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**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 or Avenir Next 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: 202223-336.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 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. 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 **8 pages**.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

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?

1. On the date of the order appointing the liquidator.
2. On the date the qualifying resolution is passed.
3. On the filing of the application to appoint a liquidator.
4. 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?

1. Within 14 days of the service of the statutory demand.
2. Within 21 days of the date of the statutory demand.
3. Within 21 days of the service of the statutory demand.

1. 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?

1. A member of the company.
2. A creditor.
3. The creditors’ committee.
4. 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**?

1. The creditors, the shareholders, persons claiming an interest in the assets and the company.
2. The creditors, sureties, the shareholders and the company.
3. The creditors, sureties, persons claiming an interest in the assets of the company and the company.
4. 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:

1. 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.
2. 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.
3. 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.
4. 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?

1. Within 12 months of the date of judgment.
2. Within three (3) months of the date of trial.
3. Within six (6) months of the date of judgment.
4. Within six (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?

1. The liquidator has custody and control of the assets of the company.
2. The assets automatically vest in the liquidator.
3. The directors remain in office but cease to have any powers.
4. Shares in the company cannot be transferred.

**Question 1.8**

In a liquidation, what is the **vulnerability period** for an undervalue transaction in the case of a transaction entered into with a connected person?

1. Two (2) years prior to the onset of insolvency and ending on the appointment of the liquidator.
2. Two (2) years prior to the appointment of the liquidator.
3. Six (6) months prior to the onset of insolvency and ending on the appointment of the liquidator.
4. 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?

1. Stating that the company is insolvent or is likely to become insolvent.
2. Approving a written proposal setting out how the creditors’ rights will be varied or cancelled.
3. Approving a liquidation plan and a declaration of solvency.
4. Nominating an eligible insolvency practitioner to be appointed interim supervisor.

**Question 1.10**

**When** does a voluntary liquidation commence?

1. When the directors of the company sign a declaration of solvency.
2. When the directors of the company sign a liquidation plan.
3. When the directors of the company pass the resolution appointing the voluntary liquidator.
4. 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]**

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

Secured creditors enjoy protection by staying out of the liquidation process. Given that secured creditors are not one of the creditors subject to the liquidation they are free to

make progress their claim against a company’s assets and escape the restrictions other unsecured creditors must submit to. The Insolvency Act affirms the secured creditors

security[[1]](#footnote-2). Although called secured creditors they do not play a role as such and are

generally do not take part in the insolvency proceedings. They therefore have the choice

about when to seek to enforce their security and are not plagued by any existing insolvency

proceedings.

**Question 2.2 [maximum 2 marks]**

What are the functions and powers of a Creditors’ Committee under the Insolvency Act 2003?

Under the Insolvency Act a creditors’ committee has the following functions and powers:

In relation to its function the committee is made up of creditors who have an input and some

influence in relation to decisions made by liquidators. They report to the liquidators and

assist as appropriate.

The committee has the power to ask for reports generated by the liquidators and hold

meetings to discuss the same and other aspects of the liquidation and generally assist the

liquidator[[2]](#footnote-3). They have the power to require the liquidator to attend meetings and they

generally have a say in and approving the liquidators remuneration.

**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?

Pursuant to the Insolvency Act Part XIX the BVI court is given power to recognise insolvency related proceedings from other jurisdictions and give assistance to any foreign representatives. The BVI has broad powers[[3]](#footnote-4) to assist in making orders which include, the restraining of commencement against a debtor, restraining enforcement against property owned by the debtor, require delivery up on property owned by the debtor, order/grant relief in order to enhance co-operation with foreign proceedings, permit the examination by a foreign representative of a debtor any one who in BVI insolvency proceedings. The court will ensure various matters are duly considered[[4]](#footnote-5).

**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.

Whilst the court holds the ultimate discretion to determine whether they consider a company is insolvent, there are certain circumstances where a company will be considered as insolvent as outlined below.

1. The court is satisfied the company’s debts cannot be paid when they are due[[5]](#footnote-6).
2. The liability outweigh the assets on a balance sheet[[6]](#footnote-7) insolvency and there is a broad application of liability[[7]](#footnote-8). However, as mentioned above the court will use its discretion in order to determine whether a company should be deemed insolvent. For example, where a company’s liabilities were more than its assets but only for a short period, this would not be sufficient[[8]](#footnote-9).
3. The company does not satisfy a judgment made in favour of the company’s creditor.
4. A statutory demand is not satisfied[[9]](#footnote-10).

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

**Question 3.1 [maximum 5 marks]**

With reference to the relevant legislation, who can be appointed as a voluntary liquidator in the BVI after 1 January 2023?

On 1 January 2023 the BVI introduced a new statue called the BVI Business Companies

(Amendment) Act 2022 as well as regulations[[10]](#footnote-11) which make some significant changes to the

existing laws. The changes are designed to ensure are more efficient process for not only

dissolution of a company but also restoration of the same.

The new laws create more certainty about the status of an entity, as the current Business

Companies Act[[11]](#footnote-12) (“BCA”) will mean that a company that has been struck off[[12]](#footnote-13) will be

deemed to be dissolved upon publication of the striking off[[13]](#footnote-14). Companies are very often

struck off for non-payment of fees or for having no registered office[[14]](#footnote-15).

Pursuant the changes to the law[[15]](#footnote-16) in January 2023 result in voluntary liquidators being

deemed as qualified to conduct a non-insolvent liquidation[[16]](#footnote-17) if they:

1. Have at least year years experience
2. Professionally competent to deal with a specific company’s voluntary liquidation
3. Holds a licence and has professional qualifications
4. Is familiar with financial services law[[17]](#footnote-18).

**Question 3.2 [maximum 5 marks]**

It is possible for the appointment of an overseas insolvency practitioner in relation to a BVI company. **Answer the two questions below**.

1. in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and
2. what is the process for such proposed appointment?
3. An overseas insolvency practitioner can be appointed in the BVI over a company but only as a joint liquidator not as a sole practitioner. Given the multi-jurisdictional aspects involved in liquidations, especially in places like the BVI, where many companies who are based there are part of larger structures, a creditor may often involve and consider appointing an overseas insolvency practitioner to assist in the tracing and recovery of assets dissipated throughout a multi-jurisdictional structure. Very often creditors wishing to wind up a BVI company are in a different jurisdiction themselves which therefore necessitates appointing an overseas insolvency practitioner.
4. The insolvency practitioner must satisfy the court that they are eligible to be appointed[[18]](#footnote-19) and demonstrating that the are licensed[[19]](#footnote-20), they give their consent to act, they are permitted to hold a licence to practise and are permitted to act and there is a retainer[[20]](#footnote-21). The requirement to be licensed does no apply to overseas insolvency practitioner who may be seeking to act jointly with a BVI licensed practitioner and notice must be given to the FSC[[21]](#footnote-22) who have the power to object to such appointment before it is made[[22]](#footnote-23). Further the Insolvency Act[[23]](#footnote-24) details the requirements of overseas practitioners.

**Question 3.3 [maximum 5 marks]**

With reference to the relevant legislation, detail the different types of liquidation in the BVI, along with the procedures required for the commencement of each type.

There are three main types of liquidation in the BVI. Firstly, under Part XII of the BCA governs voluntary liquidations. A company cannot be placed into voluntary liquidation if the company is insolvent, it must be able to pay its debts as they fall due[[24]](#footnote-25). The directors must make a formal declaration of solvency and approve some form of liquidation plan[[25]](#footnote-26) and then one or more liquidators can by appointed by either a directors or members resolution[[26]](#footnote-27) following which an eligible liquidators is appointed[[27]](#footnote-28) and the registrar must be informed within 14 day of the appointment[[28]](#footnote-29).

Secondly, under Part VIII of the Insolvency Act governs situations where an insolvency practitioner is to be appointed over an company in an insolvency context. Insolvency must be established[[29]](#footnote-30) this can be a questions of fact (inability to pay debts as they fall due)[[30]](#footnote-31); where the court is satisfied that the value of the liabilities are more than the assets on a balance sheet test[[31]](#footnote-32); where they fail to satisfy a judgment; if a statutory demand has not been satisfied.

Thirdly, a voluntary insolvent liquidation under the Insolvency Act. Under this procedure the members would pass a qualifying resolution[[32]](#footnote-33) following which a liquidator is appointed[[33]](#footnote-34). The court would not appointed the liquidator in this instance.

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

**Question 4.1 [maximum 6 marks]**

Edale Limited, a company incorporated in England, and Swift Limited, a company incorporated in the BVI, entered into a two year loan agreement for the purchase of a property on Mosquito Island in the BVI. Under the terms of the loan agreement, Edale Limited transferred USD 10,000,000 to Swift Limited who then purchased the property. Swift Limited only repaid four months’ instalments under the agreement and, as per the terms of the agreement, Edale Limited demanded immediate repayment in full.

Providing reasons, with particular reference to the Insolvency Act, what are the options open to Edale Limited against Swift Limited?

Edale Limited (EL) having loaned the money to Swift Limited (SL) would ostensibly have a few options open to them in order to try to recover the indebtedness. Consideration would also need to be given to the agreement and governing law and so on. It is unknown whether the loan agreement conferred any security over the property that was bought by SL, for the purposes of this answer it will be assumed there is no security.

Firstly, as the current law stands there is not yet in force under s.466 of Part XVIII of the BVI Insolvency Act[[34]](#footnote-35) (the Act) allowing foreign creditors the ability to commence proceedings in the BVI granting them the same rights as creditors based within the BVI.

If the demand that EL just sent out was not a statutory demand then the first step may be sending one in accordance with s.156 of the Act. If after 21 days from the date of service the monies are not repaid then SL would be deemed insolvent for failure to repay the debt in accordance with the statutory demand[[35]](#footnote-36). An application could then be made to the BVI court under Part VI of the Act whereby the court appoints an Official Receiver or a liquidator over SL[[36]](#footnote-37). Under this section a creditor which BL would be could make the application and this must be done within 6 months[[37]](#footnote-38). The court should appoint a liquidator if it finds that SL is insolvent[[38]](#footnote-39).

If there is some urgency due to risk of dissipation of assets by SL then interim relief may be sought[[39]](#footnote-40) for the appointment of a provisional liquidator for example (if a liquidator has not yet been appointed), a creditor can apply for this relief[[40]](#footnote-41). Pursuant to s.170(4) the court will only appoint a provisional liquidator if SL consents or the court deems it necessary and in the public interest. EL would have to show that there is an application to appoint a liquidator, there is a good arguable case to appoint them and that EL has standing to make this application and the court should maintain the status quo.

Secondly, receivership may also be an option for EL. The Act proves for a list of those who would be eligible to be the receiver over a BVI company[[41]](#footnote-42). There are various steps to follow in order to appoint a receiver[[42]](#footnote-43). A receiver can be appointed out of court (under a debenture) or by the court. In relation to the former the receiver would be the agent of the company[[43]](#footnote-44) and in relation to the latter an agent of the court. The receiver would be under a duty, if selling the property owned by SL, to EL as the creditor.

If there is a floating charge in relation to the loan by EL then it may be possible to appoint an administrative receiver[[44]](#footnote-45).

Depending on the detail, it may be that proceedings are commences in the UK (if that is appropriate) and then under Part XIX of the Act some form of aid sort from the BVI court to assist those foreign proceedings[[45]](#footnote-46). It may also be possible under the Eastern Caribbean Supreme Court (Virgin islands) Act[[46]](#footnote-47) to seek interim relief such as an injunction, receivers appointing or third party disclosure orders.

**Question 4.2 [maximum 9 marks]**

In April 2022 ABC Limited, a company incorporated in England, was awarded a judgment in the English High Court against DEF Limited, also incorporated in England, for GBP 2 million. In an attempt to enforce its judgment, ABC Limited has discovered that DEF Limited has no realisable assets but is the 100% owner of XYZ Limited (a company incorporated in the BVI) which owns a number of unencumbered properties in BVI but is struck off of the Register, although not yet dissolved. The sole shareholder and sole director of DEF Limited has recently died.

Your principal has been asked to advise ABC Limited of its options to recover the judgment debt owed by DEF Limited. Prepare a memorandum for your principal, stating what options ABC Limited should be advised to consider in order to enforce its judgment debt?

Given that ABC Limited (ABC) has a judgment against DEF Limited (DEF) both of whom are incorporated in England means that the Reciprocal Enforcement of Judgments Act (CAP)1922 (1922 Act) will apply[[47]](#footnote-48) in the BVI as these deals with recognition of foreign judgments together with common law. Where a judgment has been obtained and money is payable this is capable of recognition in the BVI[[48]](#footnote-49). One of the requirements is to ensure that assets in the BVI can be identified and this appears to be the case in the instant case given there are assets in in the BVI (100% owner of a BVI incorporated company XYZ Limited (XYZ)). The English judgment can then be registered by the BVI courts, upon application[[49]](#footnote-50), and upon that date it will be given the same effect as if it were a local judgment. However, it is of note that the judgment was made in April 2022 and it is currently July 2023 and a judgment is required be registered within 12 months of the date of the judgment. ABC is currently out of time but they can seek the court’s consent to grant an extension to that 12 months[[50]](#footnote-51) and this would either need to be done first or potentially at the same time as applying for the registration. There are a number of aspects which, if apparent to the BVI, will mean that the application for registration will be unsuccessful which relate to judgment[[51]](#footnote-52). Once granted local enforcement mechanisms include[[52]](#footnote-53): a charging order; garnishee order; a judgment summons; an order for seizure and sale of goods and appointing a receiver.

Ordinarily, the next step would be to make an application to reinstate XYZ but this can only be done once the company is dissolved. As of 1 January 2023 the BVI Business Companies (Amendment) Act 2022 and BVI business Companies (Amendment) regulations 2022 which amend s.216 of the BCA ensures that when a company is struck off under s.213(4) of BCA it is deemed to be dissolved as well once the Registrar publishes notice[[53]](#footnote-54). Therefore, the introduction of this new law appears to assist. The application can be done without or without notice to DEF. One must also consider that there may be a security for costs order made by the court.

At common law, a money judgment in BVI is a cause of action independently and ABC would have to prove the judgment is final for a specified amount and if the court is satisfied then summary judgment can be applied for under the CPR. ABC does not necessarily have to follow the above procedures to enforce their foreign judgment or other procedures.

**\* End of Assessment \***

1. Insolvency Act 2003, s.175(2) [↑](#footnote-ref-2)
2. Ibid, s.422 [↑](#footnote-ref-3)
3. Ibid, s.467(3) [↑](#footnote-ref-4)
4. Ibid, s.468 [↑](#footnote-ref-5)
5. *Corn hill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114 [↑](#footnote-ref-6)
6. Insolvency Act, s.8(1)(c)(i) [↑](#footnote-ref-7)
7. Insolvency Act, s.10(1), (2) [↑](#footnote-ref-8)
8. *Trade and Commerce Bank v Island Point Properties* SA BVICA 2009/0012 [↑](#footnote-ref-9)
9. Ibid, s.156 [↑](#footnote-ref-10)
10. BVI Business Companies (Amendment) Regulations 2022 [↑](#footnote-ref-11)
11. 2004 [↑](#footnote-ref-12)
12. BCA, s.213(4) [↑](#footnote-ref-13)
13. Ibid, ss(5) [↑](#footnote-ref-14)
14. As required under BCA, s.90(1) [↑](#footnote-ref-15)
15. BVI Business Companies (Amendment) Act 2022, s.199 and BVI Business Companies (Amendment) Regulations 2022, 6 [↑](#footnote-ref-16)
16. Business Companies (Amendment) Regulations 2022, 6(a)1A [↑](#footnote-ref-17)
17. Including Financial Services Commission Act; BVI Business Companies Act [↑](#footnote-ref-18)
18. Insolvency Act, s.482 [↑](#footnote-ref-19)
19. Insolvency Act, Part XX [↑](#footnote-ref-20)
20. Ibid [↑](#footnote-ref-21)
21. Insolvency Act, s.483 [↑](#footnote-ref-22)
22. Insolvency Act, s.484 [↑](#footnote-ref-23)
23. Ibid, s.483 [↑](#footnote-ref-24)
24. BCA, s.197(1) [↑](#footnote-ref-25)
25. Ibid, s.198 [↑](#footnote-ref-26)
26. Ibid, s.199 [↑](#footnote-ref-27)
27. BVI Business Companies (Amendment) Act 2022, s.199 and BVI Business Companies (Amendment) Regulations 2022, 6 [↑](#footnote-ref-28)
28. BCA, s.204 [↑](#footnote-ref-29)
29. Insolvency Act, s.8 [↑](#footnote-ref-30)
30. Ibid [↑](#footnote-ref-31)
31. Ibid [↑](#footnote-ref-32)
32. Ibid, s.159 [↑](#footnote-ref-33)
33. Ibid, s.159(2) [↑](#footnote-ref-34)
34. 2003 [↑](#footnote-ref-35)
35. Insolvency Act, s. 156 and 157 [↑](#footnote-ref-36)
36. Ibid, s.162 [↑](#footnote-ref-37)
37. Ibid, s.168 [↑](#footnote-ref-38)
38. Ibid, s.159(1) [↑](#footnote-ref-39)
39. Ibid, s.170 [↑](#footnote-ref-40)
40. Ibid [↑](#footnote-ref-41)
41. Ibid, s. 116 [↑](#footnote-ref-42)
42. Ibid, ss. 117, 118 and 139 [↑](#footnote-ref-43)
43. Ibid, s.126 [↑](#footnote-ref-44)
44. Ibid, s.142 [↑](#footnote-ref-45)
45. Ibid, ss. 466 and 467 [↑](#footnote-ref-46)
46. 2021 [↑](#footnote-ref-47)
47. Reciprocal Enforcement of Judgments Act (CAP)1922, s.3(1) [↑](#footnote-ref-48)
48. Reciprocal Enforcement of Judgments Act (CAP)1922, s.2(1) [↑](#footnote-ref-49)
49. Civil Procedure Rules (CPR) 72 [↑](#footnote-ref-50)
50. Reciprocal Enforcement of Judgments Act (CAP)1922, s.3(1) [↑](#footnote-ref-51)
51. Ibid, s,3(2) [↑](#footnote-ref-52)
52. Civil Procedure Rules (CPR) 45.2 [↑](#footnote-ref-53)
53. BCA, s.213(5) [↑](#footnote-ref-54)