



**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**.

Commented [DB1]: ???

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [JW2]: 10 mark

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.

Section 197(1) of the BCA provides that a voluntary liquidator can be appointed over a BVI company when that company (i) has no liabilities or (ii) is able to pay its debts as they fall due and when (meaning the directors of the company need to provide a declaration of solvency and approve a liquidation plan).

A voluntary liquidator can be appointed by resolution of the directors or the members.

Commented [JW3]: 1/2 mark -Section 199 (1) & (2) (subject to section 200) of the BCA 2004 sets out all the circumstances in which a voluntary liquidator can be appointed

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.

If the liquidator was appointed under section 159 of the Insolvency Act, an officer of the company is deemed to have committed an offence pursuant to the fraudulent conduct provisions of the Insolvency Act (section 289) if they have:

- (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 within the 5 years prior to the commencement of the liquidation; 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 company within the 5 years prior to the commencement of the liquidation.

Commented [JW4]: 1.5 marks - re-read the section

Unless they can prove that, at the time of the conduct constituting the offence, he or she had no intent to defraud the company's creditors.

Commented [JW5]: The reference here to 5 years is incorrect

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?

Under part XIX of the Insolvency Act, the BVI court can make orders in aid of insolvency proceedings in some other countries, including the UK, USA, Australia, Canada, Hong Kong, Japan, Jersey and New Zealand. The Court's powers are very broad and are set out in section 467 (3). They include:

- (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), 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;

Commented [JW6]: 2 marks

- (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) authorise 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 order 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.

The BVI corporate solvency test is set out in section 8 and Part VIII of the Insolvency Act. The Court also has a residual discretion. The circumstances in which a BVI company will be considered insolvent are as follows:

- (a) It is proven to the satisfaction of the Court that the company is unable to pay its debts as they fall due (see section 8(1)(c)(ii));
- (b) It is proven to the satisfaction of the Court that the value of the company's liabilities exceeds the value of its assets (see section 8(1)(c)(i) and section 10(2); or
- (c) The company has failed (in whole or in part) to satisfy a judgment, decree or order of the BVI court in favour of a creditor of the company;
- (d) The company fails to comply with the terms of a statutory demand (that complies with section 156 of the Insolvency Act and is not set aside).

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

Question 3.1 [maximum 5 marks]

Commented [JW8]: 2.5 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. Termination does not always mean company is struck off or dissolved.

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

On the application of a liquidator, creditor, director or member of the official receiver, the Court can make an order terminating the liquidation of a BVI company at any time, if it is just and equitable to do so (section 233(1) of the Insolvency Act).

Under section 234, as soon as practicable after completing their duties, the liquidator is required to prepare and send every creditor, as well as the court, a final report and a statement of realisations and distributions. If the termination application is made by someone other than the liquidator, then under section 233 the Court can order the liquidator to produce that report.

Commented [JW9]: Admitted creditors, members and Registrar not the Court unless it asks for it.

When the liquidation is being terminated, the liquidator can also apply under section 235 to be released from liability in relation to their administration of the company.

Question 3.2 [maximum 5 marks]

Commented [JW10]: 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?

An individual who is resident outside of the BVI can be appointed as an insolvency practitioner in relation to a BVI company.

A common situation in which a creditor might consider seeking to appoint an overseas insolvency practitioner is when the company has assets outside of the BVI, meaning the appointment of an insolvency practitioner based in the country in which the company's assets are may reduce costs and make the liquidation more efficient/effective (in terms of local knowledge and reduced travel costs).

An overseas insolvency practitioner can only be appointed jointly with a BVI insolvency practitioner. The process/ test for the appointment of an overseas insolvency practitioner is set out in section 483 of the Insolvency Act and is as follows:

- (a) he or she has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;
- (b) he or she has given his or her written consent to act in the prescribed form;
- (c) he or she is not disqualified from holding a licence under section 477;
- (d) he or she 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);
- (e) there is in force such security for the proper performance of his or her functions as may be specified in the Regulations; and
- (f) prior written notice of his or her appointment has been given to the Commission.

The Commission has a right to appear at the hearing to object to the appointment of the overseas insolvency practitioner.

Question 3.3 [maximum 5 marks]

Commented [JW11]: 3 marks - Not just liquidation -protection also in creditors arrangement section 15/bankruptcy section 311/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.

Secured creditors are not classed as creditors or considered participants in the BVI insolvency process because their claims are directly against assets of the company. This means there are no timelines for enforcing a secured claim against a BVI company in liquidation and it is rather at the secured creditors' discretion.

A secured creditor has the following options (depending on the security):

- (a) Have the assets subject to the security interest valued and make a claim for the balance in the liquidation as an unsecured creditor.
- (b) Surrender its security interest to the liquidator and claim the whole of their debt in the liquidation.
- (c) If the secured creditor has a legal mortgage they could (i) foreclose on its shares (ii) sell its shares or (iii) appoint a receiver over its shares.

- (d) If the secured creditor has an equitable charge they could sell the asset subject to the charge.
- (e) If the secured creditor has a pledge as the form of security they could take possession of the pledged asset, subject to a common law power to sell physical assets.

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?

The UK Reciprocal Enforcement of Judgments Act (Cap 65) 1922 ("Act") applies to the BVI.

The Act allows for the registration/ enforcement of final and conclusive judgments for monetary sums from the English High Court (among other courts) within 12 months of the date of that judgment (unless the BVI court grants an extension on the basis that it is just/convenient).

To register a judgment the judgment creditor needs to apply to the court under CPR part 72. Once registered, such a judgment would be treated as having been made by a BVI court. The remedies available under the Act that Pinforth could consider would therefore be: a charging order, garnishee order, judgment summons, order for seizure/sale of good or the appointment of a receiver. Pinforth could also consider its rights to petition for the winding up of Expat Properties.

More information is needed to properly assess Pinforths options. It is not clear if the judgment would meet the requirements of section 3(2) of the Act, because we do not know if Expat Properties is resident or carrying out business in England, whether Expat Properties submitted to the jurisdiction or whether the English court had jurisdiction, whether Expat Properties was or was not served with the process in the English court, or whether any appeal/ challenge to the summary judgment is pending or anticipated.

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?

Commented [JW12]: 3 marks - not all conditions under the REJ 1922 not listed. Claim was more than 12 months but question does not state when judgment awarded and Expat did not attend hearing so not likely to be registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA2003

Commented [JW13]: 1 mark - 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.

Under the Insolvency Act, and assuming the due date for repayment of the loans has passed, Abbeydale Limited could petition for **the winding up of Dendoncker** on the basis that it is insolvent (unable to pay its debts as they fall due and possibly also balance sheet insolvent). A liquidator (or liquidators) would then be appointed by the court (who Abbeydale could propose). Abbeydale could then file a claim form in the liquidation and would rank along with the other creditors of the same class. This could result in a low return, depending on the liquidity of Dendoncker's assets and the value of the other creditors of Dendoncker (if any).

An option that (depending on the circumstances) could result in a higher return, and should be considered as a first step in any event, is speaking further with Dendoncker, assessing its ability to repay the loans and possibly entering into a repayment plan/ agreement (depending on the prospects of this being complied with).

*** End of Assessment ***

Commented [JW14]: Section 162 IA 2003