



**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 liquidation can be used to properly tie up the affairs of a company and close it down, under the provisions of the Business Companies Act, 2004, when the company is no longer needed. The purpose of the voluntary liquidation is to ensure all assets and liabilities are cleared (doing so within the liquidation if required) in order to dissolve the entity.

In order for a company to be liquidated under Part XII of the BCA, its assets must either equal its liabilities or its assets must exceed its liabilities i.e. the company must be solvent and able to pay its debts as and when they would fall due. Such solvency is set out by the directors of the company in a declaration of solvency and a liquidation plan must be approved.

**Commented [JW2]:** 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.

The relevant period for fraudulent conduct to be considered where a liquidator has been appointed by the Court is 12 months prior to the commencement of the liquidation.

In accordance with Section 289(1) of the Insolvency Act, 2003, "a person who is or has been an officer of the company is deemed to have committed an offence if he has....

- a) Made or caused to be made any gift or transfer of, or charge on, or has caused, permitted or acquiesced in the levying of any execution against the company's assets; or
- b) Has concealed or removed any of the company's assets since, or within, sixty days of the date of any unsatisfied judgment or order for the payment of money obtained against the company"

As taken directly from the provisions of the Insolvency Act, 2003.

**Commented [JW3]:** 1.5 marks - no subsection (2) - exceptions

**Commented [JW4]:** Not quite as no subsection (2) quoted

**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?

Part XIX of the Insolvency Act, 2003 sets out the Orders in Aid of Foreign Proceedings and would be the point of reference in relation to the orders the Court can make in support of foreign proceedings.

The BVI Court has a number of powers in relation to Orders that can be made in support of foreign insolvency proceedings (pursuant to Section 467 of the IA but subject to Section 468 of the IA, the latter being matters to be considered by the Court in determining the application). These powers are included but not limited to the ability to restrain the commencement or continuation of proceedings against a debtor or debtors' property, requiring any person to deliver up any property of the debtor (or

**Commented [JW5]:** 1 mark - powers should have been listed

proceeds for the same), ordering or granting relief to facilitate the coordination of BVI insolvency proceedings and foreign proceedings and appointing an interim receiver, amongst others. The full scope of powers is set out in Section 467 of the Insolvency Act, 2003.

**Question 2.4 [maximum 4 marks]**

**Commented [JW6]:** 4 marks

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

Section 8 of the BVI Insolvency Act, 2003 sets out the "meaning of insolvent" and reference should be made to this section for the circumstances in which a company will be considered insolvent in the BVI.

The most notable position a company would be in to be considered insolvent would be the simple fact that the company is unable to pay its debts as and when they fall due, as noted in Section 8(c)(ii). So long as the debt is not disputed, this is sufficient evidence of insolvency.

A company will be considered insolvent if 'balance sheet insolvency' can be demonstrated to the satisfaction of the Court. Balance sheet insolvency occurs when the liabilities of a company exceeds its assets. Further clarity on what shall be considered a liability is set out in Sections 10(1) and 10(2) of the Insolvency Act, 2003. It is important to note, and as set out in the Foundation Certificate: Module 5B guidance text, the company may not be considered balance sheet insolvent if the company's assets dropped lower than its liabilities for only a short time, as seen in the case of *Trade and Commerce Bank v Island Point Properties*.

Finally, to set out two additional circumstances in which a company would be considered insolvent in the BVI: 1) if the company fails to satisfy execution issued on a judgment in favour of a creditor and 2) if a company fails to meet the terms of a statutory demand that has not been set aside pursuant to Sections 156 and 157 of the Insolvency Act, 2003.

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

**Question 3.1 [maximum 5 marks]**

**Commented [JW7]:** 3 marks - no mention of BCA 2004 sections 207A-208 - termination does not always mean company is dissolved.

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

The termination of a liquidation is set out in Section 232 of the BVI Insolvency Act, 2003 and states that the liquidation of a company terminates upon the first occurrence of the following:

1. An Order of the Court termination the liquidation pursuant to Section 233 of the Insolvency Act, 2003;
2. A certificate of compliance in accordance with the provisions set out in Section 234(2) is filed by the liquidator; or
3. An Order of the Court exempting the liquidator from filing a certificate of compliance.

The liquidator may make an application to Court for an Order, made under Section 233, to terminate the liquidation at any time, provided it is just and equitable to do so.

The liquidation of the company can then be completed. The liquidator must complete his duties as soon as possible, prepare a final report as soon as practicable following that and issue that report to the creditors, members and file with the Registrar of companies. The guidance for the preparation of the final report and the statements that must be included is set out at Section 234 of the Insolvency Act, 2003. Pursuant to Section 235 of the Insolvency Act, 2003, the liquidator may apply for their release which discharges them from any and all liability in respect of the administration of the company.

More often than not the company will then be dissolved under Section 236 of the Insolvency Act, 2003 and the liquidator would write to the BVI Registrar of Companies to make the request that the company be dissolved. In rare circumstances, dissolution may not be appropriate.

### 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?

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 as set out in Section 483 of the BVI Insolvency Act.

In order for the appointment of a foreign overseas insolvency practitioner to be considered, there must be sufficient justification to support the reasons for the requirement of the appointment taker. For example, in instances whereby assets are held outside of the BVI – particularly those that require support of professional advisors to be disposed of, then a foreign overseas insolvency practitioner may be appropriate in terms of their experience in disposing of such assets, the logistics of taking the practical steps to do so and the relationships they have that may help to achieve maximum realisations for the estate. The individual must be resident outside of the BVI and may only act jointly with a BVI IP. The individual must have sufficient qualifications and experience to act in respect of the appointment, must provide a written consent to act, must not be disqualified from holding a license and must not be disqualified from acting pursuant to S482(2) and S482(3) – i.e. has not been an auditor or director of the company.

In terms of practical steps, an application must be made to the Financial Services Commission for each foreign overseas insolvency practitioner proposed, with no less than 7 clear days' notice if possible, as best practice. A fee of \$500 is payable and this is non-refundable (even if the application is rejected). The application sets out the details of the proposed overseas IP, including details of the experience and license number and must include justification for the appointment. Together with the application, the proposed overseas IP's CV/resume must be appended with a copy of the Professional Indemnity Insurance. As of recent months, the application is now filed via the FSC's VIRRGIN online platform.

### Question 3.3 [maximum 5 marks]

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

A key feature of BVI Insolvency law is the *pari passu* treatment of creditors. Though, strictly speaking, secured creditors are not classed as creditors within the insolvency process,

Commented [JW8]: 5 marks

Commented [JW9]: Licensed IP

Commented [JW10]: Called security in the Act

Commented [JW11]: 2.5 marks - Not just liquidation - protection also in creditors arrangement/bankruptcy. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/s142



the BVI Insolvency Act provides for the rights of the secured creditors to enforce their security.

The claim of a secured creditor is enforceable directly against the assets of a company to which they are secured and therefore fall outside of the scope of the liquidation in terms of their ability to take control of and dispose of the asset and timings in which they can do so. The appointment of an insolvency practitioner as liquidator or Trustee does not affect the right of the secured creditor to take possession of or realise the assets over which they hold security.

Should they so wish, Section 211 of the Insolvency Act allows a secured creditor to value the assets to which they hold security and claim in the liquidation as an unsecured creditor for the balance of the debt. They can also surrender their security to the liquidator for the benefit of creditors and claim in the liquidation as an unsecured creditor for the whole debt. It is important to note that pursuant to this section, the secured creditor is not obliged to do either.

Any debt due to a secured creditor will be payable from the realisation of the charged asset as a priority. Any shortfall due to the secured creditor will then rank as unsecured in the estate.

#### **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 Reciprocal Enforcement of Judgments Act 1922 governs the recognition of foreign judgments in the BVI, since the BVI are not party to any treaties in relation to the enforcement of foreign judgments. Expat Properties has significant assets in the BVI and therefore the enforcement of a foreign judgment can be effective (further, is only effective if the debtor has assets in the BVI). Pinforth Holdings will need to be able to identify and refer to those BVI assets held by Expat Properties Limited when making the application. The Judgement was made in the English High Court, therefore, the provisions of the Reciprocal Enforcement of Judgments Act 1922 applies.

On the date the foreign judgment is duly registered under the 1922 Act by the BVI Court, it has the same force and effect as if the Judgment had been made in the BVI. Therefore, all CPR remedies will be available, such as a charging order, an order for seizure and sale of goods or the appointment of a receiver.

Pinforth Holdings have until September 2021 to register a foreign judgment, as it is only registrable within 12 months of the date of the Judgment, unless the Court grants otherwise. For a Judgment to be registered, Pinforth Holdings must apply to court under CPR Part 72, with the relevant information, an exhibited certified copy of the Judgement and details of interest pertaining to the law of the country of which the Judgement was obtained. The application can be made without notice to Expat Properties Limited.

**Commented [JW12]:** 3 marks - needed to list the conditions in REJ1922 and apply them. Claim was more than 12 months but question does not state when judgment awarded and Expat did not attend hearing so not registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA2003

**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?

The BVI is a global financial hub with creditors often being based in foreign jurisdictions and the BVI Court system is highly efficient in the enforcement of creditor rights. In cases such as this one, being a high value proceeding, it may be that it would be brought in the BVI Commercial Division.

**Application to Wind Up**

Section 446 of the Insolvency Act provides foreign creditors, i.e. Abbeydale Limited, a right of direct access and Abbeydale therefore has the same rights regarding the commencement of a BVI insolvency proceeding and the participation thereafter, as a BVI creditor. Abbeydale Limited should, therefore, make the same considerations as it would if trying to enforce a debt due in the UK and the winding up action it may take and is entitled to make an application for the winding up of Dendoncker.

In accordance with the information provided, Dendoncker Limited meets the definition of insolvency as it can be proved to the satisfaction of the Court that it is unable to pay its debts as and when they fall due. It has failed to comply with the terms of, it a statutory demand and based on what we know would appear that no action has been taken to have the statutory demand set aside pursuant to Sections 156 and 157 of the Insolvency Act. We are assuming in this case that the statutory demand is in the correct format, served in writing with the correct date and authorised signatory of the creditor. We are assuming that 21 days was provided for the debt to be repaid and that the debt remains unsatisfied. When there is failure to satisfy a statutory demand, the creditor, i.e. Abbeydale, would be entitled to apply to the High Court to have liquidators appointed over the company.

A judgment for a debt owed to a creditor under a loan agreement is likely to be a money judgment, which can be registered. In order to enforce the debt owed to it by Dendoncker Limited, Abbeydale Limited must first obtain a judgment to be handed down in England, which is a jurisdiction to which the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 is applicable. The 1922 Act governs the recognition of foreign judgments in the BVI. It is only effective if the debtor has assets in the BVI which in this case, it does, being the property on Necker Island. The property will need to be identified in the application for registration.

**Scheme of Arrangement / Creditor Arrangements**

There are some company restructuring arrangements available whereby Dendoncker could avoid a formal insolvency process by entering into an agreement with Abbeydale. A scheme of arrangement is provided for under the Business Companies Act. However, typically these

**Commented [JW13]:** 4.5 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 under section 170 if assets at risk of dissipation.

**Commented [JW14]:** Section 446 is not in force

**Commented [JW15]:** No statutory demand has been served yet only a demand under the contract.

**Commented [JW16]:** Under section 162 IA2003

**Commented [JW17]:** Scheme of Arrangement is not an Insolvency Act procedure

are not successful in the BVI and I would therefore not recommend Abbeydale pursue this route.

#### **Appointment of Receivers**

The Court may appoint a receiver where it is just and convenient to do so and such an application is made where there are assets to be safeguarded, in this case the property. Abbeydale must review the terms of the loan agreement to ensure the appointment of a receiver is provided for then pursue the appointment of a receiver in aid of execution of the loan agreement. The powers of the appointed receiver are then set in the terms of which the receiver was appointed. The ability to pursue this route would be dependent on the terms that the initial loan was granted and the protections provided for under the loan agreement, as it does not appear that any security was granted in exchange for the loan which is usually the basis for which a Receiver is appointed.

**Commented [JW18]:** If secured creditor - if debenture Administrative Receiver

**\* End of Assessment \***