



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.

Section 197(1) of the Business Companies Act stipulates that a voluntary liquidator can be appointed over a company if the company (a) has no liabilities; or (b) is able to pay its debts as they fall due and the value of the company's assets is equal to or exceeds its liabilities. Where it is proposed to appoint a voluntary liquidator over a company, the liquidators are required to make a declaration of solvency and approve a liquidation plan.

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.

Pursuant to section 289 of the Insolvency Act, an officer of the company is deemed to have committed an offence if, at any time whilst an officer or during the period of 12 months preceding the commencement of the liquidation, he has (i) made or caused to be made any gift or transfer of, or charge on, or had caused, permitted or acquiesced in the levying of any execution against the company's assets or (ii) has concealed or removed any of the company's assets since, or within, 60 days of the date of any unsatisfied judgment or order for the payment of money obtained against the company. However, an officer would not be guilty of such an offence by reason of conduct constituting an offence which occurred more than five years before the commencement of the liquidation or if he proves that at the time of the conduct constituting the offence 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?

Pursuant to Part XIX of the Insolvency Act, the BVI Court may make orders in aid of foreign insolvency proceedings in designated countries which include Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the USA. Pursuant to section 467 of the Insolvency Act, the powers provided to the BVI Court in relation to the orders that can be made are wide and include:

- (i) Restraining the commencement or continuation of any proceedings against a debtor or a debtor's property;
- (ii) Restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
- (iii) Requiring any person to deliver up any property to the debtor or the proceeds of such property;
- (iv) Ordering or granting relief to facilitate, approve or implement arrangements that will result in a co-ordination of a BVI insolvency proceeding with a foreign proceeding;
- (v) Appointing an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;

Commented [JW4]: 2 marks

- (vi) Authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding; and/or
- (vii) Staying or terminating or making any other order it considers appropriate in relation to a BVI insolvency proceeding.

Additionally, pursuant to section 24A of the Eastern Caribbean Supreme Court (Virgin Islands) Act, the BVI Court is also able to grant free-standing interim relief in aid of existing or anticipated foreign proceedings including injunctive relief, the appointment of receivers and third party disclosure orders.

Question 2.4 [maximum 4 marks]

Commented [JW5]: 4 marks

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

Pursuant to section 8 of the Insolvency Act, a company will be considered insolvent in the BVI if:

- (a) The court is satisfied that the company cannot pay its debts as they fall due (cash flow insolvency) – it has been held that an inability to pay a debt that is due and not disputed is sufficient to satisfy this requirement;
- (b) The court is satisfied that the value of the company's liabilities exceeds the value of its assets (balance sheet insolvency) – liability is given a wide definition under section 10(1) of the Insolvency Act and includes liabilities under an enactment, in contract, tort or bailment, a breach of trust and those arising out of an obligation to make restitution. However, where the value of a company's assets become lower than the value of its liabilities for only a short period of time, the company may not be considered balance sheet insolvent;
- (c) The company fails to satisfy whether wholly or partly, execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company; or
- (d) The company fails to comply with the terms of a statutory demand and it is not successfully set aside under sections 156 and 157 of the Insolvency Act.

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

Question 3.1 [maximum 5 marks]

Commented [JW6]: 3 marks - - no mention of BCA 2004 sections 207A-208 - termination does not always mean company is dissolved.

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

Pursuant to section 232 of the Insolvency Act, the liquidation of a company terminates on the date of either of the following, whichever occurs first in time: (i) the Court makes an order terminating the liquidation; (ii) the liquidator files a certificate of compliance pursuant to section 234 of the Insolvency Act; or (iii) the Court makes an order exempting the liquidator from having to file a certificate of compliance.

In terms of the Court making an order terminating the liquidation, pursuant to section 233 of the Insolvency Act the Court can make such an order on the application of a liquidator if it considers it is just and equitable to do so.

In respect of the completion of the liquidation, pursuant to section 234(2) of the Insolvency Act, the liquidator must prepare his final report as soon as practicable after completing his duties. Pursuant to section 234(3) the final report must include the following statements: (i) that all known assets of the company have been disclaimed, realised or distributed without realisation, (ii) that all proceeds of realisation have been distributed and (iii) that there is no reason why, in his or her opinion, the company should not be struck from the Register of Companies and dissolved. The liquidator must then send the report along with a summary of the grounds upon which a creditor or member may object to the striking of the company from the register of companies to every admitted creditor and every member of the company. The liquidator must also file a copy of the report with the Registrar of Corporate Affairs along with the statement of realisations and distributions sent to the creditors and members of the company. Under section 234(4) of the Insolvency Act, the liquidator can make an application to the Court to dispense with or modify the requirement for preparing, sending and filing the final report.

Additionally, the liquidator should also apply for a release when his/her appointment ends under section 235 of the Insolvency Act to ensure that he or she is discharged from all liability in respect of any act or default in relation to his administration of the company.

Question 3.2 [maximum 5 marks]

Commented [JW7]: 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?

Pursuant to section 483 of the Insolvency Act, an application may be made to the BVI court for the appointment of an overseas insolvency practitioner as a liquidator of a BVI company as a joint appointee with a BVI licensed insolvency practitioner.

BVI companies are generally holding companies or part of a group structure whereby the operational companies are based in other jurisdictions. As a result, it is common for creditors to appoint a foreign insolvency practitioner in the jurisdiction(s) where the assets of those operational companies are held as it significantly reduces costs of travel and further costs relating to local expertise.

In order for an overseas insolvency practitioner to be appointed, prior written notice of such intended appointment must be provided to the Financial Services Commission. In practice such notice is usually given to the FSC by the BVI licensed insolvency practitioner who is proposed to be jointly appointed with the overseas insolvency practitioner. Additionally, the BVI Court will only appoint an overseas insolvency practitioner to act jointly with a BVI licensed insolvency practitioner if it is satisfied that:

- (i) The proposed appointee has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;
- (ii) The proposed appointee has given his or her written consent to act in the prescribed form;
- (iii) The proposed appointee is not disqualified from holding a licence under section 477 of the Insolvency Act;
- (iv) The proposed appointee is not disqualified from acting in the case of a company or a foreign company under section 482(2) of the Insolvency Act; and
- (v) There is in force such security for the proper performance of his or her functions as may be specified in the Insolvency Regulations.

The applicant will therefore need to ensure that he is able to satisfy these requirements.

Question 3.3 [maximum 5 marks]

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

Pursuant to section 163 of the of the Business Companies Act, secured creditors can apply to the Registrar of Corporate Affairs to register their charge in the public register of charges. This is not mandatory but it is recommended as it is the public register that generally determines the priority of security in the BVI.

Pursuant to s175(2) of the Insolvency Act, the liquidation of a company does not affect the right of a secured creditor to deal with the assets of the company over which that creditor has a security interest. In other words, secured creditors fall outside of the insolvency process and can enforce against the secured assets at any time. As a result, there is no timeline for enforcing a secured claim and it is up to the secured creditor to determine the best time to enforce its security to try to obtain the best return. Additionally, in the case of a liquidation, secured assets are generally not available to the liquidator for distribution to the unsecured creditors. However, if the amount recovered from the secured creditor pursuant to its security does not satisfy the company's liability, the secured creditor may claim the balance in the liquidation.

Depending on the security held by the creditor, they may seek to enforce or realise that security by different methods. Where the security is in the form of a legal mortgage, in the event of default under the mortgage or charge, the creditor may (i) foreclose on the shares, (ii) sell the shares, or (iii) appoint a receiver over the shares; in order to enforce or realise its security. In terms of a pledge, the secured creditor will have a power of sale over the assets which have been pledged and may sell the assets in the event of a default.

In light of the above, it is clear that the BVI insolvency framework provides an avenue for secured creditors to quickly enforce and realise their security where the need arises.

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 a starting point, as the judgment was obtained against Expat Properties by Pinforth Holdings in the English High Court, Pinforth should consider registering the judgment in the BVI pursuant to the provisions of the Reciprocal Enforcement of Judgments Act 1922 (hereafter the 1922 Act). Pursuant to the 1922 Act a judgment obtained in the English High Court which is for a final and conclusive monetary sum can be enforced in the BVI. There is no dispute that the judgment awarded to Pinforth is for a final and conclusive monetary sum.

Commented [JW8]: 3 marks - not just liquidation - protection also in creditors arrangement/bankruptcy. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115

Commented [JW9]: BCA 2004 is not part of the insolvency framework

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

However, an issue may arise for Pinforth with registering the judgment under the 1922 Act as foreign judgments are registrable within 12 months of the date of the judgment unless the BVI court grants a longer period if it considers it is just and convenient to do so. We are unsure when the judgment was obtained although the claim was brought in September 2020. In the event that the judgment was obtained within 12 months of Pinforth's application for the registration of the judgment in the BVI then there would be no issues with applying to register the judgment under the 1922 Act. However, if the judgment was obtained more than 12 months before Pinforth's application, then Pinforth would need to ask the court to extend the period and provide good reasons to satisfy the court that it is just and convenient to extend the period.

Assuming that the judgment was obtained within 12 months of Pinforth's application for registration in the BVI, Pinforth would also need to satisfy the court that none of these factors apply:

1. The English High Court acted without jurisdiction;
2. Expat Properties, being a company who was neither carrying on business nor ordinarily resident in England, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court;
3. Expat Properties was not duly served with the claim and did not appear, notwithstanding that it may have been carrying on business in England and agreed to submit to the jurisdiction of the court;
4. The judgment was obtained by fraud;
5. Expat Properties satisfies the court that an appeal is pending or that it is entitled to and intends to appeal; or
6. The judgment related to a cause of action which for reasons of public policy could not have been entertained by the English High Court.

In the event that Pinforth is successful in its application to register the judgment in the BVI pursuant to the 1922 Act then Pinforth may seek to enforce the registered judgment as it would for any judgment obtained in the BVI. The usual enforcement methods under the EC Civil Procedure Rules include attachment of debts, a charging order, a judgment summons, an order for seizure and sale of goods and the appointment of a receiver. Whereas we have not been provided with details of the assets owned by Expat Properties, the enforcement method(s) employed would depend on the nature of the assets which the company owns.

Pinforth may also consider commencing proceedings under the Insolvency Act for the liquidation of Expat Properties so that a liquidator can realise and distribute Expat Properties' assets to its creditors. This may be particularly useful if the judgment was obtained more than 12 months before Pinforth applies to register the judgment in the BVI under the 1922 Act and Pinforth is unable to satisfy the court that it should extend the time for registering the judgment.

Question 4.2 [maximum 9 marks]

Abbeyle 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, Abbeyle 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, Abbeyle 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 [JW11]: Claim was more than 12 months does not state when judgment given

Commented [JW12]: 6 marks - have to determine if A is secured or unsecured creditor? If secured is there a registered charge/ debenture/ legal charge/equitable charge - have to see the loan document. Options under IA2003: Receiver /Administrative Receiver / Out of Court Receiver.

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 Limited may consider making an application for the appointment of a liquidator over Dendoncker Limited in order to enforce the debt owed to it under the loan agreement.

Pursuant to section 162 of the Insolvency Act, an application may be made to appoint a liquidator over a company by, amongst others, a creditor of the company. There is no dispute that Abbeydale is a creditor of Dendoncker pursuant to the sums outstanding under the \$12,000,000 loan agreement. Abbeydale may therefore make an application for the appointment of a liquidator over Dendoncker.

However, pursuant to s159(1) of the Insolvency Act, the Court may only appoint a liquidator over a company if the company is insolvent, the court is of the opinion that it is just and equitable or it is in the public interest to do so. Additionally, Abbeydale would need to identify an eligible insolvency practitioner to act as liquidator of Dendoncker, obtain their consent and approval from the FSC for their appointment. It is assumed that Abbeydale would have no issues with identifying a suitable insolvency practitioner to act as liquidator of the company based on the large number of qualified insolvency practitioners in the BVI. Based on the particular facts of this case, Abbeydale could consider making the application for the appointment of a liquidator over Dendoncker on the basis that Dendoncker is insolvent. Pursuant to section 8 of the Insolvency Act, a company is considered insolvent, where, amongst other things, it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due. In this case, it is not disputed that a debt exists as Dendoncker received a loan of \$12,000,000 from Abbeydale, used the loan proceeds to purchase the property on Necker Island and failed to repay the loan in accordance with the terms of the loan agreement or any at all, even after a demand for repayment has been made. Although not necessary in this case, Abbeydale may consider issuing a statutory demand in compliance with sections 156 and 157 of the Insolvency Act to give Dendoncker one final chance to repay the loan before the commencement of liquidation proceedings. A statutory demand is often used to put pressure on the debtor with the threat of liquidation and if the debt is not repaid or the statutory demand is not set aside, this is prima facie evidence of the insolvency of the company pursuant to section 8 of the Insolvency Act.

Pursuant to section 168(1) of the Insolvency Act, an application for the appointment of a liquidator over a company must be determined within 6 months of the date of filing of the application unless extended by the court. Abbeydale may also consider whether there is any utility in seeking interim relief such as the appointment of a provisional liquidator over Dendoncker, however, on the facts presented it does not appear that there will be a strong need for interim relief pending determination of the application for the appointment of a liquidator.

Assuming that the court is satisfied that Dendoncker is insolvent as it cannot pay its debts as they fall due and orders the liquidation of the company, the liquidation commences on the date when the court makes the order appointing a liquidator over Dendoncker. Pursuant to section 175(1) of the Insolvency Act, from the commencement of the liquidation, the liquidator has custody and control of Dendoncker's assets and the power to sell any such assets. The liquidator will then take control of, protect and realise the assets of the company. The liquidator is also required to give notice of his appointment and then call a first meeting of the creditors within 21 days of his appointment. The liquidator will perform his duties including admitting the admissible claims following which he or she will ultimately distribute Dendoncker's assets to the company's creditors in accordance with the order of priority prescribed by the Insolvency Act and Insolvency Rules and on a pari passu basis for each class of claim/creditor. Abbeydale will be able to submit its claim to the liquidator during this

process. The liquidator will then realise Dendoncker's assets including through the sale of the Necker Island property and use the proceeds of sale to satisfy the admissible claims.

Ultimately, an application for the appointment of a liquidator over Dendoncker is a good option for Abbeydale to consider in order to recover its loan.

*** End of Assessment ***