



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]: 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, 2003 stipulates that a liquidator can be removed from office if he/she is not eligible to act, has breached a duty or obligation, fails to comply with a Court's direction or if the Court is satisfied that the conduct of the liquidation is below the standard of what could be expected from a reasonable competent liquidator or the liquidator has a conflict of interests relating to his role as such.

Question 2.2 [maximum 2 marks]

Commented [CW14]: 2 marks, good answer

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(1) of the Insolvency Act, 2003 ("the Insolvency Act") deals with the instances in which a person will be deemed to have committed a fraudulent conduct offence. This will be the case when a person, whilst being an officer of the company or during a 12 (twelve) month period immediately preceding the liquidation of the company either made or caused and gift, transfer or charge against the company's assets or has allowed or agreed to the levying of any execution against such assets or concealed or removed any of the company's assets since, or within 60 days immediately following, the date of any unsatisfied judgment or order for payment of monies against the company. In terms of section 289(2), a person will not be guilty of an offence under the aforesaid section if the former offence was committed more than 5 (five) years prior to liquidation or if he/she can prove that there was no intention to defraud the company's creditors when the offence was committed.

Question 2.3 [maximum 2 marks]

Commented [CW15]: 1 mark
No reference to the legislation

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?

The powers of the BVI Court in respect of order which can be made to support foreign insolvency proceedings are wide. This includes the power to make orders restraining either the commencement and continuation of proceedings against the debtor or its property or the creation, exercise or enforcement of any right or remedy against the debtor's property, requiring the delivery of any property or the proceeds thereof, relief which will facilitate, approve or implement arrangements resulting in co-ordination with foreign insolvency proceedings, conditionally appointing an interim receiver, authorising an examination of persons by the foreign representative as would be allowed in a local proceeding and staying, terminating or making any appropriate order relating to a local proceeding.

Question 2.4 [maximum 4 marks]

Commented [CW16]: Good answer, 4 marks

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

A company will be considered insolvent in the BVI if:

- (a) the company fails to comply with a statutory demand for the payment of a debt due and payable, delivered in writing by a creditor under section 156 of the Insolvency Act, which demand is set aside under the aforesaid Act (section 8(1)(a) of the Insolvency Act);
- (b) the company fails to wholly or partially satisfy any execution, or any other process issued in favour of a creditor pursuant to a judgment, decree or order of a BVI court (section 8(1)(b) of the Insolvency Act);
- (c) factual insolvency is illustrated by providing satisfactory proof that the company is unable to pay its debts as and when they fall due (section 8(1)(c)(ii) of the Insolvency Act); or
- (d) balance sheet insolvency is illustrated by providing satisfactory proof that the company's liabilities exceed its assets (section 8(1)(c)(ii) of the Insolvency Act), provided that such insolvency does not only persist for a short period;

It must be noted that the Court retains a residual discretion in determining the solvency status of a company and appointing a liquidator irrespective of the statutory tests set out above.

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

Commented [CW17]: 13 marks

Question 3.1 [maximum 5 marks]

Commented [CW18]: Good answer, 5 marks

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

A liquidation can be terminated by an order of Court, the filing of a certificate of compliance (or report by the liquidator or an order by the court exempting the liquidator from filing the aforesaid certificate. An order terminating a liquidation will be made by the Court if it is just and equitable to do so, upon application by a liquidator, creditor, director or member of the Official Receiver.

Section 234(2) of the Insolvency Act places an obligation on a liquidator to prepare a final report, together with a statement of realisations and distributions in respect of the liquidation, as soon as practicable after the completion of his/her duties, which documents must be filed with the Registrar and circulated to every member and admitted creditor of the company. A summary of the grounds upon which a member or admitted creditor may object to the striking of the company from the relevant register of companies must be circulated together with the aforesaid report. Section 234(3) determines that the report must contain certain statements, including that all known assets of the company has been disclaimed, realised or distributed without realisation, confirming that all proceeds of realisation has been distributed and that no reason exists, in the opinion of the liquidator, for the company not to be dissolved and struck off the register. It follows that, in order to include these statements in the report, the liquidator must ensure that the necessary has been attended to in respect thereof, i.e. that all known assets have been dealt with appropriately, the distribution of all

proceeds and confirmation that nothing impedes the dissolution and striking of the company from the register.

Should the liquidator, for whatever reason, not wish to file a report he/she can apply to court for exemption from doing so.

Once their appointment has ended, the liquidator can apply for release to discharge them from all liability in respect of any act or default relating to their administration of the company under section 235 of the Insolvency Act,

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.

The BVI Business Companies Act, 2004 ("the BCA") deals with the scenario where a liquidator appointed in a voluntary (solvent) liquidation discovers that the company in respect of which they have been appointed is, in fact, insolvent.

Section 209(2) of the BCA notes certain discoveries regarding the solvency of a company which, if made by a liquidator through the course of their investigations, will necessitate the liquidator to take certain actions. If the value of the company's liabilities will exceed or exceeds its assets or if the company will become or is unable to pay its debts as and when they fall due, the liquidator is obliged to send written notice to the Official Receiver immediately. The written notice must be completed in the prescribed form and if the company is regulated by the Financial Services Commission, a copy must also be provided to it.

Section 210(1) determines that the liquidator must call a meeting of creditors within 21 (twenty-one) days of the date of the notice, which meeting is then, in terms of section 210(2), treated as the first meeting of creditors, as envisaged in section 179 and 180 of the Insolvency Act, by a liquidator who has been appointed by the members of the company.

Once the notice has been filed, the voluntary liquidator must conduct the liquidation as if they had been appointed under the Insolvency Act (section 211(1) of the BCA) and the Insolvency Act will apply to the liquidation, subject to such modifications as may be necessary (section 211(2)(a) of the 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.

A receiver can either be appointed by order of Court or under a debenture, charge or other instrument. The powers of a Court appointed receiver are set out in the court order making the appointment (section 127(1)(a) of the Insolvency Act) whereas that of a receiver appointed under an instrument would be as set out or implied in the said instrument (section 127(1)(b) of the Insolvency Act). It is imperative that the necessary care be taken when drafting either the court order or instrument under which a receiver is appointed to ensure that the powers of the receiver are adequately addressed therein.

Commented [CW19]: 3 marks

Commented [CW20]: Section 209(1) sets out the red flags.

Commented [CW21]: Section 209(2) requires the notice

Commented [CW22]: Candidate could also refer to whether the voluntary liquidator is an insolvency practitioner.

Commented [CW23]: Good answer, 5 marks

In instances where the instrument does not expressly deal with or make provision for the powers of the receiver, section 127(2)(a)-(d) of the Insolvency Act sets out certain statutory powers granted to the receiver. This includes the power to demand and recover income of the assets in terms of which they were appointed, issuing receipts for income received, manage, insure and maintain the assets in respect of which they were appointed and exercising a right to inspect books relating to these assets held or controlled by a third party on behalf of the company.

A receiver's primary duty is to exercise their powers in good faith and in such a manner which they reasonably believe to be in the best interests of the person/s in whose interest they were appointed. Whilst exercising their powers, a receiver must (to the extent possible) also have regard to the interests of creditors and sureties of the company, persons claiming an interest in assets of the company and the company itself.

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

Commented [CW24]: 9 marks

Question 4.1 [maximum 6 marks]

Commented [CW25]: 4 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?

In order to enforce the foreign judgment debt, Harrison Holdings Limited ("HHL") must apply for recognition of the judgment under either the Reciprocal Enforcement of Judgments Act, 1922 ("the 1922 Act") or the common law.

A "judgment" under the 1922 Act includes a judgment or order made by a court, whether before or after the commencement of the aforesaid Act, in civil proceedings for payment of a sum of money (section 2(1) of the 1922 Act). The 1922 Act extends to judgments granted by the High Court of England and, as such, the provisions thereof should be utilised for the recognition application.

An application for recognition of the judgment must be brought under part 72 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR") and must contain certain prescribed information as set out in Rule 72.2(c) and (d) of the CPR. It must be made within 12 months of the date of the judgment unless the BVI court extends the aforesaid period for convenience (s 3(1) of the 1922 Act). The application must be accompanied by a duly authenticated copy of the foreign judgment (CPR Rule 72.2(a)) as well as the details of any interest which has become due under the law of the foreign country where the judgment was granted (CPR Rule 72.2(b)).

From the date of registration of the judgment in the BVI under the 1922 Act, it has the same force and effect as if it was granted in the BVI (section 3(3)(a) of the 1922 Act). Consequently, all remedies usually available under the CPR will be available in respect of the judgment, including charging and garnishee orders, a judgment summons, appointment of a receiver and an order for seizure and sale of goods.

Commented [CW26]: Candidate fails to apply such information to the facts set out in the question.

HHL may also bring the application under the common law. In terms thereof, any final and conclusive monetary judgment obtained in any jurisdictions is treated as a cause of action itself under the doctrine of obligation by access. HHL must prove the judgment as well as that it is a final and conclusive judgment for a specified monetary sum. If the aforesaid is shown, an application for summary judgment can be made. If not, a retrial of the issues may be necessary.

Finally, HHL may also utilise procedures available under the Insolvency Act to enforce the debt. In order to do so, insolvency proceedings will have to be **opened**.

Commented [CW27]: More details could have been provided here.

Based on the information available, it is recommended that HHL proceed with an application for recognition under the 1922 Act. **This will, in the writer's view, be the most efficient and effective manner to enforce the judgment against Maximilian Properties Limited's assets located in the BVI.**

Commented [CW28]: Candidate should have considered whether the BVI would grant registration of the judgment in circumstances where the debtor did not attend the hearing.

Question 4.2 [maximum 9 marks]

Commented [CW29]: 5 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?

For purposes of this question, it is accepted that Peralta Limited ("PL") does not hold any security for the debt owed to it by Santiago Limited ("SL"). It is further accepted that SL has not granted security to any other creditor over the property purchased from HL ("the property").

PL may consider **applying for the liquidation of SL**, the appointment of a receiver or engaging with SL's directors for purposes of commencing corporate rescue.

Commented [CW30]: Candidate has failed to provide any details in relation to such application, including reference to the applicable law.

Should it wish to pursue SL's liquidation, HL must cause a written statutory demand (should the demand already delivered not be sufficient for this purpose) requesting payment of the outstanding amount due and payable to it within 21 days of service thereof to be delivered to SL as envisaged in section 156 of the Insolvency Act. **Should SL fail to adhere to the timeframe for payment stipulated in the demand, sufficient grounds will exist to apply for its liquidation and the appointment of a liquidator.** The liquidator will have custody and control of SL's assets and will administer its insolvent estate in the prescribed manner, resulting in a return for HL.

Commented [CW31]: Or fail to set aside the statutory demand

HL should also consider applying to court to appoint a receiver in respect of the property sold to **SL**. The powers of the receiver, which must be carefully specified in the court order appointing them, should include the power of sale to sell and collect the proceeds of the sale of the property. The receiver is obliged to sell the property at the best price reasonably obtainable at the time of sale. The proceeds of the sale, once collected, can be distributed in accordance with the receivership, resulting in a return for HL.

Commented [CW32]: Candidate has failed to set out the steps for appointment of a receiver or refer to the law.

Corporate rescue, in the form of a company creditors' arrangement ("CCA"), which restructures debt, can also be considered by HL. Governed by the Insolvency Act and Insolvency Rules, a CCA is a compromise between a company and its creditors allowing for the variation of creditors' rights and wholly or partially cancelling the liability of the company through a proposal which must be approved by 75% of creditors. A CCA must be initiated by the company's directors. Secured creditors cannot be prevented from exercising their security irrespective of the CCA, unless agreed to writing. Similarly, preferred creditors cannot receive a lower return than they would in liquidation unless such a return was agreed to in writing.

It bears mentioning that CCAs and corporate rescue in general is not particularly popular in the BVI. Creditors usually utilise liquidation proceedings as they are relatively easy to commence and the BVI is a creditor-friendly jurisdiction.

It is recommended that HL pursues the liquidation of SL, alternatively the appointment of a receiver.

*** End of Assessment ***

Commented [CW33]: Total marks : 41