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

**BRITISH VIRGIN ISLANDS (BVI)**

This is the **summative (formal) assessment** for **Module 5B** of this course and must be submitted by 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 5B**. 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 or Avenir Next 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.assessment5B]**. An example would be something along the following lines: 202223-336.assessment5B. **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.

**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**

For the purposes of a **qualifying resolution** for an insolvent liquidation to **appoint a liquidator** under section 159 the Insolvency Act 2003 by the company’s members, what is the required majority of those who are present and entitled to vote?

1. 50%.
2. 75%.
3. 100%.
4. 90%.

**Question 1.2**

In order to comply with section 156 of the Insolvency Act 2003, **what timeframe** for payment of the debt (or to secure or compound for the debt), must a statutory demand require?

1. Within 14 days of the service of the statutory demand.
2. Within 21 days of the date of the statutory demand.
3. Within 21 days of the service of the statutory demand.

1. Within 14 days of the date of the statutory demand.

**Question 1.3**

Which of the following **is not able** to make an application for the removal of a liquidator?

1. A member of the company.
2. A creditor.
3. The creditors’ committee.
4. A receiver.

**Question 1.4**

Where a receiver exercises a power of sale, the receiver owes a duty to obtain the best price reasonably obtainable at the time of sale. **To which one of the following is the duty owed to**?

1. The creditors, the shareholders, persons claiming an interest in the assets and the company.
2. The creditors, sureties, the shareholders and the company.
3. The creditors, sureties, persons claiming an interest in the assets of the company and the company.
4. The creditors, shareholders, sureties and persons claiming an interest in the assets of the company.

**Question 1.5**

Who cannot apply for a provisional liquidator to be appointed in a company?

1. The Attorney General.
2. The company.
3. A creditor.
4. A secured creditor.

**Question 1.6**

Under the Reciprocal Enforcement of Judgments Act 1922, what is the **time period** during which a foreign judgment is registrable in the BVI?

1. Within 12 months of the date of judgment.
2. Within three (3) months of the date of trial.
3. Within six (6) months of the date of judgment.
4. Within six (6) months of the date of trial.

**Question 1.7**

Which one of the below **is not** an effect of the appointment of a liquidator over a company?

1. The assets automatically vest in the liquidator.
2. No amendment allowed to the memorandum or articles of association of the company.
3. Shares in the company can be transferred.
4. No action can commence or proceed against the company unless ordered by the Court.

**Question 1.8**

In a liquidation, what is the **vulnerability period** for an undervalue transaction in the case of a transaction entered into with a connected person?

1. Two (2) years prior to the onset of insolvency and ending on the appointment of the liquidator.
2. Two (2) years prior to the appointment of the liquidator.
3. Six (6) months prior to the onset of insolvency and ending on the appointment of the liquidator.
4. Five (5) years prior to the appointment of the liquidator.

**Question 1.9**

Which of the following **is not** a resolution that the directors of a company must pass in order to put in place a company creditors’ arrangement?

1. Stating that the company is insolvent or is likely to become insolvent.
2. Approving a written proposal setting out how the creditors’ rights will be varied or cancelled.
3. Approving a liquidation plan and a declaration of solvency.
4. Nominating an eligible insolvency practitioner to be appointed interim supervisor.

**Question 1.10**

What is required to place a company into voluntary liquidation?

1. Directors’ resolution to appoint a voluntary liquidator.
2. A liquidation plan approved by the directors and a resolution passed by shareholders approving the liquidation plan.
3. Declaration of Solvency.
4. All of the above.

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

**Question 2.1 [maximum 2 marks]**

When is an eligible licensed insolvency practitioner required to be appointed under the Insolvency Act 2003, and what is meant by “eligible”?

An eligible insolvency practitioner can be appointed to oversee (i) an insolvent BVI company (ii) a foreign company or (iii) an individual person’s estate in its capacity as a trustee in bankruptcy.

To qualify as an “eligible” insolvency practitioner a person must be (a) licensed as an insolvency practitioner (b) gave consent in writing to act and adhere to the prescribed form (c) should in no way be disqualified to hold the necessary licence in terms of section 477 (d) should in no way be disqualified from acting and (e) have provided (as a retainer) the necessary security for the functions to be performed by the insolvency practitioner.

**Question 2.2 [maximum 2 marks]**

In what circumstances can a statutory demand be issued under the Insolvency Act 2003, and by whom?

A statutory demand for payment is made in writing by a creditor and requires the debtor to make payment of the debt which is due and payable. The debtor can make payment of the debt or propose an arrangement for the debt to be settled to the extent that it meets the creditors’ requirements.

A statutory demand can be used for an insolvent company and an individual which is bankrupt (personal bankruptcy) as outlined in Part V of the Insolvency Act. A statutory demand may be issued under section 155 of the Insolvency Act for a “prescribed minimum” as defined in section 290. The minimum amount of debt for purposes of issuing a statutory demand is USD2,000 pursuant to rule 149(1) of the Insolvency Rules, 2005.

Under Part II of the Insolvency Act the legislative framework for a company creditors’ arrangement (CCA) angry creditors often use the unassuming procedure of issuing a statutory demand and making an application for a liquidator.

**Question 2.3 [maximum 2 marks]**

Under the BVI Business Companies Act 2004, when is a company required to have a registered agent and when is one not required?

All incorporated companies and partnerships doing business in the BVI must be registered and in terms of section 91(1) of the Business Companies Act 2004 (BCA) must at all times have registered agents, save for when it might be in be in insolvent liquidation as no registered agent is then required. Only an entity that is licensed may act as a registered agent as prescribed in section 91(3) of the Business Companies Act 2004 (BCA).

**Question 2.4 [maximum 4 marks]**

When can the Court appoint a liquidator under the Insolvency Act 2003? And who can make an application for such an appointment?

Following a successful application under section 162 of the Insolvency Act 2003 the Court may appoint a liquidator over a BVI company and in line with an application under section 163 of the Insolvency Act 2003 the Court may appoint a liquidator over a foreign company. The applicant(s) for a Court appointed liquidator can be any of the following: (i) the company (ii) a creditor (iii) a member (iv) the supervisor of a creditor’s arrangement (CCA) (v) the BVI Financial Services Commission (FSC) and (vi) the Attorney General.

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

**Question 3.1 [maximum 5 marks]**

With reference to the relevant legislation, what are the requirements to be appointed as a voluntary liquidator in the BVI after 1 January 2023?

Section 199 of the BVI Business Companies (Amendment Act) 2022 and Regulation 6 of the BVI Business Companies (Amendment) Regulations 2022 prescribes the requirements for the appointment of solvent (voluntary) liquidators. In particular section 6(a)1A of the of the BVI Business Companies (Amendment) Regulations 2022 outlines the requirements and qualifications for a person to be acting as a voluntary liquidator of a solvent company:

1. Evidence of more than two years of experience in liquidation matters;
2. Must display competencies and business acumen to liquidate the subject company and knowledge of the business;
3. Needs to proof that he or she (i) holds an insolvency practitioner’s licence or (ii) is a qualified professional (lawyer or accountant) with the necessary qualifications and experience in providing legal and financial advice / guidance to companies in the financial sector;
4. Must be acquainted with the Financial Services Commission Act and the BVI Business Companies Act, must demonstrate the ability to practise the financial services legislation related to the business/operations of the subject company to be liquidated.

After being appointed, the voluntary liquidator must within 14 days file with the Registrar the following documentation:

1. A notice of his or her appointment in the approved form;
2. The directors’ declaration of solvency; and
3. A copy of the liquidation plan.

The date of commencement for the voluntary liquidation process is the date on which the voluntary liquidator files with the Registrar the notice of his or her appointment. There is a further obligation on the voluntary liquidator to advertise his or her appointment within a period of 30 days from the date the voluntary liquidation commenced.

**Question 3.2 [maximum 5 marks]**

What can be included in an order granted by the Court following a request by a foreign representative to aid in a foreign proceeding under section 467 of the Insolvency Act 2003?

The Insolvency Act 2003 has two parts that deals with cross border insolvency issues. Part XIX and in particular section 467 outlines the specific powers of the BVI Court which can assist foreign representatives in foreign proceedings. A court order that assists a foreign representative means that the BVI court can consider and apply the laws of the applicable country or the laws of the BVI.

A collective judicial or administrative proceeding in terms of insolvency law where the assets and affairs of a debtor is under supervision of a foreign court, with a view to re-organise (restructure) or liquidate, is called a foreign proceeding. A person authorised to attend to such re-organisation of liquidation acting as a representative of the foreign proceeding, is called a foreign representative.

The powers which the BVI Court can make to assist with the foreign proceeding relates to:

1. Imposing a moratorium on any proceedings against the debtor or the property of the debtor;
2. Restricting any enforcement action or any right or remedy someone may claim over the property of the debtor, including creating new rights;
3. Demanding the delivery of property of the debtor or the proceeds of any property of the debtor;
4. Granting relief to implement arrangements and agreements to promote the co-ordination of BVI insolvency proceedings with a foreign proceeding;
5. Assigning an interim receiver to oversee the debtor’s property for an interim period and on applicable terms and conditions;
6. Allowing the foreign representative to conduct the necessary examination of the debtor or any person to be question under insolvency proceedings under BVI law;
7. Making any other order which is considered applicable to an insolvency proceeding under BVI law (including pending of orders or dissolution of other orders).

**Question 3.3 [maximum 5 marks]**

What is a scheme of arrangement under the Insolvency Act 2003? When can such an application be made to the Court, by whom and what are the requisites for it to be approved?

A scheme of arrangement under the Insolvency Act 2003 and the BVI Business Companies Act 2004 is a process whereby a company can be rescued as it proposes the compromise of debt with its creditors and shareholders. This arrangement with creditors and shareholders is court sanctioned and allows for an informal restructure of the company’s affairs.

The company, its creditors, shareholders or a liquidator can apply to the BVI Court for creditors and shareholders to meet. The company can be solvent when it commences the scheme of arrangement. The proposal to compromise the debt is the so-called plan or scheme and is subject to the vote of creditors of all classes, present and voting at the meeting. Once 75% of the creditors have approved the plan put forward, the scheme will be considered “approved”. The applicant who put forward the arrangement will approach the court for an order to approve the scheme by court order whereafter the court order is filed with the Registrar and the scheme is binding on all creditors, shareholder.

Once the order is made a copy is attached to the memorandum of the company and non-adherence to the scheme or arrangement is considered a contravention of the binding scheme of arrangement and punishable by a hefty fine or imprisonment.

Critical aspects of the BVI scheme of arrangement are the following:

1. It doesn’t recognise any rights for creditors who voted against the scheme or plan;
2. Once the order is granted there is no supervisor appointed; and
3. The rights of secured or preferred creditors are not safeguarded.

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

**Question 4.1 [maximum 6 marks]**

In 2019 Yellow Limited, a company incorporated in the BVI entered into a 10-year mortgage with Orange Mortgages Limited, a company registered in the UK, for a property situated in the BVI, which mortgage was due to be paid monthly. Under the terms of the mortgage, if Yellow Limited defaulted on one payment, then the mortgage was repayable immediately. Yellow Limited is now four months in arrears on the mortgage.

Providing reasons, with particular reference to the Insolvency Act 2003, answer the following question:

1. What are the options open to Orange Mortgages Limited in respect of any redress against Yellow Limited?
2. What would be the options available to Orange Mortgages if the loan was unsecured?
3. In terms of section 161(2) of the BVI Business Companies Act the law that governs the charge in favour of the lender, over the property of the debtor, will be agreed between the parties. Should the charge relate to land in BVI it must be registered with the Land Registry in the BVI and the Registrar must keep a copy of each registered charge as prescribed by section 163(3) of the BVI Business Companies Act.

Orange Mortgages Limited (the lenders) enjoys as security a legal mortgage which is a contract that provides the lender with certain rights outlined in the underlying contract. Should the debtor default on the terms of the underlying contract, this will constitute events of default which will trigger certain rights the lender has. For a legal mortgage over immovable property (land) the lender has the option to (i) foreclose (call up the loan and demand payment) (ii) sell the property or (iii) appoint a receiver or liquidator.

If the debtor can’t repay its debts being 4 months in arrears the lender as a secured creditor can apply to BVI Court for the liquidation of Yellow Limited. In terms of section 211 of the Insolvency Act 2003 the lender as a secured creditor must determine its claim in the liquidation (i) once he has valued the assets over which his security and for the balance of the debt (if the security is not sufficient to satisfy the claim) the lender will submit a claim as an unsecured creditor or (ii) the secured creditors can confirmed that it is prepared to part with its security for the general benefit other creditors and then the full claim will be considered unsecured. This is an attempt to make good on the debt due to the lender and claims of other possible creditors.

1. Whereas the Insolvency Act 20023 acknowledges and protects creditors holding security, unsecured creditors share *pari passu* in the assets which are not encumbered in favour of a specific creditor. The proceeds of these unencumbered assets will be available for distribution to all unsecured creditors and will be shared equally (pro rata) amongst the claims of all the unsecured creditors which include claims of secured creditors which weren’t settled from their security interests.

**Question 4.2 [maximum 9 marks]**

In 2023 Owed Limited, a company registered in England, was awarded a judgment for an unsecured debt in the English High Court against Indebted Limited, also incorporated in England, of GBP 10 million. In an attempt to enforce its judgment, Owed Limited has discovered that Indebted Limited’s only asset is a 100% owned subsidiary, Subco Limited, a company incorporated in the BVI, which itself owns a number of unencumbered properties in the BVI but has been struck off of the Register and is now dissolved. The sole shareholder and sole director of Indebted Limited has recently passed away.

You have been tasked by your principal to prepare a memorandum to advise Owed Limited to assist it in recovering the judgement debt by detailing:

1. the number of obstacles Owed Limited has to overcome first before any recovery is possible; and
2. its options to recover the judgment debt owed by Indebted Limited. P38 bring application for liquidation – par 7.6 p 68
3. *Memorandum on pitfalls to register a judgment in BVI and potential of recovery process in BVI*

Recognition of foreign judgments

* A judgment awarded in the **English High Court (England) will be recognised in BVI** under the Reciprocal Enforcement of Judgments Act 1922 (1922 Act) and the common law. **The 1922 Act** specifically extends to judgments given in the High Court of England and will suffice under the circumstances as Owed Limited (the creditor) obtained a judgement in the English High Court.
* “Judgment” refers to **judgment given or a final order granted in civil proceedings** where a liquid sum of money is payable and will qualify as a judgment to be registered. The judgment awarded against Indebted Limited is GBP 10m and can accordingly be registered in BVI. In terms of the Eastern Caribbean Supreme Court (ECSC) Civil Procedure Rules (CPR), CPR45.2 remedies available to BVI judgments will similarly be available to the foreign judgment (i) charging order (ii) garnishee order (iii) judgment summons (iv) order to seize and sell goods and (v) the appointment of a receiver.
* In terms of timing Owed Limited needs to register the foreign judgment within **12 months** of the date of judgment and must apply to Court under the Eastern Caribbean Supreme Court (ECSC) Civil Procedure Rules (CPR), CPR Part 72. They will have to expedite the application as the England judgment was handed down in 2023.
* However, Owed Limited (the creditor) have to **proof that the judgment debtor** (Indebted Limited) has assets in the BVI which can be enforced. That is slightly trickier as Indebted Limited has no assets in the BVI save for a 100% stake in a BVI subsidiary, Subco Limited which owes unencumbered immovable property in the BVI. Owed Limited will have to determine and proof the recourse that Owed Limited enjoys to Subco Limited as subsidiary and related entity in BVI.

Restoration of a struck off and dissolved company

* A further complication is that Subco Limited (BVI subsidiary) have **been struck off the BVI Registrar and dissolved**. In terms of the BVI Business Companies (Amendment) Act 2022 and the BVI Business Companies (Amendment) Regulation 2022 , section 216 of the BVI Business Companies Act 2004 (BCA) has been revoked as from 1 January 2023, and now determines that a company struck off under section 213(4) of the BCA, is dissolved on the date of the notice of the striking-off as published in the Virgin Islands Official Gazette.
* There is however a **process of restoration for a struck off and dissolved entity** under sections 217 and 218 of the BVI Business Companies Act 2004 (BCA. Section 217 of the BCA caters for an application to the Registrar dealing with the necessary requirements and section 218 permits a Court application for restoration. Whereas Owed Limited is a creditor of Indebted Limited or can proof that they will have an interest in having Subco Limited restored, Owed Limited is most likely to be successful with an application under either section 217 or 218 of the BCA.
* An application for restoration must be made within 5 years from the date of dissolution of Subco Limited. Since January 2023 dissolution follow the striking off and therefore the application to restoration will not be out of time.

1. Despite the procedure to have the English judgment registered in the BVI, this is not required to enforce a foreign judgment in BVI. A foreign debtor can also apply for the liquidation of the judgment debtor. Under an amendment to the Eastern Caribbean Supreme Court Virgin Islands) Act, the Court since 7 January 2021 has the jurisdiction to grant interim relief in aid of existing foreign proceedings in any civil or commercial matter. The relief pertains to (i) injunctive relief (ii) appointment of receivers and (iii) third party disclosure orders. Whereas Owed Limited enjoys only an unsecured claim against Indebted Limited its claim against Subco Limited (BVI subsidiary) will also be unsecured. To this end, the only way to secure any dividend from the unencumbered immovable property in the name of Subco Limited, a liquidation process and appointment of a receiver would be best suited to understand the position of any other possible unsecured creditors and the extent to which unsecured creditors will share *pari passu* in the proceeds of the unencumbered assets of Subco Limited.

Since the sole director and sole shareholder of Indebted Limited passed away there could be merit in considering an application for bankruptcy of their personal estates to the extent that they were individuals of means. The interim relief for third-party disclosures will be handy to ascertain the potential of any possible claim against the estate of the deceased.

**\* End of Assessment \***