



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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 **7 pages**.

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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 for a Bahamian company?

- (a) Compulsory winding-up.
- (b) Voluntary winding-up.
- (c) Winding-up under supervision of the Court.
- (d) All of the above.**

1 mark

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?

- (a) Only when it is balance sheet insolvent.
- (b) Only when it is cash flow insolvent.
- (c) When it is balance sheet insolvent and cash flow insolvent.
- (d) 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.**

1 mark

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 employee's 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.

(a) (i), (ii), (iii), (iv).

(b) (ii), (i), (iv), (iii).

(c) (iii), (i), (iv), (ii).

(d) (i), (iii), (iv), (ii).

1 mark

Question 1.4

Select the **correct answer**:

What is the minimum percentage of the members required to resolve for a Company's voluntary winding up?

(a) 45%.

(b) 50%.

(c) 75%.

(d) 95%.

1 mark

Question 1.5

Select the **correct answer**:

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

(a) One (1) month.

(b) Six (6) months.

(c) Twelve (12) months.

(d) Two (2) years.

1 mark

Question 1.6

Select the **correct answer**:

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

a) Every fraudulent conveyance or transfer of property.

b) Every charge made three years before the commencement of the liquidation.

c) Every payment made after the commencement of the liquidation.

d) None of the above.

1 mark

Question 1.7

Select the **correct answer**:

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

- (a) The company itself.
- (b) The company's receiver.
- (c) Any officer of the company.
- (d) The Supreme Court of The Bahamas.

1 mark

Question 1.8

Select the **correct answer**:

Where do secured creditors rank in a liquidation?

- (a) Behind the costs and expenses of liquidation.
- (b) Behind preferential creditors.
- (c) Behind unsecured creditors.
- (d) In priority to all other creditors, since they can enforce their security outside of the liquidation.

1 mark

Question 1.9

Select the **correct answer**:

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

- (a) The Court is of the opinion that it is just and equitable that the company should be wound up.
- (b) The company is insolvent.
- (c) The company did not commence its business within a year from its incorporation, or suspends its business for a whole year.
- (d) All of the above.

1 mark

Question 1.10

Select the **correct answer**:

What is the effect of a winding-up?

- (a) The liquidator acquires custody and control of the company's assets.
- (b) Unless the court orders, no share in the company may be transferred.

(c) Both a and b.

(d) Neither a nor b.

1 mark

Good job. 10 out of 10 marks for the multiple choice questions.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 4 marks]

In what circumstances may a provisional liquidator be appointed in a winding-up?

A provisional liquidator can be appointed by a creditor or contributory, or a regulatory under the circumstances that 1) there is a prima facie case for making a wind up order, 2) An application of the provisional liquidator is necessary to a) to prevent the misuse of company assets, b) to prevent the oppression of minority shareholders, c) to prevent mismanagement or misconduct on the part of the company's directors or d) is in the best interest of the public. This is according to Companies (Winding Up Amendment) Bill, 2011 Section 199 (4).

3 out of 4 marks.

1 point was deducted for typos and the fact that you stated that Companies (Winding up Amendment) Bill, 2011 as your authority. A Bill is draft legislation. Once passed, it is an Act, it is no longer a Bill.

Question 2.2 [maximum 2 marks]

In what circumstances may a contributory present a winding-up petition for the winding-up of a company?

According to the Companies (Winding Up Amendment) Bill, 2011, Section 190. (3); A contributory can only present a winding up petition under the circumstances that (a) " the shares in respect of which he is a contributory, or some of them, are partly paid or (b) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him to have been held by him and registered in his name for a period of at least six months immediately preceding the presentation of the winding up petition or have devolved on him through the death of a former holder.

1.5 marks out of 2

One-half of a 1 point was deducted for typos and the fact that you stated that Companies (Winding up Amendment) Bill, 2011 as your authority. A Bill is draft legislation. Once passed, it is an Act, it is no longer a Bill.

Question 2.3 [maximum 4 marks]

Describe what the primary forms of security over moveable and immovable property are.

The primary forms of security over moveable and immovable property are mortgages, debentures, pledges, charges, liens and promissory notes.

1 mark out of 4

3 marks were deducted because you only listed the primary forms of security. You did not describe them as requested.

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

Question 3.1 [maximum 8 marks]

Write a brief essay on the duties, functions, and powers of official liquidators.

An official liquidator is appointed to assist the court by carrying out the liquidation.

The official liquidators' duties and functions are to firstly collect, realise and distribute the assets of the company to its creditors. If there is any surplus assets remaining then the remainder will be distributed who is then entitled to the assets by statute. Another function and duty of an official liquidator is investigating and reporting to the company's creditors and contributories on the affairs of the company and the process in which is being liquidated.

The official liquidator has certain powers that they can exercise with the sanction of the court and powers they can exercise without the sanction of the court.

The powers that can be exercised with sanction of the court are; bring forth 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 much as possible on behalf of the company; get rid of any property of the company to a person who is or was related to the company; pay creditors despite their class in full; make arrangements with creditors or persons claiming to be creditors and allege to have a claim, deal with any questions in anyway relating to or that affects 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 two ways, public auction or private contract; raise or borrow money and grant security over the property of the company and disclaim onerous property.

The powers that can be exercised without sanction of the court are; take possession of, collect and get into the property of the company to take all proceedings as necessary; Execute all acts on behalf of the company, of all deeds, receipts and any other documents; prove, rank and claim bankruptcy, insolvency or sequestration of any contributory for any balance against the estate; draw and accept, make and endorse any bill of exchange or promissory note on behalf of the company ; promote a scheme of arrangement; convene meetings with creditor or contributories, engage staff to assist in the liquidation; engage counsel and attorneys and other professional qualified persons to assist perform necessary function outside his expertise as liquidator.

8 marks out of 8
Very good job.

Question 3.2 [maximum 7 marks]

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

If a judgement was obtained in a superior court outside the Bahamas doesn't mean that it will be automatically recognized in the Bahamas, because that court don't have any direct operations in the Bahamas. For any foreign judgment to be recognized it must be firstly

registered or recognized by the Bahamian Supreme Court under either the statutory or common law requirements in the Bahamas. It depends on jurisdiction in which the judgement was obtained to determine if statutory or common law would apply.

Reciprocal Enforcement of Judgements Act, 1924 ("REJA") is a legislation that governs foreign judgements. The jurisdictions in which REJA would apply would be the United Kingdom, BVI, Barbados, Bermuda, Jamaica, Anguilla, St. Kitts and Nevis, St. Lucia, Antigua and Barbuda, Montserrat, St. Lucia, Guyana, Trinidad and Tobago, Belize, and Australia. Judgements from these countries will be recognised as statutory registration.

Section 3 (1) of the REJA gives the Supreme Court the power to register a foreign judgement. Section 2 of the act gives a clear definition of what "judgement" means in this case.

The application to the court to recognize a judgement is ex-parte but once or if the order is granted the judgement will become a judgement recognised by The Bahamas.

If a judgement does not fit the requirements for recognition or registration under REJA as a statutory registration; then the common law would regulate the proceedings to recognise the judgement in question. If the judgement is rejected under REJA, the judgement creditor can file a counterclaim in the Supreme Court depending on the judgement's debt as the cause of action.

Whether the foreign judgement is recognised as a statutory registration or as the debt of a Bahamian judgement, it will be enforceable in the same way in which a Bahamian judgement would be enforced.

5 marks out of 7

You lost 2 points because you did not give details respecting when the Court would recognise/register a foreign judgment under the common law.

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

Multi-national Company Limited (the Company) was incorporated in 2011 in Panama as a private company limited by shares. It held offices in Nassau, The Bahamas and carried on business in The Bahamas, the United States, Canada, England, Singapore, Italy, Switzerland, France, Australia and New Zealand. Since its incorporation, the Company conducted business as an investment firm in American and European markets. The Securities Commission of The Bahamas regulated the Company.

From 2011 to 2017, the Company had over 10,000 wealthy clients in multiple countries and had raised over BSD550 million from its investors. Its investment manager was Nicholas Jameson (Mr Jameson). It was discovered in late 2017 that Mr Jameson had defrauded the Company's investors by falsely claiming that he had successfully achieved exceptional returns when, in fact, he was concealing huge losses by his mismanagement of the assets and misappropriation of investor funds to support his lavish lifestyle. The losses were never disclosed to the Company's investors and Mr Jameson grossly misstated the Company's value in order to continue to attract new investors.

In 2018, it was discovered that the Company was insolvent. The Company's directors were aware of Mr Jameson's actions but took no action to report such behaviour to the relevant authorities and did not resign from the Company's Board.

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 the Company'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 be filed in the Bahamas for the winding-up of the Company.

The fact that the company has offices in the Bahamas and is regulated by the Securities Commission of the Bahamas, this gives the Bahamas Supreme Court the jurisdiction to make a winding-up order.

The court holds the power to wind-up based on the mere fact that the company is insolvent. If the Securities Commission of The Bahamas revokes or suspended the company's license because of the fraudulent activity of the company's director with the knowledge of the board, then this would give another reason the Court can impose its power to wind-up the company.

A company, any creditor, any contributory, or a regulator can apply to wind-up of a company. The petition is usually determined within six months of filing. In this instance, the regulator did not have standing to wind up the company as its license was not suspended or revoked.

The company can be wound up by the court under any of these circumstances; 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; its insolvent' its members are reduced in number to fewer than two, the court thinks that is just and equitable that the company should be wound-up or the company license is suspended or revoked by the regulatory (as mentioned above). Only the ground of insolvency and just and equitable ground are relevant.

A creditor can apply for the company to be wound-up under the circumstances that the company is insolvent.

5 marks out of 7

Your answer was good, but did not stay within the facts given. Further, your explanations both for whom may apply to wind up the company and the grounds on which the company may be wound up were too generic; it wasn't applied to the facts.

Question 4.2 [maximum 8 marks]

To what extent could the Company's Board be liable for the Company's insolvency and failure to act, given their knowledge of Mr Jameson defrauding the Company's investors and misappropriation of investor funds?

The board of directors will be whole liable for the Company's insolvency and failure to act, given that they were aware of Mr. Jameson's action of misappropriation of funds and defrauding the Company's investors. The directors did not report Mr. Jameson's actions to the relevant authorities, or none resigned from the Company's board. Instead, they turned a blind eye to what was happening.

Under Section 243 of the Companies (Winding Up Amendment) Bill, 2011, the court may make an order once they are satisfied that before the commencement of the winding up petition of the company, any company business has been carried with intent to defraud creditors of the company or for any fraudulent purpose.

The directors of the company owe duty to the company. They have a general duty to act honestly and in good faith when it comes to managing the business and the affairs of the company. They are to exercise due care, diligence and skill that would be appropriate in comparable circumstances.

Under Section 244 of the Companies (Winding Up Amendment) Bill, 2011, states that the court may make an order against a person who is or was a director of a company if they at any time before the commencement of the winding up of the company, that the person knew or ought to have known that there was no reasonable prospect that the company would avoid being wound up by reason of insolvency and the person must have been a director at that specific time

Once the court is convinced that the Directors that the directors knew or had the knowledge to make a conclusion that the company is heading in the direction of being wound-up due to being insolvent; the court would order the directors to contribute towards the company's assets in an amount which is determined by the court. The directors being aware of Mr. Jameson was actions this, they would have had an idea that at that rate the company could not have avoided being wound-up. The directors did nothing to mitigate the risk for the investors or company's creditors.

The directors can be held liable for defrauding the company's investors and fraudulent trading since they and Mr. Jameson were aware that he was not reporting the company's losses to the investors and grossly misstating the company's position to address new investors. Fraudulent trading is considered a criminal offence and directors may fear criminal charges once the liquidation commences.

6.5 marks out of 8

1.5 points were deducted for typos and the fact that you stated that Companies (Winding up Amendment) Bill, 2011 for your authority. A Bill is draft legislation. Once passed, it is an Act, it is no longer a Bill.

40 marks out fo 50

Well done overall.

*** End of Assessment ***