



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]: 8 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]: Incorrect 0 marks

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]: Incorrect 0 marks

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?

[In terms of section 187 of the British Virgin Islands Insolvency Act 2003 (hereinafter referred to as the Insolvency Act) a liquidator can be removed in the following circumstances:

“The Court may, on application by a person specified in subsection (2) or on its own motion, remove the liquidator of a company from office if

(a) the liquidator

(i) is not eligible to act as an insolvency practitioner in relation to the company,

(ii) breaches any duty or obligation imposed on him by or owed by him under this Act, the Rules or the Regulations made under section 486 or, in his capacity as liquidator, under 169 any other enactment or law in the Virgin Islands, or

(iii) fails to comply with any direction or order of the Court made in relation to the liquidation of the company; or

(b) 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,

(ii) the liquidator has an interest that conflicts with his role as liquidator, or

(iii) that for some other reason he should be removed as liquidator.”]

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.

[An officer of that company is deemed to have committed an offence if he/she:

1. 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 (section 289(1)(a) of the Insolvency Act);
2. 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. (section 289(1)(b) of the Insolvency Act)

Question 2.3 [maximum 2 marks]

Commented [CW15]: Correct, 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?

[In terms of section 467(3) of the Insolvency Act, a BVI court can make the following orders:

(a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;

(b) subject to subsection (4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;

(c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;

(d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;

(e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;

(f) authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;

(g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or

(h) make such other or grant such other relief as it considers appropriate".

In summary it can be said that the BVI Court has the power to recognise foreign proceedings and can extend such powers to provide assistance to the following countries namely: Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the USA.]

Question 2.4 [maximum 4 marks]

Commented [CW16]: 4 marks, well done

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 the following circumstances are met:

1. It fails to comply with the requirements of a statutory demand that has not been successfully set aside under sections 156 and 157 of the Insolvency Act (section 8(1)(a) of the Insolvency Act); or
2. Execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied (section 8(1)(b) of the Insolvency Act); or
3. The value of the company's liabilities exceeds its assets (section 8(1)(c)(i) of the Insolvency Act); or
4. The company is unable to pay its debts as they fall due. (section 8(1)(c)(ii) of the Insolvency Act)]

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

Commented [CW17]: 8 marks

Question 3.1 [maximum 5 marks]

Commented [CW18]: 5 marks, well done

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

[in order to terminate a liquidation, the appointed liquidator must make an application to Court in terms of section 233 of the Insolvency Act for an order terminating the liquidation. This application can be made at any time if it is just and equitable to do so (section 233(1) of the Insolvency Act).

A liquidator can usually apply for the above-mentioned order if he or she has completed his or her duties in relation to the liquidation of the company. The duties include but are not limited to preparing and sending every creditor whose claim has been approved the final report. The final report must contain a statement that all known assets of the company have been disclaimed, realized or distributed without realization (section 234(3)(a)). Furthermore that all proceeds of realization have been distributed (section 234(3)(b)) as well as the fact that there is no reason why in his or her opinion that the company should not be struck from the Register and dissolved (section 234(3)(c))

The liquidator must also file with the Registrar a statements of realizations and distributions sent to members of the company and creditors (section 234(2)(b) together with the summary of the grounds upon which a creditor may object to the striking of a company from the BVI Companies Register. (section 234(2)(a)(ii)).

Furthermore, once a liquidator's appointment ends, they can apply to the court in terms of section 235 of the Insolvency Act for an order to release them of their duties ie: release of liquidator.

Once a liquidation is terminated or complete the liquidator must inform the Registrar or the BVI Financial Services Commission (FSC) of the liquidation, and request that the company be dissolved.]

Question 3.2 [maximum 5 marks]

Commented [CW19]: 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.

[The red flags that would lead a voluntary liquidator to identify the company as insolvent is if in terms of the **British Virgin Islands Companies Act 2004** the company is found to have liabilities or is unable to pay its debts as they fall due or if it is found that its liabilities exceed the value of its assets. section 197 of the Companies Act states that a company can enter voluntary solvent liquidation only if it has no liabilities or is able to pay its debts as they fall due.

Commented [CW20]: It is the BVI Business Companies Act, 2004.

Commented [CW21]: Candidate should refer to section 209(1)(a) and (b) in the BVI Business Company Act, 2004

Should a liquidator find, in the course of the investigations, that the company is insolvent they must immediately send a written notice to the Official Receiver informing them of its findings. If a company is regulated in terms of the FSC then a notice must also be sent to the Commission as stipulated in section 209 of the Companies Act. Thereafter, the voluntary liquidator must call a meeting of creditors of the company within 21 days of the date of the

Notice (as stipulated in section 210 of the Companies Act). The company will then proceed to be liquidated in terms of the Insolvency Act.]

Commented [CW22]: The candidate could have provided more details here, including reference to whether the voluntary liquidator is a licensed insolvency practitioner

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 [CW23]: 0 marks

[The Official Receiver is appointed by the FSC and can be appointed in terms of section 488 of the Insolvency Act. Its powers are the same as a liquidator, supervisor, interim supervisor or bankruptcy trustee and can be derived from section 186(2) and schedule 2 of the Insolvency Act.

This question concerns the appointment of a receiver pursuant to a charge (or other instrument) or under an order of the Court. Please refer to the receivership section of the Guidance Text and section 127 of the IA.

The question does not ask about the powers of the Official Receiver.

Schedule 2 states the powers as follows:

1. Power to pay any class of creditors in full.
2. Power to make a compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging that they have any claim against the company, whether present or future, certain or contingent, ascertained or not.
3. Power to compromise, on such terms as may be agreed
 - (a) calls and liabilities to calls, debts and liabilities capable of resulting in debts, and claims, whether present or future, certain or contingent, ascertained or not, subsisting or supposed to subsist between the company and any person; and
 - (b) questions in any way relating to or affecting the assets or the liquidation of the company; and take security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it.
4. Power to commence, continue, discontinue or defend any action or other legal proceedings in the name and on behalf of the company.
5. Power to carry on the business of the company so far as may be necessary for its beneficial liquidation.
6. Power to sell or otherwise dispose of property of the company.
7. Power to do all acts and execute, in the name and on behalf of the company, any deeds, receipts or other document.
8. Power to use the company's seal.
9. Power to prove, rank and claim in the bankruptcy, liquidation, insolvency or sequestration of any member or past member for any balance against his estate, and to receive dividends, in the bankruptcy, liquidation, insolvency, sequestration or in respect of that balance, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors.
10. Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business.
11. Power to borrow money, whether on the security of the assets of the company or otherwise.
12. Power to take out in his official name letters of administration to any deceased member or past member or debtor, and to do any other act necessary for obtaining payment of any

money due from a member or past member or debtor, or his estate, that cannot conveniently be done in the name of the company. For the purpose of enabling the liquidator to take out letters of administration or do any other act under this paragraph, to be due to the liquidator himself.

13. Power to call meetings of creditors or members for

(a) the purpose of informing creditors or members concerning the progress of or matters arising in the liquidation;

(b) the purpose of ascertaining the views of creditors or members on any matter arising in the liquidation; or

(c) such other purpose connected with the liquidation as the liquidator considers fit.

14. Power to appoint a solicitor, accountant or other professionally qualified person to assist him in the performance of his duties.

15. Power to appoint an agent to do any business that the liquidator is unable to do himself, or which can be more conveniently done by an agent.”

An official receiver however is exempt from being licensed under section 474(2) of the Insolvency Act and unlike a liquidator, they possess an automatic right of audience before the BVI court.]

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

Commented [CW24]: 2 marks

Question 4.1 [maximum 6 marks]

Commented [CW25]: 2 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 its foreign judgement debt, Harrison Holding must terms of the Reciprocal Enforcement of Judgments Act 1922 (hereinafter referred to as the Reciprocal Act), apply to the BVI Court to have the foreign judgement recognised.

The Reciprocal Act recognizes foreign judgments handed down from *inter alia* the High Court of England. Furthermore, the judgment handed down by the High Court of England meets the criteria for the definition of judgment under the Reciprocal Act which includes judgments for final and conclusive monetary sums (section 2(1) of the Reciprocal Act).

Harrison Holdings must register the foreign judgment in the BVI court. Section 3(1) of the Reciprocal Act states that the foreign judgment must be registered within 12 months of the date of the judgment (unless an extension is given by the BVI court) which means Harrison Holdings must register the judgment in the next few months and before September 2021.

In bringing the application for recognition in the BVI court, Harrison holdings must ensure that the application contains certain prescribed information and an authenticated copy of the judgment and other details of interest that has become due under the law of England. The judgment would not have to be translated if it is handed down in English. The application would be a *ex parte* application meaning no notice would need to be given to Maximilian

Properties. Harrison holdings must also be alive to the possibility that the court would request that it gives security for costs in relation to bringing any proceedings.

The prospects of success for recovery of the judgment debt is high as Maximilian Properties has significant assets in the BVI. A list of the assets of Maximillion Properties in the BVI should also be prepared prior to making the application for registration as usually the BVI court would be more likely to enforce the foreign judgment should it be proven that the debtor has assets which can be seized in lieu of the outstanding debt.]

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 (hereinafter referred to as Peralta) can consider the option of bringing a liquidation application against Santiago. The application can be brought under section 296 of the Insolvency Act which is a creditors application for bankruptcy. The application must specify the amount of the liability, or the aggregate amount of their liabilities, exceeds the prescribed minimum ie \$2000 (section 296(1)(a) and the liability, or each of the liabilities, is for a liquidated sum payable to the applicant creditor immediately (section 296(1)(b). The liability had occurred in the Virgin Islands there for section 296(2) does not apply.

Peralta must also state in the application that they are willing in the event of a bankruptcy order being made to give up their security interest for the benefit of other creditors of the bankrupt or give an estimate of the value of their security interest and make the application in respect of the full amount of liability minus the estimated value of the security interest that they would have to put up.

Peralta must also specify in the application that Santiago is insolvent within the definition of section 8(2)(a) would states that an individual is insolvent if he fails to comply with the requirements of a statutory demand that has not being set aside under section 157, as is the case in this scenario.

Their application must also specify and show evidence that the debt has not been paid nor secured nor compounded for in terms of section 300(2)(a) of the Insolvency Act as well as execution or other process has been returned unsatisfied as per section 300(2)(b) which essentially would mean that the statutory demand was not satisfied by Santiago.

Should the court granted bankruptcy order then Peralta whilst they are not obliged to make a claim in the bankruptcy they can those still do so in terms of section 338 of the Insolvency Act which deals with claims instituted by secured creditors. Peralta must value the assets subject to the security interest (section 338(1)(a) and surrender its security interest to the trustee for the general benefit of creditors (section 338(1)(b).

Commented [CW26]: Candidate has failed to discuss the circumstances in which a Court is unlikely to grant registration of a foreign judgment in Section 3(2) of the 1922 Act. The candidate may then have come to the conclusion that the Court might not register the judgment.

Commented [CW27]: Candidate fails to set out any other options for enforcement. For example under the common law or under the Insolvency Act.

Commented [CW28]: 0 marks.

The candidate refers to the bankruptcy procedures instead of the corporate insolvency procedures.

Whilst the candidate makes vague reference to a statutory demand it does not set out that it would advise Peralta to serve one.

There is no reference to an application to appoint a liquidator under section 162 of the IA.

The candidate also fails to refer to the possibility of an application to appoint a receiver.

Commented [CW29]: Incorrect. The bankruptcy procedures are for individuals. The corporate insolvency procedures are for companies.

Commented [CW30]: Candidate has not yet stated whether they could advise Peralta to consider serving a statutory demand, setting out the requirements.

Section 446 deals with the access of foreign creditors to a Virgin Islands proceeding and states that foreign creditors have the same rights regarding the commencement of, and participation in, a Virgin Islands insolvency proceeding as creditors in the islands. This is known as granting a foreign creditor a right of direct access.

Should there be other liquidation proceedings being brought against Santiago in a different jurisdiction then section 448 of the Insolvency Act would apply. This section lays out the foundation for the recognition application which Peralta will have to bring as they are considered a foreign creditor. The application must be accompanied by a certified copy of the decision commencing the foreign proceeding and appointing a foreign representative or a certificate from the foreign court in example England, affirming the existence of the foreign proceeding and the appointment of the foreign representative or any other evidence acceptable to the court of the existence of the foreign proceeding and appointment of the foreign representative.]

*** End of Assessment ***

Commented [CW31]: Total marks: 28