



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]: 9 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.

Commented [JW2]: Incorrect answer

Commented [JW3]: Correct answer

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.

[Accordingly, to section 199(1) of the Business Companies Act 2004, a voluntary liquidator may be appointed over the Company (i) by resolution of the directors of such company, undergoing voluntary liquidation; or (b) by a resolution of the members (the requirements for such resolution are foreseen in section 199(2)-(4) of the Business Companies Act 2004.)

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.

[An officer would be considered as having committed an offence pursuant to the fraudulent conduct provisions if at any time while in the job, or during the period of 12 months proceeding the commencement of the liquidation, the officer has: (i) 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 (ii) has concealed or removed any of the company's asset since, or within, sixty days of the date of any unsatisfied judgment or order for the 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 foresees what are the powers of the BVI Court to make orders in aid of foreign proceedings and foreign representatives, and such legislation foresees that the BVI Court has powers in the following orders that could be made: (i) restraining the commencement or continuation of any proceedings against a debtor or its assets; (ii) restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's assets; (iii) requiring any person to deliver up any property of the debtor or the proceeds of such property; (iv) ordering or granting relief to facilitate, approve or implement arrangements that will result in a co-ordination of BVI insolvency proceeding with a foreign proceeding; (v) appointing an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate; (vi) authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding; and lastly (vii) staying or terminating or making any other order it considers appropriate in relation to the BVI insolvency proceeding.]

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.

Commented [JW4]: 1 mark - also required the circumstances s.199 subsection (2)

Commented [JW5]: 1 mark - did not mention section 289 IA2003 and no exceptions

Commented [JW6]: 1.5 marks - Section 467 IA 2003

Commented [JW7]: 3.5 marks - Section 8 IA 2003 defines meaning of insolvent.

[Accordingly to Part VIII of the Insolvency Act, the circumstance in which a company will be considered insolvent are that is proven, by the Court, that the company is unable to pay its debts and they fall due, it is proven that the company's liabilities exceeds the value of its assets, the company fails to satisfy execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company and, if the company fails to comply with the terms of a statutory demand and it is not successfully set aside under sections 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.

[Firstly, the liquidator is required, under section 234(2) to prepare a final report as soon as possible, after completing his duties before the company that was undergoing the liquidation proceeding.

A copy of such final report, elaborated by the liquidator, must also be filled before the Registrar (additionally to filling before the court). The liquidator is also empowered to make an application before the Court to exempt the liquidator from compliance with the requirement to send his final report to all known creditors or modify the entire provision with regard to a final report,

Additionally (and finally), according to section 235 of the Insolvency Act, the liquidator can apply for their release when their appointment ends – such release means that the liquidator is discharged from all liability in respect of any act or default in relation to his administration of the company.]

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 for an overseas insolvency practitioner to be appointed as liquidator of a BVI company, but only as a joint appointment along side with a BVI licenced insolvency practitioner or the Official Receiver. In order

to be appointed, it is necessary to give a written notice, to the FSC, that such appointment is intended (usually the foreign insolvency practitioner writes a letter to the FSC with the details of such appointment).

As for in which circumstances such appointment would take place, taking into account that more often than not the assets of a BVI company are situated outside BVI, it is helpful for an insolvency practitioner from the jurisdiction in which the assets are located to be appointed – it also reduces the cost of traveling and further costs related to local expertise.]

Commented [JW8]: 2.5 marks - final report must contain statement of realisations and distributions and be sent to every admitted creditor and member. No mention of section 207A -208 BCA 2004 for voluntary liquidation

Commented [JW9]: 3 marks - section 483 IA 2003, appointed by Court, conditions of approval/appointment

Question 3.3 [maximum 5 marks]

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

[Firstly, it is important to highlight that secured creditors are the one that hold claims directly against the assets of the company, which are subject to the security, therefore, falling outside of the scope of the liquidation – not existing a timeline for enforcing a secured claim against the debtor/company, and it's up to the creditor to determine when and when to take control of the security interest and when to sell it for the best return.]

The secured creditor is not obligated to make a claim in the bankruptcy proceeding of the company (but in case they want to do so, they are able to do it under section 338 of the Insolvency Act). In order to make a claim the creditor must value the assets subject to the security and claim as an unsecured creditor for the remainder of the debt as an unsecured creditor.

Alternatively, the creditor is allowed to surrender their security interest to the trustee for the benefit of all creditors and claim as an unsecured creditor for the whole 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?

[Firstly, it is important to highlight that the Reciprocal Enforcement of Judgments Act 1922 allows extends its understanding/provision of recognition of foreign proceeding to judgments given in the High Court of England Wales and Northern Ireland, reason why the sentence can be enforced in the BVI jurisdiction.]

That being said, Pinforth Holdings should duly register the sentence before de BVI Court (remembering to take into consideration the deadline of 12 months of the date of the judgment, unless BVI court grants a longer period on the basis that it is just and convenient to do so).

After the judgment is duly registered, the judgment is treated with the same force as if it had been made by the Courts of BVI, and, therefore, Pinforth Holdings has the same privileges/proceedings available as if the sentence was originated in the BVI jurisdiction.

The remedies that are available for Pinforth Holding to enforce its foreign judgment debt are (a) a charging order; (b) garnishee order; (c) a judgment summons; (d) an order for seizure and sale of goods; and € the appointment of a receiver.]

Commented [JW10]: 2 marks Not just bankruptcy under 311 - protection also in creditors arrangement section 15/liquidation section 175/section 467. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/s142

Commented [JW11]: 2.5 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. 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/statutory demand then liquidation under section 162 IA2003

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 foreseen under Part XII of the Insolvency Act, Abbeydale Limited could file a request to commence a bankruptcy proceeding against Dendoncker Limited that, once commenced by the court would have to follow the necessary/legal proceeding to determine the seizure of Dendoncker Limited's assets, selling, and payment of all Dendoncker Limited's creditors, including the credit originated from the loan agreement entered into with Abbeydale Limited.

It is important to highlight that, according to section 296(1), Abbeydale Limited must prove that the amount of its liability (that in this case is a minimum of USD 12,000,00) once the liability has to exceed USD 2,000 and that the liability is for a liquidated sum payable to the applicant creditor immediately.]

*** End of Assessment ***

Commented [JW12]: 1 mark - 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 296 relates to bankruptcy (individuals not corporate entities). The equivalent for a corporate entity is Insolvency Rule 149.