



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.

Pursuant to section 197 (1) of the Business Companies Act 2004, a voluntary liquidator can be appointed over a company if:

- a) it has no liabilities; or
- b) if it is able to pay its debts as they fall due and the value of its assets equals 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.

Under Section 289 of Division 4 – Offence Provisions of the Insolvency Act, an officer of the company is deemed to have committed an offence if, at any time whilst an officer or during the period of 12 months preceding the commencement of the liquidation, he has:

- a) made or caused to be made any gift or transfer of, or charge on, or has caused, permitted or acquiesced in the levying of any execution against the company's assets; or
- b) 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.

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?

Powers under Part XIX of the Insolvency Act provided to the BVI Court to make orders in support of foreign insolvency proceedings include:

- making orders in aid of foreign proceedings
- recognising certain foreign insolvency proceedings
- providing assistance to foreign representatives.

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.

Under Section 8 of the Insolvency Act, a company or a foreign company is insolvent if:

- a) the company fails to comply with the requirements of a statutory demand that has not been set aside under section 157 of the Insolvency Act;
- b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or

Commented [JW2]: 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.

Commented [JW3]: 1.5 marks - exceptions not included

Commented [JW4]: 0 marks - section 467 - 8 powers listed

Commented [JW5]: 4 marks

- c) either-
- (i) the value of the company's liabilities exceeds its assets (balance sheet insolvent); or
 - (ii) the company is unable to pay its debts as they fall due (cashflow 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.

The liquidation does not end until it is terminated pursuant to the provisions contained in Under Section 232 of the Insolvency Act. The liquidation of a company terminates on the first occurring date following:

- a) the making of a Court order terminating the liquidation under section 233 of the Insolvency Act (or date as specified in the order);
- b) the liquidator filing a certificate of compliance, as required under section 234(2) of the Insolvency Act; or
- c) the making of a Court order under section 243(4) exempting the liquidator from compliance with section 243(2).

Under section 233(2) the Court may make an order for the termination of the liquidation at any time, if it just and equitable to do so, following an application by a liquidator, creditor, director, member of the company or the Official Receiver. In this case the Court may require the liquidator to file a report before making the order for termination.

Under section 234(2) upon completion of his duties, the liquidator has to prepare final report to be sent to every admitted creditor and member of the company and file the same with the Registrar. Per section 234(3) the liquidator should include in the report a statement:

- a) that all known assets of the company have been disclaimed, realized, or distributed without realisation;
- b) that all proceeds of realisation have been distributed; and
- c) that there is no reason why, in his opinion, the company should not be struck from the Register, and dissolved.

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?

Section 483 of the Insolvency Act provides the requirements for an overseas insolvency practitioner to be appointed as liquidator of a BVI company. Under this section an overseas insolvency practitioner can be appointed, however, only jointly with a BVI licensed insolvency practitioner or the Official Receiver and the Court or persons appointing the overseas practitioner must be satisfied that the overseas practitioner:

- i) has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;
- ii) has given written consent to act in the prescribed form;
- iii) is not disqualified from holding a licence under section 477 of the Insolvency Act;
- iv) is not disqualified from acting in the case of a company or foreign company, under section 482(2) or section 482(3);

Commented [JW6]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. Termination does not always mean company is struck off or dissolved.

Commented [JW7]: 5 marks

In addition, there must in force such security for the proper performance of the overseas practitioners' functions as specified in The Insolvency (Transitional Provisions) Regulations, 2004.

Notice of the overseas practitioner's appointment must also be given to the Financial Services Commission ("FSC"), details such as justification for the practitioner's appointment, residence, qualifications, experience etc should be provided to the FSC. Under section 484 of the Insolvency Act, the FSC may appear and be heard at the hearing of the application for the purpose of objecting to the appointment.

A creditor may choose to consider the appoint of an overseas insolvency practitioner where the company's assets are located outside of the BVI and in the jurisdiction of the overseas practitioner. This may be beneficial for a liquidation as the overseas practitioner will have the local knowledge and will be 'on the ground' therefore reducing need for local advisors or travel by the BVI licensed insolvency practitioner to the foreign jurisdiction and related costs.

Question 3.3 [maximum 5 marks]

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

Secured creditors fall outside the scope of the BVI insolvency framework as their claim is directly against assets of the company that are subject to the security.

Section 175 (1) of the BVI Insolvency Act sets out the effects of liquidation upon commencement. Section 175 (2) provides that the effect set out in section 175 (1) does not "affect the right of a secured creditor to take possession of and realise or otherwise deal with assets of the company over which that creditor has a security interest".

A secured creditor is able to enforce their secured claim at any time and as normal – the secured creditor are in control of when and how the security interest is taken control of and when it is sold to maximum returns.

Under Section 211 (1) of the BVI Insolvency Act, a secured creditor is able to (but is not obliged to) i) value the assets subject to the security interest and submit a claim in the liquidation as an unsecured creditor for the balance of the debt due where there is a shortfall or ii) surrender his security interest to the liquidator for the benefit of creditors and submit a claim in the liquidation as an unsecured creditor for the entire debt due.

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?

Commented [JW8]: 1 mark - Not just liquidation -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 [JW9]: 3.5 marks - no 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

The recognition and enforcement of a foreign judgment in the BVI is governed by the Reciprocal Enforcement of Judgments Act 1922 (the "1922 Act") and common law.

A judgment is defined in the 1922 Act as *any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable*. The judgment must be a money judgment which is the case here as Pinforth Holdings have been awarded USD 4,500,000.

Before enforcing a foreign judgment in the BVI it must be considered if the BVI company has assets in the BVI against which the claim can be enforced – in this case Expat Properties Limited does have significant assets in the jurisdiction.

The procedure for enforcing judgments under the 1922 Act is dependent upon the country that issued the original judgment. A simplified registration process is applicable to the judgments of the High Court of England and Wales, the Court of Session in Scotland and the Court of Northern Ireland, New South Wales, the Bahamas, Barbados, Bermuda, Belize, Guyana, Grenada, Jamaica, Nigeria, St Lucia, St Vincent and Trinidad & Tobago. Such judgments can be registered as if the judgment had been made in the BVI. As the judgment was made by the English High Court this would apply in this case, if it had not been made by the English High Court or in one of the other countries noted above, the judgment could not be registered and Pinforth Holdings Limited would have to make a claim under common law.

The requirements under section 3(2) of the 1922 Act that Pinforth Holdings Limited need to consider to register the judgment are as follows:

- the application to register the judgment should be made within 12 months of the date of the judgment – the claim in this case was brought in September 2020 but it is not clear when the judgment was handed down, the BVI Court can allow for a longer period.
- if the English High Court had jurisdiction.
- that the judgment debtor, Expat Properties, was duly served with the process of the original court. This is not known from the information provided.
- if the judgment debtor, was neither carrying on business nor ordinarily resident within the jurisdiction of the foreign court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court. We only know that Expat Properties did not attend the hearing, if they did not submit or agree to submit then the judgment will not be registered.
- that the judgment has not been appealed by the judgment debtor, or they have not expressed an intention to appeal.
- if the judgment is for penalties for penalties, fines, taxes or similar.
- if the judgment was in respect to a cause of action that, for reasons of public policy could not have been entertained in the BVI court – if so, the judgment will not be registered.
- if the judgment was not obtained by fraud – if it was the judgment will not be registered.

Once the judgment has been registered under the 1922 Act, the judgment shall have the same force and effect as the original judgment and the BVI Court has the same control and jurisdiction over the judgment as the if it had been made in the BVI Court.

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 [JW10]: 1 mark - 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.

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 Limited could consider commencing insolvency proceedings against Dendoncker Limited in the BVI in order to enforce the debt owed. Section 446 of the BVI Insolvency Act provides that "*foreign creditors have the same rights regarding the commencement of, and participation in, a Virgin Islands insolvency proceeding as creditors in the Virgin Islands.*".

Under section 296 (1) of the BVI Insolvency Act, in order to make a creditor's application for a bankruptcy order, the liability at the time of the application must exceed the prescribed minimum being USD 2,000 and the liability is for a sum payable immediately – Dendoncker Limited owe USD 12,000,000 due Abbeydale Limited and Abbeydale Limited have made a demand for immediate repayment as entitled in the loan agreement – Abbeydale Limited will however need to consider the law that governs the loan agreement as pursuant to section 296 (2) a creditor can't make an application under section 296 (1) if the liability was incurred outside the BVI unless the liability is payable by "*virtue of a judgment or award enforceable by execution in the Virgin Islands.*".

Abbeydale Limited could also consider seeking a money judgment in England, Abbeydale's country of incorporation, to enforce the debt repayment in full and subsequently make an application to the BVI court for recognition and registration of the foreign judgment in the BVI. As the judgment would be handed down in England, a jurisdiction covered by the Reciprocal Enforcement of Judgments Act 1922, the judgment is likely to be registered.

Should a money judgment be granted, Abbeydale Limited, the judgment creditor may not need to apply for registration of the money judgment to enforce their debt. Under common law provisions, final and conclusive monetary judgments are treated as a cause of action in its own right where the judgment creditor can prove the judgment and confirm it is a final and conclusive monetary judgment for a specific sum, applying instead for a summary judgment. The debt owed is due under a loan agreement which specifies the repayment due.

*** End of Assessment ***

Commented [JW11]: It is not clear if you understand the difference between bankruptcy for individuals or liquidation which is for corporate entities. Section 296 is bankruptcy section - this equivalent for liquidation is insolvency rule 149.