



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. [no]
- (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. [no]
- (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. [yes]
- (b) The assets automatically vest in the liquidator.**
- (c) The directors remain in office, but cease to have any powers. [yes]
- (d) Shares in the company cannot be transferred. [yes]

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.

A voluntary liquidator can be appointed over a company pursuant to Part XII of the Business Companies Act 2004 if:

- it has no liabilities;
- it is able to pay its debts as they fall due; and
- the value of the assets is equal or greater than the 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.

Section 289 of the Insolvency Act provides remedies for fraudulent and insolvent trading, during the time the officer is in office or during the period 12 months preceding the commencement of the liquidation, they have:

- Made or caused to be made any gift or transfer of, or charge on, or has caused permitted or acquired in the levying of any execution against the company's assets.
- Has concealed or removed any of the company's assets since, or within, sixty days of the date of any unsatisfied judgement or order for 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?

Part XIX of the Insolvency Act provides the primary framework for the powers provided to the BVI Court to make orders to assist foreign proceedings. To assist the BVI Court can recognise foreign insolvency proceedings and provide assistance to foreign representations.

The powers to make these orders extend to designated countries. When making these orders the BVI Court can apply the applicable BVI laws or the laws of the applicable country.

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.

In accordance with **Part CII** of the Insolvency Act, with procedural requirements provided for under the IR. The circumstances in which a company is considered insolvent in the BVI:

- It is proved to be the satisfaction of the Court that the company is unable to pay its debts as they fall due.

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 included

Commented [JW4]: 0 mark - Section 467 - gives all 8 powers

Commented [JW5]: 3.5 marks - section 8 IA 2003

Commented [JW6]: ?

- It is proved that the value of the company's liabilities is greater than its assets i.e. balance sheet insolvent.
- The company fails to satisfy execution or other process issued on a judgement decree or order of the Court in favour of a creditor company.
- If the company fails to comply with the terms of a statutory demand and it is not successfully 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]

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

The steps that a liquidator must take when preparing to terminate a liquidation include:

Under section 234(2) of the Insolvency Act to prepare the liquidator's final report after completing their duties. This report must be sent to every creditor and member of the company. Additionally, it must be filed with the Registrar. Section 334(2) of the Insolvency Act sets out the requirements of statements required in the report.

Section 235 of the Insolvency Act, the liquidator can apply for their release when their appointment ends. The effect of a release is that the liquidator can discharge from a liability in respect to the administration of the company.

On termination and completion of the liquidation, section 336 of the Insolvency Act details that the Insolvency regulation will provide for the dissolution of a company.

Furthermore, the termination of a liquidation may not mean that a company should be dissolved. For example a company's liquidation may be terminated because the debt has been paid to the appointing creditor.

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?

In accordance with section 483 of the Insolvency Act, yes, it is possible to make an application to the BVI Court for the appointment of an overseas insolvency practitioner.

(i) A creditor may consider the appointment of an insolvency practitioner in another jurisdiction where the assets are held. This could significantly reduce costs incurred such as travel costs and local consulting costs. Particularly in long running, multi-location liquidations.

(ii) It must be noted that any overseas insolvency practitioner must be appointed jointly with a BVI licensed insolvency practitioner or Official Receiver. To be appointed, written notice of the appointment must be given to BVI's Financial Services Commission ("FSC"). The FSC can appear and be heard at the court hearing to appoint and object to the appointment. The usual practice is that the foreign insolvency practitioner usually writes a letter to the FSC, detailing information such as their expertise and qualification and the FSC will confirm if they approve of the appointment of the overseas insolvency practitioner.

Commented [JW7]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation

Commented [JW8]: 5 marks

Question 3.3 [maximum 5 marks]

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

The appointment of a liquidator does not affect the right of a secured creditor to take possession or realise or otherwise deal with the assets where the creditor has security. A secured creditor sits outside a liquidation estate.

Pursuant to section 211 of the Insolvency Act, a secured creditor is able to

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

This being said these are only options per the Insolvency Act and they are not imposed on a secured creditor and they remain outside the liquidation process.

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 ("Pinforth") should consider the Reciprocal Enforcement of Judgments Act 1922 to enforce the awarded judgment of USD 4,500,000. The recognition of foreign judgments in the BVI is governed by the Reciprocal Enforcement of Judgment Act 1922 ("1922 Act").

The enforcement of Pinforth's awarded judgement would only be effective if the judgement defendant has assets in the BVI, against which to enforce. We are aware that Expat Properties has significant assets in the BVI, so this enforcement would be possible.

The 1922 Act only extends to judgements given in the High Court of England and Wales and Northern Ireland and the Court of Session in Scotland. As the judgement was awarded in the English High Court condition of the 1922 Act is satisfied.

Upon satisfying the conditions, the judgement is registered under the 1922 Act by the BVI Court, from this date on it is treated as having the same force and effect as if the judgement was made in the BVI. As such the following remedies will be available to Pinforth – a charging order, a garnish order, a judgement summons, an order for seizure and sale of goods and the appointment of a receiver.

A foreign judgement is registerable within 12 months of the date of judgement, although we are aware that in September 2020 Pinforth brought the claim against Expat Properties Limited ("Expat"), we are not aware what date the judgement was made. In the case that that

Commented [JW9]: 2 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

Commented [JW10]: 3.5 marks - Did not include all the conditions under REJ 1922 and no application of the law or reasoning as to whether its registrable as judgment. 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.

Commented [JW11]: Which are?

judgement was made more than 12 months the BVI court will have to grant a longer period to register.

To apply for the 1922 Act Pinforth will need to submit an application an authenticated copy of the judgement and details of any interest that has become due under the law of the country in which the judgement was entered. Pinforth will not have to inform Expat of the application.

As the judgement specified the specific sum of money USD4,500,000 the application will be more straightforward thankfully.

Pinforth should be aware that they do not necessarily need to apply for registration of a foreign judgement to enforce the debt.

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?

Abbeydale Limited as a creditor in a foreign jurisdictions will have a number of options open to them. Section 446 of the Insolvency Act provide foreign creditors with a right of direct access, as such, creditors have the same rights regarding the commencement of, and participation in, a BVI insolvency proceeding as creditors from within the jurisdiction.

The Insolvency Act provides for transactions avoidance provision, which are enforced by application to the BVI Court. This includes the avoidance preference payments that may come to light in an investigation into Dendoncker Limited's affairs. Additionally, the Insolvency act also provides remedies for, fraudulent and insolvent trading.

Pursuant to section 296(1) of the Insolvency Act, Abbeydale's application will be made on a liability that exceeds US\$2,000 and the liability is payable immediately. Both conditions have been satisfied.

Abbeydale will be able to enforce a foreign judgement in the BVI as the debtor Dendoncker has assets in the BVI, being the property on Necker Island, that can be enforced on. As part of Abbeydale's application they will have to identify these assets. Under the 1922 Act only defined sum judgements can be enforced which would be the case here as the loan was USD12,000.

Additionally, the 1922 Act only extends to judgements in the High Court of England Wales and Northern Ireland where Abbeydale is domiciled. Once the judgement is recognised by the 1922 Act, it will be treated the same as a BVI judgement. As such, remedies pursuant to CPR 45.2 include (i) a charging order and (ii) the appointment of a receiver could be used to claim Abbeydale's debt back.

Commented [JW12]: 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 [JW13]: Section 446 is not in force

Commented [JW14]: This is a bankruptcy section - I for individuals not corporate entities

Commented [JW15]: For liquidation its insolvency rule 149

Commented [JW16]: It's a bit more than \$12000

The foreign judgement is registerable within 12 months of the date of judgement, so it important that Abbeydale are conscious of this timeline.

*** End of Assessment ***