



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.

A voluntary liquidator may be appointed under Part XII, pursuant to section 199 of the BVI Business Companies Act 2004 (the BCA) by resolution of the directors or members of a company if

- (a) An administrator or liquidator of the company has not been appointed under the Insolvency Act 2003 (the Insolvency Act);
- (b) An application has not been made to the High Court to appoint an administrator or liquidator of the company under the Insolvency Act or the application has been dismissed;
- (c) The person to be appointed voluntary liquidator has consented in writing to his appointment;
- (d) The directors of the company have made a declaration of solvency, complying with section 198 of the BCA, no more than four weeks earlier than the date of the resolution to appoint a voluntary liquidator, stating in their opinion (i) the company is and will continue to be able to discharge debts as they fall due and (ii) the value of the company's assets equals or exceeds its liabilities and have attached a statement of the company's assets and liabilities as at the latest practical date before making the declaration;
- (e) The directors have approved a liquidation plan under section 198(1)(b) of the BCA no more than six weeks prior to the date of resolution to appoint a voluntary liquidator specifying (i) the reasons for the liquidation; (ii) their estimated time required to liquidate the company; (iii) whether the liquidator is authorised to carry on the business of the company if in the best interests of creditors or members; (iv) the name and address of the proposed liquidator and proposed remuneration; and (v) whether the liquidator is required to send all members a statement of account prepared in respect of actions or transactions; and
- (f) The Financial Services Commission has given its prior written consent under section 200 of the BCA to the company being put into voluntary liquidation and approve the appointment of the individual proposed as voluntary liquidator.

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.

Under section 289(1) of the Insolvency Act 2003 (the Insolvency Act), an officer of the company is deemed to have committed an offence if during the period of 12 months preceding the commencement of the liquidation, the officer has: (a) 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 (b) has concealed or removed any of the company's assets since or within sixty days of the date of any unsatisfied judgement or order for the payment of money obtained against the company.

The officer is not guilty of an offence under section 289 of the Insolvency Act if (a) by reason of conduct constituting an offence in relation to a gift, etc which occurred more than five years before the commencement of the liquidation; or (b) if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud the company's creditors.

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

Commented [JW3]: 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 2003 (Insolvency Act) contains the primary framework for the powers provided to the High Court to make orders in aid of foreign proceedings. Through this provision the High Court is able to recognise certain insolvency proceedings and provide assistance to foreign representatives.

Pursuant to section 468 of the Insolvency Act the Court shall be guided by what will best ensure the economic and expeditious administration of the foreign proceeding, however, shall not make an order under section 467 of the Insolvency Act that is contrary to the public policy of the Virgin Islands.

Commented [JW4]: 1/2 mark for the section number - the 8 powers needed to be listed

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.

Under section 8 of the Insolvency Act 2003, a company will be considered insolvent in the BVI in the following circumstances (i) it is proved to the satisfaction of the court that a company cannot pay its debts as they fall due; (ii) it is proved to the satisfaction of the court that the value of the company's liabilities exceeds the value of its assets (balance sheet insolvency); (iii) a company fails to satisfy (wholly or partly) execution or other process issued on a judgement, decree or order of the court in favour of a creditor of the company; (iv) a company fails to comply with the terms of a statutory demand and it is not successfully set aside under sections 156 and 157 the Insolvency Act 2003.

Commented [JW5]: 4 marks

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.

Under section 232 of the Insolvency Act 2003 (Insolvency Act), the liquidation of a company terminates on the first occurring of: (a) the Court making an order terminating the liquidation; (b) the liquidator filing a certificate of compliance, as he is required to do under section 234(2) of the Insolvency Act; or (c) the Court making an order exempting the liquidator from having to file a certificate of compliance.

Under s234(2) of the Insolvency Act, the liquidator is required to prepare their final report as soon as practicable after completing his duties. The report must be sent to every admitted creditor and every member of the company and filed with the Registrar. The certain statements required to be included in the final report are set out in section 234(3) of the Insolvency Act. The liquidator may make an application to the Court for an exemption from compliance with the requirement to send the final report to all known creditors or to modify the entire provision with regard to the final report.

Commented [JW6]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. Termination does not always mean company is struck off or dissolved.

The liquidator can apply for their release when their appointment ends pursuant to section 235 of the Insolvency Act. This will discharge the liquidator from all liability in respect of any act or default in relation to the administration of the company.

Section 236 of the Insolvency Act states that the Insolvency Rules, 2005 will provide for the dissolution of a company on termination and completion of liquidation. The termination of a liquidation may not mean a company should be dissolved, it should be assessed on a situation basis.

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 to make an application to the BVI Court for the appointment of an overseas insolvency practitioner of a BVI company. An overseas insolvency practitioner may be appointed jointly in BVI with a BVI licensee or official receiver under section 483 of the Insolvency Act 2003 (Insolvency Act).

- (i) Creditors may find it helpful to appoint an overseas insolvency practitioner if there are company assets situated outside of the BVI. This will reduce costs of travel and engaging local expertise.
- (ii) Pursuant to section 483 of the Insolvency Act, an overseas insolvency practitioner may be appointed if prior written notice of appointment has been given to the Financial Services Commission (FSC) and the BVI Court is satisfied that (i) they have sufficient qualifications and experience to act; (ii) they have given written consent to act; (iii) they are not disqualified from holding a licence under section 477; (iv) they are not disqualified from acting under subsection 482(2) or subsection 482(3); and (v) there is security in force for the proper performance of functions as specified in the Regulations. The FSC has the power to object to the appointment pursuant to section 484 of the Insolvency Act.

Question 3.3 [maximum 5 marks]

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

A secured creditor's claim is directly against the assets of the company, which are subject to the security, so pursuant to section 175 of the Insolvency Act 2003 (Insolvency Act), they fall outside the liquidation. It is up to the secured creditor to determine when to take control of the security interest.

Pursuant to section 211 of the Insolvency Act 2003, a secured creditor is able to (a) value the assets subject to the security interest and claim in the liquidation of a company as an unsecured creditor for the balance of his debt; or (b) surrender the security interest to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole of his debt. Neither option is imposed in the Insolvency Act as they can remain outside the liquidation process.

Secured creditors are not obliged to make a claim in a bankruptcy, however, they are able to do so under section 338 of the Insolvency Act. Their claims are directly against the assets of the company which are subject to the security (s175(2) of the Insolvency Act).

Commented [JW7]: 5 marks

Commented [JW8]: 2 marks - not only liquidation in 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

Commented [JW9]: Sections 338 & 175- it is not clear if you understand the difference between bankruptcy for individuals or liquidation which is for corporate entities.

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 Reciprocal Enforcement of Judgements Act (Cap 65) 1922 (1922 Act) and common law principally govern the recognition of foreign judgements in the BVI. Judgement is defined under the 1922 Act as any judgement or order given or made by a court in any civil proceedings whether before or after the passing of the Act whereby any sum of money is made payable. Therefore, as the High Court judgement was civil and resulted in a sum of USD 4,500,000 being awarded and made payable it can be enforced.

The 1922 Act would extend to this judgement as per section 3(1), the 1922 Act extends to judgements given in the High Court of England and Wales. The enforcement would be effective as Expat Properties, being the debtor, has significant assets in the BVI.

Pursuant to section 3(1) of the 1922 Act, Pinforth Holdings will also need to ensure the application for registration in the BVI is within 12 months of the English High Court judgement being handed down unless the BVI court grants a longer period on the basis that it is just and convenient to do so.

Pinforth Holdings must apply to the court under CPR Part 72 to register the judgement and within the application include certain prescribed information and exhibit a duly authenticated copy of the judgement plus details of any interest that has become due. The application can be made without notice to Expat Properties.

Before registering, Pinforth Holdings should ensure that no events listed under section 3(2) of the 1922 Act have occurred otherwise the BVI court will not order the judgement to be registered. The events are:

- (a) The English High Court acted without jurisdiction;
- (b) Expat Properties was not carrying on a business nor residing in England and did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court;
- (c) Expat Properties was not duly served with the process of the original court and did not appear;
- (d) The judgement was obtained by fraud;
- (e) Expat Properties satisfied the court that an appeal is pending or that they are entitled to and intend to appeal; or
- (f) The judgement related to a cause of action which for reasons of public policy could not have been entertained by the 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

Commented [JW10]: 4.5 marks - Claim was more than 12 months but question does not state when judgment awarded and Expat did not attend hearing so not likely registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA2003

Commented [JW11]: 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

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?

What has been left out of the facts provided is whether the loan agreement is secured which would make Abbeydale a secured creditor of Dendoncker. The Insolvency Act 2003 (Insolvency Act) specifically recognises and protects the rights of secured creditors to enforce their securities.

A secured creditors claim is directly against the assets of the company, which are subject to the security, so pursuant to section 175 of the Insolvency Act, they fall outside the liquidation. Therefore, it would be up to Abbeydale to determine when to take control of the security interest.

If Abbeydale is secured then under section 298 of the Insolvency Act they can apply for bankruptcy by stating the full amount of the liability of Dendoncker and either stating that they are willing in the event of bankruptcy order being made to give up the security interest for the benefit of other creditors or give an estimate of the value of security interest and make the application in respect of the full amount of the liability less the estimated value of the security interest.

Commented [JW12]: It is not clear if you understand the difference between bankruptcy for individuals or liquidation which is for corporate entities.

While Abbeydale has made a demand for repayment of the loan, another option is applying to have a statutory demand issued under section 155 of the Insolvency Act as the loan is greater in value than the prescribed minimum sum required being USD 2,000. If Dendoncker still fails to make any loan repayments after the statutory demand is issued then as an unsecured creditor Abbeydale can seek to have a bankruptcy order issued under section 294 of the Insolvency Act.

Commented [JW13]: bankruptcy for individuals not corporate entities

Pursuant to section 296(1) of the Insolvency Act, Abbeydale's application must be made in respect of the liability where at the time of application (a) the liability amount exceeded USD 2,000; and (b) the liability is for a liquidated sum payable immediately. The liability must be made in respect of a liability incurred within the BVI.

Commented [JW14]: bankruptcy for individuals not corporate entities

The court must be satisfied Dendoncker is "insolvent" pursuant to section 8(2) of the Insolvency Act when making a decision on the bankruptcy order application by Abbeydale. In addition the court must be satisfied that either (a) Dendoncker fails to comply with the requirements of a statutory demand that has not been set aside under section 157; or (b) execution or other process issued in a judgement, decree or order if a BVI court in favour of a Abbeydale is returned wholly or partly unsatisfied.

In order for the court to consider making a bankruptcy order, they must also be satisfied that:
(a) on the date the application was filed, Dendoncker (i) was ordinarily resident in the BVI; (ii) was personally present in the BVI; (iii) was carrying on business in the BVI by means of a partner or partners or of an agent or manager; or (iv) had a place of residence or place of business in the BVI;
(b) Dendoncker has or appears to have assets in the BVI; or
(c) that there is a reasonable prospect that the making of a bankruptcy order will benefit the Abbeydale being a creditor of Dendoncker.

Commented [JW15]: bankruptcy for individuals not corporate entities

Commented [JW16]: For individual only not corporate entities

These are all factors that Abbeydale should take into consideration when deciding the options available to enforce the debt.

*** End of Assessment ***