



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 answer

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 answer - change of the register and transfer of shares need court order

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.

Pursuant to section 197(1) of the Business Companies Act 2004 ("BCA"), a voluntary liquidator can only be appointed over a company under Part XII if a) the company in question has no liabilities, or b) if the company in question is able to pay its debts as they fall due, and the value of its assets is equal to or exceeds its liabilities.

Commented [JW6]: 1/2 - 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.

Section 289 of Division 4 of the Insolvency Act covers fraudulent conduct.

In response to the question, an officer of that company is deemed to have committed an offence pursuant to the fraudulent conduct provisions if at any time during his time in office or in the 12 months prior to the commencement of the liquidation he has:

- a) made or cause 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 60s of the date of any unsatisfied judgement or order for the payment of money obtained against the company.

Commented [JW7]: 1.5 marks - exceptions not included

Question 2.3 [maximum 2 marks]

With reference to the Insolvency Act, what powers are provided to the BVI Court in relation to the orders the Court can make in support of foreign insolvency proceedings?

Part XIX of the Insolvency Act provides a framework relating to the powers provided to the BVI Court in relation to the orders the Court can make in support of foreign insolvency proceedings.

The BVI Court is able to apply the law of the applicable country, or apply the applicable BVI laws when making an order. Furthermore, the BVI Court is able to recognise certain foreign proceedings and provide assistance to foreign representatives.

Commented [JW8]: 0 marks - Section 467 lists the 8 powers given to the Court

Question 2.4 [maximum 4 marks]

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

Part I of the Insolvency Act covers 'preliminary provisions' and section 8(1) defines the meaning of "insolvent" with respect to a company or a foreign company. In accordance with this section, a company (or foreign company) is considered insolvent in the BVI if:

Commented [JW9]: 4 marks

- a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157*;
- b) execution or other process issued on a judgement, 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.

* The Court may set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused a) because of a defect in the demand (including a failure to comply with section 155(3), or b) for some other reason.

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.

A liquidation does not come to an end until it is terminated in line with the provisions contained within section 232 of the Insolvency Act.

In instances where the Court is not making an order terminating the liquidation under section 233, the liquidation of a company terminates on the filing of a certificate of compliance (by the liquidator(s)) under the provisions of section 234(2), as modified by the Court under section 234(4), if appropriate.

Section 234(2) of the Insolvency Act states "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 of the final report and the statement of realisations and distributions sent to creditors and members of the company.

*The final report of the liquidator must contain a statement confirming that:

- a) All known assets of the company have been disclaimed, realised, or distributed without realisation;
- b) All proceeds of realisation have been distributed; and
- c) There is no reason why, in his opinion, the company should not be struck from the Register and dissolved.

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]: 5 marks - section 483

It is possible to make an application to the BVI Court for the appointment of an overseas insolvency practitioner in relation to a BVI company. However, the overseas practitioner can only be appointed on a joint basis with either a BVI licensed Insolvency Practitioner, or the Official Receiver.

A creditor might consider the appointment of an overseas insolvency practitioner in circumstances where the BVI company has assets in a different nexus – in such instances, it is often helpful to appoint an insolvency practitioner from a jurisdiction in which some of the company's assets are held. Linked with this, and another matter for creditor consideration, is costs – in long-running liquidations involving numerous disputes in various jurisdictions, the appointment of an overseas practitioner can significantly reduce travel and other costs to the estate, thereby generating a better return to the company's creditors.

As regards (ii), prior to such an appointment being made, notice of the intended appointment must be provided to the BVI Financial Services Commission ("FSC") by way of the completion of a 'Joint Overseas Insolvency Practitioners Appointment Form'. NB, the FSC has the power to appear and be heard at the Court hearing relating to the appointment of the overseas insolvency practitioner, and is able to object to the same.

Question 3.3 [maximum 5 marks]

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

The Insolvency Act recognises and protects the rights of secured creditors to enforce their security. However, it should be noted that there is no express protection for the rights of secured creditors when discussing schemes of arrangement in the BVI.

As regards liquidation, the appointment of a liquidator does not affect a secured creditor's right to take possession or otherwise deal with assets over which it holds security. To this end, providing its security is valid, a secured creditor may enforce upon its asset and seek to recover the same outside of the scope of the liquidation, as such a proceeding has no real bearing upon its rights. Linked to this, it is entirely at the secured creditor's discretion as to when to enforce and take control of its security interest, and when to sell the same for the best return.

In terms of bankruptcy, discharge does not affect the right of any secured creditor to enforce its security interest.

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?

Commented [JW12]: 2 marks - Not just liquidation and bankruptcy - protection also in creditors arrangement section 15/section 467. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/s142

Commented [JW13]: Scheme of arrangement is not under the BVI insolvency framework

Commented [JW14]: 4.5 marks - 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.

I note from the facts of the question that the claim was brought against Expat Properties Limited (“EPL”) in September 2020 but need to determine when the judgement was awarded. Under the Reciprocal Enforcement of Judgments Act 1922 (“REJA 1922”), a foreign judgment is registrable in the BVI within 12 months of the date of judgement, unless the BVI Court grants a longer period, on the basis that it is just and convenient to do so.

In addition to the above and in accordance with section 3(2) of REJA 1922, Pinforth Holdings Limited (“Pinforth”) should be advised that the Court will not order a judgement to be registered in the event that:

- a) The original Court acted without jurisdiction;
- b) The judgement debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the Court;
- c) The judgement debtor was not duly served with process of the original Court and did not appear, notwithstanding that he is ordinarily resident or carrying on a business within the jurisdiction of that Court or agreed to submit to the jurisdiction of the court;
- d) The judgement was obtained by fraud;
- e) The judgment debtor satisfies the court that an appeal is pending or that he is entitled to and intends to appeal; or
- f) The judgement related to a cause of action which for reasons of public policy (or similar) could not have been entertained by the Court.

In light of the above, Pinforth Holdings should be advised to consider the following as regards enforcing its foreign judgment debt:

- i) whether the English High Court acted without jurisdiction – as noted in section 3(2)(a) of REJA 1922, the BVI Court will not order a judgement to be registered in the event that the original Court acted without jurisdiction;
- ii) whether EPL carries on business or is ordinarily a resident within the jurisdiction of the English High Court – as noted in section 3(2)(b) of REJA 1922, the BVI Court will not order a judgement to be registered in the event that EPL was neither carrying on business nor ordinarily resident within the jurisdiction of the English High Court, and did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the Court. I note from the facts of the question that EPL did not attend the hearing;
- iii) whether EPL was served with process of the English High Court – as noted in section 3(2)(c) of REJA 1922, the BVI Court will not order a judgement to be registered in the event that EPL was not duly served with process of the original Court and did not appear, notwithstanding that he is ordinarily resident or carrying on a business within the jurisdiction of that Court or agreed to submit to the jurisdiction of the Court;
- iv) whether the judgement was obtained by fraud – as noted in section 3(2)(d) of REJA 1922, the BVI Court will not order a judgement to be registered in the event that the judgement was obtained by fraud;
- v) whether EPL has appealed the judgement – as noted in section 3(2)(e) of REJA 1922, the BVI Court will not order a judgement to be registered in the event that EPL satisfies the Court that an appeal is pending or that he is entitled to and intends to appeal; and
- vi) whether the judgment related to a cause of action which for reasons of public policy (or similar) could not have been entertained by the Court – as noted in section 3(2)(f) of REJA 1922, the BVI Court will not order a judgement to be registered in such an instance.

Question 4.2 [maximum 9 marks]

Commented [JW15]: 2 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.

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?

Creditor status

The first thing that needs to be considered and/or determined relates to the extent of Abbeydale Limited's security – is Abbeydale **a secured creditor of Dendoncker Limited?**

Commented [JW16]: See comment above

The Insolvency Act recognises and protects the rights of secured creditors to enforce their security.

As regards liquidation, the appointment of a liquidator does not affect a secured creditor's right to take possession or otherwise deal with assets over which it holds security. To this end, providing its security is valid, a secured creditor **may enforce upon its asset** and seek to recover the same outside of the scope of the liquidation, as such a proceeding has no real bearing upon its rights. Linked to this, it is entirely at the secured creditor's discretion as to when to enforce and take control of its security interest, and when to sell the same for the best return.

Commented [JW17]: How?

In light of the above, if, upon the sums being lent to Dendoncker Limited, Abbeydale Limited took security over Dendoncker Limited and/or the property on Necker Island, it may have recourse to enforce such security and take control of its security interest.

*** End of Assessment ***