



**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]: 9 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.

Commented [JW2]: Correct answer

Commented [JW3]: Incorrect answer - need a court order to transfer

### 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.

The predominant purpose of a voluntary liquidation is to dissolve a company that is no longer required. Under Part XII of the Business Companies Act 2004 (BCA), a voluntary liquidation can only take place if it has no liabilities, or it is able to pay its debts as they fall due and the value of its assets is equal to or greater than its liabilities. A voluntary liquidator can be appointed where the directors of the company proposed to be liquidated have made a declaration of solvency, and have approved a liquidation plan (s. 198 BCA). A single voluntary liquidator can be appointed, or joint voluntary liquidators can be appointed by a resolution of the directors or a resolution of the members of the company (see ss. 199(2) to (4) BCA). If the company is regulated by the Financial Services Commission (FSC), the appointment is subject to s. 200 of the BCA.

A voluntary liquidator may not be appointed in certain circumstances, including where a liquidator has already been appointed under the Insolvency Act 2003 (IA) in respect of the company.

**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 s. 289(1) IA, where a liquidator of the BVI company is appointed under s. 159 IA, a person who is or has been an officer of the company is deemed to have committed an offence if, at any time whilst he or she is an officer or during the period of 12 months preceding the commencement of the liquidation, he or she:

- a. made or influenced the making of any gift or transfer of, or charge on, or has caused, permitted or agreed in the levying of any execution against the company's assets; or
- b. concealed or removed any of the company's assets within 60 days of the date of any unsatisfied judgment or order for payment of money 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?

S. 467(2) IA provides that a foreign representative can apply to the BVI Court for an order under subsection 3 in aid of the foreign insolvency proceeding in respect of the which the foreign representative is authorised. Under s. 467(3) and subject to s. 468, the Court has broad-ranging powers and may:

- a. restrain the commencement or continuation of any proceedings, execution or other legal process or the levy of any distress against a debtor or in relation to any of the debtor's property that is subject to the foreign insolvency proceeding;
- b. subject to the rights of any secured creditors, restrain the creation, exercise or enforcement of any right or remedy against the debtor's property that is subject to the foreign insolvency proceeding;

**Commented [JW4]:** 1/2 mark - 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 [JW5]:** The question is under what circumstances not how

**Commented [JW6]:** 1.5 marks - exceptions not included

**Commented [JW7]:** 2 marks

- c. require any person to deliver up to the foreign representative any property of the debtor that is subject to the foreign insolvency proceeding or the proceeds from such property;
- d. make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in the coordination of the Virgin Islands insolvency proceeding with a foreign insolvency proceeding;
- e. appoint an interim receiver of any property of the debtor that is subject to the foreign insolvency proceeding for such term and subject to such conditions as it considers appropriate;
- f. authorise the examination by the foreign representative of the debtor or any person who could be examined in a Virgin Islands insolvency proceeding in respect of the debtor;
- g. stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding;
- h. make such order or grant such other relief as it deems appropriate.

**Question 2.4 [maximum 4 marks]**

**Commented [JW8]:** 4 marks

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

- S. 8 IA provides that a company is insolvent if:
- a. it fails to comply with the requirements of a statutory demand that has not been set aside under s. 157 IA;
  - b. the execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
  - c. either:
    - i. the value of the company's liabilities exceeds its assets; or
    - ii. the company is unable to pay its debts as they fall due.

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

**Question 3.1 [maximum 5 marks]**

**Commented [JW9]:** 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation.

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

Under s. 234(2) IA, as soon as practicable after completing his or her duties in relation to the liquidation of the company, the liquidator must:

- a. prepare and send to every creditor whose claim has been admitted and to every member of the company:
  - i. his or her final report that:
    - all known assets of the company have been disclaimed, realised or distributed without realisation,
    - all proceeds of realisation have been distributed, and
    - there is no reason why, in his or her opinion, the company should not be struck from the Register of Companies and dissolved (s. 234(3) IA), plus a statement of realisations and distributions; 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 of the final report and the statement of realisations mentioned above.

To terminate a liquidation, under s 232(b) IA, the liquidator must file a certificate of compliance with the provisions of s. 234(2) IA, as modified by the Court under s. 234(4), if appropriate.

**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 overseas insolvency practitioner can be appointed in respect of a BVI company but he or she must be appointed jointly with a licensed BVI insolvency practitioner or the Official Receiver (s. 483 IA).

As it is common for BVI companies to have substantial assets overseas and to run for a significant amount of time, creditor may find it helpful to appoint an insolvency practitioner from the jurisdiction where those assets are located. This would also help to significantly reduce or eliminate the costs of travel and costs relating to accessing local expertise.

In order for the overseas insolvency practitioner to be appointed, prior written notice of the appointment must be provided to the Financial Services Commission (s. 483(b) IA)). The Commission may appear and be heard at the hearing of the application, for the purpose of objecting to the appointment (s. 484(1) IA)). In such case, the appointor shall not appoint the overseas insolvency practitioner unless the BVI Court approves the appointment at the hearing of the Commission's application under s. 484(2) IA, or the Court approves the appointment (s. 484(3) (a) and (b)).

**Question 3.3 [maximum 5 marks]**

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

A secured creditor can take possession of, realise and otherwise deal with the assets of the company over which the secured creditor has a valid security interest. The appointment of a liquidator does not affect the above rights of a secured creditor (s. 175(2) IA) and the secured creditor remains outside of the liquidation process.

A secured creditor may value the secured assets and claim in the company's liquidation as an unsecured creditor for the balance of its debt that exceeds the value of the secured assets. The liquidator may then redeem the secured creditor's security at the value placed on the secured assets by the secured creditor.

A secured creditor could also surrender its security to the liquidator for the benefit of all creditors and claim in the liquidation as an unsecured creditor for the entirety of its debt.

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

**Question 4.1 [maximum 6 marks]**

**Commented [JW10]:** 4 marks - conditions to be met not stated

**Commented [JW11]:** If the FSC does not approve the Court will not generally allow the appointment unless there are such exceptional circumstances that it will override the FSC - but unlikely

**Commented [JW12]:** 1 mark - Not just liquidation - 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

**Commented [JW13]:** 2.5 marks - Did not include all the conditions under REJ 1922. No reasoning as to whether its registrable as judgment. Claim was more than 12 months but does not state when judgment awarded but Expat did not attend hearing so not likely to be registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA2003



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 (**Reciprocal Enforcement Act**) applies to judgments issued by the English High Court, so Pinforth Holdings (**Pinforth**) can apply for the judgment, which is a money judgment, to be recognised as enforceable in the BVI.

Money judgments for a debt such as the one awarded in Pinforth's favour can be treated as final and conclusive under common law, and Pinforth can apply for summary judgment on the English judgment as a cause of action under the doctrine of obligation by action, subject to considerations of due service, fairness and public policy.

Pinforth should register the English judgment in the BVI for enforcement within 12 months of the date of the English judgment, unless the BVI Court grants a longer period on the basis that it is just and convenient to do so.

Pinforth must apply to court under CPR Part 72, including an affidavit containing the necessary confirmations and statements about the judgment, such as the amount of interest that has become due, along with a certified copy of the English judgment. The application can be made *ex parte*. Once recognised, the same enforcement remedies are available as for domestic judgments.

Pinforth can also use the English judgment to appoint liquidators and seek to wind up Expat Properties Limited (**Expat Properties**) on the basis of insolvency.

#### 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?

Presumably Abbeydale Limited (**Abbeydale**)'s loan was secured against Dendoncker Limited (**Dendoncker**)'s property on Necker Island in the BVI. Abbeydale should have entered a charge by way of a legal mortgage over the Necker Island property at the time of providing the loan, which provides Abbeydale with a legal interest in the property.

If so, given that Abbeydale has already made a demand for immediate payment in full and Dendoncker has failed to make any repayment, Abbeydale can either foreclose on the property and sell it to repay the debt due, or appoint a receiver in the BVI over the property.

**Commented [JW14]:** 4 marks - First issue to determine: A secured or unsecured creditor? You presumed A is a secured creditor yet then go on to discuss A applying for liquidation - to do so it would have to value its security and have an unsecured debt but if its secured creditor it would just enforce its security with assistance from the Court - Receiver /Administrative Receiver or it appoint an Out of Court Receiver so need to see the loan agreement first.

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.

If Abbeydale's loan was not secured, Abbeydale should issue a statutory demand for repayment in full before applying to the BVI High Court to appoint a liquidator (i.e. an order for compulsory liquidation). Dondencker will be deemed to be insolvent if it does not repay the debt within 21 days of the date of service of the statutory demand.

Abbeydale can propose a registered BVI insolvency practitioner to be appointed as liquidator, who will be appointed if the Court decides to make the appointment. In light of the above, the debt should be undisputed. The liquidation starts when the liquidator is appointed.

Commented [JW15]: Under section 162 IA 2003

Dondencker's assets do not automatically vest in the liquidator, who can apply to the Court for an order vesting some or all of Dondencker's assets in the liquidator. However, the liquidator does not automatically have custody and control of Dondencker's assets, Dondencker's directors will automatically lose control of the company. No other creditor, member or other person may commence or proceed with any action or proceeding against Dondencker or relating to any of its assets, or exercise or enforce or continue to exercise and enforce any right or remedy over or against any of Dondencker's assets. Any act done in breach of the above is void.

The unsecured creditors, including Abbeydale, must submit proof of their claims to the liquidator. Abbeydale's claim can include interest accruing up to the date of the start of Dondencker's liquidation.

As soon as reasonably possible, the liquidator will approve or reject each of the claims in whole or in part. Once the liquidator has realised the assets, he or she is required to apply the proceeds of realising the assets to pay the claims in the liquidation in a specific order of priority. As an unsecured creditor, Abbeydale's claim would be paid after the liquidator has paid the costs and expenses incurred in the liquidation (including the liquidator's fees and expenses) and the claims of any preferred creditors.

**\* End of Assessment \***