



**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]: 8 marks

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

When is the appointment of a liquidator **deemed to commence**, when there has been a qualifying resolution passed to appoint a liquidator?

- (a) On the date of the order appointing the liquidator.
- (b) On the date the qualifying resolution is passed.
- (c) On the filing of the application to appoint a liquidator.
- (d) On the advertisement of the application to appoint a liquidator.

Commented [JW3]: Incorrect answer

Commented [JW4]: Correct answer

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.

Commented [JW5]: Correct answer

Commented [JW6]: Incorrect answer

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.

1. company has no liabilities
2. company is able to pay its debts, the value of assets is equal/exceeds the liabilities.

Commented [JW7]: ½ 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.

Under s. 289(1) of the Insolvency Act (here and below - "Act"), if the officer within 12 months before the commencement of the liquidation:

1. made/caused to be made a gift/transfer of or charge on, or has caused/permitted/acquiesced in the levying of any execution against company's assets.
2. concealed/removed assets of the company since/within 60 days from the date of an unsatisfied judgement/order for money payment issued against the company.

Commented [JW8]: 1.5 marks - exceptions not included

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 s. 467(3) of the Act, the Court can:

1. require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
2. 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 BVI insolvency proceeding with a foreign proceeding;
3. 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;
4. make such order or grant such other relief as it considers appropriate.

Commented [JW9]: 1 mark - there are 4 more powers under section 467

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.

A company will be insolvent under BVI law if any of the following apply:

- the company fails to comply with a statutory demand which has not been set aside (s. 155 of the Act);
- the company's liabilities exceed its assets (s 8(1)(c)(i) of the Act);

Commented [JW10]: 4 marks

- the company is unable to pay its debts as they fall due (s 8(1)(c)(ii) of the Act); or
- execution or other process issued on a judgment is returned wholly or partly unsatisfied (s. 225 of the Act).

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.

Under s. 234(2), of the Act, the liquidator must prepare the final report and a summary of the grounds upon which a creditor or member may object to the striking of the company from the Register as soon as possible after completing the duties. The report must be sent to every admitted creditor, and member of the company, the copy must be filed with the Registrar. Also, the statement of realisations and distributions sent to the creditors and members of the company shall also 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?

It is possible to appoint an overseas insolvency practitioner under s. 483 of the Act in case the BVI company's assets are located abroad (very common situation in BVI cases). The overseas practitioner must be appointed together with the BVI licensed insolvency practitioner/Official Receiver.

The written notice has to be provided to FSC. FSC can appear at the appointment hearing to object. In practice the overseas practitioner will write a letter to FSC informing it about the necessary details (such as his/her expertise and qualifications), and FSC then approves the appointment (may be subject to court approval).

Question 3.3 [maximum 5 marks]

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

Secured creditors are not a separate class of creditors in the BVI. Thus, their claims are regarded to be the claims against the assets of the company, to which they hold the security. There are no timelines to ensure the claim is secured.

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.

Commented [JW11]: 2.5 marks - no mention of dissolution, if required and no mention of BCA 2004 sections 207A-208 for voluntary liquidation.

Commented [JW12]: Contained in the final report

Commented [JW13]: 3.5 marks - the reasons for such an appointment include the saving of costs and local expertise. The FSC has to the right to attend Court on hearing of application to object. The Court will not appoint generally if appointment is not approved by the FSC

Commented [JW14]: 1/2 mark - Protection in IA2003: in liquidation section 175/ 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

Commented [JW15]: 2.5 marks - Did not include all the conditions under REJ 1922. No application of the law or reasoning as to whether its registrable as judgment. Claim was more than 12 months but does not state when judgment awarded but 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

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?

Only money judgments for a debt or a definite sum are capable of being enforced under the Reciprocal Enforcement of Judgments Act 1922 ("Reciprocal Enforcement Act").

Judgments satisfying the same criteria can be regarded as final and conclusive under the common law.

The creditor under a judgment can apply for summary judgment on the foreign judgment as a cause of action under the doctrine of obligation by action.

Provided the criteria of due service, fairness and public policy are met, the foreign default judgment can be enforced in the BVI.

A judgment from a jurisdiction subject to the Reciprocal Enforcement Act (such as UK) can be registered in the BVI for enforcement as if it were a BVI judgment. The foreign judgment is registrable within 12 months of the date of judgment, unless the BVI court grants a longer period.

A judgment creditor must apply to court under CPR Part 72 (can be without notice). Once a foreign judgment is registered, it can be enforced like any other BVI judgment.

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?

Under the Act, a company is regarded as being insolvent if it is unable to pay its debts as they fall due (so-called cash flow insolvency). The Act does not define the meaning of a 'debt' but an undisputed sum of debt is the basis to infer that the company is not solvent as *per Cornhill Insurance plc v Improvement Services Ltd*.

Firstly, Abbeydale Limited can file a statutory demand - a formal written request for the payment of a debt given by a creditor to a debtor under s. 155 of the Act.

It is not obligatory for a creditor to serve a statutory demand before applying to appoint a liquidator (but advisable as the company will be presumed to be insolvent if it does not satisfy or compound the debt within 21 days of the date of service). The requirements for the statutory demand are provided for in s. 155(2) of the Act. If Abbeydale Limited is a secured creditor (we do not know), then it shall also comply with s. 155(3) of the Act, which only applies to secured creditors.

Commented [JW16]: Not correct on these facts

Commented [JW17]: 4.5 marks - You have assumed that A is unsecured creditor.
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 and whilst waiting for order ask Court to appoint provisional Liquidation under section 170 if assets at risk of dissipation.

Moreover, it is important to note that Dendoncker Limited will be deemed to be technically insolvent regardless of its true financial position if it fails to comply with the requirements of a valid statutory demand which exceeds the sum of US \$2,000 (under Insolvency rule 149(1)).

Secondly, in case Dendoncker Limited does not comply with the statutory demand, Abbeydale Limited can apply for the court order to appoint a liquidator (under s. 162(2) of the Act). It would need to show that the company is insolvent (on the cash flow or balance sheet basis) or show that it is just and equitable that a liquidator be appointed.

Under s. 156(6) of the Insolvency Rules, if Abbeydale Limited makes such an application, the notice must specify the grounds of the application and whether an eligible insolvency practitioner is being proposed together with a supporting affidavit.

*** End of Assessment ***