



**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]: 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?

Per Section 187 of the Insolvency Act, 2003, a liquidator can be removed from office either upon an application by specified person(s) as set out under sub-section (2) or by Court on its own motion under following circumstances if 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 or her by or owed by him or her under the Act and attendant he Rules or the Regulations
- (iii) fails to comply with any direction or order of the Court made in relation to the liquidation of the company; or

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 or her role as liquidator; or
- (iii) for some other reason he or she 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.

Reference is to be made to Section 289 of the Insolvency Act, 2003 which prescribes conduct of an officer of a company deemed to be fraudulent if at any time whilst being in office or in the period of 12 months preceding the commencement of liquidation, he or she 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, 60 days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.

However, the above has to be tested against the following exceptions to the above for such officers to not be held guilty of 'fraudulent conduct':

- (i) by reason of conduct constituting an offence under (i) above which occurred more than 5 years before the commencement of the liquidation; or
- (ii) if he or she proves that, at the time of the conduct constituting the offence, there was no intent to defraud the company's creditors.

**Question 2.3 [maximum 2 marks]**

Commented [CW15]: 2 marks, good answer

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?

Reference is made to Part XIX of the Insolvency Act, 2003 in which Section 467 (3) prescribes a host of powers in relation to orders which a BVI court can make (either applying the law of BVI or the law applicable in respect of the foreign proceeding in terms of sub-section (5)) in aid of foreign insolvency proceeding. They are as follows:

- (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) of this section, 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.

**Question 2.4 [maximum 4 marks]**

Commented [CW16]: 4 marks

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

Reference is made to Section 8 of the Insolvency Act, 2003 which prescribes events in which a company or a foreign company can be said to be 'insolvent in BVI'. They are:

- (a) in case the company fails to comply with the requirements of a statutory demand that has not been set aside under section 157 of the Act;
- (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.

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

Commented [CW17]: 9 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.

Reference is made to Section 232 read with Section 234(2) and 234(4) of the Insolvency Act, 2003 that set out the steps required to be complied with by a liquidator in order to

achieve termination of a liquidation, if not already terminated by operation of the provisions of Section 232(a) or (c). They are as follows:

The liquidator is required to, as soon as practicable, soon after completing his duties in relation to the liquidation of the company, prepare a (i) a final report, containing a statement that (a) 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 or her opinion, the company should not be struck from the Register, and dissolved; (ii) statement of realisations and distributions in respect of the liquidation; and (iii) ii a summary of the grounds upon which a creditor or member may object to the striking of the company from the Register.

The liquidator is required to file a copy of the aforesaid report and statement of realisations and distributions sent to every creditor with the Registrar.

It is after the above are complied with, that the liquidator can file an application with the court with a certificate of compliance with the provisions of section 234(2), as modified by the Court under section 234(4) if appropriate,

**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.

Reference is drawn to Section 209, Division 2 of the BVI Business Companies Act, 2004, which provides indicators of a company being insolvent that a voluntary liquidator must be conscious of during the course of their investigations. The same are:

- (i) the value of the company's liabilities exceeding or likelihood of exceeding the value of its assets;
- (ii) Inability of the company or such likelihood to pay its debts as they fall due.

must be looked out for by a voluntary liquidator.

In the event of insolvency being identified by the voluntary liquidator, the following steps are inter alia required to be undertaken in terms of Section 209 (2), 210 and 211 of the BVI Business Companies Act, 2004:

- (i) send a written notice to the Official Receiver in the approved form;
- (ii) call a meeting of creditors of the company to be held within twenty one days of the date of the notice;
- (iii) conduct the liquidation as if he had been appointed liquidator under the Insolvency Act.

**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.

Reference is drawn to Section 144 read with Schedule 1 of the BVI Insolvency Act, 200 whereunder an administrative receiver appointed over the assets of a BVI company,

Commented [CW19]: 4 marks, well done

Commented [CW20]: Candidate could have provided further detail here, included reference to whether the voluntary liquidator is a licensed insolvency practitioner.

Commented [CW21]: 0 marks

Commented [CW22]: Not relevant to the question, which asks about receivers, not administrative receivers.



unless the debenture or other instrument by which he was appointed provides otherwise, *inter alia*, has the power to:

- (i) execute all documents necessary or incidental to the exercise of his powers in the name of and on behalf of the company in receivership;
- (ii) use the company's seal
- (iii) take possession of, collect and get in the assets (or parts thereof) of the company, in respect of which the receiver is appointed, and, for that purpose, to take such proceedings as he considers expedient to recover possession of any assets of the company.
- (iv) sell, charge or otherwise dispose of assets of the company.
- (v) borrow money, whether on the security of the assets of the company, or otherwise.
- (vi) appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions.
- (vii) commence, continue, discontinue or defend any action or other legal proceedings in the name and on behalf of the company. 6. Power to refer to arbitration any question affecting the company.
- (viii) effect and maintain insurances in respect of the business and assets of the company.
- (ix) draw, accept, make and endorse a bill of exchange or promissory note in the name and on behalf of the company.
- (x) appoint any agent to do any business which he is unable to do himself or which can be more conveniently done by an agent and power to employ and dismiss employees.

**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?

Given that the monetary judgment is from the English High Court, Harrison Holdings can apply for registration (under the simplified registration procedure and which application can be made "without notice" to Maximilian Properties) of the judgment under the Reciprocal Enforcement of Judgments Act 1922 before the BVI court. For the judgment to be registrable, Harrison Holdings should ensure that such judgment is not hit by any of the exceptions under Section 2 and 3 of the 1922 Act.

**Commented [CW23]:** 9 marks

**Commented [CW24]:** 4 marks

The candidate has failed to consider the common law, in light of the possible difficulties in registering the judgment, given that Maximilian Properties did not attend the hearing.

The candidate might also have considered other options, such as those available under the IA

The jurisdiction requirement is generally satisfied if the person against, Maxmillan Properties, whom the judgment was given: (i) was, at the time the foreign proceedings were commenced, present in the foreign country; (ii) was a claimant or counter-claimant, in the foreign proceedings; (iii) submitted to the jurisdiction of the foreign court by voluntarily appearing in the foreign proceedings; or (iv) had, prior to the commencement of the foreign proceedings, agreed to submit to the jurisdiction of the foreign court, in respect of the subject matter of the proceedings. Most commonly, this occurs when a contract includes a jurisdiction clause.

Therefore, even if Maxmillan Properties was not present at the time of hearing, it would be advisable that Harrison Holdings proves before the BVI court, atleast one of the other requirements to satisfy the jurisdiction requirements of the English High Court in delivering the judgment. It must further be evidenced that Mxmillan Properties was infact duly served with the process of the original court and that despite that it did not appear notwithstanding that it is ordinarily resident or carrying on a business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court to evince non-applicability of Section 3(2)(c) of the 122 Act.

The judgment once registered under the 1922 Act, it will have the following consequences in terms of Section 3(3) of the act:

- (i) the judgment shall, from the date of registration, have the same force and effect as the original judgment, and proceedings may be taken upon it, as if it had been a judgment originally obtained on the date of registration in the BVI High Court;
- (ii) the BVI High Court shall have the same control and jurisdiction over the judgment as it had over judgments given by itself, but only in so far as it relates to execution;
- (iii) the reasonable incidental costs of registering the judgment (including the costs of obtaining a certified copy from the original Court and of the application for registration) are recoverable from Maxmillan Properties as if they were sums payable under the judgment

**Question 4.2 [maximum 9 marks]**

Commented [CW25]: 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?

In relation to the given facts and circumstances, Peralta has the following options to pursue remedies against the defaulting party Santiago:

Within the insolvency regime

Under this option, Peralta being a foreign creditor with its debt having been defaulted upon by Santiago, an entity incorporated in BVI, under Section 446 of the Insolvency Act, 2003, is vested with a right of direct access and same rights regarding the commencement of and

participation in a BVI insolvency proceeding as creditors within BVI jurisdiction. Accordingly, Peralta can apply to the BVI court for commencement of insolvent liquidation against Santiago by way of an application providing evidences as to dissatisfaction and default in payment by Santiago of Peralta's debt as and when they fell due.

**Commented [CW26]:** Candidate has not provided any detail as to which provision of the insolvency act applies here and therefore, what type of application is to be made.

Prior to this application, Peralta is required to issue a statutory demand to Santiago in writing under Section 155 of the Act, inter alia specifying the nature and amount of the debt; requiring Santiago to pay the debt or to secure or compound for the debt to the reasonable satisfaction of Santiago within 21 days of the date of service of the demand; state that if the demand is not complied with, application may be made to the Court for the appointment of a liquidator; further setting out Santiago's right to make application to set the demand aside under section 156. After hearing of the application for setting aside of the statutory demand notice, if filed by Santiago, in the event the same is dismissed by the Court and is not set aside under Section 157 of the Act, Peralta shall have the right to file an application for appointment of a liquidator of Santiago by way of the aforesaid application thereby claiming Santiago's insolvency which in terms of Section 8(1)(a) of the Act includes event of failure of a company to comply with the requirements of a statutory demand that has not been set aside under section 157 and in terms of Section 8(1)(c)(ii) includes the event of the company being unable to pay its debt as they fall due. Once liquidation commences, Peralta has the option to file its claim with the liquidator to be paid out of distribution of assets of Santiago as part of liquidation. Despite commencement of liquidation, if Peralta in the given case happens to be a secured creditor, can also stand outside the liquidation process and enforce its security.

**Commented [CW27]:** There is some confusion here.

Peralta is not required to serve a statutory demand. However, it will assists the application to appoint a liquidator. In the event that the demand is not satisfied or set aside then the debtor is "deemed" insolvent.

**Commented [CW28]:** Peralta has the right to file an application whether or not a statutory demand is served.

Outside of the formal insolvency regime:

(i) **Court judgment.**

Peralta can also issue a civil claim against Santiago for due and outstanding debt in the BVI court. If the court finds in the creditor's favour, the creditor can obtain judgment for the debt. If the Santiago fails to pay the judgment debt, then Peralta can (in appropriate circumstances):

apply to the court to appoint a liquidator to the debtor under the insolvency route as prescribed above; obtain a charging order over the Santiago's assets; apply to the court for the appointment of a receiver by way of enforcement; and/or obtain an attachment of debts order.

(ii) **Receivership and administrative receivership**

In the event Peralta is as secured creditor, it can also apply to the court for appointment of a receiver over the assets of Santiago to exercise its:

- (a) statutory rights (for example, where a mortgage has been granted over property or a mortgage or charge has been granted over shares as security to the loan granted by Peralta); or
- (b) contractual rights (for example, under a security document).

**Commented [CW29]:** The candidate should discuss whether Peralta could make an application to the BVI court to appoint a receiver.

Incase the loan is secured by a floating charge over the whole or substantially the whole of Santiago's assets can (by way of an application to court or pursuant to the powers in the security document) appoint an administrative receiver.

**\* End of Assessment \***

**Commented [CW30]:** Total marks: 38