



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.

Where the company either has no liabilities, or is able to pay its debts as they fall due and the value of its assets is equal or exceeds its liabilities.

Commented [JW2]: ½ mark - Section 199 (1) & (2) (subject to section 200) of the BCA 2004 sets out all the circumstances in which a voluntary liquidator can be appointed.

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.

Per s289(1) of the Insolvency Act, an officer of the company would be deemed to have committed such an offence if, at any time while an officer, or during the 12 months preceding the commencement of the liquidation, they had:

- Made a 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
- Concealed or removed any of the company's assets since, or within 60 days prior to the date of any unsatisfied judgment or order for payment against the company

Per s289(2), there is a defence where the conduct took place more than five years prior to the liquidation; or where the officer can prove that, at the time of the conduct, he had no intent to defraud the company's creditors.

Commented [JW3]: 2 marks

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 gives the court powers to make orders in aid of foreign proceedings. These include recognising the foreign proceedings and assisting foreign representatives. These apply in relation to proceedings raised in certain designated countries. Per s467(5), the court can choose to apply the applicable BVI laws or the law of the relevant country.

The powers can include restraining commencement or continuation of any proceedings; requiring a person to deliver up any property of the debtor; or appointing an interim receiver – all as set out in s467(3).

Commented [JW4]: 1/2 mark - you should have listed the 8 powers under section 467

Question 2.4 [maximum 4 marks]

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

The circumstances are set out in section 8 of the Insolvency Act. These are:

- If it is proved to the satisfaction of the Court that a company is unable to pay its debts as they fall due (within the meaning of *Cornhill Insurance Plc v Improvement Services Limited*)

Commented [JW5]: 4 marks

- If it is proved to the satisfaction of the Court that the value of the company's liabilities exceeds that of its assets (liabilities are defined in s10(1) of the Insolvency Act and, per s10(2), they may be present or future, certain or contingent, fixed or liquidated). However, this must persist for more than a short period of time (per *Trade and Commerce Bank v Island Point Properties*);
- A company fails to satisfy execution or any other process issued on a judgment, decree or order of the BVI court in favour of a creditor; or
- A company fails to comply with the terms of a statutory demand made under s156 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.

The termination of the liquidation is governed by s232 of the Insolvency Act. The court may make an order at any time if it is just and equitable to do so. However, in normal circumstances, the liquidator may bring the liquidation to an end by filing a certificate of compliance. This process is governed by s234(2) of the Insolvency Act. Under this section, the liquidator must prepare his final report as soon as practicable upon completing of his duties. The report must be sent to every admitted creditor and every member of the company, as well as a copy being filed with the Registrar. The report must include **certain statements**; these are set out in s234(3) of the Insolvency Act.

Once this has been done, the liquidator can apply for their release under s235; this discharges them from liability in respect of any act or default in relation to their administration of the company (subject to the court's ongoing power to make an order against them under s254 of the Insolvency Act).

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?

An individual resident outside of the BVI may be appointed to act as an insolvency practitioner, per s483 of the Insolvency Act. A creditor might consider such an appointment where the BVI company has assets in another jurisdiction; having a local insolvency practitioner can reduce travel costs and the expenses associated with obtaining advice from local experts.

The overseas IP must be appointed jointly with **a BVI IP**, or the Official Receiver. Prior written notice must be provided to the FSC, per s483, which has the power to appear and be heard at the court hearing to appoint, and may object to the appointment, per s484. In practice this usually means that the overseas IP sets out their credentials to the FSC and awaits confirmation that they approve the appointment, before moving to have the overseas IP appointed.

Question 3.3 [maximum 5 marks]

Commented [JW6]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation.

Commented [JW7]: You could have listed them

Commented [JW8]: 4 marks - no mention of requirement to be met for appointment

Commented [JW9]: BVI Licensed IP

Commented [JW10]: 1 mark - Protection in liquidation section 175 creditors arrangement section 15/bankruptcy section 311/section 467. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/s142

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

Broadly speaking, secured creditors are not considered as participating in the insolvency process – they are free to progress their own claims against the secured assets. The specific options available depend on the specific type of security which is held. Where the creditor holds a legal mortgage, for example, they may choose to either foreclose on the secured assets; sell the secured assets; or appoint a receiver over them. However, if a creditor holds a pledge (a type of security in which the creditor takes possession of the item being given as security) then they only have the right to sell the property, not foreclose or appoint a receiver.

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?

The first consideration is time – a foreign judgment is registrable within 12 months of the date of the judgment. In order to secure a longer period, the BVI court has determined that it is just and equitable to do so. If that time limit is met, the creditor must apply to the court for registration.

There is a potential risk in the present case, in that per section 3(2)(b) of the Reciprocal Enforcement of Judgments Act 1922, a judgment is not registrable if the debtor:

- Does not reside or carry on business in the jurisdiction of the court; and
- Does not voluntarily appear or otherwise submit to the jurisdiction of the court.

In the present case, Expat Properties is incorporated in the BVI and did not attend the court hearing. As such, unless it can be established that either it carried on business in England, or that it had somehow submitted to the jurisdiction of the High Court, there is a very real risk that the judgment will not be registrable.

Of course, it should be noted that registration of a judgment is not actually necessary in order to participate in the insolvency process. As such, unless Pinforth wishes to enforce by non-insolvency methods to enforce its debt the issues identified above are not fatal to that.

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

Commented [JW11]: 3 marks - Did not include all the conditions under REJ 1922. Claim was more than 12 months but does not state when judgment awarded but you picked up that Expat did not attend hearing so not likely to be registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA2003

Commented [JW12]: 3 marks - First issue to determine: A secured or unsecured creditor? If secured - does it have registered charge/ debenture/ legal charge/equitable charge - have to see the loan document. Options under IA2003: Receiver /Administrative Receiver / Out of Court Receiver. If unsecured creditor then: Breach of contract – damages and obtain judgment from English Court in its favour – may be delay and costly; or obtain judgment in English court – recognised in BVI Court under IA 2003; or serve statutory demand under s155 IA2003 and then if unpaid application to the Court for liquidation under Section 162 for appointment of liquidator by the Court - winding up will only be made if insolvent and whilst waiting for order ask Court to appoint provisional Liquidation under section 170 if assets at risk of dissipation

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?

Per s446 of the Insolvency Act, foreign creditors have the same rights regarding commencement of, and participation on, a BVI insolvency as creditors who are based in the BVI. As such, Abbeydale has the right to commence insolvency proceedings against Dendoncker. Per s162 of the Insolvency Act, a creditor may apply to the court for appointment of a liquidator.

Commented [JW13]: Section 446 is not in force

In order to do so, it must be established that D is insolvent. If the debt is not disputed, then following the case of *Cornhill Insurance Plc v Improvement Services Ltd* an unfulfilled demand to pay it would be sufficient to ground a petition on the basis that the debtor is unable to pay its debts as they fall due (per s8(1)(c)(ii) of the IA). Otherwise, A could arrange to have statutory demand served upon D, in terms of sections 156 and 157 of the Insolvency Act.

If the debt is disputed, the matter must be resolved by a court. Depending on the terms of the loan agreement, this could either be achieved by raising proceedings in the BVI or in England. If proceedings are raised in England, A would be required to have the judgment recognised in the BVI, upon which it would be able to attempt enforcement by other means than insolvency proceedings.

Alternatively, A could seek to appoint a receiver to D. This can be done by application to the court (per s115(2)(a) of the IA). Such a receiver would have a duty to act in the best interests of the person who appointed him (i.e. A).

*** End of Assessment ***