



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**.

Commented [DB1]: You did not follow this instruction?

ANSWER ALL THE QUESTIONS

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

Commented [JW2]: 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.

Voluntary liquidator who should be an “eligible person” is appointed when a company is put to Voluntary Liquidation, which is possible under Part XII of the BCA 2004 only when
(i) The company has no liabilities or (ii) the company is able to pay its debt as they fall due and the assets of the company are more than its liabilities.

Now to appoint a voluntary liquidator, the directors of the company has to make a declaration of solvency and approve a liquidation plan. As per BCA voluntary liquidator can be appointed by resolution of directors/members.

In case a Liquidator has already been appointed under the insolvency act then the voluntary liquidator cannot be appointed.

Commented [JW3]: 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.

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 of a company under liquidation is deemed to have committed fraudulent conduct if the officer has any time while being an officer of the company or during 12 months period preceding the commencement of liquidation has:-

- a) Made or cause to make a gift or transfer of or charge on or enabled levying of an execution on/against the assets of the company
- b) Has concealed or removed any of the company assets within 60 days of any unsatisfied judgement or order for the payment of money obtained against the company

However the officer is not guilty of fraudulent conduct in case the event occurred more than 5 years before the commencement of liquidation or the officer is able to prove that at time of the conduct he had no intention to defraud the company

Commented [JW4]: 1.5 marks - section 289 IA2003

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 BVI courts to make orders in respect to the foreign insolvency proceedings are enshrined in part XIX of the Insolvency Act. The BVI court through this can recognise certain foreign insolvency proceedings and provide assistance to foreign representatives.

The powers provided to BVI courts in this regard are:-

- a) Restraining the commencement or continuation of proceedings against a debtor or its assets
- b) Restraining the creation, enforcement and exercise of any rights or remedy over or against the debtors property

Commented [JW5]: 1.5 marks - Section 467

- c) Making a person to deliver back any property or proceeds of the property back to the debtor
- d) Granting relief so as to facilitate , approve or implement arrangement to coordinate BVI insolvency proceedings with the foreign proceedings
- e) Appointment of interim receiver of the property of debtor for the period deemed fit by the courts
- f) Authorising the examination of foreign representative of the debtor or of any person connected with the foreign proceedings
- g) Staying or terminating or making any order it deems fit in relation to BVI insolvency proceedings

Question 2.4 [maximum 4 marks]

Commented [JW6]: 3.5 marks - section 8 IA 2003

With reference to the relevant legislation, set out the circumstances in which a company will be considered insolvent in the BVI.

A company shall be deemed to insolvent in BVI if any of the following circumstances exist:-

- a) The company is unable to pay a debt as it falls due , if the debt is not disputable. As more elaborated in the English case of Cornhill Insurance Plc Vs Improvement Services Ltd.
- b) The liabilities of the company are more than its assets, this is also known as the "balance sheet test". All the liabilities as per section 10(1) of the Insolvency Act, of the nature (whether present or future. Certain or contingent etc) as per section 10(2) of the Insolvency Ac are considered for this test. However in case the liabilities are more than the assets for only a short period of time, then the company is not said to be insolvent (as more elaborated in the "Trade & Commerce Bank Vs Island Point Properties"
- c) The company fails to satisfy (wholly or partially) and execution decree, any judgement decree or any order of BVI courts in favor of the creditors
- d) The company fails to meet and satisfy the Statutory Demand in case the demand are not set aside within 21 days of the service as per section 156 and 157 of the insolvency act

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

Commented [JW7]: 2.5 marks - report has to be filed with Registrar. No mention of BCA 2004 sections 207A-208 for voluntary liquidation. 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. Termination does not always mean company is struck off or dissolved.

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

The Liquidation of a company is terminated when:-

- A) The court on an application of liquidator ,creditor , director, official receiver makes an order for termination of the liquidation
- B) When the liquidator under Section 234(2) of the Insolvency Act files his report/certificate of compliance before the court, the court may by an order exempt the liquidator from filing the report/compliance certificate.

This final report of the liquidator is prepared after the liquidator has completed all his duties pertaining to the liquidation process , which includes:-

- (i) To take possession of , protect and realize the assets of the company
- (ii) To distribute the proceeds of realization of the assets as per the waterfall mechanism as per the provisions of the Insolvency Act

- (iii) If there is any surplus after (ii) , then the same too be distributed as per the provisions of Insolvency Act

The final report so prepared shall be submitted by the liquidator to every admitted creditor and the member of the company. As per section 234(3) , the reports should contain some mandatory statements. The liquidator also has power to submit an application for exemption to file the final report with the court.

Also as per section 235, the liquidator too can file an application before the court to discharge him (liquidator) of all the liabilities that may arise due to any act done by the liquidator during the course of liquidation.

Once the liquidator has filed his final report and the liquidator is released and the liquidation terminated , the company is normally referred for dissolution (only if the company liquidation is terminated due to payment of the debt to the appointing creditor)

Commented [JW8]: With the Registrar

Commented [JW9]: Not correct

Question 3.2 [maximum 5 marks]

Commented [JW10]: 4 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?

Yes, it is possible to make an application to BVI courts to appoint an overseas insolvency practitioner in relation to BVI Company

Commented [JW11]: Along with a BVI licensed IP

- i) In most of the BVI companies, there is always a substantial/some part of its assets located overseas, therefore it is always helpful that an insolvency professional from the overseas jurisdiction wherein the overseas assets are located be appointed. This insolvency professional (called the overseas insolvency practitioner) though will add its own cost to the process, but the local expertise and saving of time with respect to travelling and communication achieved makes it worthwhile to appoint an overseas insolvency professional in relation to a BVI company.

- ii) The appointment of overseas insolvency professional is done under section 483 of the Insolvency Act. To be appointed as overseas insolvency practitioner the foreign insolvency professional will first write to the FSC (Finance Service Commission) submitting his desire to act as overseas insolvency professional along with all his expertise and qualification credentials. Similarly FSC needs to be given a notice by the court appointing the overseas insolvency practitioner.

Commented [JW12]: Financial Services Commission

Commented [JW13]: FSC has the right to be heard if it objects

The FSC based on this submission by the foreign professional and notice from the Courts, may appear before the relevant court appointing the Overseas insolvency practitioner. The FSC can therein either consent or object to the appointment and in case the FSC gives is consent to the appointment , the court may appoint the foreign insolvency practitioner as the overseas insolvency practitioner.

Question 3.3 [maximum 5 marks]

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

Commented [JW14]: 0 mark - The protection in the Insolvency Framework - 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

Under the **BVI Insolvency framework** the following protections and options are provided to secured creditors:-

Commented [JW15]: Does not include the BCA 2004

1) Charge

Section 161(1) of BCA provides the BVI companies with an option to create charge over their assets by an instrument in writing. The law governing the charge to be agreed between the parties in section 161(2) of BCA whereby (a) no formalities such as notarizing the document is needed (b) No stamp duty is payable on creation of a charge.

Public registration of the charge is not mandatory, but only the charges registered publicly (not the private charge) determines the priority of the charge in BVI laws.

Section 162 and 163 of the BCA provides the provisions of the ways of registering the charges

2) Legal Mortgage

A legal mortgage is one in which the secured creditors are given a legal right in the asset, subject to the right to have the asset re-conveyed once the obligation of debt has been settled/repaid by the company (right of redemption). In case of default the holder of the legal mortgage can (a) Foreclose (b) Sell (c) appoint a receiver

3) Equitable Mortgage

This provided the secured creditor with a power to sell the assets which have been charged upon. This security prevents the charger (the company) from disposing of the assets.

4) Floating Charge

Floating charge is provided on all the assets/an asset class of the company on a continuous basis (and not restricted to a particular asset), thereby allowing the company to keep selling the assets in a normal course of business and yet the charge remains broadly on the entire asset. The charge is not fixed or limited on a particular asset. Example – Inventory of the company/ Receivable and Book Debt of the company

5) Mortgages and Security over the shares in a BVI Company

Under section 66 of BCA the shares of a BVI company can be mortgaged to a lender by creation of a charge (a) In writing by the holder (or its authority) of the shares (b) clearly indicating the creation of charge (c) amount secured against the mortgage. A mere deposit of the shares certificate will not give effect of the charge

6) Pledge

In this form of security the secured creditor is given power of sale over the physical assets of the Company (the shares of the BVI company cannot be pledged). The pledge does not confer rights to appoint a liquidator or foreclose

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.

Commented [JW16]: 4 marks - No reasoning as to whether its registrable as judgment. 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.

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?

In the present case, Pinforth by virtue of the judgement award of USD 4.5 Million becomes a judgement debtor for Expat. To get enforced the foreign judgement debt, Pinforth has the following two options:-

1) Enforcement through Reciprocal Enforcement of Judgements Act 1922.

As per the Reciprocal Enforcement of Judgements Act 1922 judgements given by the courts of England, Wales, Northern Ireland, Scotland and 9-10 more overseas jurisdiction (all of which were part of the commonwealth) can be recognised by the courts of BVI as foreign judgements.

The judgement so recognised should be :-

- a) Given by a court in a civil proceeding whereby any sum of money is payable, therefore only judgements for final and conclusive monetary sums can be enforced
- b) The enforcement of the foreign judgement is only effective when the judgement debtor has any assets in BVI
- c) The foreign judgement should be registered within 12 months of the date of judgment (however this time can be extended by the BVI courts)
- d) Once foreign judgements are registered they are treated with same force and effect of judgment as if judgement was made by BVI courts.

In the present case, the award judgment given by the English courts fulfils the basic criteria (judgement being of English Court) and also (a) and (b) above, so the first step to be taken by Pinforth is to get the award judgement registered within 12 months of the date of judgement by an application to the courts under CPR Part 72.

The only defence that Expat Properties may give in order to not let the award judgement be recognised is that Expat will be :-

- (i) That Expat was not carrying out any business in England
- (ii) That Expat has not appeared before the English Court

Based on these defence it will try to not let the judgement be recognised by BVI courts

However, if the award judgement is recognised by the BVI courts then pursuant to CPR 45.2, **a Receiver can be appointed on the assets of the company EXPAT.**

2) Initiation of Liquidation under Insolvency Act of BVI

The Receiver so appointed can be converted into a Liquidator in case the company EXPAT is unable to honour and clear the judgement debt. Once the liquidator is appointed then the judgement debt can be recovered

3) Initiation of Insolvency proceedings in England and recognition of the same in BVI

In case the BVI courts do not recognise the judgement award considering the defence of EXPAT then in that case PINFORTH may get an insolvency proceeding initiated against EXPAT in England and once initiated, the insolvency proceeding so initiated in England can be recognised as foreign proceedings in BVI courts with English Jurisdiction, thereby ringfencing the assets of EXPAT in BVI, ultimately leading to enforcement of the judgement award and recovering the judgement debt.

Question 4.2 [maximum 9 marks]

Commented [JW17]: 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 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?

In the present case, following facts are important:-

- a) Abbeydale is incorporated in England, Dendoncker in BVI
- b) Abbeydale is a secured creditor and the asset so mortgaged (purchased) are in BVI

The options before Abbeydale to enforce the debt owed to it are as under:-

1) Right to Commence Insolvency in BVI Courts

As per section 446 of the Insolvency Act, foreign creditors are provided a "right of direct access" to BVI courts to commence Insolvency proceedings as creditors in BVI. Therefore Abbeydale will have to file an application for initiation of Liquidation proceedings before the BVI court as "Secured Creditors" under the procedure as per Part-VII of the Insolvency Act. Once a liquidator is appointed under the Insolvency Act, the debt owed can be enforced

Commented [JW18]: Section 446 is not in force

2) Concurrent insolvency Proceedings

Abbeydale can initiate insolvency proceedings in England and get appointed a liquidator in England. Once a liquidator is appointed in England a Liquidator too can be appointed in BVI over the assets of the Dendoncker assets in BVI. Since Dendoncker is incorporated in BVI, the liquidator appointed in BVI will be the primary liquidator to liquidate Dendoncker and enforce the debt of Abbeydale.

*** End of Assessment ***