



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]: 8 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.

Commented [JW2]: incorrect

Commented [JW3]: Correct answer

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 [JW4]: Correct answer

Commented [JW5]: Incorrect - 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.

According to the BCA 2004, a Liquidator can only be appointed when:

- There are no liabilities of the company
- If the company is unable to pay debts as and when they fall due and assets exceed liabilities
- Security registered with the BVI Registry will not have any effect, but will receive rights of priority

Commented [JW6]: 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.

When appointed by the BVI Court, and person that has been a Director in the last 12 months before the date of Liquidation could have committed an offence pursuant to section 289 of the Insolvency Act 2003 if:

- A gift has been made by transfer, charge, permitting, acquiring or levying any execution against a company asset.
- Any company assets have been removed or concealed within 60 days of an order or unsatisfied judgment against the company.

The possible rebuttals are:

- If the offence occurred more than 5 years before the date of the Liquidation.
- There was no intent to defraud creditors when the offence was made.

Commented [JW7]: 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?

In relation to Foreign Proceedings, section 467 of BVI Insolvency Act allows the BVI Court to give the following powers:

- Restrain, commence or continue proceedings against a debtor or their property
- Stop the creation, exercise of enforcement against property
- Require a person to deliver proceeds of property
- Grant relief to facilitate, approve or implement arrangements
- Appoint Interim Receivers over property
- Authorise an exam by a foreign representation
- Stay or terming BVI insolvency proceedings

Commented [JW8]: 2 marks - there is an 8th power - such order as Court considers

Question 2.4 [maximum 4 marks]

Commented [JW9]: 4 marks

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

The definition of 'insolvent' is defined at section 8 of the BVI Insolvency Act. A company is covered in Section 8(1) and is insolvent if:

- It cannot comply with a statutory demand under section 157 of the Act
- A judgment, decree or order of the BVI Court in favour of a creditor has not been satisfied
- If either a company's liabilities exceed its assets OR
- a company cannot pay its debts as and when they fall due.

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.

Termination of a Liquidation is defined at section 232 of the Insolvency Act.

The date of termination is the first of: (i) the date of the Court Order terminating the Liquidation; (ii) Liquidation filing a certificate of compliance under s234(2); or (iii) the date of the Court order exempting a Liquidation from filing a certificate of compliance.

The BVI Court may make an order to terminate a Liquidation if it is just and equitable to do so, based on an application from the Liquidator, the Official Receiver, a Director or a Creditor.

Under section 234(2) the Liquidation has a duty to prepare a final report once the Liquidation has completed, which must be filed with every creditor, member of the company and the BVI registrar. The section confirms all the relevant information that must be disclosed within this report. The Liquidator can apply to the BVI Court to vary this requirement.

According to section 235, a Liquidator (including Provisional Liquidators) can apply for release, to discharge them from all liability. The Court does also have the ability to make this order pursuant to section 254 separately.

Following the termination, section 336 confirms that the company will be dissolved. However, there is a *lacuna*, as there is not legislative procedure for this.

Termination does not necessarily lead to dissolution. If all liabilities have been discharged, then the company could continue its business.

Once termination has taken place, and the Liquidation has been released, the Liquidation can request the dissolution from the BVI Registry.

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?

Commented [JW10]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. Termination does not always mean company is struck off or dissolved.

Commented [JW11]: 236 IA 2003 - 336 is bankruptcy

Commented [JW12]: 5 marks

An overseas IP can only be appointed as a Joint Liquidator alongside a BVI IP under section 483. Prior notice must be given to the BVI Registry, which must receive approval. The BVI Registry is able to appear at the Liquidation Hearing to object to the overseas appointment.

The overseas IP will be required to provide the BVI Registry with a CV, qualifications, proof of insurance and identification. The BVI Registry will then approve this. This must be done for each individual case.

The circumstance may arise where there is an asset or group companies held in other jurisdictions. This will allow the overseas IP in the other jurisdictions to give local knowledge, inspect the assets and liaise with the overseas lawyers.

Another circumstance may be if there is a particularly large Liquidation for a small office in the BVI. They may require resources and assistance from other overseas offices in the Liquidation. It will also reduce the cost of travel and help with the local expertise, particularly in long term appointments.

Furthermore, if there is requirement from a foreign Court in the proceedings. They may need to request assistance from the foreign Court in that jurisdiction, which will be made easier if there is a local IP appointed there. It will also assist with the recognition of any foreign proceedings.

Question 3.3 [maximum 5 marks]

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

Pursuant to Section 9, a creditor is secured if they hold an enforceable security over an asset of the company.

A secured creditors security cannot be affected by an Arrangement, without the written agreement of the secured creditor.

A secured creditor has the ability to appoint and Administrative Receiver over the whole business or its assets.

A secured creditor can serve a statutory demand for unpaid debts against the company, which must include the full amount of the debt and nature of the security, to instigate winding up proceedings. This can be amended by the Court retrospectively, if the security has been undervalued.

A secured creditor may claim for the unsecured balance of their debt, after the secured assets have been valued.

There are no timelines for a secured creditor to enforce. The secured creditor has discretion as when to sell the asset, to achieve best value.

If a claim is made for Bankruptcy, the secured creditor must state in the application that it is willing to forgo security for the creditors as a whole and estimate the value of the liability. If the security is not disclosed in the application, then it will deem to be invalid. However, relief can be sought subject to section 299(2).

Commented [JW13]: 5 marks

Commented [JW14]: Admin Receiver normally where debenture

Commented [JW15]: whole

A secured creditor can make a claim in a bankruptcy under s338 but is not obliged to do so. The secured creditor must either value the asset and show what amount is secured or forgo their security.

A secured creditor has priority over other creditors in the Order of Priority. Subject to the specific costs of realisation, the secured creditor will receive the first proceed for the realisations of the secured asset.

The appointment of a Liquidator does not affect a secured creditors right and ability to take control of an asset.

Any order made by the Court under s476 in cross border insolvencies also will not affect the rights and abilities of a secured creditor.

A secured creditor has the right to appoint a Receiver over the secured asset. This can be done outside of court, through the security deed, or via the BVI court. The Receiver will then deal with that specific asset and realise it for the benefit of the secured creditor.

Where there is a share charge, the secured creditor can appoint a Share Receiver over the shares in the company. Subject to the security agreement, the Receiver may then transfer the share to another individual and pass resolutions. These resolutions may include removing the former directors and appoint a new director of their choice. This new director may then deal with the underlying assets of the company.

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?

Pinforth may serve Expat with a statutory demand. If no response or payment is received within 14 days, Pinforth could apply to the BVI Court to wind up Expat. Whilst a foreign judgment isn't necessarily recognised, the BVI Court may take the view that Expat is insolvent and unable to pay its debts, make the Liquidation Order.

Alternatively, Pinforth may seek for the judgment to be recognised in the BVI Court. The recognition is governed by Reciprocal Enforcement of Judgments Act 1922. It may not have been properly designated, however this has not yet been tested by the BVI Court.

In order to enforce a foreign judgment, there must be evidence of assets being held in the BVI. Therefore, it is key that assets are identified beforehand.

This Act only relates to judgments that are payable. Therefore, only monetary sums can be enforced, which applies to Pinforth.

This Act applies to a number of different countries, including England & Wales, therefore Pinforth's claim will be covered. Judgments from any other countries can not be registered.

Commented [JW16]: Its section 467 but I have not marked you down for that

Commented [JW17]: 3 marks - Did not include all the conditions under REJ 1922 and 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

Alternatively, any jurisdiction which is a party to the New York Convention covering the enforcement of foreign and arbitral awards could also comply.

Once treated under the 1922 act, it has the same effect and ability as a judgment in the BVI court. As a result, it will have all remedies under the CPR. Therefore, Pinforth could:

- Obtain a charging order
- A garnishee order
- A judgment summons
- Seizure of goods
- Appoint a Receiver

Pinforth will have 12 months from the date of the judgment, unless granted by the Court.

Section 3(2) of the 1922 Act states that the 1922 Act will only registered the judgment if:

- The foreign court acted with jurisdiction
- The judgment debtor did not carry out business in that jurisdiction
- The judgment debtor was not sufficiently served
- The judgment was obtained by fraud
- The judgment debtor satisfies the debt or appeals

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?

As a result of Dendoncker failing to make the loan repayments pursuant to the repayment clauses, it has breached the contractual agreement. Therefore, Abbeydale has a contractual debt owed to it, under the event of default terms in the loan agreement.

Initially, Abbeydale will need to consider the terms of the loan agreement. In particular, consideration should be given to (i) which laws govern the loan agreement (such as whether the correct jurisdiction to bring any enforcement action is England & Wales, or the BVI); and (ii) whether there are any relevant clauses in relation to settling disputes arising out of the loan agreement (such as an arbitration clause).

If the loan agreement is governed by English law, the 1922 Act will apply. However, given the property is in the BVI, it has been assumed for the purpose of this answer that the loan agreement is governed by BVI law. It is also assumed that there are no clauses relating to the settlement of disputes arising from the agreement, and that Abbeydale is free to take enforcement action as appropriate in the circumstances.

Commented [JW18]: 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 and whilst waiting for order ask Court to appoint provisional Liquidation under section 170 if assets at risk of dissipation.

Abbeydale has already made a demand for payment, which would be the first step in seeking repayment. As this informal demand has not been met, further action should be considered. The first instance would also be to negotiate and seek recover outside of insolvency proceedings, if that is at all possible.

In accordance with the BVI Insolvency Act, Abbeydale can seek to wind up Dendoncker and appoint liquidators over it. It is good practice to serve a statutory demand on the debtor, in advance of filing an application to appoint liquidators. A statutory demand would be served on the company, at its registered office, in accordance with s156 of the Act. The demand would need to set out the background of the debt, [etc – list what the act says. The debtor, Dendoncker, would have 14 days to apply for the statutory demand to be set aside (if appropriate) or, alternatively, 21 days to satisfy the demand. Serving a statutory demand may secure that payment is made, if the debtor wishes to avoid liquidation and this is therefore a good step to take.

In the event that the demand is not satisfied (or set aside) within the timeframe, Abbeydale could apply to wind up Dendoncker and appoint Liquidators. The application would be made pursuant to section 162 or 296 of the Act and the application should be considered within 6 months. The grounds of the application would detail the loan agreement and would advance that Dendoncker has failed to satisfy a statutory demand which has been properly served on it and it is therefore deemed to be insolvent under Part VIII of the Act.

As Dendoncker has failed to repay the debt and has defaulted on the loan agreement, it is unable to pay its debts as and when they fall due and is by definition, insolvent. Therefore, Abbeydale should serve and statutory demand. If no response is received in the timescales noted above, then an application should be made to place Dendoncker into Liquidation. If the Liquidator Order is made, the Liquidator would then realise the assets in order to repay Dendoncker's debts, including the loan claim, in the insolvency Order of Priority. Based on the information, it would appear that Dendoncker would be an unsecured creditor in the Liquidation and would therefore be paid after secured creditors, preferential creditors and the costs of the Liquidation, assuming there are sufficient funds.

*** End of Assessment ***