



**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.

Pursuant to Part XII of the Business Companies Act 2004 (“BCA”), a voluntary liquidator can only be appointed over a company if a) it has no liabilities or b) if it is unable to pay its debts as they fall due and the value of its assets exceeds or equals its liabilities.

Further, a company is able to be put into voluntary liquidation even if there are security interests registered with the BVI Registrar of Companies, however the liquidator must honour the rights of the priority claim held by the secured creditor.

**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 BVI Insolvency Act states that where a liquidator is appointed by the Court (under section 159), an officer of the company is deemed to have committed an offence if, at any time during the period 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.
- 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?

The reference is Part XIX of the Insolvency Act and it provides the primary framework for the powers provided to the BVI Court to make orders to assist with foreign proceedings. In order to assist, the BVI Court can recognise certain foreign insolvency proceedings and provide assistance to the foreign representatives.

Further, the powers to make such orders can extend to designated countries (including Australia, Canada, Hong Kong, Jersey, Japan, New Zealand, the United Kingdom and the USA). When making these orders in support of a foreign proceeding, the BVI Court can apply the applicable BVI laws or the laws of the applicable country.

**Commented [JW2]:** 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.

**Commented [JW3]:** 1.5 marks - exceptions not included

**Commented [JW4]:** 0 mark - 8 powers listed under section 467

**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.

Corporate insolvency is governed by Part VIII of the Insolvency Act. Circumstance in which the company will be considered insolvent in the BVI:

- It is proven to the satisfaction of the Court that the company is unable to pay its debts as they fall due – this must be a question of fact.
- It is proven to the satisfaction of the Court that the value of the company's liabilities exceeds its asset value (balance sheet insolvency). A liability may be a 'present or further, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion' (section 10(2) of the Insolvency Act).
- The company fails to satisfy, in whole or partly, execution or other process issued on a judgement, decree or order of the BVI Court in favour of a creditor of the company.
- If the company fails to comply with a statutory demand (i.e. a written demand for payment of a debt that is due and payable which is made by a creditor) and it is not successfully set aside under sections 156 and 157 of the Insolvency Act.

Whilst the above statutory tests exist, the Court retains residual discretion for Court appointments as to whether it finds a company insolvent and to appointment a liquidator.

**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.

A liquidation will not end until it is terminated per the provisions listed in section 232 of the Insolvency Act.

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

Section 234(2) of the Insolvency Act: A liquidator is to prepare his final report as soon as practicable after the completion of his duties and sent to every admitted creditor, every member of the company and is also to be filed with the Registrar. Section 234(3) of the Insolvency Act sets out the requirements of particular statements that are required to be included in the final report.

Additionally, section 235 of the Insolvency Act allows for the liquidator to apply for their release when their appointment ends, whereby the effect of his release is that he is discharged from all liabilities in respect of any act or default in relation to the administration of the company.

Upon the termination and completion of the liquidation, section 336 of the Insolvency Act states that the Insolvency Regulation will provide for the dissolution of a company (albeit no such procedure for this requirement has been legislated for). In practice, upon the filing of and release of the final report, the liquidator will write to the Registrar to request the company be dissolved.

**Commented [JW5]:** 3.5 marks - section 8 IA2003

**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

**Commented [JW7]:** Bankruptcy section? Should be 236

**Commented [JW8]:** Where no court order for dissolution

**Question 3.2 [maximum 5 marks]**

**Commented [JW9]:** 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?

Section 483 of the Insolvency Act allows for the appointment of an overseas insolvency practitioner of a BVI company and sets out the requirements.

The below responses are numbered in accordance to how the question has been presented:

(i) The circumstances whereby a creditor may consider the appointment of an insolvency practitioner in another jurisdiction is because it is where the assets are held, as the appointment of another insolvency practitioner can aid with reducing costs incurred such as travel and local expertise costs, particularly relating to long running liquidations that span over multiple locations which has differing jurisdictional disputes / issues.

(ii) The process for appointing an overseas insolvency practitioner is that it must be made jointly with a BVI licensed insolvency practitioner or with the Official Receiver (if applicable). To be appointed, written notification and the eligibility requirement application contained under the Insolvency Act of the appointment must be given to BVI's Financial Services Commission. The Financial Services Commission has the power to appear and be heard at the Court hearing to appoint and object such appointment. In practise, the foreign insolvency practitioner will generally write a letter to the Financial Services Commission which includes details regarding their expertise and qualifications and in turn the Financial Services Commission will confirm if they are approving of the overseas insolvency practitioner appointment.

**Question 3.3 [maximum 5 marks]**

**Commented [JW10]:** 1.5 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

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

The Insolvency Act specifically recognises and protects the rights of secured creditors in order to enforce their security.

Secured creditors, strictly speaking, are not classed as creditors or considered to be involved within the insolvency process as their claims arise directly against the company assets which are subject to security and falls outside the liquidation. It is up to the secured creditor to determine when to take control of the security interest and when to best deal with the asset for sale and to obtain a return.

Orders made by the Court under **section 476 of the Insolvency Act** do not affect the rights of secured creditors to deal with the assets over which they have a security interest. Further, the appointment of a liquidator does not affect the right of a secured creditor to take possession and realise or otherwise deal with the assets which has security attached to it.

**Commented [JW11]:** Section 467

Section 211 of the Insolvency Act allows the secured creditor to:

- 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
- 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.

**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 is encouraged to use the Reciprocal Enforcement of Judgements Act 1922 ("1922 Act") to enforce the foreign judgment debt as:

- the recognition of foreign judgements in the BVI is governed by the 1922 Act; and
- Pinforth Holdings has been awarded of USD 4,500,000 as the judgement is final and conclusive and the amount awarded is final. (Given the judgement is a final and conclusive monetary judgement for USD 4,500,000, Pinforth Holdings can apply for a summary judgement according to the rule 50 of the Civil Procedure Rules, however, provided this question has asked to focus on the application of the 1922 Act, this route will not be further discussed.)

The enforcement of Pinforth Holdings' awarded judgement would be effective as Expat Properties has significant assets in the BVI, therefore Pinforth Holdings can enforce its awarded judgement against these assets.

The 1922 Act will extend to Pinforth Holdings as it is a judgement handed down by the English High Court (which is a jurisdiction that the 1922 Act extends to).

As the conditions have been met to satisfy the requirements of the 1922 Act, the judgement is required to be registered under the 1922 Act by the BVI Court. From this date on, it is treated as being in full effect (i.e. similar to if the judgement was made in the BVI). As a result, the following remedies will be available to Pinforth Holdings pursuant to CPR 45.2:

- a charging order;
- a garnish order;
- a judgement summons;
- an order for seizure and sale of goods; and
- the appointment of a receiver.

Pinforth Holdings will need to register its foreign judgement within 12 months of the date of judgement. From the facts of the question, I am aware that the claim was brought up against Expat Properties in September 2020 however it is not known what date the judgement was made. However, the BVI Court can grant a longer period for the judgement to be registered on the basis that it is convenient to do so.

Pinforth Holdings will need to submit an application which contains an authenticated copy of the judgement and provide any details of interest that has become due under English Law (being the law of the country in which the judgement was entered). It is noted that Pinforth Holdings does not have to inform Expat Properties of the application.

**Question 4.2 [maximum 9 marks]**

**Commented [JW12]:** 3 marks - Did not include all the conditions under REJ 1922. No 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 [JW13]:** 1.5 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 and whilst waiting for order ask Court to appoint provisional Liquidation under section 170 if assets at risk of dissipation.

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's enforcement rights:

- Section 446 of the Insolvency Act allows for foreign creditors with a right for 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. Therefore, Abbeydale Limited may apply for the winding up of Dendoncker Limited in the BVI, even though it is an English incorporated company.
- For this occur (as an unsecured creditor) and pursuant to section 296(1) of the Insolvency Act, Abbeydale Limited's application will satisfy the requirements that a.) there is a liability that exceeds US\$2,000 and b.) the total liability of USD 12,000,000 is due for payment immediately, as the loan agreement has been dishonoured.

Similar to question 4.1, Abbeydale Limited can look to obtain a judgement for the loaned amount of USD 12,000,000 from an English High Court to have it enforced in the BVI by way of the 1922 Act on the basis that the debtor, Dendoncker Limited, has assets in the BVI (property on Necker Island), that can be enforced on. Once Abbeydale Limited has obtained the judgement from the English High Court and recognised by the 1922 Act, it will be treated as being in full effect as if it were a BVI judgement. The remedies that are then available to Abbeydale Limited include the use of a receiver to sell the property in order to pay back the outstanding amount.

**\* End of Assessment \***

**Commented [JW14]:** Section 446 is not in force

**Commented [JW15]:** Under section 162 IA2003 - should serve a statutory demand first and if not paid then wind it up.

**Commented [JW16]:** Dendoncker is a BVI company

**Commented [JW17]:** This is a bankruptcy section not for liquidation which is found in insolvency rule 149.