



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]: 8 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.

Commented [JW2]: Correct answer

Commented [JW3]: Incorrect - a court order is required to transfer shares

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.

Commented [JW4]: Incorrect answer

Commented [JW5]: Correct answer - its for a voluntary liquidation not CCA

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.

The BVI Business Companies Act, 2004 states that a company may only be put into voluntary liquidation if it has:

- No liabilities; or
- If it is able to pay its debts as they fall due.

Commented [JW6]: 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.

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) of the Insolvency Act 2003, where a liquidator of a company is appointed under section 159, a person who is or has been 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:

- 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
- 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.

Commented [JW7]: 1.5 marks - exceptions 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 provide the BVI Court powers to a) recognise certain foreign insolvency proceedings and b) provide assistance to foreign representatives.

Commented [JW8]: 0 mark - section 467 lists the 8 powers given

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.

According to Part VIII of the Insolvency Act, a company will be considered insolvent in the BVI if it is:

- Unable to pay its debts as they fall due;
- That it is balance sheet insolvent (i.e. its liabilities exceed its assets);
- A company fails to satisfy (in whole or in part) execution, or other process issued on a judgement, decree or other Order of the BVI Court in favour of a creditor of a company;
- If it fails to comply with the terms of a statutory demand that is not set aside under sections 156 and 157 of the Act.

Commented [JW9]: 3.5 marks - Section 8 IA 2003

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.

Under Section 234 (2) of the Insolvency Act, to terminate a liquidation, the liquidator will;

(a) prepare and send to every creditor of the company whose claim has been admitted and to every member of the company

(i) his final report, complying with subsection (3), and a statement of realisations and distributions¹⁹² in respect of the liquidation, and

(ii) a summary of the grounds upon which a creditor or member may object to the striking of the company from the Register; and

(b) file with the Registrar a copy the final report and the statement of realisations and distributions sent to the creditors and members of the company.

In order to complete the above the liquidator will have disclaimed, realised or distributed all known assets of the company without realisation and have distributed all proceeds of realisation.

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?

It is possible to make an application to the BVI Court for the appointment of an overseas insolvency practitioner in relation to a BVI company, however it can only be a joint appointment with a **BVI registered insolvency practitioner** or the Official Receiver.

A creditor might consider the appointment of an overseas insolvency practitioner if there are practical advantages of doing so, for example if a group of companies is being wound up where its parent company is in another jurisdiction where that overseas practitioner is situated. This saves on data sharing issues, is cost efficient, and allows for expedient decision making.

The overseas practitioner needs to provide prior written notice under Section 483 (b) of the Act to the Financial Services Commission no less than two weeks from the date of a hearing, together with details of the insolvency practitioner's experience and the basis for the appointment in the prescribed form (found on https://www.bvifsc.vg/sites/default/files/joint_overseas_insolvency_practitioners_appointment_form.pdf). A Consent to Act Form, pursuant to section 82 of the Insolvency Act, 2003 and Insolvency Rule 15 must also be completed for both practitioners. The court hearing date/members meeting date should also be included in the prescribed form pursuant to Insolvency Rule 325 and should be more than two weeks away from submission to the same.

Commented [JW10]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation.

Commented [JW11]: 5 marks

Commented [JW12]: licenced

Commented [JW13]: Not required to show link

Question 3.3 [maximum 5 marks]

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

The commencement of a BVI liquidation, and the resulting moratorium, does not in any way restrict the rights of a secured creditor to enforce their security. Generally the BVI is a **secured creditor friendly jurisdiction**.

For example, for Orders made under the Insolvency Act, secured creditors are still able to deal with the assets over which they have security.

Under Section 211 of the Act, a secured creditor may

- a) value the assets subject to the security interest and claim in the liquidation of the company as an unsecured creditor for the balance of his debt; or
- b) surrender his security interest to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole of his debt;

However, he is not obliged to do either and **can sit outside of the liquidation** if he so chooses.

Commented [JW14]: 1.5 marks - Not just liquidation - 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

Commented [JW15]: Most jurisdictions are because it's the law

Commented [JW16]: Not a technical term

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?

A monetary award obtained in a foreign jurisdiction can be enforced in the BVI pursuant to the Reciprocal Enforcement of Judgments Act 1922 (the Act) if it was obtained from certain countries, or under common law by way of a simple debt claim.

The countries which are included under the Act are England, Northern Ireland, Scotland, the Bahamas, Barbados, Bermuda, Honduras, Trinidad and Tobago, Guyana, St Lucia, St Vincent, Grenada, Jamaica, New South Wales (Australia) and Nigeria. This provides for a "simplified registration" procedure whereby a judgement creditor should first "register" the judgment.

One of the benefits of registration under the 1922 Act is that the application is made "without notice" to the Defendant. Thus preventing any "tipping off" to a BVI defendant which may risk the dissipation of assets. This may be a consideration for Pinforth Holdings Ltd ("PHL").

However, there are four principal requirements for recognition of a judgment under the Act:

1. The judgment or order must have been given by a Court in civil proceedings, and must be final and conclusive and for a fixed judgment sum, i.e. it must order a definite and fixed sum payable;

Commented [JW17]: 4.5 marks - 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

2. The application must be made within 12 months of the judgment being handed down (so it must be made by 31 August 2021);
3. The judgment debtor must not have appealed the judgment, or have the right or have expressed an intention to appeal;
4. It must be "just and convenient" that the judgment should be enforced in the territory.

However, the BVI High Court will not register a judgment if it is proven that:

- a) The original Court acted without jurisdiction; or
- b) The judgment debtor was not properly served with process in the foreign territory and did not appear, or was a person who was not carrying on business nor ordinarily resident within the jurisdiction of the original Court, and did not voluntarily appear or submit to the jurisdiction of that Court; or
- c) The judgment was obtained by fraud; or
- d) The judgment was in respect of a cause of action which is against public policy, or for some other reason could not have been entertained by the BVI High Court; or
- e) The judgment is for penalties, fines or taxes, or similar fiscal obligation; or
- f) The judgment was obtained in breach of "natural justice".

When considering the first point, a) on jurisdiction, there are four issues, known as the "Dicey Rule" which will be considered:

- if the judgment debtor was, at the time the proceedings were instituted, present in the foreign country;
- if the judgment debtor was the claimant, or counterclaimed in the proceedings before the foreign court;
- if the judgment debtor, being a defendant in the foreign court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; or
- if the judgment debtor, being a defendant in the proceedings before the foreign court, agreed in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or the courts of that country.

In the situation in which PHL finds itself, although it has obtained a monetary judgement in a jurisdiction in which under ordinary circumstances, whereby it would be able to apply to register its judgement in the BVI under the Reciprocal Enforcement of Judgements Act in a simplified manner, it would be rejected, as the defendant, Expat Properties Ltd ("Expat") did not appear voluntarily at the proceedings and therefore did not submit to the jurisdiction of the UK High Court.

Unfortunately, that means that PHL would need to pursue its judgement under common law. PH will need to file a claim form, and a statement of claim. Once the claim has been served, PHL will likely be able to file for a judgment in default or for summary judgment if the company chooses not to appear in the BVI Court.⁵⁰

Once judgment has been obtained it will be enforced in the same way as any other BVI judgment. For example seeking a charging order over the shares in the company, to appoint a provisional liquidator or to wind up the company if it has sufficient assets to pay the judgement and any preferential creditors.

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 property on

Commented [JW18]: 4.5 marks -

First issue to determine: A secured or unsecured creditor? You have assumed A is an unsecured creditor but answer required you consider it may be a secured creditor as well.

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.

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?

Upon the assumption that Abbeydale Ltd ("Abbeydale"), did not register any kind of security for the loan (as it is not stated as such) then Abbeydale would likely seek to have the loan recovered through utilising the Insolvency Act 2003 ("the Act") and the remedies therein.

On the presumption that the debt is not disputed, then Abbeydale could issue a statutory demand for the repayment of the loan to Dendoncker Ltd ("Dendoncker").

It would be advisable to serve the statutory demand before taking any further action (including seeking Dendoncker's liquidation) as the company will be presumed to be insolvent if it does not satisfy or compound the debt within 21 days of the date of service.

A statutory demand must be served in accordance with, the Rules and must:

- be for a debt which is not less than the statutory minimum amount (currently US\$2,000) and which is due and payable at the time of the demand;
- be in writing and state the nature of the debt and its amount;
- be dated and signed by, or on behalf of, the creditor;
- require the debtor to pay the debt or secure or compound it to the reasonable satisfaction of the creditor within 21 days of the date of service;
- state that, if the debtor does not comply with it, the creditor may apply to the High Court for a liquidator to be appointed; and
- state that the debtor has the right to apply to have it set aside.

Serving a statutory demand would be recommended to Abbeydale as it would show evidence to the Court that the company is not able to pay its debts as it falls due, being a prerequisite of any liquidation application under Part VIII of the Act and Section 8 (1), and that further, under Section 156 and 157 of the Act that the statutory demand has been served and has not successfully been set aside.

If the loan is not repaid upon the reply date of the statutory demand, Abbeydale may seek to appoint a liquidator. For the avoidance of doubt, an application to appoint a liquidator may be made by:

- the company;
- a shareholder if the High Court has given its prior permission (which it will only give if it is satisfied that, on the face of things, there is a case that the company is insolvent); or
- a creditor who can show either that the company is insolvent (on either the cash flow or balance sheet basis) or that it is just and equitable that a liquidator be appointed.

The appointment of a liquidator is governed by Part VI of the Act.

Abbeydale will likely nominate an "eligible insolvency practitioner" under Section 162 of the Act, and if so appointed by the Court, will take control of the Dendoncker and its assets.

Thereafter the liquidator would have the powers granted to it under Section 186 of the Act, which is set out in Schedule 2, and as specified in the Order to:

Deal with the assets of the company, which include to the power to sell or otherwise dispose of property of the company. If the company has surplus assets, or has some assets to satisfy *pari passu* the creditor claims within the company, the liquidator would deal with these accordingly.

Nevertheless, Abbeydale would still need to provide a proof of claim to the Liquidator regarding their unpaid loan, so that the Liquidator upon distribution of the company's surplus assets is able to adjudicate their claim and pay according to the priority of ranking of distribution of assets.

*** End of Assessment ***