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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5G**

**THE BAHAMAS**

This is the **summative (formal) assessment** for **Module 5G** of this course and is compulsory for all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 5G**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

**INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment5G]**. An example would be something along the following lines: 202122-336.assessment5G. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6.The final submission date for this assessment is **31 July 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **9 pages**.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

Select the **correct answer**:

What are the modes of winding up in The Bahamas?

1. Voluntary.
2. Compulsory.
3. Under supervision of the court.
4. All of the above.

**Question 1.2**

Select the **correct answer**:

When is a Bahamian company deemed to be unable to pay its debts under section 188 of the Companies Act, Ch 308?

1. Only when it is balance sheet insolvent.
2. Only when it is cash flow insolvent.
3. When it is balance sheet insolvent and cash flow insolvent.
4. When it is either balance sheet insolvent or cash flow insolvent, or a valid statutory demand has not been satisfied within a period of three weeks after service on the company’s registered office, or if a judgment in favour of a creditor remains unsatisfied.

**Question 1.3**

Select the **correct answer**:

In what order are the following paid in a compulsory liquidation under Bahamian law?

(i) Employees’ salaries, wages and gratuities; (ii) all taxes, assessments or impositions imposed or made under any Bahamian Act; (iii) sums due for employees medical insurance; (iv) wages for any workman or labourer regarding services rendered to the company two months before the commencement of the company’s liquidation.

1. (i), (ii), (iii), (iv).
2. (ii), (i), (iv), (iii).
3. (iii), (i), (iv), (ii).
4. (i), (iii), (iv), (ii).

**Question 1.4**

Select the **correct answer**:

A company's liquidation terminates on the occurrence of:

1. the Supreme Court making an order terminating the liquidation.
2. the filing of a certificate of compliance by the liquidator confirming the completion of the liquidation.
3. the Supreme Court exempting the liquidator from filing a certificate of compliance.
4. All of the above.

**Question 1.5**

Select the **correct answer**:

What is the clawback period for voidable preferences under section 241 of the Companies Act, Ch 308?

1. One (1) month.
2. Six (6) months.
3. Twelve (12) months.
4. Two (2) years.

**Question 1.6**

Select the **correct answer**:

What types of preferential transactions are voidable in an insolvent liquidation?

1. Every fraudulent conveyance or transfer of property.
2. Every charge made three years before the commencement of the liquidation.
3. Every payment obligation made after the commencement of the liquidation.
4. All of the above.

**Question 1.7**

Select the **correct answer**:

Who may apply for the winding up of a Bahamian company?

1. A regulator, if the company is a regulated entity.
2. The company’s receiver.
3. Any officer of the company.
4. The Supreme Court of The Bahamas.

**Question 1.8**

Select the **correct answer**:

Where do secured creditors rank in a liquidation?

1. Behind the costs and expenses of liquidation.
2. Behind preferential creditors.
3. Behind unsecured creditors.
4. In priority to all other creditors, since they can enforce their security outside of the liquidation.

**Question 1.9**

Select the **correct answer**:

Under which circumstance may a company be wound up by the court?

1. The court is of the opinion that it is just and equitable that the company should be wound up.
2. The company is insolvent.
3. The company did not commence its business within a year from its incorporation, or suspends its business for a whole year.
4. All of the above.

**Question 1.10**

Select the **correct answer**:

What is the effect of a winding-up?

1. The liquidator acquires custody and control of the company’s assets.
2. Unless the court orders, no share in the company may be transferred.
3. Both (a) and (b).
4. Neither (a) nor (b).

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 4 marks]**

What the duties, functions and powers of official liquidators?

Collecting, realising and distributing assets of the company to its creditors, and if there is surplus, to persons entitled to such assets by statute. Investigating and reporting to the company’s creditors and contributories upon the affairs of the company and how much it has been liquidated.

**Question 2.2 [maximum 2 marks]**

What is the main difference between the voluntary winding up of an entity and the compulsory winding up of an entity?

The main difference is that voluntary winding up is extra-judicial, i.e. the court is not involved, whereas a compulsory winding up involves an order for winding up by the Court. However, the voluntary liquidator or any contributory may apply to the Court to determine any question arising in the course of it.

**Question 2.3 [maximum 4 marks]**

Describe the circumstances in which a transaction may be set aside by the liquidator.

First, where the transaction transpired at a time when the company was insolvent, as defined under statute in order to give the creditor a preference over other creditors and, if it transpired within 6 months immediately before the commencement of a liquidation, this constitutes a voidable preference. The liquidator will need to make such an application.

Next, where a disposition has been made at an undervalue by or on behalf of the company with intent to defraud its creditors. This application must be made at the instance of the liquidator within 2 years of the date of the relevant disposition.

**QUESTION 3 (essay-type questions) [15 marks in total]**

**Question 3.1 [maximum 8 marks]**

Write a brief essay on the recognition of a foreign judgment in The Bahamas.

The recognition of a foreign judgment in The Bahamas is an important aspect of international law and the legal framework governing cross-border disputes. It allows for the enforcement of judgments obtained in foreign jurisdictions within the jurisdiction of The Bahamas. Recognition of foreign judgments serves to promote legal certainty, facilitate international commerce, and ensure access to justice for parties involved in cross-border transactions. The process of recognising a foreign judgment in The Bahamas involves certain legal principles and procedures.

Firstly, I turn to the legal basis for the recognition of foreign judgments in The Bahamas. Under s. 3(1) of the REJA, the Supreme Court has jurisdiction and discretion to register a foreign judgment. Only judgments which satisfy the definition of ‘judgment’ within the REJA (s. 2) can be registered, which is “any judgment or order given or made by a court in any civil proceedings… 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”. foreign judgment creditors can apply to the Court within 12 months after the date of the judgment or within such longer period as may be allowed by the Court if the Court considers that it would be just and convenient that the judgment should be enforced in the Bahamas.

Next, I turn to the grounds where the Court will refuse to exercise its discretion to register a foreign judgment: these are statutorily defined at s. 3(2) of the REJA. This includes circumstances where the original (foreign) court acted without jurisdiction; the judgment debtor is someone who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, and did not voluntarily appear or otherwise submit or agree to submit to that court’s jurisdiction; the judgment debtor was not duly served with the process of the original court and did not appear; the judgment was obtained by fraud; the debtor satisfies the Bahamas Court that either an appeal is pending or that he is entitled or intends to appeal against the judgment; and 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 Bahamas Court. The judgment debtor may challenge the registration of a foreign judgment on the same grounds.

An application for registration of foreign judgment is usually made ex parte. A judgment debtor in such cases will be unaware of the proceedings until the order granting registration is served on him/her, and once notified, he/she may seek to challenge the order on the above grounds.

Once an order has been granted registering the foreign judgment, it becomes a judgment recognised and enforceable in Bahamas.

**Question 3.2 [maximum 7 marks]**

Write a brief essay distinguishing the voluntary winding up process of an unregulated entity incorporated under the Companies Act with an entity regulated by the Central Bank of The Bahamas.

The voluntary winding-up process of an unregulated entity incorporated under the Companies Act (CA) differs significantly from that of an entity regulated by the Central Bank of the Bahamas (CBB). While both processes involve the dissolution of a company's affairs, the regulatory oversight and procedural requirements imposed by the Central Bank introduce additional complexities and considerations for the winding-up process.

Firstly, it is essential to understand the distinction between unregulated and regulated entities in the Bahamas. Unregulated entities are typically those incorporated under the CA that do not fall under the jurisdiction of a specific regulatory authority, such as the Central Bank. These entities may engage in various business activities but are not subject to specific regulatory requirements beyond those mandated by company law. On the other hand, entities regulated by the Central Bank, such as banks, trust companies, and other financial institutions, are subject to comprehensive regulatory oversight aimed at ensuring financial stability, consumer protection, and compliance with anti-money laundering and counter-terrorism financing measures.

For the former, the process of voluntary liquidation is more straightforward and is governed by the CA. A company may be voluntarily liquidated by the following process:

* file a notice of winding up with the Registrar
* file the liquidator’s consent to act with the Registrar
* file the director’s declaration of solvency with the Registrar (if the supervision of the court is not sought)
* publish notice of winding up in the Gazette

However, for the latter, regulated entities such as financial institutions are subject to additional regulatory oversight, approval requirements, and reporting obligations throughout the winding-up process. Not only the CA but also the Banks and Trust Companies Regulation Act 2020 (BTCRA) govern the voluntary liquidation of a regulated entity. For the voluntary regulation of a regulated entity, the CBB needs to approve the commencement of the entity’s voluntary liquidation and to surrender its banking licence. The CBB may approve such an application on terms and conditions as it deems appropriate. As part of such an application, the regulated entity’s directors should formulate a liquidation plan and approve the same by director resolution. Without the CBB’s approval of the winding up application, the entity may not petition to the Court for voluntary winding up.

The CBB will give its sanction once satisfied that the regulated entity is solvent and has sufficient liquid assets to repay its depositors and other creditors in full and without delay; at least 2/3 of the holders of issued voting shares approve of the winding up; and there are clear procedures in place respecting the payment of the regulated entity’s depositors and creditors within 3 days.

In terms of process, upon the CBB’s approval of the regulated entity’s voluntary liquidation, it is required to:

* surrender its licence and all copies thereof to the CBB
* apply to the Supreme Court for its winding up
* 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 CBB’s approval, and after that exercise its powers only to the extent necessary to effect an orderly winding up
* repay in full depositors within 3 days and other creditors within a reasonable period of time
* wind up all operations which were commenced or undertaken prior to the receipt of the CBB’s approval

Apart from the above, the CA applies to the voluntary winding up of an entity regulated by the CBB as it would for any other voluntary liquidation.

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

Cocoplum Limited (Cocoplum) was incorporated in 2000 in the British Virgin Islands as an investment company. It held offices in Nassau, The Bahamas and carried on business in The Bahamas, Bermuda, Jamaica, Aruba, Brazil, Uruguay and Colombia. Since its incorporation, Cocoplum conducted business in the Caribbean and South American markets. The Securities Commission of The Bahamas (SCB) regulates Cocoplum.

In 2021, due to the Covid-19 pandemic and bad management, Cocoplum experienced significant losses. To prevent insolvency, Cocoplum's directors in September 2021 borrowed BSD 3,000,000 from two of its nine directors, namely Ralph Smith and Richard Lewis. The loan was memorialised in a loan agreement dated 30 October 2021. The terms of the loan agreement provided that the loan would be repaid in full by 31 December 2023 and would be used to meet Cocoplum's recurring liabilities and responsibilities. In May 2023, the directors discovered that Cocoplum's chief operating officer, Giovanni Thomas, misappropriated BSD 750,000 and used the funds to acquire a vehicle, boat, jet skis, jewellery and clothing. The directors did not inform the Commission of Mr Thomas’ wrongdoing. As a result of Mr Thomas’ actions, Cocoplum has been insolvent since September 2022. Notwithstanding Cocoplum’s insolvency, Cocoploum has continued to trade; Mr Thomas continues to serve as its financial manager; and the directors have not resigned.

**Using the facts above, answer the questions that follow.**

**Question 4.1 [maximum 7 marks]**

Can a winding-up petition be filed in The Bahamas for Cocoplum’s winding up? Explain your answer by discussing the Bahamian Supreme Court’s jurisdiction to make winding up orders, and state on which ground any winding up petition could be filed and by whom.

Yes, a winding up petition can be filed. Even though Cocoplum was incorporated in the BVI and not the Bahamas, the Bahamian court has jurisdiction to make a winding up order over a foreign company with property within jurisdiction and which is carrying on business within jurisdiction. In this regard, Cocoplum conducted business in the Caribbean and South American markets, and is regulated by the SCB.

Here, Cocoplum has been insolvent since September 2022. This is shown from its inability to repay the director’s loan in September 2021 in the sum of BSD 3 million, as well as the losses sustained in the course of its COO’s misappropriation of BSD 750,000. While Cocoplum continues to trade, these facts suggest that it is at least balance sheet insolvent, i.e. its assets are outstripped by its liabilities. This fulfils one of the grounds on which the court may make a winding up order, namely, the company in question is insolvent (noting that amendments to Bahamas law which expanded the definition of insolvency to include the balance sheet test). The other grounds for a winding up application are not likely to be fulfilled, as it does not appear from the facts that there has been a resolution passed for its winding up, the company is not in business, the shareholders have reduced to fewer than 2, or that the SCB has suspended or revoked its licence and is now petitioning for its winding up. There is also nothing suggesting that the court may conclude it is just and equitable that the company should be wound up.

As for the application on the ground of insolvency discussed above, this may be brought by Cocoplum, any creditor thereof, any contributor thereof, or the SCB.

**Question 4.2 [maximum 8 marks]**

To what extent could Cocoplum’s board be liable for Cocoplum’s insolvency and failure to act, given their knowledge of Mr Thomas’ wrongful actions and misappropriation of BSD 750,000?

In the scenario provided, the directors of Cocoplum became aware of Mr Thomas' misappropriation of BSD 750,000 in May 2023. Despite this knowledge, they did not inform the SCB of this, and Cocoplum continued to trade with Mr Thomas serving as its financial manager.

The liability of Cocoplum's board for the company's insolvency and failure to act in response to Mr Thomas' wrongful actions and misappropriation of funds would depend on various factors, including their duties as directors, their knowledge of the situation, and their actions or inaction in response to it. Directors owe general fiduciary duties to the company, including the duty of care, duty of loyalty, and duty of good faith. If the directors failed to take action against Mr Thomas despite knowing about his misconduct, and if their inaction was influenced by personal interests or loyalty to Mr. Thomas, they could be liable for breach of the duty of loyalty. Further, the failure to investigation the misconduct and to inform SCB of Mr Thomas’ wrongdoing, and also to continue to allow him to serve as a financial manager with presumed control over the company’s finances, is arguably in breach of their duty to exercise the care, skill and diligence that a reasonable prudent person would in comparable circumstances. Finally, if the directors failed to report the misappropriation to the SCB as required by law or regulation, they could face liability for breaching reporting obligations.

More importantly, 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, under s. 244 of the Companies Act. This is known as ‘insolvent trading’. Here, the relevant conduct which could form the factual basis for such an application is the fact that the Board knew of Cocoplum’s insolvency but failed to act – if allowing Mr Thomas to continue to serve on Cocoplum and failing to take action against him for the recovery of the misappropriated sum contributed to the company's insolvency, the directors could be held responsible for failing to act in the company's best interests.

**\* End of Assessment \***