



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 can only be appointed over a company if it has no liabilities or if it is able to pay its debts as they fall due and the value of the assets is equal or exceeds its liabilities.

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 256 of the Insolvency Act, if at any time whilst an officer or during the period of 12 months preceding the commencement of the liquidation, he 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 judgment or order for the payment of money obtained against the company.

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 BVI Court is provided with the following powers pursuant to section 467(3) of the Insolvency Act:

- (a) restrain the commencement or continuation of any proceedings, against a debtor or in relation to any of the debtor's property;
- (b) restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
- (c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
- (d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;
- (e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;
- (f) authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;
- (g) stay or terminate or make any other order it considers appropriate in relation to a BVI insolvency proceeding.

Question 2.4 [maximum 4 marks]

Commented [JW2]: 1/2 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.

Commented [JW3]: 1.5 marks - exceptions under subsection (2) not included

Commented [JW4]: 2 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 or a foreign company is insolvent if:

- (a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 156 and 157; of the Insolvency Act.
- (b) it fails to satisfy (wholly or partially) execution or other process issued on a judgment, decree or order of the BVI court in favour of a creditor of the company.
- (c) the value of the company's liabilities exceeds its assets i.e., balance sheet insolvency. Section 10(1) and 10(2) provides that "liability" means a liability to pay money or money's worth including a liability under an enactment, a liability in contract, tort or bailment, a liability for a breach of trust and a liability arising out of an obligation to make restitution, and "liability" includes a debt; and that a liability may be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion.
- (d) the company is unable to pay its debts as they fall due. This is a question of fact and it has been decided in the well-known case of *Cornhill Insurance Plc v Improvement Services Limited* that an inability to pay a debt that is not disputed, is sufficient evidence of insolvency.

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 steps a liquidator must take when preparing to terminate a liquidation are as follows:

1. File a certificate of compliance pursuant to section 234(2) of the Insolvency Act. The Act provides that as soon as practicable after completing his duties in relation to the liquidation of a company, the liquidator shall:
 - (a) prepare and send to every creditor of the company whose claim has been admitted and to every member of the company
 - i. his final report, complying with subsection (3), and a statement of realisations and distributions in respect of the liquidation, and
 - ii. a summary of the grounds upon which a creditor or member may object to the striking of the company from the Register; and
 - (b) file with the Registrar a copy the final report and the statement of realisations and distributions sent to the creditors and members of the company.

Section 234(3) of the Insolvency Act also provides that the final report of a liquidator shall contain a statement that all known assets of the company have been disclaimed, realized or distributed without realization, that all proceeds of realisation have been distributed; and that there is no reason why, in his opinion, the company should not be struck from the Register, and dissolved.

2. Section 234(4) of the Insolvency Act of the liquidator is also empowered to make an application to the Court to be exempt from compliance with the requirement to report to all known creditors or modify the entire provision with regard to a final report.

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

3. Section 235 of Insolvency Act also provides that a liquidator can make an application to the Court for his/her release when their appointment ends and the Court may grant the release unconditionally or upon such conditions as it considers fit, or it may withhold it. If the Court withholds the release, it may make a compensation order against the former liquidator under section 254. Where a former liquidator is released, he is discharged from all liability in respect of any act or default of his in relation to the administration of the company. An order for the release of a former liquidator may be revoked by the Court if the release was obtained by fraud or the suppression or concealment of any material fact. A liquidator who obtains his release under this section shall file a notice in the prescribed form with the Registrar.

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?

Section 483 of the Insolvency Act provides that an overseas insolvency practitioner can be appointed as a liquidator of a BVI company, but only as a joint appointment with a BVI licenced insolvency practitioner.

A creditor may consider the appointment of an overseas insolvency practitioner where BVI companies' assets or a substantial part is situated outside of the BVI as it would significantly reduce costs of travel and further costs relating to local expertise.

The process for the appointment of an overseas insolvency practitioner in practice is that the foreign insolvency practitioner usually writes a letter to the FSC, providing the required details (such as expertise, qualifications and consent to act) and awaits the confirmation that the FSC approves the appointment (subject to the Court approval, where relevant). The Court is likely to approve the appointment provided that:

1. The proposed appointee has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;
2. The proposed appointee has given his or her written consent to act in the prescribed form;
3. The proposed appointee is not disqualified from holding a licence under section 477 of the Insolvency Act;
4. 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
5. There is in force such security for the proper performance of his or her functions as may be specified in the Insolvency Regulations.

Question 3.3 [maximum 5 marks]

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

It has been long established that the Insolvency Act specifically recognises and protects rights of secured creditors to enforce their security. Therefore, unless the secured creditors agree in writing to the contrary, a company's creditors arrangement does not affect the right of a secured creditor to enforce its security interest or vary the liability secured by the security interest. Also, a discharge of bankruptcy proceedings does not affect the right of any creditor

Commented [JW7]: 5 marks

Commented [JW8]: 3.5 marks Not just liquidation -protection also in creditors arrangement section 15/bankruptcy section 311. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/s142

to enforce his security interest and orders made by the Court in aid of foreign proceedings under section 467 of the Insolvency Act do not affect the rights of any secured creditor to deal with the property over which they have a security interest.

Also, another protection afforded to secured creditors is that they can remain outside the liquidation process as their claims are directly against the assets of the company which are subject to the security. Accordingly, there is no timeline for enforcing a secured claim and it is up to the secured creditor to determine when to take control of the security interest and when to sell it for the best return. It is also well-established that a liquidator is bound to give effect to the rights of priority of the claim of a secured creditor and that a liquidation does not affect the right of a secured creditor to take possession or realise or otherwise deal with the assets over which the creditor has security.

Secured creditors also have the option of making an application for bankruptcy order which entails stating that they are willing to give up their security interest for the benefit of other creditors of the bankrupt or give an estimate of the value of their security interest as make an application in respect of the full amount of the liability of the debtor to them less the estimated value of the security interest.

Lastly, secured creditors also have the option of making a claim in bankruptcy proceedings, under section 338 of the Insolvency Act to the trustee. However, they are required to value the assets subject to the security and claim as an unsecured creditor for the remainder of the debt. Alternately, they can surrender their security interest to the trustee for the benefit of all creditors and claim as an unsecured creditor for the whole debt.

Section 211 of the Insolvency Act also provides that a secured creditor is able to 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 surrender the security interest to the liquidation for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole of his debt.

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 Judgments Act 1922 (the "1922 Act") provides for the recognition of foreign judgments given the courts of several countries in the BVI. The 1922 Act extends to judgments given in the High Court of England and Wales. Therefore, judgments given the English High Court will be recognised once the judgment falls within the category of judgment under the 1922 Act. Therefore, Pinforth Holdings must consider registering the English Judgment in the BVI.

Pinforth Holdings should also consider whether the judgment is final and conclusive for a monetary sum. It is important to note here that foreign judgments are registrable within 12

Commented [JW9]: 4.5 marks - Claim was more than 12 months but question does not state when judgment awarded but Expat did not attend hearing so not registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA2003

month of the date of the judgment. Therefore, it must consider whether it needs to make an application for an extension on the basis that it is just and convenient to do so.

In order to register the judgment in the BVI Pinforth Holdings should also apply to the court for a registration of the English judgment under part 72 of the CPR. This application must contain the prescribed information and must exhibit a duly authenticated copy of the judgment and details of any interest that has become due under the law of the country in which judgment has been entered. Pinforth Holdings can also consider to make the application for enforcement without notice.

Pinforth Holdings is also to consider the reasons for which the court is not likely to grant the recognition of the foreign judgment pursuant to section 3(2) of the 1922 Act:

1. Whether the English High Court acted without jurisdiction;
2. Whether the judgment debtor is 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. Whether the Judgment debtor 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. Whether the judgment was obtained by fraud;
5. Whether the judgment debtor satisfies the court that an appeal is pending or that it is entitled to and intends to appeal; or
6. Whether the judgment is related to a cause of action which for reasons of public policy could not have been entertained by the English High Court.

Once the judgment is enforced, Pinforth Holdings could consider utilising remedies available under rule 45.2 of the CPR such as applying for a charging order, a garnishee order, order for the appointment of the receiver, an order for seizure and sale of goods.

Question 4.2 [maximum 9 marks]

Abbeydale Limited, a company incorporated in England, and Dendoncker Limited, a company incorporated in the BVI, entered into a loan agreement for the purchase of a property on Necker Island in the BVI. Under the terms of the loan agreement, Abbeydale transferred USD 12,000,000 to Dendoncker and Dendoncker successfully purchased the property. Subsequently, Dendoncker failed to make any of the loan repayments pursuant to the repayment clauses. As a result of this failure, Abbeydale made a demand for immediate repayment in full, as it was entitled to do under the agreement. Dendoncker failed to make any repayments in full or in part.

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 could consider to first issue a written statutory demand that is in accordance with section 156 of the Insolvency Act. The statutory demand must be in signed and dated by Abbeydale Limited and must demand Dendoncker Limited to pay the loan of USD 12,000,000 in full together with any interest that is due under the loan agreement within 21 days of service of the statutory demand.

If Dendoncker Limited fails to satisfy the statutory demand, section 162 of the Insolvency Act provides that Abbeydale Limited, as a creditor can file an application in the BVI Court for the appointment of a liquidator over Dendoncker Limited. This application can be made on the

Commented [JW10]: 3.5 marks

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

ground that Dendoncker Limited is insolvent pursuant to section 159(1) as it is unable to pay its debts as they fall due and on the ground that it has failed to comply with the terms of the statutory demand which was not successfully set aside under sections 156 and 157 of the Insolvency Act. It should therefore consider retaining an insolvency practitioner and making this application.

Abbeydale Limited could also consider whether there is any evidence to suggest that there is an urgent need to preserve assets identified to be owned by Dendoncker Limited in the BVI and whether it is necessary to appoint an official receiver or provisional liquidator as there is either a risk of dissipation of assets by Dendoncker Limited or its business will not be properly maintained between the filing of the application and its determination.

*** End of Assessment ***