



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]: ??? Why must I do this for you?

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.

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.

Commented [JW3]: Incorrect answer

Commented [JW4]: Correct answer

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.

[Type your answer here]

A voluntary liquidator can be appointed over a company pursuant to Part XII of the Business Companies Act 2004 if:

- (i) It has no liabilities; or
- (ii) If it is able to pay its debts as they fall due and the value of the assets is equal to or exceeds its liabilities.

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.

[Type your answer here]

Pursuant to section 289(2) of the Virgin Islands Insolvency Act ("the Insolvency Act") here a liquidator is appointed to a BVI incorporated company by the Court, a person who is or has been an officer of that company is deemed to have committed an offence under the fraudulent conduct provisions if he or she has:

- (i) 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
- (ii) has concealed or removed any of the company's assets since, or within, 60 days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.

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?

[Type your answer here]

Part XIX of the Insolvency Act outlines the primary framework for the powers provided to the BVI Court to make orders in aid of foreign insolvency proceedings. The BVI Court can recognise certain foreign insolvency proceedings and provide assistance to foreign representatives. Section 467(3) of the Insolvency Act outlines certain relief / orders which the BVI Court can make including to "*make such order or grant such other relief as it considers appropriate*".

Section 467(5) allows the BVI Court to apply the law of the BVI or the law applicable in respect to the foreign proceeding.

Commented [JW5]: 1/2 - 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.

Commented [JW6]: 1.5 marks - exceptions under subsection 2 not included

Commented [JW7]: 1/2 mark - There are a further 7 powers not listed

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.

[Type your answer here]

That statutory tests to determine whether a company is insolvent in the BVI are:

- (i) It is proved to the satisfaction of the Court that a company is unable to pay its debts as they fall due (section 8(c)(ii) of the Insolvency Act). The English case of *Cornhill Insurance Plc v Improvement Services Limited* sets out that the inability to pay a debt that is due and not disputed is sufficient evidence of insolvent.
- (ii) It is proved to the satisfaction of the Court that the value of the company's liabilities exceeds the value of its asset, also known as balance sheet insolvency (section 8(1)(c)(i) of the Insolvency Act). Section 10(1) and (2) set out the definitions of what would constitute a liability in this regard.
- (iii) A company fails to satisfy, wholly or partly, execution or other process issued on a judgement, decree or order of the BVI Court in favour of a creditors of a company.
- (iv) If a company fails to comply with a statutory demand and it is not successfully set aside under section 156 or 157 of the Insolvency Act.

The Court retains residual discretion as to whether it should find that a company is insolvent.

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.

[Type your answer here]

Pursuant to section 232 of the Insolvency Act, the liquidation of a company terminates on the first occurring of:

- (i) the making of the BVI Court of an order termination the liquidation, or such later date as may be specified in the order;
- (ii) the filing by the liquidator of a certificate of compliance with the provisions of section 234(2) as modified by the BVI Court under section 234(4), if appropriate; or
- (iii) the making by the BVI Court of an order under section 234(4) exempting the liquidator from compliance under section 234(2) or such later date as may be specified in the order.

As discussed further below, section 234(2) and (4) of the Insolvency Act refer to the preparation of a final report.

Section 233 of the Insolvency Act outlines that on the application of a liquidator, a creditor, a director or a member of a company, or the official receiver, the BVI Court may at any time after the appointment of the liquidator of a company, make an order terminating the liquidation if it is just and equitable to do so.

Pursuant to Section 234(2) of the Insolvency Act, the liquidator is required to prepare his final report as soon as practicable after completing his / her duties. Such report must be sent to every admitted creditor and every member of the company. A copy of the final report must

Commented [JW8]: 4 marks

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

also be filed with the BVI Registrar of Corporate Affairs ("the Registrar"). The requirements for certain statements to be included in the final report are outlined in section 234(3) of the Insolvency Act. Section 234(4) of the Insolvency Act also allows the liquidator to make an application to the BVI Court to either exempt compliance with section 234(2)(a) Insolvency Act or modify the application of section 234(2) of the Insolvency Act.

Finally, section 235 of the Insolvency Act relates to release of a liquidator. A liquidator can apply for their release when their appointment ends. The effect of a release is that the liquidator is discharged from all liability in respect of any act or default in relation to their administration of the Company. Notwithstanding a release under section 235 of the Insolvency Act, the Court can still make an order under section 254 of the Insolvency Act, summary remedy against delinquent officers and others, against the liquidator.

Question 3.2 [maximum 5 marks]

Commented [JW10]: 5 marks

Is it possible to make an application to the BVI Court for the appointment of an overseas insolvency practitioner in relation to a BVI company and, if so: (i) in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and (ii) what is the process for such proposed appointment?

[Type your answer here]

Section 483 of the Insolvency Act allows an individual resident outside of the BVI to be appointed to act as an insolvency practitioner and sets out detailed requirements for the overseas insolvency practitioner to be appointed. The overseas insolvency practitioner must be appointed jointly with a BVI licenced insolvency practitioner.

Section 483 of the Insolvency Act also outlines that where an overseas insolvency practitioner is appointed by the BVI Court, the BVI Court or the person appointing the overseas insolvency practitioner must be satisfied that:

- (i) the overseas insolvency practitioner has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;
- (ii) the overseas insolvency practitioner has given written consent in the prescribed form;
- (iii) the overseas insolvency practitioner is not disqualified from holding a licence under section 477;
- (iv) the overseas insolvency practitioner is not disqualified from acting in the case of a company or a foreign company; and
- (v) there is in force such security for the proper performance of the overseas insolvency practitioner functions as may be specified in the Regulations.

A creditor might consider appointing an overseas insolvency practitioner in circumstances where a company has substantial assets outside of the BVI. The appointment of an overseas insolvency practitioner in the jurisdiction where a company has significant assets may be helpful in managing the assets and reducing costs of travel and acquiring local expertise. This is particularly helpful in long-running liquidations which involve multiple disputes in different jurisdictions.

In order to appoint an overseas insolvency practitioner, the overseas insolvency practitioner must meet the requirements set out above pursuant to section 483 of the Insolvency Act. The liquidator will then make an application to the BVI Court for the appointment of the overseas insolvency practitioner.

Prior written notice must also be provided to the Financial Services Commission ("FSC"). Pursuant to section 484 of the Act, the FSC has the power to appear at the hearing for the proposed appointment of the overseas insolvency practitioner and object to the appointment.

Question 3.3 [maximum 5 marks]

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

[Type your answer here]

Pursuant to section 211(1) of the Insolvency Act, a secured creditor is able to:

- (i) value the assets subject to the security interest and claim in the liquidation of a company as an unsecured creditor for the balance of his or her debt; or
- (ii) surrender the security interest to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole amount of the debt, but a secured creditor is not obliged to do either.

Section 211(2) of the Insolvency Act provides the protection to the secured creditor to apply to the liquidator at any time to amend the value the secured asset, ensuring the subsequent value of the secured creditors potential unsecured claim. However, section 211(4) of the Insolvency Act allows the liquidator to require the secured asset to be offered for sale if the liquidator is dissatisfied with the value placed on the secured asset.

Pursuant to section 175(2) secured creditors are not strictly classed as creditors or considered as participating in the insolvency process. Therefore, there are no timelines for a secured creditor to enforce a secured claim.

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?

[Type your answer here]

From a practical standpoint, the enforcement of a foreign judgement in the BVI is only effective to the extent that the Expat Properties Limited ("Expat") has assets in the BVI, against which Pinforth Holdings Limited ("Pinforth") can enforce the judgement. Pinforth have identified that Expat have significant assets in the BVI. Therefore, it is worthwhile for Pinforth to consider enforcement of their foreign judgement debt in the BVI.

Under section 2(1) of the Reciprocal Enforcement Judgements Act (1922) ("the 1992 Act") the word 'judgement' is defined as any judgement or order given or made by a court in any civil proceedings, where before or after the passing of the 1992 Act, whereby any sum of money is payable. The judgement debt awarded to Pinfold ("the Judgement") meets the definition of a judgement pursuant to the 1992 Act as it is for the conclusive amount of US\$4,500,000. The

Commented [JW11]: 1.5 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

Commented [JW12]: 5 marks -Claim was more than 12 months but question does not state when judgment awarded and Expat did not attend hearing so not likely registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment/stat demand then liquidation under section 162 IA2003.
Note: The REJ Act is 1922 not 1992.

Judgement also meets the requirement set out in section 3(1) of the 1992 Act in that it was given in the High Court of England Wales and Northern Ireland.

Should Pinforth choose to register the judgement in the BVI, Pinforth will have to apply to the BVI Court under the ECSC Civil Procedure Rules 2000 ("CPR") Part 72. The application by Pinforth must contain certain prescribed information and exhibit duly authenticated copy of the judgement and details of any interest that has become due under the law of England. The application by Pinforth may be made without providing notice to Expat.

Section 3(2) of the 1992 Act outlines the events in which the BVI Court will not order a judgement to be registered. In the scenario of Pinforth and Expat, the BVI Court will not order the judgement to be registered if:

- (i) the High Court of England Wales and Northern Ireland acted without jurisdiction;
- (ii) Expat, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the High Court of England Wales and Northern Ireland, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of High Court of England Wales and Northern Ireland;
- (iii) Expat was not duly served with the process of High Court of England Wales and Northern Ireland and did not appear, notwithstanding that Expat is ordinarily resident or carrying on a business within the jurisdiction of the High Court of England Wales and Northern Ireland or agreed to submit to the jurisdiction of High Court of England Wales and Northern Ireland;
- (iv) The judgement was obtained fraudulently;
- (v) Expat satisfied the BVI Court that an appeal is pending or that Expat is entitled to or intends to appeal; or
- (vi) The judgement related to a cause of action which for reasons of public policy could not have been entertained by the BVI Court.

Based on the facts presented, Pinforth does not meet any of the events under section 3(2) of the 1992 Act.

If the judgement is duly registered under the 1992 Act, from the date of registration, the judgement will be treated as being of the same force and effect as if the judgement had been made in the BVI Court. All the remedies available under the CPR will be available to Pinforth, including (CPT 45.2):

- (i) a charging order;
- (ii) a garnishee order;
- (iii) a judgement summons;
- (iv) an order for seizure of sale of goods; and
- (v) the appointment of a receiver.

Based on the above analysis, Pinforth should apply to the BVI Court to enforce the judgement and to pursue the assets of Expat located in the BVI.

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

Commented [JW13]: 4.5 marks - You have assumed A is a secured 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. Provisional Liquidation can be appointed under section 170 if assets at risk of dissipation.

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?

[Type your answer here]

Pursuant to section 446 of the Insolvency Act, Abbeydale as a foreign creditor, has the same rights regarding the commencement of, and participation in, a BVI insolvency proceeding as BVI creditors.

Commented [JW14]: Section 446 is not in force

Because Abbeydale has loaned the money to Debdobcker for purchase of the property located on Necker Island ("the Property"), it is likely that Abbeydale is a secured creditor and has a security interest over the Property. Security interests are outlined in section 161 to 163 of the BCA.

Generally, the Insolvency Act allows for three broad groups of insolvency proceedings:

- (i) Corporate Liquidation;
- (ii) Receivership; and
- (iii) Corporate Rescue.

Commented [JW15]: Including Administrative receiver under a debenture or other instrument

Corporate Liquidation

As Abbeydale are a 'secured creditor', they do not meet the definition of a 'creditor' under section 9 of the Insolvency Act and therefore does not qualify as one of the parties able to make petition to wind up Denbdoncker pursuant to section 162 of the Insolvency Act.

Receivership

Abbeydale can either appoint a receiver (i) by the Court on an application; or (ii) under a debenture. Should Abbeydale appoint a receiver over the Property by application to the Court, under section 117 of the Insolvency Act, the receiver's powers will be dictated by the order appointing them.

If the receiver is appointed out of Court, pursuant to section 139 of the insolvency Act, the receivers powers will be those assigned to them by Abbeydale.

In either case, the receiver will have the powers to take control and of the Property and realise the same for the benefit of Abbeydale, should that be the best solution for Abbeydale as the secured creditor.

Corporate Rescue

The facts and circumstances are not conducive to a corporate rescue.

Accordingly, should Abbeydale wish to enforce their debt within the BVI insolvency system, they would be best placed to appoint a receiver over the Property through the BVI Court.

*** End of Assessment ***