



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: **[studentID.assessment5B]**. An example would be something along the following lines: 202122-336.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 “studentID” 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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 [JW1]: 9 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.

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.

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.**

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.

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.

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.

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 [JW2]: Correct answer

Commented [JW3]: Have to obtain court order to transfer shares

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.

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.

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.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Commented [JW4]: 2 marks

Set out the circumstances in which a voluntary liquidator can be appointed over a company, pursuant to Part XII of the Business Companies Act 2004.

- (a) According to section 199 of the Business Companies Act 2004, directors may by a resolution appoint a voluntary liquidator in any of the following circumstances:
- (i) upon the expiration of such time as may be specified in its memorandum or articles for the company's existence;
 - (ii) upon the happening of such event as may be specified in its memorandum or articles as an event that shall terminate the existence of the company;
 - (iii) in the case of a company limited by shares, if it has never issued any shares
 - (iv) in any other case:
 - (i) if the memorandum or articles permit them to pass a resolution for the appointment of a voluntary liquidator, and
 - (ii) the members have, by resolution, approved the liquidation plan.
- (b) Section 199 of the Business Companies act 2004 also states that members of a company may by a resolution appoint a voluntary liquidator.]

Question 2.2 [maximum 2 marks]

Commented [JW5]: 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.

- (a) According to section 289 of the Insolvency Act 2003, where a liquidator of a company is appointed under section 159, a person who is or has been an officer of the company is deemed to have committed an offence 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.
- (b) A person is not guilty of an offence under this section
- (i) by reason of conduct constituting an offence under subsection (1)(a) which occurred more than five years before the commencement of the liquidation; or

- (ii) if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud the company's creditors.]

Question 2.3 [maximum 2 marks]

Commented [JW6]: 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?

[Under the Insolvency Act (section 467), a foreign representative may apply to the BVI court for any of the following orders:

- (a) to 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) to restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property (without prejudice to the existing rights of a secured creditor);
- (c) to require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
- (d) to 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) to appoint an interim receiver of any property of the debtor for such term and subject to such conditions as the court considers appropriate;
- (f) to 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) to stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or
- (h) to make such other or grant such other relief as it considers appropriate.]

Question 2.4 [maximum 4 marks]

Commented [JW7]: 4 marks

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

[In section 8 of the Insolvency Act 2003, a company or 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) in the event of execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company, the company is unable to satisfy the judgment or order (fully or partly); 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.

It is stated in the Insolvency Rules 2005 (Rule 149) the minimum amount for a statutory demand is \$2000 (amongst other criteria).

In the Business Companies Act 2004, it is stated in section 209 that a company is insolvent in any of the following circumstances :

- (a) the value of its liabilities exceeds, or will exceed, its assets; or
- (b) it is, or will be, unable to pay its debts as they fall due.]

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

Question 3.1 [maximum 5 marks]

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

- [(a) An application has to be filed to the court by the liquidator (section 233 of the Insolvency Act).
- (b) The liquidator has to prepare a report which will be submitted to the court, if the court requires such report to be submitted when as part of the application for termination of liquidation.
- (c) The liquidator should also prepare its final report with a statement of realisations and distributions and a summary of the grounds for which a creditor or member may object to the striking of the company from the Register. (in anticipation of termination of liquidation).
- (d) As soon as practicable after completing its duties, the liquidator is required to send its final report to every creditor whose claim has been admitted and also to every member of the company. The contents of the report are to be as prescribed in the Act.
- (e) The final report of the liquidator has to contain a statement as specified in section 234(3).
- (f) The final report and the statement of realisations and distributions is required to be filed with the Registrar]

Question 3.2 [maximum 5 marks]

Is it possible to make an application to the BVI Court for the appointment of an overseas insolvency practitioner in relation to a BVI company and, if so: (i) in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and (ii) what is the process for such proposed appointment?

- [(a) An overseas insolvency practitioner is defined in section 473 of the Insolvency Act as an individual resident outside the Virgin Islands appointed as an insolvency practitioner under section 483.
- (b) The overseas insolvency practitioner must act jointly with a licensee or with the Official Receiver for the purposes of carrying out the actions described in section 474 of the Insolvency Act.
- (c) The criteria applicable to the appointment of an overseas insolvency practitioner (by a court or a creditor) is set out in section 483 of the Insolvency Act. The court or the persons appointing the overseas insolvency practitioner (in this case the creditor) has to be satisfied that:

Commented [JW8]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation

Commented [JW9]: 5 marks

- (i) the overseas insolvency practitioner has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made,
- (ii) the overseas insolvency practitioner has given his written consent to act in the prescribed form,
- (iii) the overseas insolvency practitioner is not disqualified from holding a licence under section 477,
- (iv) the overseas insolvency practitioner is not disqualified from acting in the case of a company or a foreign company, under subsection 482(2) or in the case of an individual, under subsection 482(3),
- (v) there is in force such security for the proper performance of the functions of the overseas insolvency practitioner as may be specified in the Regulations; and
- (vi) prior written notice of the appointment of the overseas insolvency practitioner has been given to the Commission.]

Question 3.3 [maximum 5 marks]

Discuss the protections and options provided to secured creditors under the BVI insolvency framework.

- [(a) The Insolvency Act provides that secured creditors may claim against the estate of the bankrupt with respect to the balance of the debt owing (after taking into account value of the security interest, in good faith) or the secured creditor may surrender its security interest to the trustee and claim in the bankruptcy as an unsecured creditor for the whole of the debt. It is worded as “may” and it goes on to say that the secured creditor is not under any obligation to do so (section 338 of the Insolvency Act).
- (b) As a secured creditor, the existing security interest created in favour of a secured creditor will remain unaffected by bankruptcy/insolvency proceedings, The right of action to be taken by the secured creditor (when it elects to pursue enforcement action) lies against the asset and therefore enforcement of such security is a separate process from the liquidation proceedings.
- (c) If the liquidator is not satisfied with the value of the security (as assessed by the secured creditor), the liquidator is empowered to require the secured .assets of the secured creditor to be offered for sale
- (d) Examples of security interest that can be created in favour of a secured creditor are:
 - (i) Legal mortgage (in the case of immovable property)
 - (ii) Equitable charge (in the case of immovable property)
 - (iii) Floating charge (in the case of immovable property)
 - (iv) Mortgage or charge of shares of a BVI company
 - (v) Pledge (in the case of movable property i.e., physical assets but not over shares)
- (e) Notwithstanding the above, if the liquidator considers that there is any irregularity in connection with the security interest (or its creation), the liquidator is empowered to challenge the validity of the security interest, including requiring the security interest

Commented [JW10]: 3 marks - it is not clear if you understand the difference between bankruptcy for individuals or liquidation which is for corporate entities. Generally, secured creditors rights are not affected by Insolvency proceedings and the protection is in in creditors arrangement/ bankruptcy/liquidation unless the secured creditor relinquishes the security . Options to relinquish security interest in all insolvency procedures. Options under the IA2003 for secured creditors: they appoint receiver/admin receiver/out of court receiver and value their security and claim for any unsecured balance.

to be re-classified as part of the general pool of assets, resulting in the relevant secured creditor making a claim against the general pool of assets instead of against the security interest.

- (f) If the secured creditor is not able to recover the secured amount from the proceeds of the sale of the security interest, the secured creditor may claim for the balance outstanding as an unsecured creditor.]

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

Question 4.1 [maximum 6 marks]

In September 2020 Pinforth Holdings Limited, a company incorporated in England, brought a claim against Expat Properties Limited, a company incorporated in the BVI, in the English High Court. Expat Properties did not attend the hearing and Pinforth Holdings was awarded judgment in the sum of USD 4,500,000.

Expat Properties has significant assets in the BVI. Giving reasons, with particular reference to the Reciprocal Enforcement of Judgments Act 1922, what options should Pinforth Holdings be advised to consider in order to enforce its foreign judgment debt?

- [1: Availability of assets in the jurisdiction

It is noted that Expat Properties is described as having significant assets in the BVI. This is a relevant fact to be ascertained as registration of a foreign judgment in the BVI will have limited effect if the debtor does not have any assets in the jurisdiction (in this case, BVI)

- 2: Judgment is issued from a recognised jurisdiction

Judgments obtained outside of BVI can be registered in the BVI for purposes of enforcement if the judgment is obtained from a recognised jurisdiction.

In the case of the judgment obtained by Pinforth Holdings in the English High Court, the Reciprocal Enforcement of Judgments Act 1922, judgments given in the High Court of England and Wales (amongst a number of other foreign jurisdictions) is recognised as being eligible for enforcement in the BVI. There are procedural requirements to be adhered to, to achieve enforcement status.

3. Judgment is recently obtained

The judgment should be registered within 12 months from the date of the judgment itself.

If it is sought to be registered more than 12 months from the date of the judgment, it must be on the basis that it is just and convenient to do so.

It is noted that the claim was initiated in September 2020. It is not stated when judgment was obtained. For present purposes, it is assumed that the judgment was recently obtained and it is still within the 12 months grace period specified in section of 3(1) of the Act.

Commented [JW11]: 5 marks - so if judgment is not registrable then common law remedy under doctrine of obligation action as specified sum or summary judgment and then liquidation

4. Judgement is final and conclusive and is a monetary judgment

It is also assumed that this is a monetary judgment and that it is final and conclusive.

If it is not a monetary judgment, Pinforth Holdings will have to persuade the BVI Court that it is not necessary to re-litigate a claim that has already been properly dispensed with in another jurisdiction by a competent court from that jurisdiction.

5. No 'exception' events/factors apply

It is noted that Expat Holdings did not attend the hearing in the English High Court.

It is assumed that Expat Holdings was duly served with in accordance with the applicable requirements in the English High Court, otherwise the BVI Court will not order the judgment to be registered.

There are several other circumstances specified in Section 3(2) of the Act which, if applicable will mean that the BVI Court will not order a judgement to be registered.

The circumstances specified in Section 3(2) of the Act are as follows:

- (a) the original court acted without jurisdiction;
- (b) the judgment 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;
- (c) the judgment debtor was not duly served with the process of the original court and did not appear, notwithstanding that he is ordinarily resident or carrying a business within the jurisdiction of that court or agreed to submit to the jurisdiction of the court;
- (d) the judgment was obtained by fraud;
- (e) the judgment debtor satisfies the court that an appeal is pending or that he is entitled to and intends to appeal; or
- (f) the judgment related to a cause of action which for reasons of public policy (or similar) could not have been entertained by the court.

6. Once the judgment from the English High Court is registered, the remedies available to be initiated for enforcement are as provided in the Civil Procedure Rules.

Examples of these remedies are as follows:

- (a) a charging order
- (b) a garnishee order
- (c) a judgment summons
- (d) an order for seizure and sale of goods

(e) Appointment of a receiver.]

Question 4.2 [maximum 9 marks]

Abbeydale Limited, a company incorporated in England, and Dendoncker Limited, a company incorporated in the BVI, entered into a loan agreement for the purchase of a property on Necker Island in the BVI. Under the terms of the loan agreement, Abbeydale transferred USD 12,000,000 to Dendoncker and Dendoncker successfully purchased the property. Subsequently, Dendoncker failed to make any of the loan repayments pursuant to the repayment clauses. As a result of this failure, Abbeydale made a demand for immediate repayment in full, as it was entitled to do under the agreement. Dendoncker failed to make any repayments in full or in part.

Providing reasons, with particular reference to the Insolvency Act, what options should Abbeydale Limited be advised to consider in order to enforce the debt owed to it by Dendoncker Limited?

[It appears from the given facts that Abbeydale Limited did not create a charge over the property or obtained any other form of security. This suggests that Abbeydale is an unsecured creditor.

Abbeydale may apply to the court in BVI to commence insolvency proceedings. In considering the application by Abbeydale, the court must be satisfied that Dendoncker Limited is insolvent. Section 8 of the Insolvency Act states that a company will be considered insolvent if it is unable to pay its debts as they fall due, which is the case here. Abbeydale will have to issue a statutory demand to Dendoncker. If Dendoncker fails to comply with the statutory demand and it has not been set aside (disputed), Dendoncker will be considered "insolvent". Further steps can then be taken to initiate insolvency proceedings. There is a set timeframe for steps to be taken and events to occur.

Another option to consider is a **company creditors' arrangement**. This requires directors of Dendoncker to pass a resolution to state that Dendoncker is insolvent or likely to be so, to approve a written proposal containing details of how rights of the creditors will be varied or cancelled and to nominate an insolvency practitioner to act as the interim supervisor. Unlike an insolvency proceeding, the timeframe for a company creditors' arrangement is not as clear cut as that of insolvency proceedings, which means there is less certainty in terms of the time that this process would take, when compared to insolvency proceedings.]

Commented [JW12]: 4 marks - First issue is A secured or unsecured creditor?
If secured - IA 2003 - appointment of receiver/ administrative receiver/out of court receiver. If unsecured - sue for breach of contract for damages and obtain judgment from English Court in its favour – may be delay and costly; or obtain judgment in English court – recognised in BVI Court under IA 2003; or serve statutory demand under s155 IA2003 and then if unpaid application to the Court for liquidation under Section 162 for appointment of liquidator by the Court - winding up will only be made if insolvent - provisional liquidation under 170 if assets at risk of dissipation.

Commented [JW13]: Advice for A - creditor cannot propose a CCA as you state it require a directors resolution

*** End of Assessment ***