



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]

Commented [JW1]: 10 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 three (3) months of the date of trial.
- (c) Within six (6) months of the date of judgment.
- (d) 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?

- (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.

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]

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

[
Secured creditors can enforce their security independently or separately of the insolvency proceedings and apply the proceeds to satisfy their debt that they are owed.

Secured creditors can vote or partake in creditors' meetings for any claim amount exceeding the value of their security.

The mutual debts or credits between the insolvent company and a secured creditor, the sums due can be set off against the sums due from the other.

If a company defaults on a secured debt, the secured creditor may apply in the court for the company's liquidation.

]

Question 2.2 [maximum 2 marks]

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

[
Here are the main functions and powers of the committee:

- The liquidator is generally required to consult the committee on matters relating to the insolvency.
- committee monitors the conduct of the liquidation or insolvency and considers reports by the liquidator or insolvency practitioner.
- The committee may give approval or directions to the liquidator on matters relating to the insolvency proceedings. This might include approval for certain actions that the liquidator wants to take that are beyond their general powers.

The creditors committee's powers includes:

- Calling a creditors meeting;
- Requiring the liquidator to provide the committee with reports and information concerning the liquidation as it seems fit; and
- Demand the liquidator to attend the committee and provide it with clarifications regarding the insolvency proceedings.

]

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?

[

Commented [JW2]: 1 mark. See section 15, company creditors arrangements, section 175 liquidations, section 338 bankruptcy, also section 211 and receiverships.

Commented [JW3]: 2 marks

Commented [JW4]: .5 marks. Answer required 8 orders possible under 467(3)

The court can recognize the authority of a foreign representative appointed in a debtor's home country in certain cases.

The BVI court can make orders in aid of foreign proceedings. The power to make such orders are allowed in designated countries and the BVI court can use the laws of the BVI in its application or the laws of the foreign country.

The BVI court is allowed to cooperate with foreign courts or representatives and can communicate directly with them, the BVI court can also grant relief to assist foreign proceedings, like staying proceedings against the debtor or allowing the foreign representative to distribute the debtor's assets in the BVI.

]

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.

[

Under the BVI Insolvency Act, 2003, a company will be considered insolvent in the British Virgin Islands (BVI) in the following circumstances:

The company is unable to pay its debts as they fall due or cash-flow insolvency and considers both the company's current financial status and its future financial outlook. (Section 8(1)(c)(i))

The value of the company's liabilities, including any contingent or prospective liabilities, exceeds its assets. Also known as balance-sheet insolvency. (Section 8(1)(c)(ii))

A company is also presumed to be unable to pay its debts, and thus insolvent, if it fails to satisfy a judgment or order of the court that has been served on it and not set aside under section 157. (Section 8(1)(a)):

A company is insolvent if execution or other process issued on an order by the court for the benefit of a creditor of the said company is unsatisfied either in whole or in part. (Section 8(1)(b))

]

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?

[

From 1 January 2023, an amendment BVI act namely the Section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies (Amendment) Regulation

Commented [JW5]: 3.5 marks- statutory demand words missing

Commented [JW6]: 4 marks

2022 came into force which provided some changes in the respect of voluntary liquidators that can be appointed.

Commented [JW7]: Regulation 19 - also states is not disqualified and imposes residency requirement.

Any person appointed as a voluntary liquidator of a company can only be eligible to if they adhere to the following:

1. Has a minimum of two years' experience in the field of liquidation.
2. Possesses the requisite professional knowledge to effectively carry out the liquidation of the specific company in question.
3. Can prove that he:
 - a. Is a holder of a licence to practice as an insolvency practitioner, and
 - b. Has relevant professional qualifications in fields such as law or accountancy, coupled with experience in offering legal and financial counsel or assistance to companies within the financial services sector.
4. Has a comprehensive understanding of pertinent financial services legislation related to the business of the company that is to be liquidated, including laws under the Financial Services Commission Act and the BVI Business Companies Act.

Commented [JW8]: Should be 'or'.

]

Question 3.2 [maximum 5 marks]

Commented [JW9]: 5 marks

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

- (a) in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and
- (b) what is the process for such proposed appointment?

[

- a) An overseas insolvency practitioner can be appointed but it needs to be in a joint appointment with a BVI licensed insolvency practitioner.
Section 483 of the Insolvency act allows an overseas person (resident not in BVI) to be appointed as an insolvency practitioner.

Circumstances that could warrant such an appointment could be the following:

- If the BVI company has significant assets, operations, or creditors located overseas, it may be beneficial to appoint an overseas insolvency practitioner who is familiar with the laws, regulations, and practices in those jurisdictions. This can also reduce travelling costs and costs related to having to obtain local expertise.
 - If the BVI company operates in a specialized industry or sector that is more common in a foreign jurisdiction, an insolvency practitioner from that jurisdiction might have more relevant industry knowledge and experience.
- b) To make such an appointment, it is necessary to provide prior written notice to the Financial Services Commission ("FSC"). (S483 of BVI Insolvency Act 2003) When the proposal involves appointing an overseas insolvency practitioner, the FSC holds the authority to attend the court hearing, if applicable, and voice objections to the appointment. In reality, the foreign

insolvency practitioner typically sends a letter to the FSC, including the necessary information like their expertise and qualifications, and awaits confirmation of the FSC's approval for the appointment of the overseas insolvency practitioner, which is subject to Court approval, if necessary.

]

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.

[
Voluntary Liquidation:

Members' Voluntary Liquidation (MVL): This type of liquidation is for solvent companies. The procedure involves a resolution passed by the company's members to wind up the company voluntarily. Prior to the appointment of a liquidator, the directors must sign a declaration of solvency stating that the company can pay its debts in full within a specified period, not exceeding 12 months. This is governed by the BVI Business Companies Act, 2004.

Individuals Creditors arrangement: This type of liquidation is for insolvent companies and governed by division 3 of the BVI Insolvency Act, 2003. A person could make a request to his creditors to appoint an insolvency practitioner as supervisor. The directors provide a statement of affairs, which is a summary of the company's assets, liabilities, and creditors. The company's creditors then have the opportunity to appoint their chosen liquidator at a meeting. Once accepted the insolvency practitioner must notify the official receiver of his or her appointment.

Court-Appointed Liquidation:

Compulsory Liquidation or an Insolvent liquidation: This type of liquidation is initiated by an order of the court. It is typically sought by a creditor, shareholder, or the company itself. The grounds for seeking compulsory liquidation include failure to pay debts, inability to pay debts, or just and equitable winding up. The court will appoint an official liquidator to oversee the liquidation proceedings. This is governed by the BVI Insolvency Act, 2003 and the Insolvency Rules 2005.

Receiverships: A receivership involves the appointment of a receiver, to take control of the company's assets and manage them for the benefit of the creditor or creditors of the said company who hold security over those assets. This prevents the assets of the company from being sold or used up in the course of operations while in distress or under dispute. The procedures for the appointment and powers of a receiver in the BVI are governed by the BVI Business Companies Act, 2004 as well as the insolvency act of 2003 and the Insolvency Rules 2005 and receivers are appointed either by court on application or under a debenture.

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

Question 4.1 [maximum 6 marks]

Commented [JW10]: 2 marks. There are 3 types of liquidation in the BVI:

1. Solvent: Voluntary liquidation under BCA 2004 - solvent
2. Insolvent by Members Resolution under section 159 (3) the Insolvency Act 2003
3. Insolvent: application to the court by those entities listed under section 162.

Commented [JW11]: A solvent Voluntary liquidation under the BCA 2004 in BVI. MVL is UK procedure

Commented [JW12]: Section 197 BCA - Director must prepare liquidation plan. Declaration of Solvency not more than 4 weeks old and be accompanied by Statement of Affairs. Appointment cannot be more than 6 weeks after approval of Liquidation plan. a Notice of appointment, Declaration of Solvency and Liquidation plan to be filed within 14 days, appointment advertised in 30 days. If company is the applicant then the application for the appointment of liquidator has to be advertised. Court has discretion to appoint liquidator: insolvent; just and equitable, public interest/ Application must be determined within 6 months after filing - possible to extend 3 months.

Commented [JW13]: This is not a type of liquidation

Commented [JW14]: Under what section can application be made? See section 162 for the possible applicants

Commented [JW15]: This is not a type of liquidation

Commented [JW16]: 3 marks
First issues to resolve 1. is it a secured or unsecured loan and 2. was the 'demand' already made a statutory demand? And if so the consequences of that which you have covered? Then options from there. If secured and E wants appoints a receiver or administrative receiver (if debenture) needs to check if registered charge on the Register of Charges and/or registered at the BVI Land Registry. If unsecured and liquidation option then it's a class action & concept of pari passu would mean % recovery of debt c.f. if secured creditor then E's rights outside of any liquidation and has priority.

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 ("Edale") is company that is resident outside of the BVI and Edale has a couple of options against Swift Limited ("Swift"), considering the non-repayment of the loan under the terms of their loan agreement, especially with regards to the creditors friendly BVI legislation.

Edale is able to leverage the BVI Insolvency Act, 2003 ("Insolvency Act"), as Swift has failed to pay back its debt and now owes the full amount under the agreement causing it to likely be insolvent. As under Section 8 (c.) of the Insolvency Act, the definition of insolvent is that it the value of the company's liabilities exceeds its assets of the company is unable to pay it debts as they fall due, which appears to be the case with Swift as they have not paid their debts due for the last 4 months.

Commented [JW17]: ?

Insolvency Proceedings: If Swift is unable to repay the loan and we established that is indeed insolvent, Edale may consider initiating insolvency proceedings against Swift Limited. This could involve seeking the appointment of a liquidator through a creditors' voluntary liquidation or potentially pursuing a compulsory liquidation if certain insolvency criteria are met.

Under the Insolvency Act, a company may be deemed insolvent if it is unable to pay its debts as they fall due (cash-flow insolvency) or if its liabilities exceed its assets (balance-sheet insolvency). If Swift meets these criteria, Edale could petition the court for the liquidation of Swift Limited to seek repayment as part of the liquidation process under the BVI Insolvency Act.

Under Section 162 of the Insolvency Act, the Court may on application by a creditor (Edale) appoint a liquidator is the company is Insolvent which Swift appears to be.

Section 446 under the BVI Insolvency Act, 2003 provides for Edale as the foreign creditor with a right of direct access and the same rights to partake in a BVI insolvency proceeding as local BVI creditors based within the BVI jurisdiction. This is yet to come into effect.

Commented [JW18]: Not in force

Enforcement of Security Interest: If the loan agreement between Edale and Swift included a security interest, such as a mortgage over the purchased property on Mosquito Island, Edale may have the right to enforce that security interest. This could involve initiating foreclosure proceedings to sell the property and recover the outstanding debt.

Legal Action: Edale can pursue legal action against Swift for breach of contract. They can file a lawsuit in the BVI courts seeking a judgment for the repayment of the outstanding loan amount, plus any applicable interest or damages.

Note that the specific steps and requirements for each option may depend on the details of the loan agreement, any security arrangements, and the circumstances surrounding the case. Legal advice

from a qualified professional familiar with BVI law should be sought by Edale to assess the specific options and determine the best course of action in this situation.
]

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?

[

To: Principal ABCD
From: DKNY
Date: 1 July 2023

Subject: Options that ABC Limited has for Enforcing Judgment Debt against DEF Limited

Dear Principal ABCD,

Regarding the matter of ABC Limited's judgment debt against DEF Limited, I have conducted an analysis of the situation and identified several options that ABC Limited should consider enforcing its judgment debt. Please find below the suggested options:

Pursue Debt Recovery against XYZ Limited's Assets: Since DEF Limited is the 100% owner of XYZ Limited, which owns unencumbered properties in the BVI, ABC Limited may explore the possibility of pursuing debt recovery against XYZ Limited's assets. Although XYZ Limited is currently struck off the Register but not yet dissolved, there may still be a chance to recover the debt from its assets. (It should be noted that these rules change after 1 January 2023, where under the BVI Business Company's Act of 2004, the company would be considered dissolved the date that the Registrar publishes the notice of striking-off in the Virgin Islands Official Gazette. It would be prudent to engage legal counsel in the BVI to assess the potential for restoring XYZ Limited to the Register and initiating debt recovery proceedings against its assets. This would involve engaging with the former registered agent of DEF Limited to restoring the company.

ABC Limited may then consider applying to the court to in order to hold the shareholders of DEF Limited personally liable for the judgment debt. This legal doctrine, if successfully invoked, could allow ABC Limited to pursue the shareholders' personal assets to satisfy the debt owed by DEF Limited. However, piercing the corporate veil is a complex and fact-specific matter, and legal advice should be sought to assess the viability and prospects of success in this approach.

ABC Limited should review its own insurance policies, such as "directors and officers liability insurance" or "debt recovery insurance," to determine if any coverage exists for situations where a

Commented [JW19]: 2 marks

Discussion was required on the possible options to be considered by ABC:

1. Enforcement of a judgment under Reciprocal Enforcement of Foreign Judgments Act 1922 - the 8 conditions under the Act and issue with the 12 months and would an extension be required.
2. ABC could appoint a liquidator in DEF then the liquidator make an application for recognition and restoration of XYZ at the same time, and deal with its assets - its not known if XYZ is solvent or insolvent but if insolvent then once restored liquidator could apply for XYZ liquidation.
3. Restoration to the register of XYZ - was it just struck off or was it to be dissolved under the new law - an application to the court would be required to restore it.
4. Could ABC could apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares.

debtor company lacks realizable assets. If such coverage is identified, ABC Limited may be able to seek compensation under the insurance policy to recover a portion or the full amount of the judgment debt.

Investigate Fraudulent Conduct: It may be worthwhile for ABC Limited to investigate whether DEF Limited's lack of realizable assets or XYZ Limited's struck-off status is a result of fraudulent or insolvent trading conduct. If any such conduct is discovered, legal action can be taken against the responsible parties, potentially leading to the recovery of the judgment debt.

It is crucial that ABC Limited seeks advice from qualified legal professionals with expertise in both English and BVI law to assess the specific circumstances, evaluate the prospects of success, and devise an appropriate strategy for enforcing the judgment debt.

If you require further information or clarification on any of the above points, please do not hesitate to reach out.

Kind Regards,
DKNY

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*** End of Assessment ***

Commented [JW20]: 33 marks