



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 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: **[studentnumber.assessment5B]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. 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**.

ANSWER ALL THE QUESTIONS

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

Commented [CW1]: 10 marks

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

When is the appointment of a liquidator **deemed to commence**, when there has been a qualifying resolution passed to appoint a liquidator?

- (a) On the date of the order appointing the liquidator.
- (b) On the date the qualifying resolution is passed.
- (c) On the filing of the application to appoint a liquidator.**
- (d) On the advertisement of the application to appoint a liquidator.

Commented [CW2]: Incorrect 0 marks

Question 1.2

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

- (a) Within 14 days of the service of the statutory demand.
- (b) Within 21 days of the date of the statutory demand.
- (c) Within 21 days of the service of the statutory demand.**
- (d) Within 14 days of the date of the statutory demand.

Commented [CW3]: Correct 1 mark

Question 1.3

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

- (a) A member of the company.
- (b) A creditor.
- (c) The creditors' committee.
- (d) A receiver.**

Commented [CW4]: Correct 1 mark

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?**

- (a) The creditors, the shareholders, persons claiming an interest in the assets and the company.
- (b) The creditors, sureties, the shareholders and the company.
- (c) The creditors, sureties, persons claiming an interest in the assets of the company and the company.
- (d) The creditors, shareholders, sureties and persons claiming an interest in the assets of the company.

Commented [CW5]: Correct 1 mark

Question 1.5

A person is an "eligible insolvency practitioner", able to be appointed over an insolvent BVI company, foreign company or an individual's estate as a trustee in bankruptcy if:

- (a) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (b) He or she is a licenced insolvency practitioner; has advertised for his or her role; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (c) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding an appointment; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (d) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force an undertaking for the proper performance of his or her functions.

Commented [CW6]: Correct 1 mark

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?

- (a) Within 12 months of the date of judgment.
- (b) Within 3 months of the date of trial.
- (c) Within 6 months of the date of judgment.
- (d) Within 6 months of the date of trial.

Commented [CW7]: Correct 1 mark

Question 1.7

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

- (a) The liquidator has custody and control of the assets of the company.
- (b) The assets automatically vest in the liquidator.
- (c) The directors remain in office, but cease to have any powers.
- (d) Shares in the company cannot be transferred.

Commented [CW8]: Correct 1 mark

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?

- (a) Two (2) years prior to the onset of insolvency and ending on the appointment of the liquidator.
- (b) Two (2) years prior to the appointment of the liquidator.
- (c) Six (6) months prior to the onset of insolvency and ending on the appointment of the liquidator.
- (d) Five (5) years prior to the appointment of the liquidator.

Commented [CW9]: Correct 1 mark

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?

- (a) Stating that the company is insolvent or is likely to become insolvent.
- (b) Approving a written proposal setting out how the creditors' rights will be varied or cancelled.
- (c) Approving a liquidation plan and a declaration of solvency.
- (d) Nominating an eligible insolvency practitioner to be appointed interim supervisor.

Commented [CW10]: Correct 1 mark

Question 1.10

When does a voluntary liquidation commence?

- (a) When the directors of the company sign a declaration of solvency.
- (b) When the directors of the company sign a liquidation plan.
- (c) When the directors of the company pass the resolution appointing the voluntary liquidator.

(d) On the date the voluntary liquidator files a notice of appointment with the Registrar.

Commented [CW11]: Correct 1 mark

QUESTION 2 (direct questions) [10 marks]

Commented [CW12]: 8 marks

Question 2.1 [maximum 2 marks]

Commented [CW13]: Correct answer 2 marks

With reference to the relevant legislation, in what circumstances can a liquidator be removed from office?

[According to the Insolvency Act under section 221, there are enforcement provisions in relation to a liquidator's duties. An application to remove the liquidator can be made by the creditors' committee, a creditor or member of the company, or the Official Receiver. An application may not be made for an order as against a liquidator or an administrator who has been released, except with the leave of the Court. Pursuant to section 187 of the Insolvency Act, the liquidator can be removed from office if he: is not eligible to act; breaches a duty or obligation, fails to comply with a direction of the Court, or the Court is satisfied that: (i) the liquidator's conduct of the liquidation is below the standard that may be expected of a reasonably competent liquidator; or (ii) the liquidator has interests in conflict with his role. In addition, there are provisions under section 231 for the enforcement of a liquidator's administrative duties.]

Question 2.2 [maximum 2 marks]

Commented [CW14]: 1 mark

A liquidator is appointed to a BVI incorporated company by the Court. In what circumstances would an officer of that company be deemed to have committed an offence pursuant to the fraudulent conduct provisions? You are required to make reference to the relevant legislation.

The candidate appears to have confused the question and the wording of the Act.

[Pursuant to section 289 of the Insolvency Act, a liquidator appointed by the Court, who is or has been an officer of the company is deemed to have committed an offence if, at any time whilst an officer or during the period of twelve months preceding the commencement of the liquidation, he has: made or caused to be made any gift or transfer of, or charge on, or has caused, permitted or acquiesced in the levying of any execution against the company's assets; or has concealed or removed any of the company's assets since, or within, sixty days of the date of any unsatisfied judgment or order for the payment of money obtained against the company. A person is not guilty of an offence under this section: by reason of conduct constituting an offence which occurred more than five years before the commencement of the liquidation; or if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud the company's creditors.]

Commented [CW15]: This is confusing – the question refers to officers of the Company and not the Liquidator.

Question 2.3 [maximum 2 marks]

Commented [CW16]: 2 marks

With reference to the Insolvency Act, what powers are provided to the BVI Court in relation to the orders the Court can make in support of foreign insolvency proceedings?

However, the candidate should be wary of copying and pasting from the Guidance Text.

[Part XIX of the Insolvency Act provides the primary framework for the powers provided to the BVI Court to make orders in aid of foreign proceedings. Pursuant to section 467 of the Insolvency Act, the power to make such orders extends to designated countries. The BVI Court is provided with wide powers in relation to the orders that can be made, which include: restraining the commencement or continuation of any proceedings, against a debtor or debtor's property; restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property; requiring any person to deliver up any property of the debtor or the proceeds of such property; ordering or granting relief to facilitate, approve or implement arrangements that will result in a co-ordination of BVI insolvency proceeding with a foreign proceeding; appointing an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate; authorising the examination by the foreign representative of the debtor or of any person who could

examined in a BVI insolvency proceeding; or staying or terminating or making any other order it considers appropriate in relation a BVI insolvency proceeding.]

Question 2.4 [maximum 4 marks]

With reference to the relevant legislation, set out the circumstances in which a company will be considered insolvent in the BVI.

[Corporate insolvency is governed by Part VIII of the Insolvency Act, with procedural requirements provided for under the IR and another important definitions are provided in section 8 of the Insolvency Act. There are a few circumstances in which a company will be considered insolvent in the BVI. Let's see: (i) If it is proved to the satisfaction of the Court that a company is unable pay its debts they fall due (a question of fact). In other words, that an inability to pay a debt that is due and not disputed, is sufficient evidence of insolvency. (ii) If it is proved to the satisfaction of the Court that the value of the company's liabilities exceeds the value of its assets, or "balance sheet insolvency". The BVI Court of Appeal in Trade and Commerce Bank Island Point Properties confirmed that a company may not be considered balance sheet insolvent in circumstances where the value of a company's assets became lower than those of its assets for only a short period. (iii) If a company fails to satisfy (wholly or partly) execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company. (iv) If a company fails to comply with the terms of a statutory demand and it is not successfully set aside under sections 156 and 157 of the Insolvency Act. The most common reason that a company would apply to set aside a statutory demand is that a debt is disputed. Where a company wishes to set aside a statutory demand, it must make an application to the Court.]

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

Question 3.1 [maximum 5 marks]

With reference to the relevant legislation, explain the steps a liquidator must take when preparing to terminate a liquidation.

[In practice, there are three steps. The liquidator must (i) file to the final report, (ii) apply for their release and (iii) write to the Registrar/FSC to request that the company be dissolved.

The liquidation company terminates when the Court makes an order terminating the liquidation or when the liquidator filed a certificate of compliance; or when the Court makes an order exempting the liquidator from having to file a certificate of compliance.

At first, the liquidator is required to prepare his final report as soon as practicable after completing his duties. Such report must be sent to every admitted creditor and every member of the company. A copy of the final report must also be filed with the Registrar. Section 234 sets out the requirements for certain statements to be included in the final report. The liquidator is also empowered to make an application to the Court to exempt the liquidator from compliance of this requirement.

In addition, pursuant to section 235 of the Insolvency Act, the liquidator or provisional liquidator can apply for their release when their appointment ends. The effect of a release is that the liquidator is discharged from all liability in respect of any act or default in relation to his administration of the company.

On termination and completion of liquidation, section 336 of the Insolvency Act states that the IR will provide for the dissolution of a company. However, there is a lacuna in the IR in this respect, as no such procedure has been legislated for.

Commented [CW17]: 3 marks.

1 mark deducted for copying and pasting much of the Guidance Text.

Commented [CW18]: Not defined as copied and pasted from the Guidance Text

Commented [CW19]: 10 marks

Commented [CW20]: Good answer, 5 marks

Moreover, termination of a liquidation may not necessarily mean that the company should be dissolved.]

Question 3.2 [maximum 5 marks]

In relation to a voluntary (solvent) liquidation, please set out: (i) the red flags that would lead a voluntary liquidator to identify the company as insolvent; and (ii) the steps that are required of the voluntary liquidator in the event insolvency is identified. Please ensure that you refer to the relevant legislation.

[Pursuant to section 209, Division 2 of the BCA, should a voluntary liquidator discover, during the course of their investigations, that (i) the value of the company's liabilities exceeds or will exceed those of its assets; or (ii) the company is or will be unable to pay its debts as they fall due, the voluntary liquidator is required to immediately send a written notice to the Official Receiver, because this is a red flag that the company is insolvent.

After this, the voluntary liquidator must then call a meeting of the creditors within 21 days of the date of the notice (called under section 179 of the Insolvency Act). In the event that the voluntary liquidator is not a licenced insolvency practitioner, the Official Receiver may apply to the Court for the appointment of himself or another licenced insolvency practitioner as liquidator. From the time that the voluntary liquidator becomes aware that the company is or will be insolvent, the Insolvency Act will apply. Then the Court will appoint a liquidator if it is satisfied that the company is insolvent.]

Question 3.3 [maximum 5 marks]

Referring to legislation (where relevant), explain where a receiver, appointed over the assets of a BVI company, would find his or her powers.

[The receiver's powers are those which are granted under the order appointing the receiver. Accordingly, the initial drafting of the appointing document or the order are very important in relation to the breadth of the powers of a receiver. Section 127(2) of the Insolvency Act also sets out the statutory powers granted to a receiver in the event that the charge of other instrument does not expressly provide for these. The receiver must also have reasonable regard to the interests of: (a) the creditors of the company; (b) sureties who may be called upon to fulfil obligations of the company; (c) persons claiming, through the company, an interest in assets in respect of which he was appointed; and (d) the company.]

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

Question 4.1 [maximum 6 marks]

In September 2020 Harrison Holdings Limited, a company incorporated in England, brought a claim against Maximilian Properties Limited, a company incorporated in the BVI, in the English High Court. Maximilian Properties did not attend the hearing and Harrison Holdings was awarded judgment in the sum of USD 5,000,000.

Maximilian Properties has significant assets in the BVI. Giving reasons, with particular reference to the Reciprocal Enforcement of Judgments Act 1922, what options should Harrison Holdings be advised to consider in order to enforce its foreign judgment debt?

Commented [CW21]: 3 marks

Commented [CW22]: Or the Commission if the Company is regulated.

Commented [CW23]: The candidate could have provided more detail here in relation to the steps to be taken, with reference to section 210 of the BCA.

Commented [CW24]: 2 marks Candidate failed to note the different between a receiver appointed under a Court order and under a document such as a debenture and failed to refer to the legislation. There is also a lack of detail.

Commented [CW25]: A receiver may also be appointed pursuant to a document such as a debenture. Please refer to section 127(1)(a) and (b) of the IA.

Commented [CW26]: Candidate could have provided more detail in relation to section 127(2).

Commented [CW27]: 1 mark

Commented [CW28]: 0 marks.

Answer is incorrect and lacking detail or any real consideration.

[[The enforcement of a foreign judgment in the BVI is only effective to the extent that the judgment defendant has assets in the BVI, against which to enforce, like Maximillian Properties has.

Prior to making an application for registration, Harrison Holdings Limited has to identify any assets held in the Territory, because under the 1922 Act, only judgments for final and conclusive monetary sums can be enforced and any other judgment, declaratory, injunctive or otherwise, cannot be enforced.

Given that the foreign judgment was given by the High Court of England Wales, Harrison Holdings Limited should apply for register under the 1922 Act by the BVI Court, then it is treated as being of the same force and effect as if that judgment had been made in the BVI. Accordingly, all the remedies usually available under the CPR will be available. Pursuant to CPR 45.2, these include: (i) charging order; (ii) a garnishee order; (iii) a judgment summons; (iv) an order for seizure and sale of goods; and (v) the appointment of a receiver. The foreign judgment is registrable within 12 months of the date of judgment, unless the BVI court grants a longer period on the basis that it is just and convenient to do 232 so. In order to register a judgment, a judgment creditor must apply to court under CPR Part 72.]

Question 4.2 [maximum 9 marks]

Peralta Limited, a company incorporated in England, and Santiago Limited, a company incorporated in the BVI, entered into a loan agreement for the purchase of a property on Moskito Island in the BVI. Under the terms of the loan agreement, Peralta transferred USD 10,000,000 to Santiago and Santiago successfully purchased the property. Subsequently, Santiago failed to make any of the loan repayments pursuant to the repayment clauses. As a result of this failure, Peralta made a demand for immediate repayment in full, as it was entitled to do under the agreement. Santiago failed to make any repayments in full or in part.

Providing reasons, with particular reference to the Insolvency Act, what options should Peralta Limited be advised to consider in order to enforce the debt owed to it by Santiago Limited?

[Peralta Limited can commence a formal insolvency proceeding. Santiago Limited will be considered insolvent in the BVI, if It is proved to the satisfaction of the Court that a company is unable pay its debts they fall due. In other words, that an inability to pay a debt that is due and not disputed, is sufficient evidence of insolvency. In a BVI insolvent liquidation, it is the creditors of the company who ate the ley stakeholders. Moreover, the BVI is a creditor-friendly jurisdiction and much of the legislation is biased heavily toward creditors]

*** End of Assessment ***

Commented [CW29]: This is confused and incorrect. It is useful to identify assets in the jurisdiction so that the creditor can assess whether or not it is worth making the application. If there are no assets, it would be pointless to spend the money, as there would be nothing to enforce against. However, this in itself does not prevent the creditor from making the application for registration.

Commented [CW30]: Candidate has failed to consider the act and the steps required. If the candidate had done so they would have identified that it is unlikely the judgment would be registrable as the debtor failed to attend the hearing. The remedies under the CPR are therefore unlikely to be available and other options should be considered.

Commented [CW31]: 1 mark
Candidate has failed to answer the question, aside from identifying that Peralta Limited can consider commencing a formal insolvency proceeding.

Commented [CW32]: Total marks: 29