



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?

A liquidator can be removed from office under the Insolvency Act s. 187, as follows:

- (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 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.

Application to remove the liquidator can be made by the creditor's committee, a creditor or member of the company, or the Official Receiver.

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.

Insolvency Act s. 289(1) Where a liquidator of a company is appointed under s.159, a person who is or has been an officer of the company is deemed to have committed a fraudulent conduct offence if, at any time during the period of 12 months preceding the commencement of the liquidation, he has

- (a) 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
- (b) 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.

It is to be noted that there are exceptions to the above, detailed under s. 289 (2)(a) if the offence under subsection (1)(a) occurred more than five years before commencement of liquidation or if the person proves that at the time of conduct constituting the offence, he had no intent to defraud the company's creditors.

Question 2.3 [maximum 2 marks]

Commented [CW15]: 1 mark

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 has not set out the orders that the Court can make pursuant to 467(3).

Part XIX of the Insolvency Act provides the primary framework for the powers provided to the BVI Court to make orders in aid of "foreign proceedings". BVI Court are provided with the power to

- 1. Recognise certain foreign insolvency proceedings; and

2. Provide assistance to foreign representatives

Insolvency Act s. 467(3) stipulates the powers the BVI Court is provided with in relation to the orders that can be made.

Question 2.4 [maximum 4 marks]

Commented [CW16]: 4 marks, good answer

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 where one of the below is satisfied:

1. Insolvency Act, s 8(1)(a) A company or a foreign company is insolvent if it fails to comply with the requirements of a statutory demand that has not been set aside under s. 157;
2. Insolvency Act, s 8(1)(b) A company or a foreign company is insolvent if 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 partially unsatisfied;
3. Insolvency Act, s 8(1)(i) A company or a foreign company is insolvent if the value of the company's liabilities exceeds its assets; or
4. Insolvency Act, s 8(1)(c)(ii) A company or a foreign company is insolvent if the company is unable to pay its debts as they fall due.

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

Commented [CW17]: 13 marks

Question 3.1 [maximum 5 marks]

Commented [CW18]: Comprehensive answer, 5 marks

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

Termination of liquidation of a company can occur through one of three ways, as follows per Insolvency Act s. 232:

- (a) The making by the Court of an order terminating the liquidation under section 233, or such later date as may be specified in the order;
- (b) The filing by the liquidator of a certificate of compliance with the provisions of s. 234(2), as modified by the Court under s. 234(4), if appropriate; or
- (c) The making by the Court of an order under s.234(4) exempting the liquidator from compliance with s.234(2), or such later date as may be specified in the order.

It is noted that under s. 232(a), s.233(1) states that the Court may, at any time after the appointment of the liquidator of a company, make an order terminating the liquidation if it is satisfied that it is just and equitable to do so while s. 233(2) states that this application may be made by the liquidator him/herself. Insolvency Act s. 233(6) states that where the Court makes an order under subsection (1), the person who applied for the order shall, within ten days of the date of the order, file a sealed copy of the order with the Registrar.

Insolvency Act s. 234(2) states that as soon as practicable after completing his/ her duties in relation to the liquidation of a company, the liquidator shall

- (a) Prepare and send to every creditor of the company whose claim has been admitted and to every member of the company
 - i. His final report, complying with subsection (3) and a statement of realisation and distribution in respect of the liquidation, and
 - ii. A summary of the grounds upon which a creditor or member may object to the striking of the company from the Register; and

- (b) File with the Registrar a copy of the final report and the statement realisations and distributions sent to the creditors and members of the company.

It is to be noted that under Insolvency Act s. 234(3) The final report of a liquidator shall contain a statement

- (a) That all known assets of the company have been disclaimed, realised or distributed without realisation;
- (b) That all proceeds of realisation have been distributed; and
- (c) That there is no reason why, in his/her opinion, the company should not be struck from the Register, and dissolved.

It is further noted that Insolvency Act s.234(4) allows for the liquidator to be exempted from compliance with subsection (2)(a) or the application of the provisions of subsection (2) on the liquidator be modified upon application of the liquidator to the Court and if such terms and conditions are considered just by the Court.

Question 3.2 [maximum 5 marks]

Commented [CW19]: Good answer, 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 Procedure for voluntary liquidations is contained in Part XII of the Business Companies Act (subject to further steps that must be taken in order to place an entity which is regulated by the Financial Services Commission in voluntary liquidation).

Per s197(1) of the Business Companies Act, a company can only be liquidated under Part XII if (1) it has no liabilities; or (2) if it is able to pay its debts as they fall due and the value of the assets is equal or exceeds its liabilities.

The red flags that would lead a voluntary liquidator to identify the company as insolvent are:

Commented [CW20]: Candidate could refer to section 209(1)(a) and (b) here

- (1) Balance Sheet Insolvency - The value of the company's liabilities exceeds or will exceed its assets;
- (2) The company is or will be unable to pay its debts as they fall due

If the liquidator identifies insolvency, the voluntary liquidator is required to immediately send a written notice to the Official Receiver. Per Business Companies Act, s 210(1), the voluntary liquidator must call a meeting of the creditors within 21 days of the date of the notice.

Under s179 Insolvency Act, the meeting will be the first meeting of creditors of the company, by a liquidator appointed by the members of the company. It is noted that unlike in an insolvency liquidation, a voluntary liquidator need not be a licenced insolvency practitioner unless the company is regulated, but must be an "eligible individual". Regulation 19(2) of the Business Companies Act Regulations sets out a list of individuals who are disqualified from being appointed or acting as a voluntary liquidator of a company.

Therefore, 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. The Insolvency Act will apply from the time that the voluntary liquidator becomes aware that the company is or will be insolvent. Alternatively, the Court will appoint a liquidator if it is satisfied that the company is insolvent under Business Companies Act s 211A.

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 are those expressly or impliedly set out in the charge or other instrument in terms of which the receiver was appointed.

Section 127 Insolvency Act sets out the Powers of receiver, other than administrative receiver.

Section 127 states

- (1) A receiver has the powers expressly or impliedly conferred on him,
 - a. In the case of a receiver appointed out of court, by the charge or other instrument by which he was appointed; or
 - b. In the case of a receiver appointed by the Court, by the Court order under which he was appointed

Furthermore

- (2) Unless the charge or other instrument under which, or Court order by which, he was appointed expressly provides otherwise, a receiver may
 - a. Demand and recover, by action or otherwise, income of the assets in respect of which he was appointed;
 - b. Issue receipts for income recovered;
 - c. Manage, insure, repair and maintain the assets in respect of which he was appointed; and
 - d. Exercise, on behalf of the company, a right to inspect books or documents that relate to the assets in respect of which he was appointed in the possession or under the control of a person other than 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 BVI being party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 allows an individual who has the benefit of arbitral award granted by a state that is party to the New York Convention to seek enforcement of that award in the BVI. The 1922 Act extends to judgment given in the High Court of England.

The foreign judgment is registrable within 12 months of the date of judgement, unless the BVI Court grants a longer period on the basis that it is just and convenient to do so (Reciprocal Enforcement of Judgements Acts s3(1)). A foreign judgement has the effect of being made in the BVI once said judgment is duly registered under the 1922 Act by the BVI Court.

However, pursuant to section 3(2) of the 1922 Act, the Court will not order a judgement to be registered in the event that (amongst others)

Commented [CW21]: 3 marks.

Answer is a little confused, but gets there by copying and pasting the IA. It is not clear that the candidate understands how a receiver is appointed. Please note that this is also an essay question, which requires explanation.

Commented [CW22]: Here the candidate fails to also state that the powers of a receiver can also be set out in the order of the Court which appoints him or her (where the receiver is not appointed under a charge or debenture (or other instrument)).

Commented [CW23]: Unless the charge (other instrument) or the Court order provides otherwise.

Commented [CW24]: 8 marks

Commented [CW25]: 3 marks

Answer is slightly confused in places and could contain more detail.

The candidate should have considered the common law more clearly and enforcement that might be available under the IA.

Commented [CW26]: Peralta does not have an arbitral award.

Commented [CW27]: There is a lack of detail here as to the type of judgment and requirements of the 1922 Act

1. the judgement debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court;
2. the judgement debtor was not duly served with the process of the original court and did not appear, notwithstanding that he is ordinarily resident or carrying on a business within the jurisdiction of that court or agreed to submit to the jurisdiction of the court.

Based on the facts of the case, Maximillian Properties Limited is a company incorporated in the BVI. Whilst it is unknown if Maximillian Properties Limited is ordinarily a resident or carrying on a business within England, the fact is that Maximillian Properties did not attend the hearing in England.

On that basis, the BVI Court will not order the registration of the judgement made in the English High Court.

Notwithstanding the above, Harrison Holdings Limited could also consider its rights under Civil Procedure Rules r.50 which states that an application by a judgment creditor for an attachment of debts order (in the appropriate practice form) can be made without notice. If the Court considers that on the evidence submitted the judgment creditor is entitled to an attachment of debts order, it must make a provisional order and the court must do this without hearing.

If the above methods prove unsuccessful, Harrison Holdings Limited could pursue Maximillian Properties Limited through s446 of Insolvency Act which provides foreign creditors with the same rights as local creditors within the jurisdiction being a right of direct access to commence, and participate in a BVI Insolvency proceeding.

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?

S 8 Insolvency Act details the meaning of "Insolvent"

- (1) A company or a foreign company is insolvent if
 - a. It fails to comply with the requirements of a statutory demand that has not been set aside under section 157;
 - b. 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; or
 - c. Either
 - i. The value of the company's liabilities exceeds its assets, or
 - ii. The company is unable to pay its debts as they fall due.

Based on the facts of the case, we know that

1. Santiago failed to make any of the loan repayments pursuant to the repayment clauses
2. Peralta has made a demand for immediate repayment in full

Commented [CW28]: An application for summary judgment? Under common law?

Commented [CW29]: More details and clarity could have been provided here.

Commented [CW30]: 5 marks.

Candidate should also have considered the following options (among other things):

Service of a statutory demand, setting out the requirement.

An application for the appointment of a receiver, setting out the requirements.

3. Santiago failed to make any repayments in full or in part
On that basis, Peralta can take the following steps to enforce the debt owed to it by Santiago Limited:

1. Pursuant to s 162(2)(b) An application under 162(1) may be made by a creditor.
2. Pursuant to s162(1)(a) the court may, on application by a person specified in s162(2) of the Insolvency Act appoint a liquidator of a company under s159(1) if the company is insolvent.
3. Pursuant to s 159(1)(a) Insolvency Act, the Court may appoint the Official Receiver or an eligible insolvency practitioner as liquidator of a company, on an application under s 162 of the Insolvency Act.

Therefore, Peralta (being a creditor of Santiago) can apply to the Court for the appointment of an Official Receiver or a liquidator over Santiago under sections 162(2)(b) and 162(1)(a) as Santiago would be considered insolvent under sections 8(1)(a) and s 8(1)(c)(ii) of the Insolvency Act.

Simultaneous to appointing a liquidator over Santiago, Peralta Limited could also consider the following option to enforce the debt owed to it by Santiago:

1. S 170(1) Insolvency Act states that where an application for the appointment of a liquidator of a company has been filed but not yet determined or withdrawn, the court may, on application by a person specified in s 170(2), appoint the Official Receiver or an eligible insolvency practitioner as provisional liquidator of the company subject to s 170 (4).
2. Pursuant to s 170(2)© an application under s 170(1) can be made by a creditor.
3. Pursuant to s 170(4)(b)(i) the Court may appoint a provisional liquidator if the Court is satisfied that the appointment of a provisional liquidator is necessary for the purpose of maintaining the value of the assets owned or managed by the company

Therefore, while Peralta awaits the appointment of a liquidator to Santiago to be determined by the BVI Courts as discussed above, Peralta may also consider making an additional application to the Court for the appointment of a provisional liquidator to Santiago (under sections 170(1) and 170(2) of the Insolvency Act) on the basis that as Santiago is now deemed insolvent, the property located in Mosquito Island may be in jeopardy (under s 170(4) of the Insolvency Act).

*** End of Assessment ***

Commented [CW31]: Correct

Commented [CW32]: Why would the appointment of the Official Receiver be preferable to making an application to appoint a liquidator of its own choosing?

Commented [CW33]: Total marks: 40