



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5B**  
**BRITISH VIRGIN ISLANDS (BVI)**

This is the **summative (formal) assessment** for **Module 5B** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 5B.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment5B]**. An example would be something along the following lines: 202122-336.assessment5B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **7 pages**.

## **ANSWER ALL THE QUESTIONS**

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

Commented [JW1]: 10 marks

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

#### **Question 1.1**

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

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

#### **Question 1.2**

In order to comply with section 156 of the Insolvency Act, **what timeframe** for payment of the debt (or to secure or compound for the debt), must a statutory demand require?

- (a) Within 14 days of the service of the statutory demand.
- (b) Within 21 days of the date of the statutory demand.
- (c) Within 21 days of the service of the statutory demand.**
- (d) Within 14 days of the date of the statutory demand.

#### **Question 1.3**

Which of the following **is not able** to make an application for the removal of a liquidator?

- (a) A member of the company.
- (b) A creditor.
- (c) The creditors' committee.
- (d) A receiver.**

#### Question 1.4

Where a receiver exercises a power of sale, the receiver owes a duty to obtain the best price reasonably obtainable at the time of sale. **To which one of the following is the duty owed to?**

- (a) The creditors, the shareholders, persons claiming an interest in the assets and the company.
- (b) The creditors, sureties, the shareholders and the company.
- (c) The creditors, sureties, persons claiming an interest in the assets of the company and the company.
- (d) The creditors, shareholders, sureties and persons claiming an interest in the assets of the company.

#### Question 1.5

A person is an "eligible insolvency practitioner", able to be appointed over an insolvent BVI company, foreign company or an individual's estate as a trustee in bankruptcy if:

- (a) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (b) He or she is a licenced insolvency practitioner; has advertised for his or her role; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (c) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding an appointment; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (d) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force an undertaking for the proper performance of his or her functions.

#### Question 1.6

Under the Reciprocal Enforcement of Judgments Act 1922, what is the **time period** during which a foreign judgment is registrable in the BVI?

- (a) Within 12 months of the date of judgment.
- (b) Within 3 months of the date of trial.
- (c) Within 6 months of the date of judgment.
- (d) Within 6 months of the date of trial.

**Question 1.7**

Which one of the below **is not** an effect of the appointment of a liquidator over a company?

- (a) The liquidator has custody and control of the assets of the company.
- (b) The assets automatically vest in the liquidator.**
- (c) The directors remain in office, but cease to have any powers.
- (d) Shares in the company cannot be transferred.

**Question 1.8**

In a liquidation, what is the **vulnerability period** for an undervalue transaction in the case of a transaction entered into with a connected person?

- (a) Two (2) years prior to the onset of insolvency and ending on the appointment of the liquidator.**
- (b) Two (2) years prior to the appointment of the liquidator.
- (c) Six (6) months prior to the onset of insolvency and ending on the appointment of the liquidator.
- (d) Five (5) years prior to the appointment of the liquidator.

**Question 1.9**

Which of the following **is not** a resolution that the directors of a company must pass in order to put in place a company creditors' arrangement?

- (a) Stating that the company is insolvent or is likely to become insolvent.
- (b) Approving a written proposal setting out how the creditors' rights will be varied or cancelled.
- (c) Approving a liquidation plan and a declaration of solvency.**
- (d) Nominating an eligible insolvency practitioner to be appointed interim supervisor.

**Question 1.10**

**When** does a voluntary liquidation commence?

- (a) When the directors of the company sign a declaration of solvency.
- (b) When the directors of the company sign a liquidation plan.
- (c) When the directors of the company pass the resolution appointing the voluntary liquidator.
- (d) On the date the voluntary liquidator files a notice of appointment with the Registrar.**

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 2 marks]**

Set out the circumstances in which a voluntary liquidator can be appointed over a company, pursuant to Part XII of the Business Companies Act 2004.

A voluntary liquidator may only be appointed where the company has no liability or where the company is solvent on both the cash flow basis (i.e. it is able to pay its debts as they fall due) and the balance sheet basis (i.e. the value of its assets equals or exceeds the value of its debt).

**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.

Under section 289 of the Insolvency Act 2003, an officer of the company would be deemed to have committed an offence if he or she has (a) made or caused to be made any gift or transfer of, or charge on, or has caused, permitted or acquiesced in the levying of any execution against the company's assets, or (b) has concealed or removed any of the company's assets since, or within sixty days of the date of any unsatisfied judgment or order for the payment of money obtained against the company, during the period of 12 months preceding the commencement of the liquidation or whilst an officer.

**Commented [JW3]:** 1.5 marks - no mention of exceptions

**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 section 467 of the Insolvency Act 2003, the BVI Court may make the following orders in support of foreign insolvency proceedings:

- (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 the right of secured creditors to take possession of and realise or otherwise deal with the debtor's asset subject to security interests, 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;
- (d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a coordination of a BVI 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) authorize the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding in respect of a debtor;
- (g) stay or terminate or make any other order it considers appropriate in relation to a BVI insolvency proceeding; or
- (h) make such order or grant such other relief as it considers appropriate.

**Commented [JW4]:** 2 marks

**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 considered insolvent in the BVI if:

- (a) it fails to comply with the requirement of a statutory demand that has not been set aside (section 8(1)(a) of the Insolvency Act 2003);
- (b) the value of its liabilities exceeds its assets (section 8(1)(c)(i));
- (c) it is unable to pay its debts as they fall due (section 8(1)(c)(ii)); or
- (d) execution or other process issued on a judgment, decree or order of a BVI Court in favour of a creditor of the company is returned wholly or partly unsatisfied (section 8(1)(b)).

**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.

After a liquidator completes his or her duties, the liquidator should prepare and send to all creditors whose claims have been admitted and all members of the company, a final report, a statement of realisations and distributions in respect of the liquidation, and a summary of the grounds upon which a creditor or member may object to the striking of the company from the register of companies (section 234(2)(a) of the Insolvency Act 2003).

The liquidator should also file with the Registrar of Companies a copy of the final report and the statement of realisations and distributions sent to the creditors and members. (section 234(2)(b))

The above steps may be modified by the Court upon application of the liquidator (section 234(4)).

**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 make an application to the BVI Court for the appointment of an overseas insolvency practitioner jointly with a BVI resident and licensed insolvency practitioner or the Official Receiver. The Court may appoint such an overseas insolvency practitioner if it is satisfied that:

- (a) the person has sufficient qualification and experience to act;
- (b) the person has given written consent to act;
- (c) the person is not disqualified from holding a licence;
- (d) the person is not disqualified from acting;
- (e) there is in force such security for the proper performance of the person's functions; and
- (f) prior written notice of the appointment has been given to the Financial Services Commission.

**Commented [JW5]:** 4 marks

**Commented [JW6]:** 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. .

**Commented [JW7]:** 5 marks

The process of appointment including giving written notification to the Financial Services Commission, filing an application with the Court with supporting affidavit and evidence of qualification, experience, security for performance, written consent of the insolvency practitioner and written notice to the Financial Services Commission. The Commission may object to the appointment and can attend at the hearing of the appointment application in order to object. Upon hearing of the application, the Court may approve the appointment.

### Question 3.3 [maximum 5 marks]

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

If the security documents provides powers to appoint receivers, secured creditors may appoint receivers over the property subject to their security out of Court. If the security documents contain no such power, the secured creditor may apply to the Court for an order to appoint receivers. Upon appointment, the receiver will take custody and control of the secured assets, collect income from the assets, and sell the assets on behalf of the secured creditor.

Though with effect from the commencement of liquidation, no person may commence or proceed with any action or proceeding against the company or in relation to its assets, or exercise or enforce, or continue to exercise or enforce any right or remedy over or against assets of the company unless the Court otherwise orders (see section 175(1)(c) of the Insolvency Act 2003), the secured creditor may take possession of, and realise or otherwise deal with assets of the company over which it has a security without a Court order and without reference to the liquidators (see section 175(2)). So secured creditors may enforce their security interest by selling the property subject to the security outside of the insolvency process.

If the value of the secured asset is not sufficient to satisfy the secured creditor's debt. The secured creditor may claim in liquidation the balance of its debts as an unsecured creditors. Alternatively, the secured creditor may surrender its security interest and claim in liquidation as an unsecured creditor for the whole amount of its debt.

## 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?

Pinforth Holdings may apply to the BVI Court to register the judgment from the English High Court under Reciprocal Enforcement of Judgments Act (Cap 65) 1922) (**1922 Act**) within 12 months of the date of the judgment (section 3(1) of the 1922 Act).

Note that Expat Properties may object to the registration on one or more of the grounds set out in section 3(2) of the 1922 Act. If established, the English judgment will not be registered.

**Commented [JW8]:** 3 marks - protection also in creditors arrangement section 15/bankruptcy section 311/section 467. Options to relinquish security interest in all insolvency procedures.

**Commented [JW9]:** 4 marks - did not list all of the conditions under REJ1922. Claim was more than 12 months but question 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



Given that Expat Properties did not attend the hearing, it is likely that it may object to the registered based on one or more of the following grounds:

- (1) the English High Court acted without jurisdiction (section 3(2)(a));
- (2) Expat Properties was not carrying on business within the jurisdiction of the England High Court or ordinarily resident within the jurisdiction, and did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the English High Court (section 3(2)(b)); or
- (3) Expat Properties was not duly served with the process of the English High Court proceedings and did not appear, notwithstanding that it was ordinarily resident or was carrying business within the jurisdiction of the English High Court or agreed to submit to the jurisdiction (section 3(2)(c) of the 1922 Act).

Once registered, the judgment will be treated as being of the same force and effect as the domestic judgment made in the BVI from the date of registration (section 3(3)(a) of the 1922 Act). Accordingly, once registered, Pinforth Holdings may apply to the BVI Court to enforce the judgment by a charging order, a garnishee order, an order for seizure and sale of goods, appointment of receivers by way of equitable execution and other orders that may be available.

Alternative to registration of the High Court judgment, Pinforth Holdings may enforce its judgment debt by issuing a statutory demand and if the statutory demand is not satisfied, applying to wind up Expat Properties in the BVI Court.

#### **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?

Assuming Abbeydale's loan is unsecured, Abbeydale may consider to apply to wind up Dendoncker. As a creditor of Dendoncker, Abbeydale has standing to apply to wind up the company (section 162(2) of the Insolvency Act 2003). Before making an application in Court, Abbeydale needs to issue a statutory demand in compliance with section 155 and allows Dendoncker 21 days to pay. If Dendoncker failed to satisfy the statutory demand, it is deemed to be insolvent (section 8), and as a result, the Court make order it to be wound up (section 162).

To prevent the company dissipating its asset, in particular the property in Necker Island, Abbeydale may apply to appoint provisional liquidator(s) to Dendoncker (section 170(b)). The Court will grant the provisional liquidators the rights and powers necessary to maintain the value of the assets of the company as it considers fit (sections 170-171).

**Commented [JW10]:** 5 marks - First issue to determine: A secured or unsecured creditor? You discussed as 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.

Once liquidators are appointed, the directors and other officers of the company will cease to have any powers (section 175(1)(b)), and the liquidators will have custody and control of the assets of the company (section 175(1)(a)). The liquidators will realise the company's assets and distribute the proceeds to creditors of the company in accordance with the priorities under the Insolvency Act.

To summarise the above, liquidation is an option that will swiftly protect the assets of the company and will help Abbeydale to recover its debt.

Another option Abbeydale may consider is to bring legal actions in the BVI against Dendoncker for breach of contract. Once it obtains judgement against Dendoncker, it may enforce its judgment through charging order, garnishee order, and appointment of receiver.

**\* End of Assessment \***

**Commented [JW11]:** As unsecured creditor all creditors treated equally under pari passu