordinary resolution -

- it must have been passed at the first meeting of creditors representing both a majority in number and three-fourths in value of the creditors of the debtor;⁶⁹
- notice of the meeting at which it was passed must have been given not less than six clear days prior to the meeting with the time and place published in the local paper;⁷⁰
- notice of the convening of a subsequent general meeting must be have given not less than seven days and not more than 14 days from the date of the meeting at which the initial resolution was passed;⁷¹ and
- at the subsequent general meeting, a majority in number and value of the creditors present must have confirmed the initial resolution.⁷²

6.3.3 Procedure at meetings of creditors

The following important aspects should be noted with reference to meetings of creditors:

- a statement of the debtor's affairs, including the cause of his failure, must be included with a notice of the meeting and sent to each creditor mentioned in the statement;⁷³
- the meeting will be held at such place as is most convenient for the majority of creditors;⁷⁴
- the debtor is to be present at every meeting at which an extraordinary resolution is passed and confirmed (unless prevented by sickness or other reasonable excuses) and must answer any inquiries made of him;⁷⁵
- the debtor must produce to the meetings a statement showing the whole of his assets and debts and the names and addresses of the creditors to whom such debts respectively are due;⁷⁶ and
- the chairman at meetings will be such person as the meeting by resolution appoint.⁷⁷

⁶⁹ *Idem*, s 97, 2nd para.

⁷⁰ Bankruptcy Rules, First Schedule, r 1.

⁷¹ Bankruptcy Act, s 97, 2nd para.

⁷² *Ibid.*

⁷³ Bankruptcy Rules, First Sch, r 3.

⁷⁴ *Idem*, r 4.

⁷⁵ Bankruptcy Act, s 97, 4th para.

⁷⁶ *Ibid.*

⁷⁷ Bankruptcy Rules, First Sch, r 7.

6.3.4 *Dividing the debtor's property amongst the creditors*

After creditors have been served with notice of the meeting, they must submit proof of their debts before the commencement of the meeting in order to vote at that meeting.⁷⁸ The debt must be one that would be provable in bankruptcy.⁷⁹ A creditor may not vote regarding an unliquidated or contingent debt or in respect of a debt for an unascertained value.⁸⁰

Secured creditors may vote in respect of the balance due to them after deducting the value of their security if they submit proof of their claims together with statements of the value at which they assess it. If they vote in respect of the whole debt, they are deemed to have surrendered their security.⁸¹

Where a debt arises on a bill of exchange or promissory note, and if the debtor is unaware of who holds the note, the debtor should state its amount and other particulars to his knowledge, and this will be deemed a sufficient description in respect of the note.⁸² Any error or mistake concerning it may be corrected at a further meeting after due notice.

The chairman of a meeting will have the power to admit or reject proof for voting.⁸³ With the consent of the meeting, the chairman may adjourn the meeting from time to time and from place to place.⁸⁴

A creditor may vote either in person or by proxy.⁸⁵

Creditors may add to or vary the terms of any composition previously accepted by them by passing an extraordinary resolution in the same manner as before.⁸⁶

The composition will bind all creditors whose names and addresses are shown in the debtor's statement of assets and debts produced at the meetings at which the resolution was passed. However, it does not affect or prejudice the rights of any other creditors.⁸⁷

6.3.5 *Effect of composition proceedings and powers of the Supreme Court*

Once the creditors have passed an extraordinary resolution agreeing to accept a composition, certain formalities follow involving the Registrar of the Supreme Court:

- the resolution and the debtor's statement of assets and debts must be presented to the Registrar for registration. The Registrar must examine the process by which it was passed

⁷⁸ *Idem*, r 8.

⁷⁹ *Ibid.*

⁸⁰ *Idem*, r 9.

⁸¹ *Idem*, r 10. The creditor may apply to the court in the event of his inadvertent omission to value the security.

⁸² Bankruptcy Act, s 97, 8th para.

⁸³ Bankruptcy Rules, First Sch, r 14. Any decision to reject a proof of debt may be appealed to the court.

⁸⁴ *Idem*, r 23.

⁸⁵ *Idem*, r 15.

⁸⁶ Bankruptcy Act, s 97, 6th para.

⁸⁷ *Idem*, s 97, 7th para.

to ensure that the requirements of the Bankruptcy Act were satisfied. If satisfied, the Registrar will register the resolution and the statement of assets and debt,⁸⁸

- the resolution is validated upon registration by the Registrar. After that, any debtor's creditor may inspect the statement of assets and debts at prescribed times upon payment of a fee;⁸⁹
- the composition accepted by extraordinary resolution will be binding on all creditors whose names, addresses and the amount of the debts due to them are shown in the statement produced at the meeting at which the resolution was passed. It will not affect or prejudice the rights of any other creditors;⁹⁰ and
- the provisions of such composition may be enforced by an order of the Supreme Court made in a summary application. Disobedience of an order for enforcement is deemed to be in contempt of court.⁹¹

Provisions of the Bankruptcy Act relating to the close of bankruptcy, the discharge of the bankrupt, the release of the trustee and audit of accounts by the Registrar, do not apply to liquidation by arrangement. However, the creditors may by special resolution fix the close of the liquidation, discharge of the debtor and release of the trustee. The creditors also decide matters relating to the auditing of the accounts.⁹²

Notably, upon commencement (amongst other consistencies with a bankruptcy):

- all property of the debtor vests in a trustee for the benefit of the creditors;
- a trustee in the case of liquidation by arrangement will have such powers, duties and rights regarding the debtor's affairs as a trustee would in bankruptcy;
- the property of the debtor will be distributed in the same manner as in a bankruptcy;
- all the provisions of the Bankruptcy Act will apply to the liquidation by arrangement as it would to bankruptcy; and
- the appointment of a trustee in bankruptcy will be equivalent to and in substitution for the presentation of a petition in bankruptcy, service of a bankruptcy petition or an order of adjudication in bankruptcy.

Accordingly, as is the case with bankruptcy, all creditors are bound by the liquidation by arrangement and the court may stay or restrain actions against the debtor.

⁸⁸ *Idem*, s 97, 5th para.

⁸⁹ *Ibid.*

⁹⁰ *Idem*, s 97, 7th para.

⁹¹ *Idem*, s 97, 9th para.

⁹² *Idem*, s 96(9).

6.3.6 Protective measures available to the debtor

As mentioned, the court may restrain and stay suits. Bankruptcy or liquidation by arrangement binds all creditors and creditors must prove in a bankruptcy or liquidation by arrangement.

Property divisible in a bankruptcy or liquidation by arrangement does not include any tools of a debtor's trade or the personal clothing of the debtor or his family under a specific maximum value.

Self-Assessment Exercise 3

What options are available to debtors to deal with their indebtedness outside of bankruptcy proceedings?

[For commentary and feedback on self-assessment exercise 3, please see APPENDIX A](#)

6.4 Corporate liquidation

Insolvency proceedings in The Bahamas may take on one of three forms,⁹³ namely a:

- voluntary winding-up of the company;
- voluntary winding-up continued under the supervision of the court; or
- compulsory winding-up by the court.

6.4.1 Voluntary liquidation

The rules of a voluntary winding-up under the Companies Act and under the IBC Act differ.

6.4.1.1 Voluntary liquidation under the Companies Act

A company incorporated and registered under the Companies Act may be liquidated voluntarily if:

- (1) it was by its constitutional documents a fixed-duration entity and that period has expired;
- (2) an event occurs which through its constitutional documents it is provided that on such occurrence, the company is to be liquidated;
- (3) the company passes a resolution by a majority of at least 75% of its members that it be liquidated voluntarily; or

⁹³ Companies Act, s 184 and IBC Act, s 89.

(4) if the company resolves by resolution that it be liquidated voluntarily because it is insolvent.⁹⁴

Voluntary liquidation is deemed to commence at the time of the passing of the resolution for liquidation, or on the expiry of the period or occurrence of the event specified in the company's constitutional documents for the commencement of liquidation.⁹⁵

Pursuant to the Companies Act,⁹⁶ within 28 days of the commencement of the company's voluntary liquidation, the liquidator is required to do the following:

- (1) file notice of the winding up with the Registrar;
- (2) file the liquidator's consent to act with the Registrar;
- (3) file the director's declaration of solvency with the Registrar (if the supervision of the court is not sought);
- (4) publish notice of the winding up in the Gazette.

The liquidation of a company commenced voluntarily may continue as a voluntary liquidation only if a declaration of solvency has been made by all directors and filed with the Registrar of Companies within 28 days of the commencement of the liquidation. If not, the voluntary liquidator must apply to the court for a supervision order within seven days thereafter.⁹⁷

The voluntary liquidator will pay debts owing to creditors in the ordinary course as if the company were still carrying on its business. The voluntary liquidator may require a creditor to submit proof of debt if there is doubt or dispute about the existence of the debt or the amount owing to the creditor. A proof of debt may be submitted respecting a contingent claim.⁹⁸

The timeline for a voluntary liquidation process depends on the extent to which outstanding obligations to be wound up are satisfied, which might include ongoing litigation to be resolved. Typically, a voluntary liquidation would run from commencement to completion for a period between one to three years.

Claims in a voluntary liquidation are not often transferred or traded, but an assignment of claims is possible in law.

There is no automatic moratorium or stay of the continuation of legal proceedings or enforcement action against the company in the case of voluntary liquidation.

⁹⁴ Companies Act, s 211.

⁹⁵ *Idem*, s 212.

⁹⁶ *Idem*, s 218(1).

⁹⁷ Companies Liquidation Rules, O 13.

⁹⁸ Companies Act, s 235.

An officeholder is appointed as liquidator of a voluntary liquidation and (the voluntary liquidation being a solvent liquidation) a director or officer of a company may be appointed as its voluntary liquidator.⁹⁹ On the appointment of a voluntary liquidator, the voluntary liquidator assumes control of the company to wind up the company's affairs and distribute its assets. All the directors' powers cease, except insofar as the company in a general meeting, or the liquidator, approves their continuance. Generally, a voluntary liquidator, without the approval of the court, has the same duties, functions and powers as an official liquidator.¹⁰⁰

A voluntary liquidator may disclaim contracts in the manner mentioned below.¹⁰¹

A creditor may exercise rights of set-off and netting as mentioned below.¹⁰²

A voluntary liquidation is a solvent process and, as such, other than the company being responsive to questions put by creditors, there is no expressed process for reporting to creditors.

As mentioned above, in a voluntary liquidation the voluntary liquidator will pay debts owing to creditors in the ordinary course as if the company were still carrying on its business. Where the voluntary liquidator requires proofs of debt, these debts will be paid / not paid following the liquidator approving / not approving the claim.

When the company's affairs are fully wound-up, the voluntary liquidator will convene a final meeting of the company to consider and approve the voluntary liquidator's final report and accounts, remuneration, *etcetera*. Within seven days of the meeting, the liquidator submits a return to the Registrar of Companies in the prescribed form, specifying the date upon which the meeting was held and whether a quorum was present. Further, particulars of the resolutions, if any, passed at the meeting should also be included.¹⁰³

The company will cease to exist three months from the date that the liquidators' return is submitted to the Registrar. The Registrar will, in due course, publish a notice of the dissolution in the Official Gazette.

6.4.1.2 Voluntary liquidation under the International Business Companies Act, Ch 309 (IBC Act)

An international business company is a company incorporated under the IBC Act. It is widely used for offshore operations in The Bahamas. The voluntary winding up of an IBC is governed by the IBC Act¹⁰⁴ and the company's memorandum or articles of association. A liquidator may be appointed by a resolution of members or directors to wind up the company's affairs and distribute its property.¹⁰⁵

⁹⁹ *Idem*, s 215.

¹⁰⁰ *Idem*, s 214.

¹⁰¹ See the discussion in para 6.3.3.7 below.

¹⁰² See the discussion in para 6.3.3.8 below.

¹⁰³ Companies Act, s 222 and Companies Liquidation Rules O 13, r 11.

¹⁰⁴ IBC Act, ss 131-136 and 138-141.

¹⁰⁵ *Idem*, s 133(1).

The procedure for the winding-up and dissolution of an IBC is as follows:

Step 1

The directors of the company are required to approve a plan of dissolution,¹⁰⁶ which must contain a statement:

- (a) of the reason for the winding-up and dissolving;
- (b) that the company is, and will continue to be, able to discharge or pay or provide for the payment of all claims, debts, liabilities and obligations in full;
- (c) that the winding-up will commence on the date when articles of dissolution are submitted to the Registrar or on such date after it, not exceeding 30 days, as is stated in the articles of dissolution;
- (d) of the estimated time required to wind-up and dissolve the company;
- (e) as to whether the liquidator is authorised to carry on the business of the company if the liquidator determines that to do so would be necessary or in the best interest of the creditors or members of the company;
- (f) of the name and address of each person to be appointed a liquidator and the remuneration proposed to be paid to each liquidator; and
- (g) as to whether the liquidator is required to send to all members a statement of account prepared or caused to be prepared by the liquidator regarding his actions or transactions.

In respect of a company that has issued shares:¹⁰⁷

- (a) the plan of dissolution must be authorised by a resolution of members or a resolution of directors, as the case may be, and the holders of the outstanding shares of a class or series of shares are entitled to vote on the plan of dissolution as a class or series only if the memorandum or articles of association so provide;
- (b) if a meeting of members is to be held, a notice of the meeting accompanied by a copy of the plan of dissolution shall be given to each member, whether or not entitled to vote on the plan of dissolution; and
- (c) if it is proposed to obtain the written consent of members, a copy of the plan of dissolution shall be given to each member, whether or not entitled to consent to the plan of dissolution.

¹⁰⁶ *Idem*, s 138(1).

¹⁰⁷ *Idem*, s 138(2).

Step 2

Following approval of the plan of dissolution by the directors, and if required by the members, the articles of dissolution shall be executed by the company and shall contain:¹⁰⁸

- (a) the plan of dissolution; and
- (b) how the plan of dissolution was authorised.

Step 3

The articles of dissolution must be submitted to the Registrar who must retain and register it in the Register. Within 30 days immediately following the date on which the articles of dissolution are submitted to the Registrar, the company must cause to be published, in the Official Gazette, in a publication of general circulation in The Bahamas and in a publication of general circulation in the country or place where the company has its principal office, a notice stating:

- (a) that the company is in dissolution;
- (b) the date of commencement of the dissolution, and
- (c) the name and addresses of the liquidators.¹⁰⁹

Step 4

The winding-up and dissolution of an IBC Company commences when the Registrar registers the articles of dissolution, or on such date thereafter, not exceeding 30 days, as is stated in the articles of dissolution.¹¹⁰

Step 5

The liquidator must fulfil their duties under section 135(1) of the IBC Act.

Step 6

The liquidator, after the completion of the winding-up, is required to submit to the Registrar a notice that the winding-up and dissolution have been completed and, upon receiving the notice,¹¹¹ the Registrar must:

- (a) strike the company off the Register; and

¹⁰⁸ *Idem*, s 138(3).

¹⁰⁹ *Idem*, s 138(4).

¹¹⁰ *Idem*, s 138 (5).

¹¹¹ *Idem*, s 138(6).

(b) issue a certificate of dissolution under his hand and seal certifying that the company has been dissolved.

Step 7

Upon the Registrar issuing a certificate of dissolution under his hand and seal certifying that the company has been dissolved:

(a) the certificate is *prima facie* evidence of compliance with all requirements of the IBC Act in respect of dissolution; and

(b) the dissolution of the company is effective from the date of the issue of the certificate.¹¹²

Step 8

Upon the issuance by the Registrar of a certificate of dissolution, the liquidator should publish in the Official Gazette, in a publication of general circulation in The Bahamas and in a publication of general circulation in the country or place where the company has its principal office, a notice that the company has been dissolved and has been struck off the Register.¹¹³

6.4.1.3 Voluntary liquidation of a Segregated Accounted Company

A segregated accounted company (SAC) was introduced per the Segregated Accounts Companies Act 2004 (SAC Act). A SAC is a separate legal entity that creates segregated accounts; each segregated account's assets and liabilities are separate from the assets and liabilities of each of the other segregated accounts. For SACs established under the provisions of the SAC Act and incorporated under either the Companies Act or the IBC Act, insolvency proceedings must be conducted in terms of the insolvency provisions of either of the Companies Act or IBC Act, as applicable.

6.4.1.4 Voluntary liquidation of an entity regulated by the Central Bank of The Bahamas (CBB)

Until December 2020, the voluntary winding up regime applicable to a Companies Act company applied to a solvent financial institution. The winding up of a financial institution, which is licensed and regulated by the CBB pursuant to the Banks and Trust Companies Regulation Act 2020 (BTCRA) to carry on "non-resident" banking and trust business from within The Bahamas.

The BTCRA and the Companies Act as amended and modified by the BTCRA, govern the voluntary liquidation. The BTCRA and Companies Act set out the duties and functions of a liquidator.

The financial institution requires the CBB's approval for it to commence its voluntary liquidation and to surrender its banking license. The CBB may approve the financial institution's

¹¹² *Idem*, s 138(7).

¹¹³ *Idem*, s 138(8).

applications for voluntary liquidation and surrender of its license on such terms and conditions, as the CBB deems appropriate.

As part of the application to the CBB, the directors ought to formulate a liquidation plan and approve the same by resolution of directors.

The CBB's approval¹¹⁴ for the financial institution to wind up voluntarily, is mandatory. Notwithstanding provisions¹¹⁵ of the Companies Act, the financial institution requires the CBB's written¹¹⁶ approval before petitioning to the Supreme Court for its voluntary winding up.

The CBB is permitted to, on such terms and conditions as it deems appropriate, approve the financial institution's application to commence voluntary liquidation if it is satisfied that:

- (1) The financial institution is solvent and has sufficient liquid assets to repay its depositors and other creditors in full and without delay;
- (2) At least two-thirds of the holders of the issued voting shares of the financial institution approve its winding up; and
- (3) There are clear procedures in place respecting the repayment of the financial institution's depositors and creditors within three days.

Upon the CBB's approval of the financial institution's voluntary liquidation, the financial institution is required to:

- (1) surrender its license and all copies thereof to the CBB, which shall forthwith accept the surrender of such license;
- (2) apply to the Bahamian Supreme Court for its winding up;
- (3) cease to do business, retaining only such staff as is necessary for an orderly winding up under the supervision of a voluntary liquidator appointed with the approval of the CBB, and after that exercise its powers only to the extent necessary to effect its orderly winding up;
- (4) repay in full all depositors within three days and other creditors within a reasonable period of time; and
- (5) wind up all operations which were commenced or undertaken prior to the receipt of the approval to wind up.

Other than as specified above, the other provisions of the Companies Act apply to the voluntary liquidation of a financial institution.

¹¹⁴ BTCRA, s 59.

¹¹⁵ Companies Act, ss 190(1) and 211.

¹¹⁶ BTCRA, s 59 (1).

6.4.1.5 Voluntary liquidation of a Registrant of the Securities Commission of The Bahamas (SCB)

A process for the voluntary liquidation of a registrant of the SCB is the same as specified at 6.3.1.1 above, save that the registrant requires the SCB's approval.¹¹⁷

6.4.2 Court-supervised liquidation

A court-supervised liquidation is essentially a liquidation by the Supreme Court, except that it is commenced by way of a voluntary liquidation which has transitioned to a court liquidation because the company is insolvent. Only a solvent entity can be wound up voluntarily. The transition from a voluntary liquidation to a court-supervised liquidation is required to take place upon application by the voluntary liquidator. Following the commencement of voluntary liquidation, if the directors fail to sign a declaration of solvency as required by the Companies Act¹¹⁸ within 28 days and in the prescribed form, or if the company is deemed insolvent by the voluntary liquidator, the voluntary liquidator must apply for an order that the voluntary liquidation continues under the supervision of the court.¹¹⁹

After the voluntary liquidator applies and the court makes the order, the regime applicable to liquidation by the court applies to a voluntary liquidation under the supervision of the court.¹²⁰

6.4.3 Compulsory winding up

A Bahamian court has jurisdiction to make a winding-up order in respect of:

- a company existing under the Bahamian company statutes;
- a body incorporated under any other law of The Bahamas; and
- a foreign company with property in The Bahamas that is carrying on business in The Bahamas, or is registered in The Bahamas under the Companies Act as a foreign company.¹²¹

A company may be wound up by the court if:

- it has passed a resolution requiring the company to be wound up by the court;
- it does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- it is insolvent;

¹¹⁷ Securities Industries Regulations, regs 12 and 45.

¹¹⁸ Companies Act, s 219.

¹¹⁹ *Idem*, s 225.

¹²⁰ *Idem*, s 227.

¹²¹ *Idem*, s 185.

- its members are reduced in number to fewer than two;
- the court thinks that it is just and equitable that the company should be wound-up; or
- a regulator has regulatory authority over it and its licence or registration has been suspended or revoked and the regulator petitions for its winding up.¹²²

The company, any creditor, any contributory, or a regulator may make an application to the court for the winding-up of a company. A winding-up petition is usually determined within six months of its filing, unless the court is satisfied that particular circumstances justify an extension of such time (not exceeding a further six months).¹²³

Claims in a voluntary liquidation are not often transferred or traded, but an assignment of claims is available under the law.

After a winding-up petition is filed and before a winding-up order is made, an application for a moratorium or stay of proceedings against the company may be made by the company or any creditor or contributor.¹²⁴

Upon making a winding-up order or the appointment of a provisional liquidator, there is an automatic moratorium or stay of all proceedings or enforcement against the company, except with leave of the court.¹²⁵

On commencement of compulsory liquidation, the company does not continue with the management of its business. Instead, an official liquidator is appointed to conduct the liquidation and assist the court in that regard.¹²⁶

6.4.3.1 Duties and functions of an official liquidator

The duties and functions of an official liquidator include:

- collecting, realising and distributing the assets of the company to its creditors and, if there is surplus, to the persons entitled to such assets by the statute; and
- investigating and reporting to the company's creditors and contributories upon the affairs of the company and how it has been liquidated.

6.4.3.2 Powers of liquidators

Additionally, in the Fourth Schedule to the Companies Act, there is a list of specific powers exercisable with and without the sanction of the court.

¹²² *Idem*, s 186.

¹²³ *Idem*, s 190.

¹²⁴ *Idem*, s 192.

¹²⁵ *Idem*, s 193.

¹²⁶ *Idem*, s 200.

Powers of liquidators exercisable with the sanction of the court are as follows, namely the power to:

- bring or defend any action or other legal proceeding in the name and on behalf of the company;
- carry on the business of the company so far as may be necessary for its beneficial winding up;
- dispose of any property of the company to a person who is or was related to the company;
- pay any class of creditors in full;
- make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain, or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable;
- compromise on such terms as may be agreed on all debts and liabilities capable of resulting in debts, and all claims (present or future, specific or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company;
- deal with all questions in any way relating to or affecting the assets or the winding-up of the company, to take any security for the discharge or any such call, debt, liability or claim and to give a complete discharge in respect of it;
- sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels;
- raise or borrow money and grant security therefore over the property of the company; and
- disclaim onerous property.

Powers exercisable without the sanction of the court are the following, namely the power to:

- take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as are considered necessary;
- do all acts and execute, in the name and on behalf of the company, all deeds, receipts, and other documents and for that purpose to use, when necessary, the company seal;
- prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends, in bankruptcy, insolvency of

sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and rateably with the other separate creditors;

- draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect in respect of the company's liability as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;
- promote a scheme of arrangement according to section 158;¹²⁷
- convene meetings of creditors and contributories;
- engage staff (whether or not as employees of the company) to assist him in the performance of his functions;
- engage counsel and attorneys and other professionally qualified persons to assist him in the performance of his functions; and
- do all other things incidental to the exercise of his powers.

6.4.3.3 *Directors' duties in a distressed company*

Directors have the general duty to direct the management of the business and affairs of the company¹²⁸ and, in so doing, must act honestly and in good faith with a view to the best interests of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.¹²⁹ These duties are owed to the company alone.¹³⁰

In the context of a distressed company, its directors may be liable to restore funds paid out of the company and not otherwise recovered, where they vote for or consent to a resolution authorising:

- the making of a loan prohibited under the Companies Act,¹³¹ namely, in circumstances prejudicial to the company, a loan to the company's directors, officers, or agents for any purpose or anyone, to purchase shares in the company or an affiliated company. Circumstances prejudicial to the company exist where there are reasonable grounds for believing that the company is insolvent, or would become insolvent, after making the loan;
- the making of payment for the purchase, redemption or other acquisition of shares contrary to the Companies Act;¹³²

¹²⁷ In terms of the Companies Act.

¹²⁸ Companies Act, s 79.

¹²⁹ *Idem*, s 81.

¹³⁰ *Ibid.*

¹³¹ *Idem*, s 31.

¹³² *Idem*, s 44.

- the paying of a commission contrary to the Companies Act,¹³³ namely where there are reasonable grounds for believing that the company is insolvent, or would become insolvent after making the payment; or
- the paying of a dividend contrary to the Companies Act,¹³⁴ namely the company is insolvent, or would be insolvent after the making the payment.

Also, in the context of a distressed company, where a court is satisfied that before the commencement of a liquidation a director knew or ought to have concluded that there was no reasonable prospect that the company would avoid being wound-up due to insolvency, the court may order the director / former director to make such contribution to the company's assets as the court considers proper.¹³⁵ This is known as "insolvent trading" and is comparable to what is known as "wrongful trading" in some other Commonwealth jurisdictions.

There is also exposure for directors for liability arising from pre-liquidation conduct regarding fraud in anticipation of a winding up, transactions in fraud of creditors, or fraudulent trading.¹³⁶ Additionally, there may be liability for misconduct post the commencement of liquidation,¹³⁷ including material omissions in the statement of affairs in respect of the company.¹³⁸

A person may be disqualified from the management of a public company by a court where the person has been convicted in The Bahamas or elsewhere or an offence involving fraud or dishonesty in connection with the promotion, formation or management of any company.

6.4.3.4 Proof of debt

In a solvent compulsory liquidation, the liquidator must pay the company's debts in the ordinary course and the obligation currency as if the company were still carrying on business.¹³⁹

In the context of an insolvent company or one of doubtful solvency being wound-up by the court, persons asserting that they are creditors and wishing to recover their debts must submit their claims in writing to the official liquidator to prove their debts and the documents by which they seeks to establish their claims are referred to as their "proofs" or "proofs of debt".¹⁴⁰

The official liquidator is responsible for adjudicating the creditors' claims, for which purpose he acts in a *quasi*-judicial capacity.¹⁴¹

¹³³ *Idem*, s 47.

¹³⁴ *Idem*, ss 61 or 63.

¹³⁵ *Idem*, s 244.

¹³⁶ *Idem*, s 243.

¹³⁷ *Idem*, s 230.

¹³⁸ *Idem*, s 231.

¹³⁹ Companies Liquidation Rules, O 16, r 1(1).

¹⁴⁰ *Idem*, O 16, r (2).

¹⁴¹ *Idem*, O 16, r 4.

6.4.3.5 Supply of goods

If a request is made by, or with the concurrence of, the liquidator after the appointment of a provisional liquidator, or after the date on which a winding up order was made, for the provision of any of the following supplies:

- electricity;
- water;
- telecommunication services;
- cable services; or
- any other utility,

the supplier may make it a condition of the giving of the supply that the liquidator personally guarantees the payment of any charges in respect of the supply; but shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the effective date are paid.

6.4.3.6 Transactions that may be set aside

Transactions, such as credit and security transactions, may be set aside in cases where:

- they transpired at a time when the company was insolvent (as defined under the statute) in order to give the creditor a preference over the other creditors and, if having transpired within the six months immediately preceding the commencement of a liquidation, this constitutes a voidable preference.¹⁴² The application is made at the instance of the liquidator; and
- a disposition has been made at an undervalue by or on behalf of the company with the intent to defraud its creditors.¹⁴³ The application must be made at the instance of the liquidator within two years of the date of the disposition in question.

6.4.3.7 Disclaiming onerous property

With leave of the court, a liquidator of a company may disclaim onerous property even though possession of it has been taken, tried to sell or assign it or otherwise exercised ownership rights regarding it.¹⁴⁴

¹⁴² Companies Act, s 241.

¹⁴³ *Idem*, s 242.

¹⁴⁴ *Idem*, s 234(3).

Onerous property means:

- an unprofitable contract; or
- the company's assets are unsaleable or not readily saleable, or may give rise to a liability to pay money or perform an onerous act.¹⁴⁵

The disclaimer process is initiated by the liquidator filing a notice of the disclaimer with the court to disclaim onerous property and after that within 14 days give notice to every person whose rights are, to the knowledge of the liquidator, affected by the disclaimer. The disclaimer takes effect on the date that the notice of disclaimer is filed at court. A disclaimer operates to determine, with effect from the date of the disclaimer, the rights, interests and liabilities of the company in or regarding the property disclaimed but does not (other than releasing the company from liability) affect the rights or liabilities of any other persons. Any persons sustaining loss or damage due to the onerous disclaimer of property may claim in the company's liquidation as a credit for the amount of the loss or damage.¹⁴⁶

6.4.3.8 Right of set-off or no set-off

In the absence of any contractual right of set-off or no set-off, creditors may exercise rights of set-off or netting. Account is to be taken of what is due (as between the company and a person) from one party to the other regarding their mutual dealings. The sums due from one to the other will be set off against the sums due from the other.¹⁴⁷ Such rights are exercised at the point in time that the proof of debt process commences. There is no express provision for the temporary suspension or termination of such rights.

The official liquidator must prepare reports and accounts respecting the conduct of the liquidation and state of the company's affairs. These reports are to be made available to the court, creditors and contributories.¹⁴⁸

In relation to distribution to creditors and conclusion of proceedings (subject to preferential and secured creditors' rights), the company's assets are distributed in satisfaction of its liabilities to creditors *pari passu*. After that to members, according to their rights and interests in the company.¹⁴⁹

A creditor who has security over the whole or part of a company's assets is entitled to enforce his security without leave of the court or reference to the official liquidator.¹⁵⁰

¹⁴⁵ *Idem*, s 183.

¹⁴⁶ Companies Liquidation Rules, O 16.

¹⁴⁷ Companies Act, s 236 and Companies Liquidation Rules, O 16.

¹⁴⁸ Companies Liquidation Rules, O 16.

¹⁴⁹ Companies Act, s 235.

¹⁵⁰ *Idem*, s 238.

Once the company's affairs have been completely wound up, the court will order that the company be dissolved from the date of that order or such other date as the court thinks fit and the company will be dissolved accordingly.¹⁵¹

6.4.3.9 Priority of creditors

Upon satisfaction of secured creditor's claims and pursuant to the Companies Act,¹⁵² the order of creditors' claims in insolvency proceedings is as follows:

- the expenses of the liquidation, if there are sufficient assets to meet them, including the liquidator's fees and disbursements;
- preferential debts, including all rates, taxes, assessments, or impositions imposed or made under the provisions of any act;
- sums due by the company to its employees (if any, and whether employed in The Bahamas or elsewhere) for salaries, wages and gratuities accrued in the four months preceding the commencement of the winding-up;
- wages due to any worker or labourer for services rendered to the company in the two months preceding the commencement of the winding-up or, in the case of a company ordered to be compulsorily wound-up which had not commenced winding-up voluntarily, the date of the winding-up-order (in each case, referred to as the relevant date);
- sums due and payable by the company on behalf of employees in respect of medical health insurance premiums or pension fund contributions;
- sums due by the company to former employees in respect of severance pay and earned vacation leave, where employment contracts have been terminated as a consequence of the company being wound-up; and
- sums due to workers for personal injury accrued before the relevant date, unless:
 - the company has, on commencement of the winding-up, an insurance contract with rights capable of being transferred to, and vested in, the workers; or
 - the company is being wound-up voluntarily merely for reconstruction or amalgamation with another company.

6.4.3.10 Unclaimed dividends

If there are unclaimed dividends or undistributed assets on the date of the dissolution of the company, the Companies Act allows for such dividends and assets to be held by the former

¹⁵¹ *Idem*, s 249.

¹⁵² *Idem*, s 237.

liquidator as “trustee upon trust for the benefit of the contributories or creditors to whom such funds are owed”,¹⁵³ for one year.¹⁵⁴ If the liquidator cannot unite those with the beneficial owners, the liquidator may seek directions of the court for an extension of the period. At the end of the one year (or such other period if the court grants an extension), if the assets cannot be united with the beneficial owners, the trustees are required to transfer the assets to the Treasurer of The Bahamas.¹⁵⁵

6.4.3.11 Termination of liquidation and order for dissolution

The termination of a company’s liquidation terminates on the occurrence of:

- the Supreme Court making an order terminating the liquidation;¹⁵⁶
- the filing of a certificate of compliance by the liquidator confirming the completion of the liquidation;¹⁵⁷ or
- the Supreme Court exempting the liquidator from filing a certificate of compliance.¹⁵⁸

Following the official liquidator’s completion of the winding-up of the company’s affairs, the liquidator is required to:¹⁵⁹

- publish his final report and accounts per Order 1, rule 3 of the Companies Liquidation Rules; and
- apply to the Supreme Court for an order under section 249 of the Companies Act to dissolve the company.

Self-Assessment Exercise 4

Question 1

In what circumstances may a transaction be set aside by the liquidator?

Question 2

What is the order of creditors’ claims in a company’s liquidation?

¹⁵³ *Idem*, s 250(1).

¹⁵⁴ *Idem*, s 250(2).

¹⁵⁵ *Ibid* and Companies Liquidation Rules, O 23, r 1.

¹⁵⁶ Companies Liquidation Rules, O 22, r 1(a).

¹⁵⁷ *Idem*, O 22, r 1(b).

¹⁵⁸ *Idem*, O 22, r 1(c).

¹⁵⁹ *Idem*, O 22, r 5(1).

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.5 Receivership

6.5.1 Introduction

Receivership is still a valid form of administration of companies in The Bahamas.

A receiver may be appointed by court order¹⁶⁰ if it is just and convenient to do so,¹⁶¹ or by an agreement (under deed) by a creditor. Commonly, a receiver is appointed under deed by a creditor in circumstances whereby the company is in default of a loan, and the creditor appoints a receiver as permitted under the deed to seek to recover the debt.

6.5.2 Functions of receiver

A receiver, subject to the rights of any secured creditors, may receive income from the property, pay the liabilities connected with the property and realise the security interest of those on behalf of whom he is appointed. Except to the extent permitted by the Supreme Court, the receiver may not carry on the company's business.¹⁶²

6.5.3 Court-appointed receiver

A receiver appointed by court order must act as directed by the Supreme Court.¹⁶³

6.5.4 Duty of care

A receiver is required to:

- act honestly and in good faith; and
- deal with any property of the company in his possession or control in a commercially feasible manner.¹⁶⁴

6.5.5 Duties of receivers

Receivers are required to:

- immediately give notice of their appointment to the Registrar and also of their discharge;

¹⁶⁰ Companies Act, s 139.

¹⁶¹ Supreme Court Act, s 21.

¹⁶² Companies Act, s 142.

¹⁶³ *Idem*, s 144.

¹⁶⁴ *Idem*, s 146(1).

- take into their custody and control the property by the court order or instrument under which they are appointed;
- open and maintain a bank account in their name as receiver of the company for the monies of the company coming under their control;
- keep detailed accounts of all transactions carried out by them as receiver;
- keep accounts of their administration, which should be available during usual business hours for inspection by the directors of the company;
- prepare financial statements of their administration at such intervals as the court may direct or as the instrument of their appointment may require;
- upon completion of their duties, render a final account of their administration; and
- file with the Registrar a copy of any financial statement and financial accounts prepared within 15 days of preparing the financial statement or rendering the final account, as the circumstances require.¹⁶⁵

6.5.6 Appointment of a receiver under the Conveyancing and Law of Property Act¹⁶⁶

A mortgagee, where the mortgage is made by deed, has the power to appoint a receiver of the mortgaged property's income or any part thereof when the mortgage money has become due.¹⁶⁷

A mortgagee entitled to appoint a receiver under the Conveyancing and Law of Property Act (CLPA) should not appoint a receiver until such mortgagee has become entitled to exercise the power of sale conferred under the CLPA and may then, by writing under his hand, appoint such person as the mortgagee thinks fit to be a receiver.

The receiver is an agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides.

The receiver:

- has the power to demand and recover all the income of the property of which he is appointed receiver, by action, distress or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of and to give effectual receipts, accordingly, for the same;
- is entitled to retain out of any money received by him, for his remuneration and in satisfaction of all costs, charges and expenses incurred by him as the receiver, a commission at such rate, not exceeding 5% on the gross amount of all money received, as is specified in

¹⁶⁵ Companies Act, s 147.

¹⁶⁶ Conveyancing and Law of Property Act, s 26.

¹⁶⁷ *Idem*, s 21.

his appointment, and if no rate is so specified, then at the rate of 5% on that gross amount, or at such higher rate as the court thinks fit to allow, on an application made by him for that purpose;

- if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the monies received by him, any building, effects or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature; and
- apply all money received by him as follows, namely in:
 - the discharge of all rents, taxes, rates and outgoings whatever affecting the mortgaged property;
 - keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right of which he is the receiver;
 - payment of his commission, and of the premiums on fire, life or other insurances, if any, adequately payable under the mortgage deed or the CLPA, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and
 - payment of the interest accruing due in respect of any principal money due under the mortgage, and must pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

6.6 Corporate rescue

Restructuring procedures in The Bahamas are limited to companies incorporated under the Companies Act and the IBC Act. Restructuring procedures are based solely on reorganising a company's share capital, merger with a subsidiary company, or consolidating with a foreign company.¹⁶⁸ Other than a solvent company restructuring, reorganising, or undergoing a rescue under section 158 of the Companies Act, there is no formal process for a solvent company restructuring, reorganising, or undergoing a rescue in The Bahamas.

7. CROSS-BORDER INSOLVENCY LAW

7.1 General approach

Although The Bahamas has not adopted the UNCITRAL Model Law, its laws allow for assisting liquidating companies in many of the same ways that the UNCITRAL Model Law does.

¹⁶⁸ Companies Act, s 158.

7.2 Recognition under the Companies Act or IBC Act

Under the Companies Act¹⁶⁹ and the IBC Act,¹⁷⁰ provision is made for international co-operation in insolvency matters. The Supreme Court has jurisdiction to make orders related to foreign insolvency proceedings for some foreign countries if the foreign insolvency representative (such as a liquidator) applies to the Bahamian court.

The Bahamian court may make ancillary orders¹⁷¹ such as:

- recognising the right of a foreign representative to act in The Bahamas on behalf of or in the name of a debtor and, in the court's discretion, to do so jointly with a qualified insolvency practitioner granting a stay of proceedings or enforcing a judgment against a debtor;
- staying the enforcement of any judgment against a debtor;
- requiring certain persons with information concerning the debtor's business or affairs to be examined or to produce documents; or
- ordering the turnover of the debtor's property to the foreign representative.

In 2012, the Supreme Court rendered a judgment¹⁷² on the hearing of petitions for the winding-up and appointment of official liquidators of two related entities with extensive cross-border dealings. In the exercise of the court's discretion on the appointment of official liquidators, the Supreme Court appointed a foreign court-appointed receiver (who had been appointed by a Federal Court in the United States over the debtor's estate in the United States) to be the official liquidator in the Bahamian liquidation jointly with two Bahamian insolvency practitioners in furtherance of ensuring a co-ordinated and efficient administration of the company's estate.

Barnett, CJ (as he then was) at paragraph 37 of his judgment stated that:

"...in my judgment, it is in the interest of creditors that there should be cooperation between the work of the receiver and that of the Liquidator. It serves no purpose for both of them to be going after the assets separately. The creditors are not served by two different persons seeking to recover the same assets, one in the capacity of a receiver and another in the capacity of Liquidator."

In the context of turning over assets in Bahamian cross-border insolvency proceedings, in February 2017 the Supreme Court gave its ruling¹⁷³ in respect of an application under sections 254 and 255 of the Companies Act for the remittance of funds realised in The Bahamas to the principal liquidators in the Cayman Islands.

¹⁶⁹ *Idem*, s 254.

¹⁷⁰ IBC Act, s 89.

¹⁷¹ Companies Act, s 254.

¹⁷² Judgment of Barnett, CJ (as he then was) in 2012/COM/com/0086 and 2012/COM/com/0087.

¹⁷³ *In the matter of Caledonian Bank Limited* [2017] 1 BHS J No 55.

Notwithstanding that the Supreme Court accepted that the Cayman Islands had been designated a relevant foreign country (concerning the statutory power to order remittal), Winder J determined that Part VIIA of the Companies Act (which relates to international co-operation in insolvency proceedings), does not apply to ancillary winding-up proceedings. Winder J, at paragraph 9, stated as follows:

- “(a) Section 254 of the Act relates to applications by foreign representatives as defined by the Act.
- (b) The section relates to foreign representatives seeking the assistance of the Court rather than domestic liquidators seeking a direction in an ancillary winding up proceedings.
- (c) Part VIIA relates to circumstances where a company has been placed in liquidation by a foreign court and not to circumstances where parallel winding up orders have been made in respect of the same company.”

However, Winder J did accept, citing *Swissair Schweizerische Luftverkehr- Aktiengesellschaft*,¹⁷⁴ that under the common law the court has jurisdiction to make an order for the remittal of assets in an ancillary liquidation to the principal liquidation and held that there was no prohibition as the Supreme Court’s power to order the remittal of assets to a foreign liquidation where the local law provided for a *pari passu* distribution.

7.3 Recognition of personal bankruptcy proceedings

In the context of personal bankruptcy proceedings, all creditors may claim in the bankruptcy, liquidation by arrangement or composition by creditors under the Bankruptcy Act.

An order of a foreign court may be recognised and enforced in The Bahamas under the inherent jurisdiction of a court of justice. Correspondingly, there is inherent jurisdiction in a Bahamian court to issue Letters of Request.¹⁷⁵

“...the courts’ power to issue a letter of request stems from the jurisdiction inherent in the court. Inherent in the court is power to do those acts, which the court must have to maintain its character as a court of justice (see Lord Diplock in *Bremer Vulcan Schiffbau Und Maschinenfabrik v South India Shipping Corp.* (1981) 1 All ER 289 at 295).”¹⁷⁶

Moreover, it was held in The Bahamas that section 122 of the Bankruptcy Act 1914 of Great Britain affected The Bahamas.¹⁷⁷ Section 122 stated as follows:

“122. Courts to be auxiliary to each other.-- The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every other British court elsewhere having jurisdiction in bankruptcy or insolvency, and

¹⁷⁴ [2009] EWHC 2009 (Ch).

¹⁷⁵ *Al Sabah (Trustee of)* [2002] BHS J No 51.

¹⁷⁶ *Panayioton et al v Sony Music Entertainment (UK) Limited* [1994] 1 All ER 755, per Sir Donald Nichols VC at para 761.

¹⁷⁷ *Al Sabah (Trustee of)* [2002] BHS J No 51, Lyons J, para 19; *In the Matter of Al Sabah* 2004-05 CILR 373.

the officers of those courts, respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy. An order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions”.

The Bahamian Supreme Court has held that it is empowered to facilitate the obtaining of assistance of foreign courts by the issuance of Letters of Request for assistance on the authority section 122 of the Bankruptcy Act 1914 of Great Britain as, by its own terms, it was extended to all British courts during a period when The Bahamas was a British colony and, as such, its court is a British court. Moreover, by the Declaratory Act¹⁷⁸ of The Bahamas, the Bankruptcy Act 1914 of Great Britain was contained in a table entitled “Acts of the United Kingdom Parliament applying in or affecting The Bahamas otherwise than by an enactment of the Legislature of The Bahamas”.¹⁷⁹

In deciding to issue Letters of Request to the Grand Court of the Cayman Islands for judicial assistance on the application of a Bahamian trustee in bankruptcy, Lyons J stated:

“From the most helpful material placed before me by counsel for Mr Culmer, I have little doubt that, ‘to maintain its character as a court of justice, this court should, even in the absence of all else, issue the Letters of Request asked for. The Trustee should be given this court’s assistance to follow what he considers to be the trail of funds to wherever it may lead, be it Cayman or elsewhere.”

Accordingly, the issuance of Letters of Request being within the court's discretion where it is necessary to maintain its character as a court of justice if the case for so doing is made out on the evidence, a Bahamian court may so issue.

Self-Assessment Exercise 5

List the circumstances in which the Supreme Court would make ancillary orders under section 254 of the Companies Act.

[For commentary and feedback on self-assessment exercise 5, please see APPENDIX A](#)

8. RECOGNITION OF FOREIGN JUDGMENTS

A judgment obtained from a superior court outside the jurisdiction of The Bahamas has no direct operation in The Bahamas. It cannot therefore be immediately enforced by execution in The Bahamas. To have direct operation in The Bahamas, the judgment must first be registered or

¹⁷⁸ 2009 Statute Laws of The Bahamas, Ch 4.

¹⁷⁹ *Al Sabah (Trustee of)* [2002] BHS J No 51.

given recognition by the Bahamian Supreme Court under either statutory or common law requirements.

Whether statutory or common law requirements govern the registration or recognition proceedings is generally determined by the jurisdiction where the judgment was obtained. Statutory registration is generally governed by the Reciprocal Enforcement of Judgments Act 1924 (REJA) and the associated subsidiary legislation.

The REJA applies only to judgments obtained in the United Kingdom and certain Commonwealth countries, namely Barbados, Bermuda, Jamaica, Leeward Islands (Antigua & Barbuda, Montserrat, St. Kitts & Nevis, Anguilla, and the British Virgin Islands), St Lucia, Trinidad & Tobago, Guyana, Belize, and Australia.

Therefore, where the judgment is obtained in a jurisdiction outside of The Bahamas other than those enumerated in the REJA, standard law requirements would regulate the proceedings to recognise that judgment.

8.1 Statutory requirements

Under section 3(1) of the REJA, the Supreme Court has jurisdiction and discretion to register a foreign judgment. The section provides:

"3. (1) Where a judgment has been obtained in a superior court outside The Bahamas the judgment creditor may apply to the Supreme Court, at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in The Bahamas and subject to the provisions of this section, order the judgment to be registered accordingly."

To invoke the Court's jurisdiction for statutory recognition, the foreign judgment must satisfy the definition given to the term "judgment" per section 2 of the REJA. Section 2 defines, "judgment" as:

"any judgment or order given or made by a court in any civil proceedings whether before or after the passing of this Act and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place."

The Court will refuse to register a judgment, or it may be challenged by the judgment debtor on any of the grounds provided in section 3(2) of the REJA as follows:

"3. (2) No judgment shall be ordered to be registered under this section if –
 (a) the original court acted without jurisdiction;

- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;
- (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;
- (d) the judgment was obtained by fraud;
- (e) the judgment debtor satisfies the registering court either that an appeal is pending or that he is entitled or intends to appeal against the judgment;
- (f) the judgment was in respect of a cause of action which for reasons of public policy or some other similar reason could not have been entertained by the registering court."

The application to the court to have the judgment registered is usually made *ex parte*. Given this, the judgment debtor is unaware of the proceedings until the order granting registration is served on the judgment debtor. Once notified, the judgment debtor may challenge the order and enforce the judgment on any of the grounds provided in sections 3(1) and (2) of the REJA, noted above.

On the grant of the order registering the foreign judgment, the judgment becomes a judgment recognised in The Bahamas.

8.2 Common law requirements

If a foreign judgment fails to satisfy the requirements for registration under the REJA, the judgment creditor may commence an action or file a counterclaim in the Supreme Court relying on the judgment debt as the cause of action.

Generally, the judgment debtor resides outside The Bahamas. Therefore, service outside the jurisdiction would be necessary. As such, if the judgment debtor does not reside or carry on business in The Bahamas, despite having assets in The Bahamas, the judgment creditor may have a challenge commencing the proceedings and obtaining leave for service outside of the jurisdiction. If the said factors are present in any given case, the Supreme Court may not have jurisdiction over the judgment debtor resulting in the judgment creditor not being permitted to commence the necessary proceedings to enforce the foreign judgment.

On the other hand, where service outside the jurisdiction is either unnecessary or is approved by the Supreme Court, the proceedings to have the foreign judgment recognised may proceed. The standard law requirements in such proceedings are that:

- the foreign court must have been of competent jurisdiction;

- the rules of natural justice must have been complied with in the foreign proceedings;
- the foreign judgment must have been final and conclusive;
- the judgment debt must be definite or ascertainable;
- the foreign judgment must not have been obtained by fraud; and
- enforcement of the foreign judgment must not be contrary to public policy in The Bahamas.

Failure to satisfy any of the above requirements would suffice as a defence for the judgment debtor to oppose the recognition and enforcement of the foreign judgment against them.

Once judgment is granted in The Bahamas in favour of the judgment creditor on the basis of the debt of the foreign judgment, the Bahamian judgment is enforceable as any other Bahamian judgment.

8.3 Enforcement

Whether the foreign judgment is recognised under the statutory requirements or as the debt of a Bahamian judgment, it becomes enforceable by the same means available for the enforcement of any Bahamian judgment.

The judgment may be enforced under Order 45, rule 1(1) of the Rules of the Supreme Court by:

- a writ of *Fieri Facias*;
- garnishee proceedings;
- a charging order;
- the appointment of a receiver;
- in the case of which rule 5 applies, an order of committal;¹⁸⁰ or
- a writ of sequestration.

Additionally, enforcement of the judgment may be by the sale of land pursuant to the court's jurisdiction under Order 31, Rule 1 of the Rules of the Supreme Court (RSC) if the assets in The Bahamas includes land and the court deems it necessary and expedient to order the sale of land. Enforcement by an application for the sale of land is possible as the judgment creates an equitable charge on "every estate or interest in land" pursuant to section 63(1) of the Supreme Court Act. However, this equitable charge can only be created where the judgment debt is definite or ascertainable.

¹⁸⁰ RSC, O 45, provides for the enforcement of a judgment to do or abstain from doing an act.

Self-Assessment Exercise 6

Question 1

Does the Reciprocal Enforcement of Judgments Act 1924 apply to judgements from all countries? If not, which countries does it apply to?

Question 2

List how a judgment may be enforced under Order 45, rule 1(1) of the Rules of the Supreme Court.

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

9. INSOLVENCY LAW REFORM

Currently, there is no legislation before Parliament proposing any reform to the personal bankruptcy regime or corporate insolvency regime.

10. USEFUL INFORMATION

10.1 Bahamas legislation

- Consolidated Bahamian legislation is publicly available online at Bahamas Legislation, available at <http://laws.bahamas.gov.bs/cms/en/>.

10.2 Bahamas Court Judgments

- Reported Bahamian judgments are available by subscription online on LexisNexis® and JustisOne.
- Privy Council judgments are available at <https://www.jcpc.uk/decided-cases/>.
- Court of Appeal judgments are available without subscription at <https://www.courtofappeal.org.bs/judgments.php>.
- Recent Supreme Court judgments are available without subscription at <https://www.bahamasjudiciary.com/judgments/>.
- Industrial Tribunal cases are available at <https://industrialtribunal.org/judgements/1>.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES**Self-Assessment Exercise 1****Question 1**

What is the governing legislation for each of personal bankruptcy and corporate insolvency?

Question 2

In the context of insolvency, is The Bahamas a debtor-friendly or creditor-friendly jurisdiction? Why?

Commentary and feedback on Self-assessment Exercise 1**Question 1**

Individual bankruptcy is governed by the Bankruptcy Act and the Bankruptcy Rules, and per the Bankruptcy Rules the provisions of The First and Second Schedules to the Bankruptcy Act, 1914 of Great Britain apply in any bankruptcy proceedings subject to any formal alteration or modifications as required to make the Schedules properly applicable to the circumstance of The Bahamas.

Corporate insolvency is governed by the Companies Act (as amended), IBC Act, Companies Liquidation Rules, the Insolvency Practitioners Regulations, 2012 and the Foreign Bankruptcy Proceedings (International Co-operation) Rules, 2012.

Question 2

The Bahamas is a creditor-friendly jurisdiction as the primary focus is the protection of creditors' rights in insolvency. Students are required to make mention of the following: that secured creditors are entitled to enforce their security during bankruptcy proceedings and liquidations; that the property is applied *pari passu*, and distributed amongst members according to their rights and interests in the company.

Self-Assessment Exercise 2

What types of security may be created under Bahamian law?

Commentary and Feedback on Self-Assessment Exercise 2

The following security may be created over immovable and movable property:

- mortgages;
- debenture;
- pledges;
- charges;
- liens; and
- promissory notes.

Self-Assessment Exercise 3

What are the options available to a debtor to deal with him or her indebtedness outside of bankruptcy proceedings?

Commentary and Feedback on Self-Assessment Exercise 3

Students are expected to mention that outside of bankruptcy proceedings, a debtor may seek to enter a liquidation by arrangement or composition with creditors.

Self-Assessment Exercise 4

Question 1

Under what circumstances may a transaction be set aside?

Question 2

What is the order of creditors' claims in a company's liquidation?

Commentary and Feedback on Self-Assessment Exercise 4

Question 1

Transactions, such as credit and security transactions, may be set aside in the following cases:

- where they transpired at a time when the company was insolvent (as defined under the statute) with a view to giving the creditor a preference over the other creditors a preference over the other creditors, and if having transpired within the six months immediately preceding the commencement of a liquidation, this constitutes a voidable preference.¹⁸¹ The application is made at the instance of the liquidator; and
- where a disposition has been made at an undervalue by or on behalf of the company with intent to defraud its creditors.¹⁸² The application must be made at the instance of the liquidator within two years of the date of the disposition in question.

Question 2

Students should mention that upon satisfaction of secured creditors' claims, the order of creditors' claims in insolvency proceedings is as follows:

- the expenses of the liquidation, if there are sufficient assets to meet them, including the liquidator's fees and disbursements;
- preferential debts, including all rates, taxes, assessments, or impositions imposed or made under the provisions of any act;
- sums due by the company to its employees (if any, whether employed in The Bahamas or elsewhere) for salaries, wages and gratuities accrued in the four months preceding the commencement of the winding up;
- wages due to any worker or labourer for services rendered to the company in the two months preceding the commencement of the winding-up or, in the case of a company ordered to be compulsory wound-up which had not commenced winding-up voluntarily, the date of the winding-up order;
- sums due and payable by the company on behalf of employees in respect of medical health insurance premiums or pension fund contributions;
- sums due by the company to former employees in respect of severance pay and earned vacation leave, where employment contracts have been terminated as a consequence of the company being wound up; and
- sums due to workers for personal injury accrued before the relevant date, unless the company has, on commencement of the winding up, an insurance contract with rights capable of being transferred to and vested in the workers; or the company is being wound up voluntarily merely for reconstruction or amalgamation with another company.

¹⁸¹ Companies Act, s 241.

¹⁸² *Idem*, s 242.

Self-Assessment Exercise 5

List the circumstances in which the Supreme Court would make ancillary orders under section 254 of the Companies Act.

Commentary and Feedback on Self-Assessment Exercise 5

The Bahamian court may make ancillary orders¹⁸³ such as:

- recognising the right of a foreign representative to act in the Bahamas on behalf of or in the name of a debtor and, in the court's discretion, to do so jointly with a qualified insolvency practitioner granting a stay of proceedings or enforcing a judgment against a debtor;
- staying the enforcement of any judgment against a debtor;
- requiring certain persons with information concerning the debtor's business or affairs to be examined or to produce documents; or
- ordering the turnover of the debtor's property to the foreign representative.

Self-Assessment Exercise 6

Question 1

Does the Reciprocal Enforcement of Judgments Act, 1924 apply to judgments from all countries. If not, which countries does it apply to?

Question 2

List how a judgment may be enforced under O.45, r1(1) of the Rules of the Supreme Court.

Commentary and Feedback on Self-Assessment Exercise 6

Question 1

No, the Reciprocal Enforcement of Judgments Act, 1924 does not apply to judgments for all countries. It only applies to judgments obtained in the United Kingdom and certain Commonwealth countries, namely: Barbados, Bermuda, Jamaica, Leeward Islands (Antigua & Barbuda, Montserrat, St. Kitts & Nevis, Anguilla, and the British Virgin Islands), St. Lucia, Trinidad & Tobago, Guyana, Belize, and Australia.

¹⁸³ *Idem*, s 254.

Question 2

List how a judgment may be enforced under O.45, r1(1) of the Rules of the Supreme Court.
The judgment may be enforced under Order 45, rule 1(1) of the Rules of the Supreme Court by:

- a writ of *Fieri Facias*;
- garnishee proceedings;
- a charging order;
- the appointment of a receiver;
- in the case of which rule 5 applies, an order committal; or
- a writ of sequestration.

Additionally, enforcement of the judgment may be by the sale of land pursuant to the court's jurisdiction under Order 31, rule 1 of the Rules of the Supreme Court if the assets in The Bahamas includes land and the court deems it necessary and expedient to order the sale of land.



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