



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]: 8 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?

Under section 187 of the Insolvency Act 2003, a liquidator can be removed from office if he (i) is not eligible to act, or (ii) breaches a duty of obligation, or (iii) fails to comply with a Court direction or (iv) the Court is satisfied that his conduct of the liquidation is below the standard that may be expected of a reasonably competent liquidator, or (v) or the Court is satisfied that the liquidator has interests in conflict with his role.

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.

In the circumstances, an officer of that company would be deemed to have committed an offence pursuant to the fraudulent conduct provisions if at any time whilst an officer or during the period of 12 months preceding the commencement of the liquidation he has (i) 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 (ii) 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. Such provisions are found in section 289(1) of the Insolvency Act 2003.

Question 2.3 [maximum 2 marks]

Commented [CW15]: 0 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?

The candidate as not set out the orders the Court can make under section 467.

Part XIX of the Insolvency Act provides the primary framework for the powers provided to the Court to make orders in aid of foreign proceedings. The Court can recognise certain foreign insolvency proceedings and provide assistance to foreign representative's in designated countries. When making an order in aid of foreign proceedings. The Court is able to apply the applicable laws or the law of the applicable country.

Under section 218 of the Insolvency Act the court is provided with wide powers in relation to the order which can be made, which include the conventional insolvency tools in order to, for example, provide for a moratorium against proceedings in respect of the debtor.

Commented [CW16]: Section 218 relates to disclaimers not foreign insolvency proceedings

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.

Part VIII of the Insolvency Act provides for statutory tests as to the insolvency of a company, and in addition the Court retains residual discretion as to whether should find that a company

is insolvent. Under the Insolvency Act (the "Act"), the Court will find that company is insolvent in any one of the following circumstances:

1. It is proved to the satisfaction of the Court that company is unable to pay its debts as they fall due. This is a question of fact and under the well-settled case law, if a company is able to pay a debt that is due and not disputed, this will constitute sufficient evidence of insolvency. (s 8(1)(c)(ii) of the Act)
2. It is proved to the satisfaction of the court that the value of the company's liabilities exceeds the value of its assets; i.e. the balance sheet insolvency test. S 10(1) of the Act provides a wide definition of liability. Under section 10(2) of the Act a liability may be present or future, certain or contingent, fixed or liquidation, sounding in damages or capable of being ascertained by fixed rules or as a matter of opinion. The Court will be guided by case law, including the Court of Appeal decision in Trade and Commerce Bank v Islands Point Properties on the question of changing asset values. (s 8(1)(c)(i) of the Act)
3. A company fails to satisfy in whole or in part execution or other process issued on a judgment, decree or order of the court in favour of a creditor of the company
4. If a company fails to comply with the terms of a validly served statutory demand which has not been set aside

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

Commented [CW18]: 11 marks

Question 3.1 [maximum 5 marks]

Commented [CW19]: 4 marks

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

Unless the liquidation is being terminated upon the application of a person other than the liquidator, the liquidator should first prepare his application to the Court for termination of the liquidation.

Under s 234(2) of the Act, the liquidator must file a certificate of compliance (unless the Court makes an order exempting the liquidator from having to file a certificate of compliance).

The liquidator must also prepare his final report as soon as practicable after completing his duties. The report must be sent to every admitted creditor and every member of the company, and also must be filed with the registrar. The report must be in compliance with the requirements of section 234(3) of the Act. The liquidator may apply the Court for an exemption from the requirement to send his final report to all known creditors or modify the entire provision with regard to the report (s 234 (4) of the Act).

Commented [CW20]: More detail could have been included here.

Pursuant to section 235 of the Act the liquidator can apply for their release when their appointment ends. The effect of the release is that the liquidator is discharged from all liability in respect of any act or omission in relation to his administration of the company. However, the Court can still make an order under section 254 of the Act against a liquidator notwithstanding his release under section 235 of the Act.

Finally the liquidator must consider the position on dissolution of the company. Under section 336 of the Act the IR are intended to deal with the dissolution of the company; however the IR do not do so. In practice the liquidator should write to the Registrar / FSC to request that the company be dissolved.

Question 3.2 [maximum 5 marks]

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

Under section 209, division 2 of the Business Companies Act a voluntary liquidator must be alert to two key 'red flags' of insolvency of the company: (i) if the value of the company's liabilities exceed or will exceed those of its assets, and (ii) if the company is or will be unable to pay its debts as they all due.

If the voluntary liquidator identifies that either criteria is met, he is required under the same provision to immediately send a written notice to the Official Receiver (and to the Financial Services Commission in the event the company so regulated). He must also the **call a meeting of the creditors** within 21 days of the date of that **notice**.

If the voluntary liquidator is not a licenced insolvency practitioner, the Official Receiver may apply to the court for the appointment of himself or another licenced insolvency practitioner as liquidator. As soon as the voluntary liquidator becomes aware that the company is or will be insolvent, the Insolvency Act will apply. If the Court is satisfied that the company is insolvent, it will appoint a liquidator (s 210 (1) of the BCA).

Commented [CW21]: 4 marks

Commented [CW22]: This is pursuant to section 210 of the BCA.

Commented [CW23]: More details could be provided here in relation to the meeting.

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.

Pursuant to section 127(1)(a) of the Insolvency Act the powers of a receiver are as expressly or impliedly set out in the charge or other instruments in terms of which the receiver is appointed. Therefore where the receiver is appointed out of court under a debenture, he would look to that debenture for this powers, and where appointed by the Court he would look to the Order under which he was **appointed**.

In the event that the appointing instrument does not expressly provide for certain powers, which the law regards as necessary for a receiver, section 127(2) of the Insolvency Acts sets out those statutory powers granted to a **receiver**.

A receiver is to exercise his powers in compliance with the provisions of s128 of the Insolvency Act.

Particular rules apply to **administrative receivers**. Under Schedule 1 of the Insolvency Act, an administrative receiver is granted particular (and wide) powers, unless the instruments under which the administrative receiver was appointed provides otherwise.

Commented [CW24]: 3 marks

Commented [CW25]: See section 127(1)(b)

Commented [CW26]: More details should be provided here.

Commented [CW27]: Not relevant here

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

Commented [CW28]: 9 marks

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?

Maximilian Properties ("MP") should consider the merits of registering the English judgment in the BVI in order to assist with enforcement. The judgement was handed down in England and Wales, which is a jurisdiction to which the 1922 Act extends. Under the 1922 Act MP could have one year from the date of the judgment in which to register it. On the facts given, it appears that the judgment is for a final and conclusive monetary sum, and so that criteria for registration is met.

Section 3(3) of the 1922 Act sets out certain criteria which may make the judgement incapable of registration, and we would therefore need more information regarding the circumstances of the judgment, in order to confirm whether it is capable of registration.

If the judgment can be registered it can then be enforced without a re-visitation of the merits of the claim by the BVI court, and as if it had been handed down by the BVI court. Various remedies under CPR 45.2 would be available including a charging order, garnishee order, judgment summons, and order for seizure and sale of goods and the appointment of a receiver.

Another option would be to serve a statutory demand on Harrison Holdings in respect of the outstanding debt. If the demand is not met, Harrison Holdings would be deemed insolvent and MP could apply for a liquidator to be appointed over the company.

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 Mosquito 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?

Firstly Peralta should consider the asset position of Santiago. Does Santiago have sufficient assets to pay the debt, and does it have other creditors? On our facts, Peralta has a claim in breach of contract, seek summary judgment and enforce the judgment debt under CPR 45.2, in the usual way. Given that Santiago owns the property, Peralta might consider seeking a charging order over the property.

Commented [CW29]: 3 marks

Commented [CW30]: There is a lack of detail here.

Commented [CW31]: Section 3(2) of the 1922 Act

Commented [CW32]: Candidate should apply the information given, including the fact that the debtor did not attend the hearing.

Commented [CW33]: Candidate has not considered the common law.

Commented [CW34]: 6 marks.

There is a lack of detail in this answer.

The candidate has also not set out whether it would advise Peralta to consider the appointment of a receiver, in light of the known asset.

Peralta would have been well advised to seek a mortgage over the property when making the loan, in which case it would be a secured creditor and entitled to enforce its security in the usual way, outside of any liquidation process. Alternatively Peralta should have sought the appointment of a receiver in the loan agreement empowered to take control of the property and sell it to repay the debt. However, no mention is made on our facts of any such security or receivership option.

Another option would be for Peralta to apply for Santiago to be placed into insolvent official liquidation under section 162 of the Insolvency Act and to submit an admissible claim in the liquidation.

To the extent that the demand already made does not comprise a valid statutory demand under the Insolvency Act, Peralta should serve a statutory demand on Santiago. Should Santiago fail to pay the demand (or set it aside under sections 156 and 157 of the Insolvency Act) the company will be deemed insolvent. Peralta could then apply for Santiago to be placed into insolvent official liquidation. On our facts it appears that Peralta is an unsecured creditor. It would need to submit an admissible claim the liquidation. Peralta's claim would rank behind preferential claims, and alongside other unsecured creditors to be paid pari passu. Therefore if Santiago has other creditors and no assets other than the property there is a risk the debt could not be recovered in full.

Finally, Peralta might consider engaging in a form of corporate rescue, whether a plan of arrangement, scheme of arrangement or company creditor's arrangement. In order for this to work, the company's directors would need to be on board and drive the process.

* End of Assessment *

Commented [CW35]: Candidate has failed to specify under which subsection of section 162 Peralta would make such application. There is a lack of detail here.

Commented [CW36]: Correct

Commented [CW37]: Correct. However, candidate should set out the requirements of a statutory demand.

Commented [CW38]: Total marks: 38