



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.

Voluntary liquidation under the Business Companies Act 2004 (“BCA”) is not in relation to insolvencies. This method is mostly used when a company is defunct, but may have assets and liabilities to deal with, and needs to be dissolved. The assets must be sufficient to repay the liabilities. Per section 197(1) of the BCA the liquidation can only occur if (i) the company has no liabilities, or if (ii) the company can pay its debts as they fall due and the value of the assets is equal to or exceeds the liabilities.

Commented [JW2]: 1/2 mark - Section 199 (1) & (2) (subject to section 200) of the BCA 2004 sets out all the circumstances in which a voluntary liquidator can be appointed.

Question 2.2 [maximum 2 marks]

A liquidator is appointed to a BVI incorporated company by the Court. In what circumstances would an officer of that company be deemed to have committed an offence pursuant to the fraudulent conduct provisions? You are required to make reference to the relevant legislation.

Per section 289(1) of the Insolvency Act, an officer of the company is deemed to have committed an offence pursuant to the fraudulent conduct provisions if they have, during the 12-month period preceding the commencement of the liquidation:

- a) *“made or caused to be made any gift or transfer of, or charge on, or has caused, permitted or acquiesced in the levying of any execution against the company’s assets; or*
- b) *has concealed or removed any of the company’s assets since, or within, 60 days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.”¹*

Commented [JW3]: 1.5 marks - exceptions under subsection (2) not included

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?

Part XIX of the Insolvency Act provides framework for the BVI Court to recognise and also provide assistance to certain foreign insolvency proceedings and their foreign representatives. The court can make an order applying the applicable BVI laws or the law of the applicable country.

Per section 467, the court may:

- 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;*

Commented [JW4]: 2 marks

¹ Per section 289 of the Insolvency Act

- 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) authorise 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.²

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.

Per Section 8(1) of the Insolvency Act – the meaning of insolvent:

1. Either:
 - a. The cash flow test - If it cannot pay its debts as they fall due (per *Cornhill Insurance Plc v Improvement Services Limited*); or
 - b. The balance sheet test - If the value of its liabilities exceeds the value of its assets such liability may be present or future and the application is quite wide reaching. See Section 10(1) of the Insolvency Act.
2. Execution or other process issued on a judgment, decree or order of a BVI court in favour of a creditor of the company is returned wholly or partly unsatisfied.
3. If it fails to comply with a statutory demand which has not been set aside under section 156 and 157 of the Insolvency Act.

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.

- Per section 234(2) of the Insolvency Act (2003) the liquidator must prepare their final report as soon as practicable and issue to all admitted creditors and all members, and file the report with the Registrar. Certain exemptions can be made by the court on application – i.e. the liquidator may apply to the court to exempt the liquidation from compliance to send the report to all creditors.
- The report must be in accordance with the statements detailed in section 234(3) of the Insolvency Act (2003). The liquidator must state that:
 - all known assets of the company have been disclaimed, realised or distributed without realisation;
 - all proceeds have been distributed; and

² section 289 of the Insolvency Act

- there is no reason why the company should not be struck from the register and dissolved.
- The liquidator must also write to the Registrar/FSC to request that the company be dissolved.
- The liquidator can then file a certificate of compliance with section 234(2) for the liquidation to be terminated.

Question 3.2 [maximum 5 marks]

Commented [JW7]: 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, per section 483 of the Insolvency Act, however, the overseas IP must be appointed jointly with a BVI practitioner.
- Prior written notification must be provided to the FSC. The FSC may also appear in court and be heard and/or object to the appointment. Typically, the foreign IP would provide a letter, following receipt and review, the FSC will approve the appointment (subject to the court).
- Eligibility includes:
 - the foreign IP satisfying to the court and the FSC that they have sufficient qualifications and experience to act;
 - Providing a written consent to act;
 - Confirming they are not disqualified under section 477;
 - Confirming they are not disqualified from acting; and
 - Confirming there is in force such security for the proper performance of their functions.
- A foreign IP appointment may benefit a creditor via reduced costs if the foreign IP is located in the same country as the assets, the travel costs can be reduced. Or in a situation where the foreign IP has expertise which would assist the orderly wind-down and create efficiencies.

Question 3.3 [maximum 5 marks]

Commented [JW8]: 3 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

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

- The appointment of a liquidator does not impact a secured creditor's rights to take possession and realise any assets it holds as security.
- Under the BVI framework, secured creditors are not exactly a class of creditors as their claim is against assets of the company which fall outside of the liquidation. However, the liquidator must obey the rights of priority of a secured creditor claim.
- There is no timeframe for enforcing a secured claim.
- A secured creditor is not obliged to make a claim in a bankruptcy, but may do so under section 388 of the Insolvency Act.

Commented [JW9]: Incorrect section

- Per section 211 of the Insolvency Act, the secured creditor may make a claim in the estate by valuing the secured assets, less the debt outstanding and the balance is the claim in the estate. The secured creditor is also able to surrender their security for the benefit of all creditors and claim as an unsecured creditor. Noting however, in the situation where a creditor mistakenly surrenders its debt, there are remedies for such via a court application.

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?

The recognition of foreign judgments in the BVI is mostly governed by common law and the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 (1922 Act).

As money was awarded in the judgment and it was awarded by the English High Court (which the 1922 Act covers), Pinforth can seek to have its foreign judgment recognised and registered by the BVI Court. The judgment will be treated as being as if it was given in the BVI and all normal remedies are available, such as, charging order, garnishee order, judgment summons, order for seizure and sale, and the appointment of a receiver.

However, the order must be registered within 12 months of the date of judgment (Unless the BVI court grants longer), via an application to court under Civil Procedural Rules Part 72, including an authenticated copy and details of additional interest due. No notice is required to be given to the debtor.

However, pursuant to section 3(2) of the 1922 Act, the Court will not order a judgment to be registered if the debtor was not duly served in the original court process and **did not appeal**. The court will further not order the judgment to be registered if the debtor did not carry on business or agree to submit to the English Court. As such, the facts of this case need to be considered carefully. As Expat has significant assets in England – Pinforth may be able to satisfy the BVI court that the debtor had submitted to the English court. As Expat did not appear, Pinforth would want to provide satisfactory evidence that service duly occurred and that is not the reason why Expat did not appear.

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.

Commented [JW10]: 3 marks- REJ conditions not all listed. Claim was more than 12 months but question does not state when judgment awarded and 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

Commented [JW11]: Not quite correct.

Commented [JW12]: 6 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.

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?

It is likely that Abbeydale is a secured creditor either in relation to the property or shares in the company if it gave such an amount for the property. Accordingly, Abbeydale could seek to appoint a Receiver (in line with the requirements under section 116(1) of the Insolvency Act) under the terms of the debenture.

The powers of the receivers will be governed by the charge documents, however, section 127(2) of the Insolvency Act sets out the powers under BVI law to act in good faith and in the best interests of the appointor.

The Receiver will have the duty to obtain the best price reasonably obtainable at the time of sale for the benefit of the creditors, sureties, persons claims and interest in the assets, and the company (per section 129(1)).

It is possible under BVI law to appointment a receiver pursuant to a floating charge over all the assets of the Company. However, it is noted that a pledge cannot be granted over BVI company shares and a receiver can not be appointed if this was the method of security.

Alternatively, Abbeydale could seek to place the company into liquidation on the basis of insolvency. Per section 162 of the Insolvency Act, Abbeydale could file a creditor's application as the liability is due and was incurred in the BVI. Per Section 8(1) of the Insolvency Act, Abbeydale would need to show the following:

1. Either
 - a. The cash flow test - If it cannot pay its debts as they fall due. *This seems likely as it has not paid Abbeydale and is clearly in breach.*
 - b. The balance sheet test - If the value of its liabilities exceeds the value of its assets. *It is not clear from the question what the company's net assets are.*
2. Execution or other process issued on a judgment, decree or order of a BVI court in favour of a creditor of the company is returned wholly or partly unsatisfied. *Abbeydale should take steps in this regard.*
3. If it fails to comply with a statutory demand which has not been set aside under section 156 and 157 of the Insolvency Act. *Abbeydale should take steps in this regard.*

*** End of Assessment ***