



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]: 9 marks

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

Question 1.1

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

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

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.

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.

Under to Part XII of the BCA 2004, a voluntary liquidator can be appointed if a) it has no liabilities; or b) it is able to pay its debts when they fall due and the value of its assets is equal to or exceeds its liabilities.

Commented [JW5]: 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.

Pursuant to section s289 of the Insolvency Act - An officer of a company in liquidation is deemed to have committed an offence if, at any time whilst an officer or at any time during the 12 months prior to the liquidation commencing, he or she has:

1. 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 asset; or
2. 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.

Commented [JW6]: 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?

Part XIX of the Insolvency Act provides the powers of the BIV Court to make orders in aid of foreign proceedings. In particular, the BVI Court can recognise certain foreign insolvency proceedings and provide assistance to foreign representatives.

Commented [JW7]: 0 marks - Section 467 - lists the 8 powers available to the BVI Court

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 Part VII of the Insolvency Act a company will be considered insolvent in the BVI if:

1. A company cannot pay its debts as they fall due (see section 8(1)(c)(ii) of the Insolvency Act; see also *Cornhill Insurance Plc v Improvement Service Limited* [1986] 1 WLR 114);
2. The value of the company's liabilities exceeds the value of its assets (see section 10(1) of the Insolvency Act provides a wide definition of liability, see section 10(2) of the Insolvency Act provides that liability can be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion);

Commented [JW8]: 4 marks

3. A company fails to satisfy (whether in whole or in part) execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company;
4. A company fails to comply with the terms of a statutory demand and it is not successfully set aside under section 156 and 157 of the Insolvency 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 the Insolvency Act a liquidator is required pursuant to section 234(2) to prepare a final report as soon as practicable after completing all his or her duties. This report is required to be sent to every admitted creditor and every member of the company. Further, the report must be filed with the Registrar.

The liquidator is also able to apply pursuant to section 235 of the Insolvency Act for their release when the appointment ends. This would discharge the liquidator of all liability in respect of any act or default in relation to his or her administration of the Company

Commented [JW9]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. T

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?

Pursuant to section 483 of the Insolvency Act, it is possible to appoint an overseas insolvency practitioner as a liquidator of a BVI company. However, this can only occur as a joint appointment and this can only occur after written notice of the intended appointment is provided to the FSC (this letter includes details such as the expertise and qualifications) then they await for confirmation from the FSC of its approval.

Given that BVI companies often hold assets which are situated outside the BVI, it can be helpful to appoint an insolvency practitioner from the jurisdiction where the assets are held, this can have longer term cost savings from reduced travels and engaging local expertise.

Commented [JW10]: 3.5 marks - joint appointment with a BVI Licensed IP, and FSC can attend hearing

Question 3.3 [maximum 5 marks]

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

Under section 175(2) of the Insolvency Act the appointment of a liquidator does not affect the right of a secured creditor to take possession or realise or otherwise deal with the assets over which it has security.

Under section 211 of the Insolvency Act, the secured credit can:

- 1) value the assets subject to the security interest and claim in the liquidation of the company as an unsecured creditor for the balance of the debt;
- 2) surrender the secured asset to the liquidator for the benefit of the estate and claim in the liquidation as an unsecured creditor

Commented [JW11]: 2 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

Further, the rights of the secured creditor are not affected by orders of the Court under section 476 of the Insolvency Act

Commented [JW12]: Section 467

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 [JW13]: 3.5 marks - Did not include all the conditions under REJ 1922 and 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?

The Reciprocal Enforcement of Judgments Act 1922 provides for the recognition of foreign judgments in the BVI. However, it only extends to *inter alia*, judgments given in the High Court of England Wales and Northern Ireland.

It defines judgment as any judgement or order given or made by a court in any civil proceedings, whether before or after the passing of the Act, whereby any sum of money is made payable.

Accordingly, given Pinforth Holdings was awarded a judgment in the sum of USD4,500,000 being a conclusive monetary sum it can be enforced in the BVI. However, it would only be effective to the extent that Expat Properties has assets in the BVI.

Once Pinforth Holdings registers its judgment in the BVI, all the remedies usually available under the CPR will be available, which include:

- 1) a charging order;
- 2) a garnishee order;
- 3) a judgment summons;
- 4) an order for seizure and sale of goods; and
- 5) appointment of a receiver.

However, they would need to seek to register their judgment within 12 months otherwise they would need the BVI Court to grant a longer period.

The application for registration must be made under Part 72 of the CPR. It must contain:

- 1 – Certain prescribed information;
- 2 – exhibit a duly authenticated copy of the judgment; and
- 3 – any details of any interest that has become due under the law of the country in which the judgment has been entered.

This application must be made without notice to the judgment debtor. However, the Court can require the Pinforth Holdings as creditor to enter security for costs.

Question 4.2 [maximum 9 marks]

Abbeyle 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

Commented [JW14]: 4.5 marks
First issue to determine: A secured or unsecured creditor? You have assumed A is 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.

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?

Abbeydale could seek to wind up Dendoncker pursuant to Part VIII of the Insolvency Act.

In the circumstances, that Dendoncker has failed to make any repayments under the loan agreement Abbeydale can seek repayment in full. Accordingly, Abbeydale could serve a statutory demand for the repayment of the loan (noting that a statutory demand is a written demand for payment of a debt that is due and payable and is made by a creditor in the format required under section 156 of the Insolvency Act). The statutory demand must be in writing, dated and signed by the creditor (based on the facts we cannot confirm that the demand is a statutory demand, accordingly they ought do it again). Further it must require the company to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the service of the stat demand.

Pursuant to section 8 of the insolvency Act, a company is insolvent if, *inter alia*, it fails to comply with the terms of a statutory demand and it is not successfully set aside under sections 156 and 157 of the insolvency Act. Dendoncker could attempt to set aside the statutory demand on the basis that the debt is disputed, however, this is unlikely to be successful.

Accordingly, they could seek the appointment of a liquidator over Dendoncker pursuant to an application as a creditor under 162 of the Insolvency Act. Pursuant to section 159(1) the Court would be able to appoint a liquidator as the company is insolvent (as set out above).

Abbeydale could see the appointment of a provisional liquidator under section 170 of the Insolvency act on the basis that there is urgent need to preserve the assets of the company (being the house purchased with the loan money). However, pursuant to section 170(4) of the Insolvency Act, they would need to satisfy the court that the appointment is:

- a) necessary for the purpose of maintain the value of the assets owned or managed by the company; and
- b) is in the public interest.

They would also need to demonstrate to the Court:

- a) there is an application before the court for the appointment of a liquidator;
- b) there is a good arguable case that a ground for the appointment of a provisional liquidator exists;
- c) there is a good arguable case that the application has standing to make the application; and
- d) the court should exercise its discretion to maintain the status quo in relation to the company's assets.

The assets do not automatically vest in the liquidator. Accordingly, the liquidator will need to apply to the court for such an order regarding the house. This is relevant as there is no evidence that Abbeydale is a secured creditor and accordingly, they would likely need the liquidator to sell the house to realise the proceeds.

*** End of Assessment ***