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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. Should be none 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?

The duties and functions of official liquidators are to collect, administer and distribute assets of the Debtor entity to its creditors (and shareholders if there are sufficient funds to do so).

Also, to investigate the Debtor entity affairs and to report to the creditors and shareholders the results of the investigation and the status of the liquidation.

Certain powers of the official liquidator require sanction of the Court and are as follows:

1. To bring or defend litigation on behalf of the company;
2. To carry on the Debtor’s business, as necessary for the winding up;
3. To dispose of assets of the Debtor entity to a related person;
4. To pay creditors;
5. To make compromises or arrangements with creditors;
6. To address any questions relating to the Debtor’s assets or winding up;
7. To sell any of the Debtor’s assets at public auction or by private contract;
8. To borrow money or grant a security interest against an asset of the Debtor;
9. To abandon onerous property.

Certain other powers are exercisable without court permission as follows:

1. Collect, take possession of the Debtor’s assets;
2. Execute such deeds, receipts, documents and/or promissory notes on behalf of Debtor entity;
3. Analyze claims and priority of creditors and shareholders;
4. Promote a scheme of arrangement under section 158;
5. Hold the meetings of creditors and shareholders;
6. Hire staff to assist with duties;
7. Hire counsel and other professional persons to assist;
8. Do all other incidental things necessary to exercise his power.

**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 between the voluntary winding up of an entity and the compulsory winding up of an entity is whether or not the company is insolvent.

A voluntary liquidation is only for solvent companies and can only continue as a voluntary liquidation if the debtors unanimously file a declaration of insolvency within 28 days of commencement. The voluntary liquidation generally lasts 1-3 years. Generally a director or officer is appointed as the voluntary liquidator. In contrast, a compulsory winding up is for insolvent companies and generally is completed within 6 months. Also, the company does not continue in management; an official liquidator is instead appointed.

**Question 2.3 [maximum 4 marks]**

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

Transactions which may be set aside by the liquidator include primarily the following:

1. avoidance of a payment or giving of security made to a creditor within 6 months preceding the initiation of the liquidation whereby the creditor received more than the share it otherwise would have received of the Debtor estate. This is known as a preference.
2. Avoidance of a transfer within 2 years of initiation of the liquidation which was made by or on behalf of the Debtor for less than fair value, with the intent to defraud the Debtor’s creditors.

**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.

A foreign judgment is not automatically recognized in the Bahamas. To be recognized, the judgment must first be registered or given effect by the Bahamian Supreme Court. Some judgments are recognized under statutory law and some are given effect under common law.

Judgments which can be recognized under statutory law are those that are governed by the Reciprocal Enforcement of Judgments Act (REJA) and other related legislation. REJA only applies to judgments originating from the UK and certain commonwealth countries, namely Barbados, Bermuda, Jamaica, the Leeward Islands, St Lucia, Trinidad and Tobago, Guyana, Belize and Australia. If the judgment originates from somewhere other than those countries listed in the REJA, then common law would instead apply.

REJA

The statutory requirements under section 3(1) of the REJA provides that the judgment creditor may apply (usually ex parte) to the Supreme Court to have the judgment registered, if within 72 months of the date of judgment, or longer if allowed by the Court. The Court can allow registration in its discretion if it is just and convenient.

Registration of the judgment can be challenged by the judgment debtor and the Court can refuse the register the judgment under section 3(2) if:

1. The original court did not have jurisdiction;
2. The judgment debtor did not submit to jurisdiction of that court;
3. The judgment debtor was not served with process and did not appear;
4. The judgment was obtained by fraud;
5. An appeal is pending or the debtor intends to appeal;
6. Public policy dictates refusal.

If the Court does grant recognition, the foreign judgment has full recognition in the Bahamas as if it had been obtained there.

Common Law

If a foreign judgment creditor cannot satisfy REJA, it may commence an action relying on the judgment debt as a cause of action. However, there can be many difficulties with this procedure. First, it is often the case that the judgment debtor resides outside the Bahamas (and the judgment creditor is seeking to collect from assets located in the Bahamas). As such, service would be required outside the jurisdiction and the Supreme Court of the Bahamas may not have jurisdiction over the judgment debtor. In that case, the judgment creditor may not be able to commence the action.

If service outside the jurisdiction is either unnecessary or is approved by the Court, the judgment can be recognized if:

1. The foreign court had jurisdiction;
2. The “rules of natural justice” have been applied;
3. The judgment is final, definite and ascertainable;
4. The judgment was not obtained by fraud; and
5. There is not violation of public policy by recognizing

The debtor can oppose registration on any of the above grounds.

If recognition is granted, the judgment is fully enforceable as if it was obtained in the 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.

Until December 2020, the same rules applied to a company incorporated and registered under the Companies Act and to a financial institution licensed and regulated by the Central Bank of the Bahamas (CBB). However, as of December 2020, the Banks and Trust Companies Regulation Act 2020 (BTCRA) applies to those companies regulated by the CBB.

CBB Procedure.

Essentially, the BTCRA and the Companies Act as amended and modified by the BTCRA govern voluntary liquidation for financial institutions. The financial institution must have the CBB’s approval prior to commencing voluntary liquidation and/or surrendering its banking license. And the CBB may approve the voluntary liquidation and surrender of license on terms and conditions, as it deems prudent. This approval must be acquired prior to petitioning the Supreme Court for voluntary winding up.

The CBB may approve the voluntary liquidation if the following prongs are satisfied:

1. The institution is solvent and has sufficient liquid assets to pay depositors and creditors without delay;
2. At least 2/3 of the voting members of the institution have approved the liquidation; and
3. There are clear procedures in place to repay depositors and creditors within 3 days.

Once approved by the CBB, the institution must surrender its license; apply to the Bahamian Supreme Court for a wind up petition; cease doing business, repay all depositors within 3 days (and other creditors within a reasonable time) and wind up operation.

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

Companies Act procedure

In contrast, a voluntary liquidation of a company that is not regulated by CBB may be liquidated voluntarily without CBB or Court permission. A voluntary liquidation under the Companies Act may commence if:

1. It was a fixed duration entity and the fixed period has expired;
2. The constitutional documents of the company provide for liquidation upon a certain event and that event has transpired;
3. The company passes a resolution by majority of at least 75% of its members to commence voluntary liquidation; or
4. The company resolves by resolution for voluntary liquidation because it is insolvent.

Applying to Both

Assumedly, the following requirements will apply to any company, whether or not regulated by the CBB:

Within 28 days of the voluntary liquidation commencement, the liquidator is required to do all of 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 insolvency with the Registrar (unless supervision of the Court is requested)
4. Publish notice of the winding up in the Gazette.

**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.

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**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.

A winding up petition can likely be filed in The Bahamas for Cocoplum, except that, because it is regulated by the Securities Commission of the Bahamas (SCB), pursuant to the Securities Industries Regulations, regs 12 and 45, the SCB must first approve the voluntary liquidation. If this hurdle is satisfied, the Bahamian Supreme Court has jurisdiction to make a winding up order because Cocoplum is a foreign company (incorporated in the BVI’s) with property located in the Bahamas (possibly the office lease would suffice to satisfy this prong) and is carrying out business in the Bahamas. Alternatively, the Bahamian Supreme Court has jurisdiction to make the order because Cocoplum is registered in the Bahamas with the SCB.

Cocoplum will not be permitted to continue in a voluntary liquidation because it is insolvent. However, it may start as a voluntary liquidation and then the voluntary liquidator will have to apply for an order that the winding up continue under the jurisdiction of the Court because Cocoplum is insolvent.

The company, any creditor, any contributory or the SCB regulator may make the application for the winding up. Because Cocoplum is insolvent, it will continue as a compulsory liquidation and an official liquidator will be appointed. The company does not stay in the management role of the business.

**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?

It is highly likely that at least the COO of Cocoplum’s board would be held liable for Cocoplum’s insolvency and failure to act. First, directors have a general duty in the Bahamas to act honestly, in good faith and in the best interests of the company and they have a duty to exercise care, diligence and skill commensurate with that of a reasonably prudent person in similar circumstance. Also, if the Court is satisfied that a director knew or should have known that there was no reasonable prospect that the company could avoid a wind up due to insolvency, it may order the director to contribute such amount to the company as the Court deems appropriate. This is known as “insolvent trading”. In addition, directors can be held liable for pre-liquidation conduct regarding fraud in anticipation of a wind up, transactions in fraud of creditors, or fraudulent trading. Or, liability can also ensue for misconduct after commencement of the liquidation, including material omissions as to the statement of affairs of the company.

The COO should be held liable for fraudulent trading as a result of his using the corporate funds for personal use, in anticipation of the windup. And certainly it appears he did not act honestly, in good faith or in the best interests of the company when buying the personal items using corporate funds. The COO can also be disqualified from management of any public company if he is convicted in the Bahamas of an offence based on fraud or dishonesty.

The other directors could be held liable for any failure to disclose the trading of the COO if they do not disclose the transactions after commencement of the windup. Also, all could be held liable if the Court finds that there was no reasonable prospect that the company could avoid insolvency due to the known fraudulent conduct of the COO and the Court can order the directors to contribute such amount as the Court deems appropriate for their lack of appropriate governance.

**\* End of Assessment \***