



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5B
BRITISH VIRGIN ISLANDS (BVI)

This is the **summative (formal) assessment** for **Module 5B** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 5B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment5B]**. An example would be something along the following lines: 202122-336.assessment5B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **7 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [JW1]: 8 marks

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

When is the appointment of a liquidator **deemed to commence**, when there has been a qualifying resolution passed to appoint a liquidator?

- (a) On the date of the order appointing the liquidator.
- (b) On the date the qualifying resolution is passed.**
- (c) On the filing of the application to appoint a liquidator.
- (d) On the advertisement of the application to appoint a liquidator.

Question 1.2

In order to comply with section 156 of the Insolvency Act, **what timeframe** for payment of the debt (or to secure or compound for the debt), must a statutory demand require?

- (a) Within 14 days of the service of the statutory demand.**
- (b) Within 21 days of the date of the statutory demand.
- (c) Within 21 days of the service of the statutory demand.**
- (d) Within 14 days of the date of the statutory demand.

Commented [JW2]: incorrect

Commented [JW3]: Correct answer

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.

Commented [JW4]: incorrect

Commented [JW5]: Correct answer

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.

- Upon the expiration of the Company's fixed term, as defined in its memorandum or articles (e.g. per the Company's articles it had a fixed term of ten years after which it was to be dissolved);
- Upon the occurrence of an event that is specified as an event that shall terminate the Company's existence, as defined in the Company's memorandum or articles (e.g. sale of the Company's sole asset);
- If a Company limited by shares has never issued any shares; and

Commented [JW6]: 1.5 marks -subsection (d) is missing

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.

Fraudulent conduct is defined in section 289 (Division 4 – Offence Provisions, of the BVI insolvency act) and per section 289 an officer of the company would be deemed to have committed an offence pursuant to the fraudulent conduct provisions if they have performed the following within the period of twelve months prior to the commencement of the liquidation:

- Made or directed/caused to be made and gift, transfer of or charge on the company's assets; and
- Has concealed or removed any of the company's assets since or within 60 days of the date of any unsatisfied judgement or order for payment of money obtained against the company.

Commented [JW7]: 1.5 marks - the exceptions under subsection (2) are missing

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?

In accordance with Part XIX, section 467 of the Insolvency Act upon an application the Court may (subject to section 468):

- Restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;
- Restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property (subject to subsection 4 of section 467);
- Require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
- make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;
- appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate

Commented [JW8]: 2 marks

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 I section 8 of the Insolvency Act, a company is considered insolvent in the BVI in the following circumstances:

- It is proved (to the satisfaction of the Court) that the company is unable to pay its debts as they fall due (a question of fact);
- The value of the company's liabilities exceeds its assets ("balance sheet insolvency");
- It fails to comply with the requirements of a statutory demand that has not been set aside under sections 156 and 157 of the Insolvency Act;
- execution or other process issued on a judgment, decree or order of a BVI court in favour of a creditor of the company is returned wholly or partly unsatisfied

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.

In accordance with Part VI, section 234 of the Insolvency Act once a liquidator has completed their duties they shall prepare a final report which shall contain the following, per subsection 3 of section 234:

- A statement that all known assets of the company have been disclaimed, realised or distributed without realisation;
- A statement that all proceeds of realisation have been distributed; and
- A statement that there is no reason why, in the liquidators opinion the company should not be struck from the Register and dissolved.

In addition, the final report should contain a statement of realisations and distributions in respect of the liquidation. The final report should be sent to every creditor whose claim was admitted in the liquidation and to every member 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?

In accordance with Part XX, section 483 of the Insolvency Act an individual resident outside of the BVI can be appointed to act as an insolvency practitioner jointly with a licensee or the Official Receiver if the Court is satisfied that:

- He or she has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;
- He or she has given his or her written consent to act in the prescribed form;

Commented [JW9]: 4 marks

Commented [JW10]: 3 marks Termination is covered in 232-235. No mention of BCA 2004 - sections 207A&208 termination for voluntary liquidation

Commented [JW11]: 5 marks

- He or she is not disqualified from holding a licence under section 477;
- He or she is not disqualified from acting in the case of a company or a foreign company, under subsection 482(2) or in the case of an individual, under subsection 482(3);
- There is in force such security for the proper performance of his or her functions as may be specified in the Regulations.

In addition, prior written notice of the proposed appointment must be provided to the Financial Services Commission ("FSC"). In practice the foreign insolvency practitioner will often write to the FSC providing the required details such as details concerning their expertise and qualifications and await confirmation from the FSC that they approve of the appointment (subject to the Court's approval).

Given that a number of BVI registered company's act as holding companies and the nature of the local BVI economy it is common that a BVI registered company's assets are not located in the BVI itself but are in other jurisdictions. Therefore, a creditor may consider the appointment of a foreign insolvency practitioner who is located in the jurisdiction of the companies assets as whilst this incurs additional costs in respect of the foreign practitioners remuneration and expenses it can significantly reduce other costs such as travel and mean that local specialists are not required in said jurisdiction. This would be very applicable in liquidations that are anticipated to run for a number of years and involve potential disputes in other jurisdictions.

Question 3.3 [maximum 5 marks]

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

Per Part VI, section 175 of the Insolvency Act, the right of a secured creditor to take possession of and realise or otherwise deal with the assets of the company for which it has a security interest are not affected by the company entering liquidation.

Per the Insolvency Act secured creditors are not technically classed as creditors or considered as participating in the insolvency process. In addition, there are no timelines for the secured creditor to enforce their secured claim and it is up to the secured creditor as to when they take control of the security interest and when to sell it for the best return.

In accordance with section 213 of the Insolvency Act where a secured creditor realises their security interest and there is a surplus remaining from the net amount realised after the secured creditors debt has been satisfied they shall account to the liquidator for the surplus.

Although secured creditors are not obliged to make a claim in bankruptcy proceedings, they are able to do so under section 338 of the Insolvency Act. To make a claim the secured creditor must value the assets subject to the security and claim for the remainder of the debt as an unsecured creditor. Alternatively, a secured creditor can surrender their security interest to the trustee for the benefit of all creditors and claim as an unsecured creditor for their entire debt.

In respect of a company creditors arrangement, unless a secured creditor agrees in writing to the contrary a CCA doesn't affect the right of a secured creditor to enforce their security interest.

Finally, orders made by the BVI Court under section 476 of the Insolvency Act do not affect the rights of any secured creditors to deal with property over which they have a security interest.

Commented [JW12]: 4 marks - protection also in bankruptcy section 311. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/s142

Commented [JW13]: Section 467

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?

As Pinforth were awarded a final and definitive monetary amount it is applicable with the definition of a "judgment" per 1922 Act and therefore can be enforced in the BVI. In addition, the 1922 Act extends to judgements obtained from the High Court of England (in addition to a number of others) therefore, Pinforth's judgement has been obtained from a Court recognised under the 1922 Act.

Should Pinforth choose to register the judgement with the BVI Court the judgement would be treated from the date of registration as being of the same force and effect as if that judgement had been made in the BVI. Therefore, Pinforth would have the same remedies as available under the CPR, pursuant to CPR 45.2 the remedy for an order for the seizure or sale of goods and the appointment of a receiver would be available. Given Expat Properties has significant assets in the BVI Pinforth could look to seize these assets or appoint a receiver over Expat Properties to take control of the assets to prevent potential dissipation and the receiver could then proceed to sell Expat Properties assets as needed to satisfy Pinforth's judgement.

In order to register the judgement Pinforth would be required to apply to the Court under CPR Part 72 and the application must contain prescribed information including a duly authenticated copy of the judgment and details of any interest that has become due under the law of the country in which the judgement was entered (in this case, England). The application could be made by Pinforth without giving notice to Expat Properties.

However, given that Expat Properties did not attend the hearing there is the possibility that the BVI Court would not order the judgement to be registered if it was the case that Expat Properties had not been duly served with the process of the original court. This information is not provided in the background but assuming that Expat Properties were duly served their failure to appear at the proceedings in the English High Court would not preclude the order from being registered by the BVI court.

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.

Commented [JW14]: 3 marks - All of REJ 1922 conditions not listed. Claim was more than 12 months but question does not state when judgment awarded but 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

Commented [JW15]: Question specifically wanted you to mainly discuss REJ 1922

Commented [JW16]: 6 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.

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 Ltd can apply to the Court for the appointment for a liquidator to be appointed over Dendoncker pursuant to section 162 of the Insolvency Act. The Court may appoint a liquidator over Dendoncker if the company is insolvent (however not enough information has been provided in the question to determine whether Dendoncker is insolvent). Alternatively, Abbeydale could apply to the Court for the appointment of a liquidator on just and equitable grounds. As a creditor of Dendoncker, Abbeydale would have standing to apply to the Court for the appointment of a liquidator to be appointed over Dendoncker.

Prior to filing their application Abbeydale should ensure that the demand served on Dendoncker is compliant with the format required by section 155 of the Insolvency Act.

Were Abbeydale Ltd to file an application to the Court for the appointment of the liquidator they could also apply for the appointment of a provisional liquidator in the intervening period between their application being filed and ultimately determined by the Court, pursuant to section 170 of the Insolvency Act. The court may appoint a provisional liquidator if the Court is satisfied that the appointment is necessary for the purpose of maintaining the value of assets owned or managed by the company. This could be applicable in this scenario if there was a risk that Dendoncker may dispose of or transfer legal title of the property purchased with the loan proceeds.

Alternatively, were the jurisdiction of the underlying loan agreement to be England Abbeydale could seek to obtain a judgement from the English high court which it could then seek to have recognised by the BVI court.

Abbeydale could also apply to the BVI Court for the appointment of a receiver, in particular should there be concerns regarding the potential dissipation of assets by Dendoncker. In addition, a receiver may be more appropriate if the outstanding loan balance represents a small portion of Dendoncker's liabilities and does not impede its ability to continue as a going concern as opposed to the entire company being liquidated which may cause harm to other creditors of Dendoncker.

A receiver has the powers expressly or impliedly conferred on him or her, for example should the property purchased by Dendoncker using the loan proceeds be anticipated to be sufficient to repay the outstanding loan and accrued interest a receiver could be given powers limited to selling said property and returning the proceeds to repay Abbeydale's loan, thus not impairing Dendoncker's normal business operations.

*** End of Assessment ***