



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: 2020211FU-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]: 9 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]: Incorrect 0 marks

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]: 9 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?

Section 187 of the Insolvency Act quotes that a liquidator can be removed from their positions if:

- Is not eligible to act; or
- Breaches duty or obligation or fails to act by the direction of the Court, or the Court is satisfied that:
 - o The liquidator's conduct has not been to adequate standard and the liquidator has acted incompetently; or
 - o The liquidator has conflicts of interest.

The creditors committee, a creditor, a member, or the official receiver can apply to remove the liquidator.

Question 2.2 [maximum 2 marks]

Commented [CW14]: 2 marks, well done

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.

Section 289 states that a person that is or was an officer of the company during the 12 months prior to the commencement of the liquidation if they have:

- Made or caused to made any gift or transfer, 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 judgement or order for the payment of money obtained against the company.

Question 2.3 [maximum 2 marks]

Commented [CW15]: 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?

Section 467 states that the BVI Court has the following powers, which are not fully comprehensive:

- Restraining the commencement or continuation of any proceedings, against a debtor or debtor's property;
- Authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding;

- Ordering or granting relief to facilitate, approve or implement arrangements that will result in a co-ordination of BVI insolvency proceedings with a foreign proceeding;
- Restraining the creation, exercise or enforcement of any rights or remedy over or against any of the debtor's property;
- Staying or termination or making any other order it considers appropriate in relation to a BVI insolvency proceeding; or
- Appointing an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate.

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.

There are four circumstances in which a company is considered insolvent in the BVI:

- It cannot pay its debts as they fall due;
- It is in a net liability position (liabilities exceed assets);
- It fails to satisfy, wholly or partly, execution or other process issued on a judgement, decree or order of the BVI Court in favour of a creditor of the company; or
- It 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.

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.

A liquidation is considered open until the liquidator terminates the liquidation pursuant to section 232 of the Insolvency Act. However, a liquidation can be concluded on the first of the Court terminating, the liquidator filing a certificate of compliance, or the court makes an order exempting the liquidator from filing the certificate of compliance.

Under section 234(2) of the Insolvency Act, the liquidator must prepare a final report as guided by section 234 (3) as soon as practicable to do so once their duties are complete. This report should be sent to all creditors and all members of the company, and filed with the Registrar. The liquidator can apply to be exempt from providing the report to all creditors.

Once the liquidator has filed for the termination of the liquidation, the company will be placed in to dissolution. Pursuant to section 235, the liquidator can apply for their release which means that they are discharged from all liability relating to any act or default in relation to the

Commented [CW16]: 3 marks, Not a comprehensive answer and does not refer to the relevant legislation.

Commented [CW17]: 7 marks

Commented [CW18]: 3 marks

Commented [CW19]: More details in relation to the report could be included here.

Commented [CW20]: Candidate should refer tot the legislation.

Commented [CW21]: Please refer to the Guidance Text.

administration of the company. Under section 254, the Court can still make an order against the liquidator.

In conclusion, the liquidator must file a report and apply for his release, and finally, write to the Registrar and/or FSC.

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.

Generally, the red flags for a voluntary liquidator that indicate a company is insolvent are that the assets of the company do not meet its liabilities in value and that the company is unable to meet its debt obligations, or will be unable to meet them in the future.

If it became prevalent that the company is insolvent, then the voluntary liquidator needs to alert the Official Receiver immediately by way of written notice, and call a meeting of the creditors within 21 days of sending the written notice. This is considered the first meeting of creditors under section 179 of the Insolvency Act by the liquidator.

If the voluntary liquidator is not an insolvency practitioner (they are not qualified and/or licenced) then Court application may be made by the Official Receiver to appoint themselves. The Insolvency Act will apply as soon as the company is insolvent, and the Court will appoint a liquidator if they deem it necessary.

As such, the voluntary liquidator will be unable to continue the liquidation if they are not qualified, and the Official Receiver will take it forward if this is the case. The Court will then appoint a liquidator if they are satisfied 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 powers of a receiver, as listed and specified in section 127(2) of the Insolvency act, of a company in the BVI heavily depend on the method of their appointment; there are two methods:

- By the Court on an application; or
- Under a debenture.

If a receiver is appointed by the Court, they are considered to be an agent of the Court, and his powers extend to those which are granted under the order appointing the receiver, and hence the appointment document is extremely important.

Examples of powers granted by the Court to a receiver are to demand and recover, by action or otherwise, income from the assets, issue receipts for income recovered; manage, insure, repair and maintain the assets over which the receiver has been appointed; and exercise, on behalf of the security giver, a right to inspect books or documents that relate to the assets in the possession, or under the control, of a person other than the security giver.

Commented [CW22]: 2 marks

Commented [CW23]: Candidate has failed to refer to the legislation.

Commented [CW24]: Candidate should proof read work, this sentence does not make sense.

Commented [CW25]: Again the candidate should refer to the legislation and provide more detail here.

Commented [CW26]: 2 marks
This answer is a little confused and contains a number of mistakes.

Commented [CW27]: Section 127(2) provide the powers of a Receiver, unless otherwise provided for by the charge (or other instrument) or the Court order.

Commented [CW28]: Charge or other instrument by which the receiver is appointed

Commented [CW29]: This is found in section 127(1) of the IA

Commented [CW30]: These are the powers conferred on the Receiver pursuant to section 127(2)

If a receiver is appointed out of Court, or under a debenture is an agent of the company unless a liquidator is appointed. There is no guideline on the powers given to an out of court appointment, however, the aforementioned powers are generally accepted.

Under section 128(1), a receiver has duty to exercise the powers in good faith and in a manner they believe to be in the best interest of the person in whose interest he was appointed. This includes consideration for the creditors, the sureties that may be called upon, any person claiming interests in the assets over which the receiver is appointed, and to take into consideration 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?

The Reciprocal Enforcement of Judgments Act 1922 extends to judgements given in the High Court of England and Wales. Once the judgement is registered by the BVI Court, it is treated from the date of registration as being of the same force and effect as if that judgement has been made in the BVI (section 3.3.a).

As there is a defined monetary value, Harrison Holdings Limited should register the judgement with the BVI Court within 12 months from the date the judgement was made.

Under the Eastern Caribbean Supreme Court (ECSC) Civil Procedure Rules 2000 (CPR) govern the practice and procedure in the BVI Courts. Within the Commercial Court, parts 69A and 69B, the transaction should have a value of over \$500,000 (USD), and as such, the claim of \$5,000,000 would be eligible. Further, it is common for high value insolvency proceedings to be brought in to the BVI Commercial Division which was established in May 2009.

In order for the order to be recognised, it will need to be determined that the English Court has granted an eligible order. The BVI may refuse the order on the grounds that:

- The English Court acted without jurisdiction;
- The judgement debtor, being a person who was neither carrying on business nor ordinary resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the English Court;
- The judgement debtor was not duly serviced with the process of the English Court and did not appear, notwithstanding that they are ordinarily resident or carrying on a business within the jurisdiction of that court or agreed to submit to the jurisdiction of the English Court;

Commented [CW31]: 5 marks

Commented [CW32]: 2 marks

Candidate failed to identify that the BVI Court is unlikely to register the judgment as Maximilian Properties did not appear at the hearing.

Candidate failed to discuss the common law.

Candidate failed to discuss other enforcement options available.

- The judgement was obtained by fraud;
- The judgement debtor satisfied the English Courts that an appeal is pending or that they are entitled to and intend to appear; or
- The judgement related to a cause of action which for reasons of public policy could not have been entertained by the BVI court.

It appears that Harrison Holdings would be successful in applying for a claim in the BVI Court against Maximillian Holdings as they meet all the relevant criteria, and it does not appear that the statements that would allow the BVI to reject their claim are relevant.

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 is considered to be a "foreign creditor" as it is incorporated in England. Section 446 of the insolvency act would provide Peralta Limited direct access, and as such, has the same rights as a BVI creditor when it comes to commencing proceedings against Santiago Limited.

The question has not state if Santiago is insolvent, if it is currently in liquidation nor whether the loan provided for the property is secured over that particular asset. Presuming it is not yet in liquidation, and that it is insolvent in that it is unable to currently settle its debts, or settle them in the future, and that the loan is secured over the property and that a charge has been registered in accordance with section 162 of the Act, then their claim will be directly against the assets of the company and they would not form part of the liquidation.

Further, as a creditor of Santiago Limited, Peralta Limited can apply to the BVI court for the appointment of a liquidator pursuant to section 162 of the Act. The application should be determined within 6 months, however the Court can extend this timeframe by a further 3 months if they considered it necessary.

The appointment of the liquidator does not impact Peralta Limited's claim over the company, even though the assets of the company are vested in the liquidator, as they are considered secured and as stated above, are outside of the scope of the liquidation.

The above said, if Peralta Limited is an unsecured creditor, then it will need to submit a Claim against the company by submitting it to the liquidator in writing. The liquidator will require Peralta Limited to:

- Verify the claim by affidavit;
- Provide further particulars of the claims; or

Commented [CW33]: Incorrect, the question specifically states that Maximillian Properties did not attend the hearing.

Commented [CW34]: 3 marks

Candidate has failed to give any detail in relation to the application to be made for the appointment of a liquidator (please refer to section 162).

Candidate has not discussed service of a statutory demand.

Candidate has not discussed the appointment of a receiver or any other options available.

Commented [CW35]: Candidate fails to set out the basis under section 161 pursuant to which such application would be made.

Commented [CW36]: The question does not state that the debt is secured.

- Provide the liquidator with documentary or other evidence to substantiate the claim.

Unlike if they were secured, and would receive their entire return as higher up in the parri passu principle, they could only receive part of their claim where liabilities exceed the assets of the company. The liquidator may also amend or rebut Peralta Limited claim if they are unsecured.

For clarity, here is the order in which creditor claims are settled:

- Costs and expenses properly incurred in the liquidation in accordance with the prescribed priority;
- Preferential claims;
- Unsecured creditors; and finally
- Any interest accrued.

It would be sensible for Peralta Limited to form a creditors committee after the commencement of the liquidation as they would be able to consult with the liquidator regarding matters relating to the liquidation, receive reports from the liquidator and be involved in the process by assisting the liquidator in discharging their functions.

Further, a creditors committee can:

- Call a meeting of creditors;
- Require the liquidator to provide the committee with reports and information concerning the liquidation; and
- Require the liquidator to attend the committee to provide it with such information and explanations concerning the insolvency proceedings as it reasonably requires.

In conclusion, if Peralta cannot come to an agreement with Santiago, then they should apply to the court for the Santiago to be placed in to liquidation. They must be mindful if they are not a secured creditor, and do not have charge over the property as the liquidation will be expensive, and could impact the amount recovered from their claim as the liquidation costs will come out first, and potentially preferential creditors will rank before them in a possible insolvent liquidation.

*** End of Assessment ***

Commented [CW37]: Total marks: 30