



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.

Under Section 197 of the Act, it is clear that the company should not have any liabilities or it should be able to pay its debts as they fall due and the value of its assets either 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(1), an officer of such a company is deemed to have committed such an offence where: -

- a) At any time while an officer or during the period of 12 months preceding the commencement of the liquidation, he 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, 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?

Under Section 467 of the Insolvency Act, the Court has the powers to do any of the following: -

- 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) 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 co-ordination of a Virgin Islands 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 Virgin Islands insolvency proceeding in respect of a debtor;
- g) Stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or

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.

Commented [JW3]: 1.5 marks - exceptions not listed

Commented [JW4]: 2 marks

h) Make such other or grant such other relief as it considers appropriate.

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 Section 8(1) of the Insolvency Act, a company is considered insolvent when:

- a) It fails to comply with the requirements of a statutory demand that has not been set aside under section 157 of the 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 either-
 - I. the value of the company's liabilities exceeds its assets; or
 - II. the company is unable to pay its debts as they fall due.

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.

There are three modes of terminating a liquidation under Section 232 of the Act. Termination of the liquidation occurs on the date of any of the following, whichever comes first: -

- a) An order of Court terminating the liquidation;
- b) The filing by the liquidator of a certificate of compliance; or
- c) An order exempting the liquidator from filing the certificate of compliance.

Before making the order terminating the liquidation, the court will require the Liquidator to prepare a report on all matters relevant to the application. In this instance, the Liquidator will be required to report on the status of the liquidation and the particular aspects of it that will give the court a vivid picture of the state of affairs.

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?

Yes. It is possible for an overseas insolvency practitioner to be appointed in relation to a BVI company but only in a joint appointment where the practitioner will be working jointly with a licensee or the Official Receiver.

The application for appointment is made to the Financial Services Commission in which the practitioner defends his/her eligibility to act. Such eligibility will center on the following: -

- a) He/She has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made.

Commented [JW5]: 4 marks

Commented [JW6]: 2 marks - no reference to s234 IA 2003 - gives the requirement re the report and who to serve it on. In an application to terminate the liquidation the Court can ask the Liquidator to prepare a report before he grants the order, but once terminated the Liquidator has to prepare a final report containing statement of realisations and distributions and has to be to send to every admitted creditor and member and filed with the Registrar.

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

- b) He/She has given his/her written consent to act in the prescribed form.
- c) He/She is not disqualified from holding a licence under section 477.
- d) He/She is not disqualified from acting in the case of a company or a foreign company.
- e) There is in force such security for the proper performance of his/her functions as may be specified in the Regulations.

The FSC will then consider the application and if it finds that the overseas insolvency practitioner meets the standards, it will grant the application subject to the terms and conditions of the appointment.

A creditor may consider the appointment of an overseas practitioner where the debtor company incorporated in BVI has assets in another jurisdiction. This will enable a concerted realisation of the assets of the debtor. The appointment of an overseas insolvency practitioner will also be considered where there is an establishment in another jurisdiction.

Question 3.3 [maximum 5 marks]

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

A secured creditor is considered to be outside the realm of insolvency proceedings because its claim is directly against the assets of the company. The secured creditor's rights remain intact. For this reason, a secured creditor may choose to realise its asset after valuing it and claim for the balance after realisation as an unsecured creditor. The secured creditor also has the option to surrender its asset for the general benefit of all creditors and claim in concert with the other creditors of the debtor company.

When it comes to the protections, the asset over which the secured creditor has an interest cannot be dealt with in a manner that affects the secured creditor's interest especially in a negative way. For instance, in determining whether an arrangement can be approved, Section 15(4) of the Insolvency Act states that except with the written consent of a secured creditor, an arrangement shall not affect the right of a secured creditor of the debtor to enforce his or her security interest or vary the liability secured by the security interest

This goes to show that nothing can be done to impede the secured creditors' rights to the assets except where they expressly agree.

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 Limited has the option of applying for recognition of the foreign judgment in the BVI under the Reciprocal Enforcement of Judgments Act (Cap 65) 1922. Given that the judgment originates from England, the judgment must be registered before it can be recognised for purposes of affecting the assets in BVI. An application will therefore be made

Commented [JW8]: 2 marks -protection also in liquidation 175 /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]: 4 marks - Not all conditions under REJ 1922 referred to.

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/stat demand then liquidation under section 162 IA2003

to the BVI for the recognition and registration of the judgment and the court will consider the following before such recognition/registration is granted: -

- a. The judgment must have arisen from a civil proceeding and must be final and conclusive. It must also be for a fixed judgment sum.
- b. The application for recognition/registration ought to be made within 12 months from the date of judgment.
- c. There should not be a pending appeal on the matter or evidence of an intention to appeal.
- d. It must be shown that it is just and convenient for the judgment to be enforced in the territory.

According to the facts, the judgment satisfies the above criteria. Section 3(2) of the Act provides for a number of factors that will affect the registration of the judgment. From the facts, there is nothing to suggest that the factors mentioned therein would affect the judgment from the England court.

Once the judgment is registered/recognised, it will be enforceable like any other BVI judgment from the date of registration and the High Court will have the same control over the judgment as it would in a BVI judgment but only to the extent of facilitating execution. This implies that Pinforth Holdings would have the option of applying for execution by way of, say, attachment of the assets in BVI to satisfy the decretal sum.

Question 4.2 [maximum 9 marks]

Abbeydale Limited, a company incorporated in England, and Dendoncker Limited, a company incorporated in the BVI, entered into a loan agreement for the purchase of a property on Necker Island in the BVI. Under the terms of the loan agreement, Abbeydale transferred USD 12,000,000 to Dendoncker and Dendoncker successfully purchased the property. Subsequently, Dendoncker failed to make any of the loan repayments pursuant to the repayment clauses. As a result of this failure, Abbeydale made a demand for immediate repayment in full, as it was entitled to do under the agreement. Dendoncker failed to make any repayments in full or in part.

Providing reasons, with particular reference to the Insolvency Act, what options should Abbeydale Limited be advised to consider in order to enforce the debt owed to it by Dendoncker Limited?

Under Section 446(1), Abbeydale Limited has the same rights regarding the commencement of, and participation in, a Virgin Islands insolvency proceeding as creditors in the Virgin Islands. This would mean that Abbeydale can commence insolvency proceedings against Dendoncker in the BVI Court.

The facts do not confirm whether the property that was purchased by Dendoncker is the subject of a charge. Given that the loan was obtained to purchase the property, it is likely that Abbeydale could have registered a mortgage on the property to secure the repayment of the loan that was given. If this is the case, then as a foreign creditor, Abbeydale has the option of realising its asset. If this is not the case, then Abbeydale should commence insolvency proceedings depending on the nature of the property.

If the property generates income, then a receivership may be commenced under Part IV of the Act. Administration would not be appropriate unless Dendoncker has other significant creditors. Liquidation would also be an option available to Abbeydale which it can pursue under Part VI of the Act.

Commented [JW10]: Incorrect - Expat did not attend the Court

Commented [JW11]: 2 marks
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.

Commented [JW12]: Section 446 not in force

*** End of Assessment ***