



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.

The circumstances in which a voluntary liquidator can be appointed over a company are set out in section 197(1) of the Business Companies Act 2004 (“BCA”), in that, a company can only be liquidated under Part XII of the BCA if

- It has no liabilities; or
- It is able to pay its debts as they fall due, and the value of the assets is equal or exceeds its liabilities.

It is noted that a company may also be put into voluntary liquidation even if a security interest is registered with the BVI Registrar of Companies. The primary purpose for this process is to deal with the assets or pay any liabilities (if there are any) in order to dissolve a solvent company.

Question 2.2 [maximum 2 marks]

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

In a situation where a liquidator is appointed to a BVI incorporated company by the Court, an officer of that company is deemed to have committed an offence if, at any time during the period of 12 months before the commencement of the liquidation, he/she has:

- Has misapplied or retained, or become accountable (made any gift or transfer) for any money or other assets of the company; or
- Has concealed or removed any of the company’s assets (or guilty of any misfeasance or breach of his/her fiduciary duty to the company) within 60 days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.

The relevant legislation for this guidance is found in the BVI Insolvency Act in Part IX – Malpractice (section 254).

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 powers provided to the BVI Court to make orders in aid of foreign insolvency proceedings are captured in Part XIX of the Insolvency Act. The BVI Court can recognise foreign insolvency proceedings and support a foreign representative (which is a person/body authorised in a foreign proceeding to administer the liquidation of the debtor’s property or affairs, or to act as a representative of the foreign proceeding). The power to make these orders, granted to the BVI Court, extends to the following countries:

- USA;
- United Kingdom;
- New Zealand;
- Jersey;
- Japan;
- Hong Kong;

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 - section 289 not stated and exceptions under subsection (2)

Commented [JW4]: 2 marks

- Canada; and
- Australia.

Subject to section 468 of the Insolvency Act, the powers granted to the BVI Court are wide with respect to the orders that can be made. The Court may:

- Restrain the commencement or continuation of any proceedings against a debtor or his property;
- Restrain the exercise or enforcement of any right or remedy over or against any of the debtor's property;
- Requiring any person to deliver up any property (or its proceeds) of the debtor;
- Facilitate arrangements resulting in cooperation of a BVI insolvency proceeding with that of a foreign proceeding;
- Appoint an interim receiver of the debtor's property;
- Authorise the examination of the debtor or relevant parties by the foreign representative; and
- Staying or making any other order it deems appropriate in relation to the BVI insolvency proceeding.

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.

A company is considered insolvent in the BVI pursuant to Part VIII of the Insolvency Act with other important definitions set out in section 8 of the Insolvency Act. An insolvent liquidation is defined as a liquidation of a company where the assets of the company are insufficient to pay its liabilities and the expenses of the liquidation.

The BVI Court has discretion to find a company insolvent and appoint a liquidator. The Court follows the following guidelines and tests to do so:

- If it is proved to the Court that a company cannot pay its debts as they fall due. The Court relies on the English case *Cornhill Insurance Plc v Improvement Services Limited* which sets out that an inability to pay a debt that is due and undisputed is evidence of insolvency.
- If it is proved to the Court that the value of the company's liabilities exceeds the value of its assets, also referred to as "balance sheet insolvency". The definition of a liability is set out in sections 10(1) and 10(2) of the Insolvency Act.
- If a company cannot prove to the court that it has executed a judgment or order of the BVI Court in its creditor's favour.
- If a company fails to comply with the terms of a statutory demand and it is not successfully set aside under sections 156-157 of the Insolvency Act. The format of a statutory demand is set out under section 156 of the Insolvency Act. A statutory demand must be made in an application to the BVI Court and the Court can test whether a dispute of the debt is genuine with the decision made in the case *Sparkasse Bregenz Bank v Associated Capital Corporation*.

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 - termination does not always mean company is dissolved.

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

The provisions contained in section 232 of the Insolvency Act govern the termination of a liquidation. The provisions are set out as follows:

- A BVI Court's order terminating the liquidation under section 233 of the Insolvency Act;
- A liquidator's filing of a certificate of compliance (with provisions set out in 234 including that a final liquidator's report along with a summary of the grounds upon a creditor or shareholder may object to striking off the Company from the Registrar is sent to all admitted creditors and members of the company and also filed with the Registrar.); or
- A BVI Court's order exempting the liquidator from having to file a certificate of compliance or send his final report to all known creditors.

It is noted that the liquidation of the company is terminated on the date of whichever of the above actions occur first.

Pursuant to section 233 of the Insolvency Act, the BVI Court may make an order terminating the liquidation at any time after the appointment of a liquidator, if the BVI Court is satisfied that it is just and equitable to do so. An application to terminate the liquidation can be made by:

- The liquidator;
- A creditor;
- A director;
- A member; or
- The Official Receiver.

Once the liquidation is completed and terminated, the liquidator has filed his final report, and the liquidator has been released (by application to the Court), the liquidator will write to the Registrar or the FSC to request that the company is dissolved.

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?

An individual resident living overseas and outside of the BVI can be appointed to act as an insolvency practitioner in relation to a BVI company under section 483 of the Insolvency Act. A creditor may consider the appointment of an overseas insolvency practitioner if a company's assets are substantially situated outside of the BVI jurisdiction. Practically, the costs of a liquidation (including travel and engaging local expertise) are reduced if there is an overseas insolvency practitioner appointed. In addition, the requirement to be licenced in the BVI does not apply to an overseas insolvency practitioner who is acting jointly with the Official Receiver or a licensee.

The requirements governing the appointment of an overseas insolvency practitioner are set out in section 483 of the Insolvency Act. The process of appointing an overseas insolvency practitioner starts with the requirement that he must be appointed jointly with a BVI licenced insolvency practitioner, or the Official Receiver (an employee of the FSC) and prior written notice of this intended appointment must be provided to the FSC. It is the FSC which has the power to object or be otherwise heard at the court in relation to the appointment. The overseas insolvency practitioner would typically write to the FSC and provide their expertise and qualifications and then wait for confirmation by the FSC before applying to the Court. In addition, an overseas insolvency practitioner must have sufficient qualifications and not be disqualified from holding a licence under section 477 of the Insolvency Act, among other requirements.

Question 3.3 [maximum 5 marks]

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

It is noted that secured creditors are not classed as creditors "strictly speaking" or considered as participating in the insolvency process. A secured creditor's claim is made directly against the assets of the company, which are subject to the security, so they are viewed as outside of the liquidation. In the BVI, there are no timelines for enforcing a secured claim, but rather, it is up to the secured creditor to determine when to sell the security interest for the best return. Several forms of security interests in the BVI granted over property are listed below:

- Legal mortgages;
- Equitable charges
- Floating charges;
- Mortgages or charges over shares in a BVI Company; and
- Pledges.

In relation to a charge held over shares in a BVI Company which has undergone an event of default, the holder of this charge can foreclose on the shares, sell the shares, or appoint a receiver over the shares. In the BVI, a simple deposit of share certificates does not amount to an equitable mortgage.

If a secured creditor properly discloses his security interest, and makes a statutory demand on application to the BVI court (the provisions of such are set out in section 157 of the Insolvency Act), the Court has the power to make a bankruptcy order and appoint an eligible insolvency practitioner or the Official Receiver over the bankrupt debtor.

A secured creditor can make a claim into the insolvency estate of a BVI company under section 338 of the Insolvency Act. Pursuant to section 211 of the Insolvency Act, the secured creditor can value the assets subject to the security as the secured claim and then claim in the liquidation for the remainder of the debt as an unsecured creditor. Alternatively, the creditor can surrender their security interest to the appointed bankruptcy trustee for the benefit of all creditors, then make an unsecured creditor claim for the whole amount of the debt. The Insolvency Act does not impose either of these options on the secured creditor who can remain outside of the liquidation process if he/she wishes.

It is noted that there is no express protection for the rights of secured or preferential creditors in relation to schemes of arrangement in the BVI.

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?

Commented [JW8]: 3 marks - Not just liquidation - protection also in creditors arrangement/bankruptcy. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/s142

Commented [JW9]: Not an Insolvency Act procedure

Commented [JW10]: 3 marks - did not list the conditions under REJ 1922, Claim was more than 12 months but question does not state when judgment awarded and Expat did not attend hearing so not registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA2003

A foreign judgment debt in the BVI is governed by the Reciprocal of Judgments Act 1922. Practically, a judgment is only enforceable and effective in the BVI based on the assets the judgment debtor has in the BVI. Pinforth Holdings Limited (“Pinforth”) should make sure that Expat Properties identifies all of its assets held in the BVI.

In order to enforce its foreign judgment debt, Pinforth will first need to make sure that it is registered properly. Pinforth will need to apply to the BVI court under CPR Part 72 with an application that contains prescribed information, a duly authenticated copy of the judgment and details of any interest that has become due under English law (where the judgment has been entered). The foreign judgment is registrable within 12 months of the date of the judgment, although, an application could be made to the BVI Court in request for a longer period. Given that it was awarded a specific monetary sum, Pinforth could apply for summary judgment.

Notably, Pinforth does not necessarily need to apply to register a foreign judgment to enforce their debt, as Pinforth could utilise the procedures set out under the Insolvency Act instead, given that the BVI is considered to be an international financial centre and foreign creditors have a right of direct access with the same rights as BVI creditors.

Various options are available to Pinforth with regards to remedies of enforcing their judgment including a charging order, a garnishee order, a judgment summons, an order for seizure and sale of goods, and the appointment of a receiver.

If the debtor does not take practical and reasonable steps to pay the judgment awarded to Pinforth, Pinforth may need to consider submitting an application to the BVI court to place the debtor into liquidation. If the judgment was registered properly, and because the 1922 Act extends to judgments given in the English High Court, it will be enforceable in the BVI and will be considered an unpaid liability on the books of the debtor payable to the creditor immediately, based on the assets the debtor holds in the BVI.

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?

As stated in section 446 of the Insolvency Act, foreign creditors (such as Abbeydale) have the right of direct access meaning that they have the same rights to commence and duly participate in a BVI insolvency proceeding as a creditor in the BVI. As such, Abbeydale could apply to place Dendoncker into liquidation in the BVI. Abbeydale would most likely serve a statutory demand on Dendoncker, which would need to be made by Abbeydale in the format required under section 156 of the Insolvency Act.

However, if Dendoncker was to be placed into liquidation in the BVI, Abbeydale would become an unsecured creditor of Dendoncker’s liquidation estate and be affected by the *pari passu*

Commented [JW11]: 4.5 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 - provisional Liquidation under 170 if assets at risk of dissipation.

principle meaning that Abbeydale's US\$12 million claim would be ranked at the same level of priority as any other unsecured creditor of Dendocker. It is noted that the Insolvency Act specifically recognises and protects the rights of secured creditors to enforce their security, therefore, Abbeydale should check with their counsel and understand whether they have security over the property and if the security was registered properly.

In this scenario, Dendocker would most likely be considered insolvent if a BVI judge were to determine that the value of its liabilities exceeds the value of its assets, and that Dendocker failed to make any repayments on the Abbeydale loan in full or in part. Abbeydale would need to prove to the BVI court that Dendocker was unable to pay its debts as they fall due, which as a question of fact, would most likely be proved in this scenario. The BVI court determines the insolvency of a debtor using discretion, and as mentioned above, a statutory demand written in the format required by 156 of the Insolvency Act which went unpaid within 21 days of the service of the statutory demand would accomplish this task.

In addition, the BVI Court has a breadth of powers in relation to the orders that can be made if Abbeydale was able to bring a proceeding that the BVI Court were to label as a "foreign proceeding", which extends to the English courts. Abbeydale would need to bring an insolvency proceeding against Dendocker in England and apply for recognition in the BVI, as England is one of the designated jurisdictions where the BVI Court can provide assistance to foreign representatives by way of an order. For instance, one of these powers include the ability for a BVI Court to make an order requiring a debtor to hand over their property (or the proceeds of a sale of such property).

If Abbeydale were to receive a judgment to enforce upon property in the BVI, the recognition of such judgments would be governed by the Reciprocal Enforcement of Judgments Act (Cap 65) 1922, as well as the common law. The 1922 Act extends to the High Court of England Wales and Northern Ireland. It is noted that if the judgment was on behalf of the property itself, the position would be more complex as the judgment is not for a specified sum of money.

*** End of Assessment ***