



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]: 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.

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.

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]

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 voluntary liquidator can be appointed over a company pursuant to Part XII of the BCA:

- (a) upon the expiration of such time as may be specified in the company's memorandum and articles for its existence;
- (b) 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;
- (c) in the case of a company limited by shares, if it has never issued any shares; or
- (d) In any other case- if the memorandum and articles permit them to pass a resolution for the appointment of a voluntary liquidator; and the members have, by resolution, approved the liquidation plan¹.

Commented [JW2]: 2 marks

Question 2.2 [maximum 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.

Where a liquidator of a company is appointed under section 159 of the BVI Business Companies Act 2004 (the "BCA"), 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 or she 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, 60 days of the date of any unsatisfied judgment or order for the payment of money obtained against the company².

Commented [JW3]: 1.5 marks - Section 289

Question 2.3 [maximum 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?

An application pursuant to section 448 of the Insolvency Act may be made by a foreign representative to the BVI Court to recognise a foreign proceeding in respect of which the foreign representative has been appointed. The BVI Court enjoys the power to grant interim relief prior to recognition and relief upon recognition in support of foreign insolvency proceedings.

In terms of interim relief, where a recognition application has been made but not yet determined, the court has the power under section 452 of the Insolvency Act to grant such relief as it considers appropriate, including staying execution against the debtor's assets, entrusting the administration or realisation of all or part of the debtor's assets located in the

Commented [JW4]: 0 mark - 8 powers under section 467 not listed

None of the sections 448-454 IA2003 mentioned are in force.

¹ Section 199 (2) of the BVI Business Companies Act 2004

² Section 289 of the Virgin Islands Insolvency Act 2003 (revised) (the "Insolvency Act")

BVI to the foreign representative or to another person designated by the court in order to protect and preserve assets in jeopardy and any of the longer term relief provided for in the Insolvency Act.

Upon recognition of the foreign proceeding, the court has the power pursuant to section 454 of the Insolvency Act to grant any appropriate relief, including staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities, to the extent they have not been stayed under section 453 (1) (a) of the Insolvency Act; staying execution against the debtor's property to the extent it has not been stayed under section 453 (1) (b); suspending the right to transfer, encumber or otherwise dispose of any property of the debtor to the extent this right has not been suspended under section 453 (1) (c); providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; entrusting the administration or realisation of all or part of the debtor's assets located in the BVI to the foreign representative or another person designated by the court; extending the relief granted under section 452 (1).

Question 2.4 [maximum 4 marks]

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

Pursuant to section 8 of the Insolvency Act, a 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 BVI court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
- (c) either the value of the company's liabilities exceeds its assets or the company is 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.

Pursuant to section 234 of the Insolvency Act, as soon as practicable after completing his or 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: his or her final report, complying with subsection (3), and a statement of realisations and distributions in respect of the liquidation; and 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 of realisations and distributions sent to the creditors and members of the company.
- (c)

Pursuant to section 234, the final report of the liquidator shall contain a statement that all known assets of the company have been disclaimed, realised or distributed without realisation; that all proceeds of realisation have been distributed; and that there is no reason

Commented [JW5]: 4 marks

Commented [JW6]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. Termination does not always mean company is struck off or dissolved.

why, in his or her opinion, the company should not be struck from the Register, and dissolved.

The liquidator can then make an application under section 233 to the court to terminate the liquidation.

Question 3.2 [maximum 5 marks]

Commented [JW7]: 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?

Yes, it is possible to make an application to the BVI Court for the appointment of an overseas insolvency practitioner in relation to a BVI company, but only as a joint liquidator. Section 483 of the Insolvency Act provides that an individual resident outside the BVI may be appointed to act as an insolvency practitioner jointly with a licensee or the Official Receiver.

The circumstances where a creditor might consider the appointment of an overseas insolvency practitioner are where, for example assets of a BVI company are located in a different jurisdiction and/or time zone, where it makes sense to have another liquidator on the ground in that jurisdiction to deal with the asset and to assist with the coordination of global recovery efforts, especially as it relates to long-running liquidations.

The process for appointing an overseas insolvency practitioner as a joint liquidator is as follows:

- (a) Prior written notice of the intended appointment must be provided to the FSC.
- (b) File the application. This is often done as a single application to appoint joint liquidators.
- (c) Where an applicant is proposing to appoint an overseas joint liquidator, the FSC is entitled to appear at the hearing and to object to the appointment, pursuant to section 484.

Question 3.3 [maximum 5 marks]

Commented [JW8]: 2 marks - liquidation under s.175 and bankruptcy s 311 - protection also in creditors arrangement section 15/section 467. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/s142

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

Pursuant to section 155 of the Insolvency Act, a secured creditor may make a demand on an individual or company for payment of a debt (a statutory demand).

If a debtor fails to satisfy the statutory demand, a secured creditor can then take steps to take possession of and realise or otherwise deal with assets of the company over which that creditor has a security interest, even if the company is in liquidation³.

Where a secured creditor has claimed in the liquidation of a company under section 211 (1) (a), the liquidator may at any time give notice to the creditor that he or she proposes at the expiration of 28 days from the date of the notice to redeem the security interest at the value placed on it by the creditor⁴. The secured creditor can apply within 21 days of that notice to revise the value placed on it pursuant to section 212 (2).

³ Section 175 Insolvency Act

⁴ Section 212 (1)

Pursuant to section 211 of the Insolvency Act, a secured creditor may:

- (a) Value the assets subject to the security interest and claim in the liquidation of a company as an unsecured creditor for the balance of his or her debt; or
- (b) Surrender his or her security interest to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole of his or her debt, but he or she is not obliged to do either.
- (c) At any time, apply to the liquidator to amend the value that he or she placed on the security interest in his or her claim.
- (d) Bid on assets of the company offered for sale by public auction.

Pursuant to section 388 of the Insolvency Act allows a secured creditor to do the above in relation to a bankrupt estate. A secured creditor can also apply for a bankruptcy order.

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?

We are told that Pinforth Holdings Limited has an English money judgment against a BVI company, Expat Properties Limited, which has assets in the BVI. The 1922 Act extends to England and Wales and to money judgments.

However, we are not told that the defendant company, Expat Properties Limited, has any connection to England and Wales. We are told that Expat Properties Limited has not attended the hearing in which Pinforth Holdings was awarded judgment. We are told the proceedings were brought in September 2020, but we are not told the date of the judgment.

If Expat Properties Limited participated in the English proceedings, by, for example putting in a defence, notwithstanding it did not appear that the hearing at which judgment was entered against it, there may be an opportunity for Pinforth Holdings to apply to register the English judgment against it, if the judgment is less than a year old. In those circumstances, even if the judgment is over a year old, Pinforth Holdings could apply for the BVI court to extend the time to apply to register the judgment on the basis it is just and convenient to do so⁵.

However, assuming Expat Properties Limited has no connection to England, being a company which 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 by participating in the English proceedings then the BVI court will not permit the judgment to be registered, pursuant to section 3 (2) of the 1922 Act.

If registration under the 1922 Act is not open to Pinforth Holdings, then it can instead make an application under common law for the court to treat the final and conclusive money judgment as a cause of action in itself under the doctrine of obligation by action. Pinforth can

⁵ Section 3 (3) of the 1922 Act

Commented [JW9]: 5.5 marks - although you did not list all of the conditions listed under REJ1922 you picked the issues: date and not submitting to the court so judgment not likely to be registrable so your conclusion was correct and alternative given.

then apply for summary judgment and then enforce against Expat Properties Limited's assets in the BVI, using the BVI judgment⁶.

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?

We are told that Abbeydale Limited entered into a loan agreement, which Dendoncker Limited has since defaulted on. That default triggered acceleration of the loan, such that the full amount became due and payable. Abbeydale has already made a demand for repayment under the loan agreement, but Dendoncker has not repaid the loan in part or in full. Abbeydale should therefore look once more at the loan agreement and see whether there are any direct provisions such as a power of attorney for it to seize control of the property on Necker Island and sell it to recover the loan, or to appoint a receiver to do the same.

Barring the above, the most straightforward thing for Abbeydale to do is to issue a statutory demand against Dendoncker pursuant to section 155 of the Insolvency Act. Dendoncker will need to be served with the statutory demand at its registered office in the BVI. Once Dendoncker has been given 21 days to pay up on the statutory demand and failed to do so or failed to have the statutory demand set aside pursuant to section 156 of the Insolvency Act, Abbeydale can make an application to appoint a liquidator over Dendoncker, which is the most time and cost effective solution, unless otherwise provided for in the loan agreement. The disadvantage of this option is if a liquidator is appointed over Dendoncker, Abbeydale has no control and may have to stand in line with other creditors, depending on where it sits in the hierarchy.

If the property is operating as a business (for example, being let out on a short term basis) then the appointment of a liquidator may cause disruption to that, and actually decrease the cash flow which might have been available for loan repayment.

In the answer above I have assumed (since there is no suggestion of it in the facts) that, unusually for a real estate loan, the loan is not secured on the property. If the loan was secured against the property, other enforcement options would be available, for example, the option of applying to appoint a receiver over Dendoncker.

*** End of Assessment ***

⁶ INSOL Guidance Text Module 5B BVI Chapter 8

Commented [JW10]: 4 marks

First issue to determine: A secured or unsecured creditor? If secured - does it have registered charge/ debenture/ legal charge/equitable charge - have to see the loan document. Options under IA2003: Receiver /Administrative Receiver / Out of Court Receiver. If unsecured creditor then: Breach of contract – 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 can be appointed under section 170 if assets at risk of dissipation.

Commented [JW11]: Who is 'we'?