



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]

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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.

According to Section 199 of the Business Companies Act 2004, a voluntary liquidator may be appointed by

1. a resolution of the directors of the company or
2. by a resolution of the members of the company

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.

According to Section 289 of the Insolvency Act 2003:

¹"a person who is or has been an officer of the company is deemed to have committed an offence if, at any time during the period of 12 months preceding the commencement of the liquidation, he has

²(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

³has 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".

A person however is not guilty if ⁴by reason of conduct constituting an offence occurred more than five years before the commencement of the liquidation; or ⁵if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud the company's creditors.

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?

According to Section 467 (3) of the Insolvency Act, a court may make the following orders:

⁶(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;

¹ Section 289 (1) of Insolvency Act, 2003

² Section 289 (1) (a) of Insolvency Act, 2003

³ Section 289 (1) (b) of Insolvency Act, 2003

⁴ Section 289 (2) (a) of Insolvency Act, 2003

⁵ Section 289 (2) (b) of Insolvency Act, 2003

⁶ Section 467 (3) of Insolvency Act, 2003

Commented [JW2]: 1 mark - need the second part of section 199 as well

Commented [JW3]: 2 marks

Commented [JW4]: 2 marks

- (b) restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
- 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
- (h) make such order or grant such other relief as it considers appropriate.

Question 2.4 [maximum 4 marks]

Commented [JW5]: 4 marks

With reference to the relevant legislation, set out the circumstances in which a company will be considered insolvent in the BVI.

The circumstance under which a company will be considered insolvent are listed in Section 8(1) of the Insolvency Act 2003. A company is insolvent under the following circumstances;

1. The company has failed to comply with the requirements of a statutory demand that has not been set aside under section 157 of the Insolvency Act;
2. The company has failed to satisfy execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company wholly or partially.
3. the value of the company's liabilities exceeds its assets
4. 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]

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.

With reference to the relevant legislation, explain the steps a liquidator must take when preparing to terminate a liquidation.

According to Section 234 (2) of the Insolvency Act 2003, upon the completion of the liquidation, the liquidator is required to, as soon as practicable to:

1. Prepare his final report and send to every creditor of the company whose claim has been admitted and to every member of the company. The report is mandated to contain a statement that all known assets of the company have been disclaimed, realised or distributed without realisation, that all proceeds of realisation have been distributed; and that there is no reason why, in his opinion, the company should not be struck from the Register, and dissolved.
2. The liquidator must file a copy of the final report with the registrar: the purpose of this is to make room for the registrar to strike off the company off the Register of Companies and issue a certificate of dissolution in the approved form certifying that the company has been dissolved.

According to Section 234(4) of the Insolvency Act 2003 the liquidator can make an application to the court to exempt the liquidator from the statutory requirement of sending his

final report to all creditors of the company who claimed has been admitted and to every member of the company or to modify the whole provision regarding to the final report.

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?

According to Section 483 of the Insolvency Act 2003, it is possible for an overseas insolvency practitioner to be appointed in relation to a BVI company. The Act states that "an individual resident outside the Virgin Islands may be appointed to act as an insolvency practitioner jointly with a licensee or the Official Receiver"

- i. If the circumstance is such that the BVI company has assets outside the jurisdiction it is better to appoint an Insolvency practitioner from that jurisdiction in which the assets are held.
- ii. An overseas insolvency practitioner must be appointed jointly with a BVI licensed Insolvency Practitioner or the Official Receiver. Then the process follows thus:

A written notice must be given to the Financial Services Commission (FSC) expressing the intention to appoint the overseas Insolvency practitioner, the Commission upon receipt of the notice may give the appointor notice that it intends to apply to the Court for an order that the overseas insolvency practitioner concerned should not be appointed.

When an application is made to the court to appoint the overseas insolvency practitioner, the FSC may appear and be heard at the hearing of the application for the purpose of objecting to the appointment.

The practice however is that the overseas Insolvency Practitioner will usually write a letter to the FSC providing the commission with his requisite details prescribed under section 483 (a) of the Insolvency Act while he awaits approval of the appointment by the commission or by the court where an application was made to the court.

Question 3.3 [maximum 5 marks]

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

Firstly Section 338 of the Insolvency Act 2003 provides that the secured creditor has the option to value the assets subject to the security interest and claim in the bankruptcy as an unsecured creditor for the balance of his debt; or to surrender his security interest to the trustee for the general benefit of creditors and claim in the bankruptcy as an unsecured creditor for the whole of his debt. The secured creditor may elect not to do any of the two.

Secondly, under Company Creditors arrangement (CCA), it is only when the secured creditors agree in writing that the company creditors arrangements will affect the right of a secured creditor to enforce its security interest or vary the liability secured by the security interest. If the secured creditors do not agree in writing the CCA will not

Commented [JW7]: 4 marks - save cost and use expertise of overseas liquidator

Commented [JW8]: The practice is the BVI IP completes a form available online on behalf of the Oversea IP

Commented [JW9]: 2.5 marks - protection in liquidation section 175/ 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.

affect their rights to enforce its security or vary the liability secured by their security interest.

Thirdly, when a court gives an order in aid of foreign proceeding under section 467(3) of the Insolvency Act, the order shall not affect the right of a secured creditor to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest. (Section 467 (4) of the Insolvency Act 2003)

In conclusion, secured creditors are not strictly speaking classed as creditors during an insolvency procedure, the Insolvency Act, 2003 recognizes and protects the rights of secured creditors to enforce their security in the British Virgin Island.

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?

According to Foreign and Commonwealth Judgments (Reciprocal Enforcement) Act, "judgment" means any judgment or order given or made by a court in any civil proceedings whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place. (Section 2(1) of Act 1922)

Before a judgement can be enforced in the BVI it is important to find out whether the Defendant has assets within the jurisdiction against which a Claimant can enforce. The Act extends to judgements given in English High Court. (Section 3(1) of Act 1922). The facts of the case says that the judgement was awarded against Expat Properties by the English High Court. From the facts also Expat Properties has significant assets in the BVI. From the facts therefore, the judgement can be registered in the BVI court.

To enforce a judgment under the 1922 Act, the first necessary step is to "register" the judgment. The following four principles are requirements for recognition and registration of a judgment under the 1922 Act:

- The judgment must have been given by a Court in civil proceedings, and must be final and conclusive and for a fixed judgment sum. This means that the judgement must order a definite and fixed payable sum.
- The application must be made within 12 months of the judgment (unless the court grants a longer period on the basis that it is just and convenient to do so)
- The judgment should not be subject to an appeal or the judgment debtor should not have the right or have expressed an intention to appeal;
- It must be "just and convenient" that the judgment should be enforced in the territory.

Where a judgment is registered under the 1922 Act, it will have the following consequences:

Commented [JW10]: 3 marks -Did not include all the conditions under REJ 1922. You picked up that 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 judgment shall, from the date of registration, have the same force and effect as the original judgment, and proceedings may be taken upon it, as if it had been a judgment originally obtained on the date of registration in the BVI High Court; the BVI High Court shall have the same control and jurisdiction over the judgment as it had over judgments given by itself, but only in so far as it relates to execution; the reasonable incidental costs of registering the judgment (including the costs of obtaining a certified copy from the original Court and of the application for registration) are recoverable as if they were sums payable under the judgment. After registering the judgement, the following remedies are available to enforce the money judgement according to CPR Part 45.2:

- I. Charging order
- II. Garnishee/attachment order
- III. Judgment summons
- IV. Order for the seizure and sale of goods
- V. Appointment of a Receiver

From the facts, the judgement was made in September 2020 therefore an application for recognition and registration cannot be made to the court for lapse of time., It may however be registered if the the BVI court thinks it is just and convenient to do so.

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?

According to Section 9(1) of Insolvency Act, 2003 “a person is a creditor of another person (the debtor) if he has a claim against the debtor, whether by assignment or otherwise, that is, or would be, an admissible claim in (a) the liquidation of the debtor, in the case of a debtor that is a company or a foreign company.”

Foreign creditors have the same rights regarding the commencement of, and participation in, a Virgin Islands insolvency proceeding as creditors in the Virgin Islands. (Section 446(1) of Insolvency Act, 2003)

A foreign proceeding means a collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy and “debtor” shall be construed accordingly. (Section 466(1) of Insolvency Act, 2003)

A foreign proceeding” means a collective judicial or administrative proceeding in a designated foreign country, including an interim proceeding, pursuant to a law relating to

Commented [JW11]: 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.

Commented [JW12]: This section is not in force

insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy. (Section 437(1) of Insolvency Act, 2003)

A foreign representative is a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding. (Section 466(1) of Insolvency Act, 2003)

The British Virgin Island courts have powers to make orders which extends to certain designated countries which include the United Kingdom.

A foreign representative may apply to the Court for an order in BVI court in aid of the foreign proceeding in respect of which he is authorized according to Section 467 (2) of Insolvency Act, 2003.

Therefore, Abbeydale Limited will have to firstly appoint a representative for the procedure and then the representative which will be regarded as a foreign representative will make an application to the court.

According to Section 467(3) of Insolvency Act, 2003 the Court may make any of the following orders upon the application:

- (a) restrain the commencement or continuation of any proceedings against the 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) 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;
- (g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or make such order or grant such other relief as it considers appropriate.

The court is required to be guided by what will best ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with the just treatment of all persons claiming in the foreign proceeding, the protection of persons in the Virgin Islands who have claims against the debtor against prejudice and inconvenience in the processing of claims in the foreign proceeding, the prevention of preferential or fraudulent dispositions of property subject to the foreign proceeding, or the proceeds of such property, the need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a Virgin Islands insolvency and comity. (Section 468 of Insolvency Act, 2003)

*** End of Assessment ***