



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]: Correct 1 mark

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]: 10 marks

Question 2.1 [maximum 2 marks]

Commented [CW13]: 2 marks

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

Answer

Under Section 187 of The Insolvency Act 2003, a liquidator can be removed from office in the following circumstances: (a) he or she is not eligible to act as a liquidator, (b) is in breach of a duty or obligation, fails to comply with the court's direction or the court is satisfied that the liquidator's conduct is below the standard that may be expected of a reasonably competent liquidator or the liquidator is conflicted to act.

Question 2.2 [maximum 2 marks]

Commented [CW14]: 2 marks

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.

Answer

A liquidator can be appointed by the court to a BVI incorporated company pursuant to Section 159(1)(a) of The Insolvency Act 2003. An officer of the company is deemed to have committed an offence pursuant to the fraudulent conduct provisions under Section 289(1) of The Insolvency Act 2003 in the following circumstances:

- Has made or caused to be made any gift, transfer, charge, permitted or acquiesced in the levying of any execution against the assets of the company.
- Has concealed or removed the company's asset since or within 60 days of an unsatisfied judgement or order for the payment of money against the company.

Any of the above offences should have been committed whilst such a person is an officer of the company or during 12 months preceding the start of liquidation.

Commented [CW15]: Please also see section 289(2).

Question 2.3 [maximum 2 marks]

Commented [CW16]: Good answer 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?

Answer

The orders that the BVI court can made in support of foreign insolvency proceedings are to be found in Section 467(3) of The Insolvency Act 2003 and these are as follows:

- An order restraining the start or continuation of any proceedings against a debtor or the debtor's property.
- An order restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property.
- An order that requires a person to deliver any of the debtor's property or any such proceeds relating to that property.
- The granting of a relief or an order that facilitates, approves or implements the arrangements that will result in the co-ordination of the BVI insolvency proceedings with a foreign proceeding.

- The appointment of an interim receiver of any of the debtor's property for such term and subject to any such conditions as the court considers appropriate.
- An order authorising the examination by the foreign representative of the debtor or any person who could be examined in a BVI insolvency proceedings.
- An order for stay or termination or the making of any other such order the court considers appropriate in relation to BVI insolvency proceedings.

Section 468 sets out the factors that the court should consider in making any order under Section 467 listed above.

Question 2.4 [maximum 4 marks]

Commented [CW17]: 4 marks

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

Answer

Under Section 8 of The Insolvency Act 2003 a company is considered to be insolvent in the following circumstances:

- If it can be proved to the court's satisfaction that a company is unable to pay its debts as they fall due. This is a question of fact.
- If the court is satisfied that the value of the company's liabilities exceeds the value of its assets or balance sheet insolvency (section 10).
- If a company fails to satisfy wholly or in part execution or any other process issued on a judgement, decree or court order in favour of a creditor of the company.
- If the company fails to comply with the terms of a statutory demand that has not been set aside under Section 156 and 157 of the Insolvency Act 2003.

Commented [CW18]: Section 10 sets out the definition of liability.

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

Commented [CW19]: 10 marks

Question 3.1 [maximum 5 marks]

Commented [CW20]: 4 marks
Candidate could have provided more detail, particularly given this is an essay type question.

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

Answer

Following the completion of liquidation, the liquidator is obliged under Section 234 to do the following:

- Prepare a final report to be sent to all admitted creditors and members of the company as soon as practicable following the completion of his duties under Section 234 (2).
- The final report should contain the statements contained in Section 234(3).
- File a copy of the final report with the Registrar.
- Apply to the court for his or her release under Section 235 thereby being discharged from all liabilities in respect of any act or default in the administration of the company.

Question 3.2 [maximum 5 marks]

Commented [CW21]: 3 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.

Answer

The red flags are as follows:

- the company's liabilities exceed or are likely to exceed its assets and / or

- the company is or will be unable to pay its debts as they fall **due**.

Commented [CW22]: Candidate failed to refer to the legislation – section 209(1)(a) and (b)

Once insolvency is identified the liquidator is required to take the following steps:

- Send a written notice to the Official Receiver and also the Financial Services Commission if the company is so regulated.
- Call a creditor's meeting within 21 days of the notice under Section 210 (1) of the Business Companies **Act**.

Commented [CW23]: Details and steps are missing from this answer. Candidate should refer to section 210 of the BVI BCA.

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**.

Commented [CW24]: 3 marks

Answer

The powers of a receiver appointed over the assets of a BVI company are to be found

- (i) expressly or impliedly in the charge or other document under which the receiver has been appointed,
- (ii) If appointed by the court under the court order appointing the receiver,
- (iii) in Section 127(2) of The Insolvency Act if the charge document or any other instrument fails to expressly provide for such **powers**.

Commented [CW25]: Candidate has failed to refer to the legislation (section 127(1)(a) and (b)).

Commented [CW26]: Candidate should have provided more detail here.

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

Commented [CW27]: 6 marks

Question 4.1 [maximum 6 marks]

Commented [CW28]: Good answer 5 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?

Answer

The recognition of foreign judgement as is the case of the English court judgment by Harrison Holdings Limited against Maximilian Properties is governed by the Reciprocal Enforcement of Judgements Act (CAP65)1922. There are a number of options that Harrison Holdings should consider to enable it to enforce its foreign judgement in the BVI.

Firstly, we have been advised that the judgment debtor, Maximilian Properties, "has significant assets in the BVI". This is very useful information and it means that there are assets in the BVI that Harrison Holdings can enforce its judgement against. Harrison Holdings should therefore take steps to identify all such assets in the BVI as the judgment is for a significant amount.

The definition of "judgement" in Section 2(1) of the above- mentioned Act should be noted. It includes any judgment or order of a court in any civil proceedings before or after the passing of the Act, whereby any sum of money is made payable. The judgment obtained against Maximilian Properties falls within this definition. We have been told it was a judgment of the High Court in the United Kingdom in a civil proceeding and that under the judgment the sum of US\$5,000,000 was awarded in favour of Harrison Holdings Limited.

The next step that Harrison Holdings Limited should take is to register the foreign judgment in the BVI court. This should be done within 12 months from the date the judgment was obtained. Once registered the English judgment is treated under Section 3 (3) (a) as a judgement obtained in the BVI from the date of its registration. The remedies available to Harrison Holdings are to be found in CPR 45.2 and includes a charging order, a garnishee order, a judgement summons, an order for seizure and sale of goods and the appointment of a receiver.

In making an application to have the foreign judgement registered Harrison Holdings Limited must apply to the BVI court under CPR Part 72. The application must contain the information as prescribed under Part 72 and a duly authenticated copy of the judgment including details of interest that has become due under English Law should be exhibited. There is no need for Maximillian Properties to be given notice of the above application.

It is likely that Harrison Holdings Limited will be required to give security for costs in case Maximillian Properties applies to have the registration of the judgment set aside. It is likely that one of the grounds under which the BVI court cannot order the registration of a foreign judgment will apply in this case i.e. the judgement debtor being not resident or carrying on business in England did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the English court. This is likely to be met as we have been advised that Maximillian Properties was not present at the hearing.

Harrison Holdings Limited can decide not to apply to have the judgement registered and instead use insolvency proceedings under the Insolvency Act 2003.

Another option that Harrison Holdings Limited should consider is to bring an action at common law against Maximillian Properties for the judgement amount. Harrison Holdings Limited should be able to do so as the courts in the BVI will treat any such monetary judgment as a cause of action.

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?

Answer

There are a number of options that Peralta Limited can use to enforce the debt owed to it by Santiago Limited.

The first option is for Peralta Limited to commence proceedings in the UK. This is dealt with in Part XIX of the BVI Insolvency Act. It provides the framework and empowers the BVI court to make order in aid of foreign proceedings. The courts in the BVI can recognise such foreign proceedings and provide assistance to foreign representatives. This is useful as the United Kingdom is one of the countries that the power of the court to make such orders

Commented [CW29]: The candidate could have provided a little more detail here.

Commented [CW30]: 1 mark

Given that the asset which is the subject of the loan agreement is situated in the BVI and the debtor is a BVI incorporated entity, the candidate should have considered advising Peralta of the following potential options:

Serving a statutory demand on Santiago.

Making an application for the appointment of a liquidator in the BVI Court.

Making an application for the appointment of a receiver, given that the debt relates to a property.

Making a contractual claim in the BVI Court.

Commented [CW31]: However, the asset and the debtor are both in the BVI. This would be a much more complicated route to pursue and would likely be much more expensive, particularly when the BVI has a highly developed insolvency regime.

extends to. Under Section 467(5) of the Insolvency Act, in making an order to aid foreign proceedings the BVI courts are able to apply the law of the foreign country in this case the United Kingdom or that of the BVI.

The definition of foreign proceedings includes interim proceedings in which the property and affairs of the debtor i.e. Santiago Limited are subject to control or supervision by a foreign court. Under Section 466(1) such control or supervision should be for the reorganisation, liquidation or bankruptcy. Foreign representative is also defined in the Act as "a person or body (including one appointed on an interim basis), authorised in a foreign proceedings to administer the reorganisation or the liquidation of the debtor's property or affairs, or to act as a representative in the foreign proceeding. The liquidator appointed in the UK would fall within the definition of a foreign representative.

Under Section 467(3) of the Insolvency Act, the BVI court is given a wide range of powers as to the orders it can make. Such as

- 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.
- Ordering the delivery of property belonging to the debtor or the proceeds of such property.
- Grant a relief to facilitate, approve or implement arrangements that will result in a co-ordination of BVI insolvency proceedings with a foreign proceeding.
- Appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate.
- Authorise the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding.
- Stay or send or make any other order it considers appropriate in relation to a BVI insolvency proceeding.

Section 468 of the Act sets out matters that the BVI court should consider in making any of the orders mentioned above. The court should be guided to achieve what is best to ensure the economic and expeditious administration of the foreign proceeding in so far as it is consistent with :

- o The just treatment of all persons claiming in the foreign proceeding.
- o The protection of persons in the BVI who have claims, from prejudice and inconvenience in the processing claims in the foreign proceeding.
- o Prevention of fraudulent or preferential distribution of property.
- o Enduring that the distribution to claimants in the foreign proceedings is substantially in accordance with the order of distribution under a BVI insolvency.
- o Comity

None of the above orders should affect the rights of the secured creditor to deal with the property over which they have a secured interest under Section 467(4). They also do not affect the right of creditors to benefit from a set off or result in a preferential creditor receiving less than he or she would have received in a BVI insolvency proceeding except with their consent.

Another option that Peralta Limited should consider is that under Section 446 under which foreign creditors like Peralta Limited are provided with a direct access regarding the commencement and participation in BVI insolvency proceedings as creditors in the BVI. Such rights however does not affect the priority of claims in the BVI insolvency proceedings or the execution of foreign penal, revenue and social security claims.

Section 461 deals with concurrent proceedings . It should however be noted that in such case the liquidation in BVI will be considered the primary liquidation as the BVI is Santiago's country of incorporation.

Another option available to Peralta Limited is to obtain a money judgement in the UK and then have it registered in the BVI. This should however get done within 12 months of the judgement being obtained. It should be noted that the conditions set out in Section 3(2) of the Reciprocal Enforcement of Judgements Act 1922 are not breached. For example the UK court acted without jurisdiction, the judgement debtor was not carrying business nor resident in the UK did not voluntarily appear or otherwise submit to the jurisdiction of the UK court.

In my opinion the option of seeking assistance from the BVI Court under Section 467 is the most suitable alternative.

*** End of Assessment ***

Commented [CW32]: The question specifically states that the question should have reference to the BVI Insolvency Act.

Commented [CW33]: Please see above comments. Candidate has not considered using the BVI insolvency regime to any great extent.

Commented [CW34]: Total marks: 36