



**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

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 BCA a company may be placed into voluntary liquidation if:

- It has no liabilities
- If it is able to pay its debts as they fall due and the value of the assets is equal or exceeds its liabilities

The voluntary liquidation is usually used for circumstances where the company is no longer needed and the Liquidator will deal with assets and liabilities further to dissolution.

Question 2.2 [maximum 2 marks]

A liquidator is appointed to a BVI incorporated company by the Court. In what circumstances would an officer of that company be deemed to have committed an offence pursuant to the fraudulent conduct provisions? You are required to make reference to the relevant legislation.

Pursuant to Section 289 If within the 12 months preceding the commencement of the liquidation, the below has occurred, this would constitute a fraudulent conduct:

- Made or caused to make any gift or transfer of, or charge on, or has caused, permitted or acquiesced in the levying of any execution against the companies assets; or
- 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

These do not stand in the cases of:

- The transaction being over 5 years before the relevant date
- It can be evidenced there was no intent to defraud creditors

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 the primary framework for the powers provided to the BVI Court to make order in air of foreign proceedings.

These powers include:

- (i) Restraining the commencement or continuation of any action/proceedings against the assets/debtors property
- (ii) Restraining the creation, exercise or enforcement of any rights of remedy against the debtor/Company assets
- (iii) Requiring the delivery of property or proceeds of same
- (iv) Granting relief to facilitate, approve or implement arrangements resulting in co-ordination of BVI insolvency proceedings with that of foreign jurisdictions
- (v) Appointment an interim receiver of any property of the debtor/Company
- (vi) Authorising examination by the foreign representative of any person connected to the proceedings

Commented [JW4]: 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]: 2 marks

Commented [JW6]: 2 marks

- (vii) Staying or terminating or making any other order it considers appropriate in relation to a BVI insolvency proceeding

Question 2.4 [maximum 4 marks]

Commented [JW7]: 4 marks

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

Part VIII of the insolvency Act

- The company cannot pay its debts as they fall due
- The value of the company's liabilities exceeds the value of its assets – Section 10(1) and section 10(2)
- A company fails to satisfy (wholly or partly) execution or other process issued on a judgment decree or order of the BVI Court in favour of a creditor of the Company
- A Company fails to comply with the terms of a statutory demand (and it is not successfully set aside under sections 156 and 157 of the insolvency act)

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

Question 3.1 [maximum 5 marks]

Commented [JW8]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. Termination does not always mean company is struck off or dissolved.

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

Section 232-234 of the Insolvency Act defines how the liquidator may be discharged from office and terminate the liquidation.

Pursuant to section 234(2) the liquidator must prepare his/her final report to the Court.

This report should also be sent to every admitted creditors and member of the Company and filed with the registrar.

Pursuant to Section 234(3) the report should contain:

- (i) A statement that all known assets of the Company has been disclaimed, realised or distributed without realisation
- (ii) That all proceeds of realisation have been distributed
- (iii) That there is no reason why, in his opinion the company should not be struck from the register and dissolved

The liquidator should also send all known creditors, with this report, a summary of the ground upon which they may object to the striking of the Company from the Register

On the application of the liquidator the Court may order:

- Exempt the liquidator from compliance with subsection 2(a)
- Modify the application of the provisions of subsection (2) to the liquidator

The liquidator must ensure, as is clear from the above, that all assets have been dealt with, distributions made and the bank balances have been brought to zero. That he believes all his duties are complete and ensure that all creditors are notified of same.

Question 3.2 [maximum 5 marks]

Commented [JW9]: 5 marks

Is it possible to make an application to the BVI Court for the appointment of an overseas insolvency practitioner in relation to a BVI company and, if so: (i) in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and (ii) what is the process for such proposed appointment?

Pursuant to section 483 Insolvency act an overseas insolvency practitioner may be appointed in relation to a BVI company, they must however be appointed as a joint office holder with a licenced practitioner within the BVI or in some cases joint with the Official Receiver

The conditions of such appointment are:

- That the office holder has sufficient qualifications and experience to act as such
- Has given consent to act in the prescribed form
- Has not been disqualified from acting in accordance with section 477
- Has not been disqualified from acting in the case of a foreign company under sections 482(2) and 482(3)
- There is in force such security for the proper performance of his or her functions as may be defined by the regulators
- Prior written notice of the appointment has been given to the Commission

Notice must be given prior and have no rejections from the FSC – BVI Financial Services Commission.

The circumstances when they may be appropriate could be:

- Where there are ongoing proceedings in another jurisdiction which are connect – this could be a group structure, a recovery of an asset which is due to the estate of a foreign ongoing proceeding.

Question 3.3 [maximum 5 marks]

Commented [JW10]: 1 mark - under the BVI Insolvency framework 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

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

Secured creditors are not classed as ‘creditors’ of the insolvency as their claims rest directly against the assets of the Company for which they hold security and this does not fall into the liquidation, or Company, estate. The office holder does not have powers over these assets in so far as there is no surplus from the asset after satisfying the charge in full.

Section 161(1) of the BCA provides each BVI company with the ability to create a charge over its property by an instrument in writing,

The options for security are: Legal Mortgage, Equitable charge, floating charge, mortgages and charges over shares in BVI Company

Commented [JW11]: Question ask what protections under the Insolvency framework - BCA 2004 not included

Legal Mortgage

Commented [JW12]: Can appoint a court/out of court receiver

- Provides the lender legal interest in the assets
- Three primary remedies in the event of default
 - (i) Foreclose on the asset
 - (ii) Sell the asset
 - (iii) Appoint a receiver of the asset

Equitable charge

Provides the lender with the power to obtain and sell assets subject to the charge. Prevents the charger from disposing of the asset in whole or part without the consent of the charge

Floating charge

Generally granted by a Company over its assets, these assets are not crystallised and the Company is permitted to dispose of them without the consent of the charge holder, to a point until crystallisation occurs. This type of security is typically for movable assets such as stock, the Company does not need to notify or gain consent of the charge holder to sell in the normal course, but on a default event of onset of insolvency the debt will crystallise and the charge holder will have a claim over the realisations of these assets. Unlike the fixed charges the charge holder does not have powers outside of the liquidation preceding,

Commented [JW13]: Administrative receiver section 142

Mortgages and charges over shares in BVI Company

Section 66 of the BCA – three remedies in this type of charge on default:

- (i) Foreclose on the shares
- (ii) Sell the shares
- (iii) Appoint a receiver over the shares

Commented [JW14]: Appoint a receiver section 115+

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.

Commented [JW15]: 4.5 marks - Claim was more than 12 months but question does not state when judgment awarded and as 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

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 BVI are not party to any conventions or treaties in relation to the enforcement of local or foreign judgments.

Party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. This is only in relation to US proceedings.

Enforcement and recognition of foreign judgments in the BVI is governed by the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 and common law.

Enforcement of judgment in the BVI is only effective if there are assets held within the BVI, in which case for this example as noted Expat Properties does.

Under the 1922 Act the judgement needs to be final and conclusive monetary sums – in which case the judgement in the UK is final and of a conclusive monetary sum.

The 1922 Act also stipulates this must be a judgment of the High Court, of which again in this case is satisfied.

Is it to be noted the judgement will need to be registered with 12 month of the date of the judgment, unless the BVI Court grants an exception.

Pinforth Holdings limited must therefore:

- Apply to the BVI Court under CPR Part 72.

Pursuant to section 3(2) of the 1922 Act, the Court may not order the judgement be registered if:

- The original court acted without jurisdiction
- The debtor was not duly served with the process of the original court and did not appear, withstanding that he is ordinarily resident or carrying on business within the jurisdiction of that court of agreed to submit to the jurisdiction of the court
- Obtained by fraud
- Appeal of the judgment is pending
- Judgement related to a cause of action which for reasons of public policy could not be entertained by the Court
- The 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 of agree to the jurisdiction

It may therefore bring an issue for Pinforth Holdings Limited that the debtor, being Expat Properties Limited, did not appear at the hearing within the UK. It would need to be determined if they (Expat Properties) were given sufficient notice and or service in relation to the hearing, and if it was by voluntary basis that they did not attend the hearing.

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?

BVI are not party to any treaties or similar in relation to recognition of foreign judgments.

Recognition is mainly governed by:

- Reciprocal Enforcement of Judgments Act (Cap 65) 1922
- Common Law

First Abbeydale Limited should seek a final judgment within the UK for the debt should they wish to enforce this within the BVI. The fact a demand has been served and not paid in full will not be sufficient to enforce in the BVI as the judgment should be final and of a fixed/crystallised value.

Another consideration for the BVI Court in relation to recognition is that there should be sufficient assets within the BVI for recovery, as the property is in the BVI this will be satisfied.

The Reciprocal Enforcement of Judgments Act extends to judgments given in the High Court of England and Wales and Northern Ireland and the Court of Session in Scotland, therefore for Abbeydale Limited the judgment from the UK will be sufficient for this requirement.

Commented [JW16]: 1 mark - REJ was previous question. 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.

Once obtained, the remedies for such recovery are:

- Charging Order
- Garnishee Order
- Judgment summons
- Order for seizure of goods
- Appointment of a receiver

The judgment must be registered in the BVI within 12 months of the judgment in the UK.

An application will need to be made to Court under CPR Part 72, the following will need to be done:

- Exhibit duly authenticated copy of the judgment
- Details of the interest (claim) which is due
- No notice needs to be given to the judgment debtor
- The Court may order that there is some security for costs to be provided although this is not necessary for all applications

Considerations:

- Costs of recovery
- Should the judgment lead to an insolvency of Dendoncker, there will be a waterfall of payments and it does not appear that security was granted for the loan for which could protect the recovery
- Should the payment of the debt mean Dendoncker becomes insolvent, the payment may be challenged should an insolvency proceed for Dendoncker
- The current value of the island and the potential for recovery including the costs

*** End of Assessment ***