



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.**
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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 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 security¹. 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 liquidator². 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 powers³ 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 considered⁴.

Question 2.4 [maximum 4 marks]

¹ Insolvency Act 2003, s.175(2)

² Ibid, s.422

³ Ibid, s.467(3)

⁴ Ibid, s.468

Commented [JW2]: .5 mark
See section 15 company creditors arrangements, section 175 liquidations, section 338 bankruptcy, also section 211 and receiverships.

Commented [JW3]: 1 mark
For functions see section 422

Commented [JW4]: 1.5 marks
8 orders possible under section 467(3) IA2003.

Commented [JW5]: 4 marks
section 8 and section 10 not in the answer only as a footnote.

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 due⁵.
2. The liability outweighs the assets on a balance sheet⁶ insolvency and there is a broad application of liability⁷. 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 sufficient⁸.
3. The company does not satisfy a judgment made in favour of the company's creditor.
4. A statutory demand is not satisfied⁹.

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 statute called the BVI Business Companies (Amendment) Act 2022 as well as regulations¹⁰ which make some significant changes to the existing laws. The changes are designed to ensure a 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 Act¹¹ ("BCA") will mean that a company that has been struck off¹² will be deemed to be dissolved upon publication of the striking off¹³. Companies are very often struck off for non-payment of fees or for having no registered office¹⁴.

Pursuant to the changes to the law¹⁵ in January 2023 result in voluntary liquidators being deemed as qualified to conduct a non-insolvent liquidation¹⁶ 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

⁵ *Cornhill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114

⁶ Insolvency Act, s.8(1)(c)(i)

⁷ Insolvency Act, s.10(1), (2)

⁸ *Trade and Commerce Bank v Island Point Properties SA* BVICA 2009/0012

⁹ *Ibid*, s.156

¹⁰ BVI Business Companies (Amendment) Regulations 2022

¹¹ 2004

¹² BCA, s.213(4)

¹³ *Ibid*, ss(5)

¹⁴ As required under BCA, s.90(1)

¹⁵ BVI Business Companies (Amendment) Act 2022, s.199 and BVI Business Companies (Amendment) Regulations 2022, 6

¹⁶ Business Companies (Amendment) Regulations 2022, 6(a)1A

Commented [JW6]: 3.5 marks

Please note that the relevant legislation should have been in the answer and not as footnotes - I have not deducted marks for it.

Commented [JW7]: Not required

Commented [JW8]: Not required

Commented [JW9]: 2 years

Commented [JW10]: Not 'and' - it should be 'or'

4. Is familiar with financial services law¹⁷.

Commented [JW11]: Regulation 19 - also states is not disqualified and imposes residency requirement.

Question 3.2 [maximum 5 marks]

Commented [JW12]: 3.5 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?

Commented [JW13]: Location of assets, saving costs and local expertise

- (a) 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.
- (b) The insolvency practitioner must satisfy the court that they are eligible to be appointed¹⁸ and demonstrating that they are licensed¹⁹, they give their consent to act, they are permitted to hold a licence to practise and are permitted to act and there is a retainer²⁰. The requirement to be licensed does not apply to overseas insolvency practitioner who may be seeking to act jointly with a BVI licensed practitioner and notice must be given to the FSC²¹ who have the power to object to such appointment before it is made²². Further the Insolvency Act²³ details the requirements of overseas practitioners.

Commented [JW14]: Which are? - these needed to be stated. Not disqualified from holding a licence under s. 477, not disqualified from acting due being a director or auditor and must have proper security in force. FSC must approve appointment and if it objects then it has right to apply to court. Court can approve the appointment at the hearing of the FSC's application (unlikely the court will appoint if FSC objects).

Question 3.3 [maximum 5 marks]

Commented [JW15]: 2.5 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 due²⁴. The directors must make a formal declaration of solvency and approve some form of liquidation plan²⁵ and then one or more liquidators can by

Commented [JW16]: The legislation states 'liquidation plan' not some form of.

¹⁷ Including Financial Services Commission Act; BVI Business Companies Act

¹⁸ Insolvency Act, s.482

¹⁹ Insolvency Act, Part XX

²⁰ Ibid

²¹ Insolvency Act, s.483

²² Insolvency Act, s.484

²³ Ibid, s.483

²⁴ BCA, s.197(1)

²⁵ Ibid, s.198

appointed by either a directors or members resolution²⁶ following which an eligible liquidators is appointed²⁷ and the registrar must be informed within 14 day of the appointment²⁸.

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 established²⁹ this can be a questions of fact (inability to pay debts as they fall due)³⁰; where the court is satisfied that the value of the liabilities are more than the assets on a balance sheet test³¹; 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 resolution³² following which a liquidator is appointed³³. 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 Act³⁴ (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

²⁶ Ibid, s.199

²⁷ BVI Business Companies (Amendment) Act 2022, s.199 and BVI Business Companies (Amendment) Regulations 2022, 6

²⁸ BCA, s.204

²⁹ Insolvency Act, s.8

³⁰ Ibid

³¹ Ibid

³² Ibid, s.159

³³ Ibid, s.159(2)

³⁴ 2003

Commented [JW17]: Section 197-200 BCA 2004- 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.

Commented [JW18]: Lacking details. Insolvent liquidation by an application to the court see section 162 possible applicants. 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 [JW19]: Requires 75% majority

Commented [JW20]: 4 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 what the consequences. 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.

Commented [JW21]: Not in force

demand³⁵. 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 SL³⁶. Under this section a creditor which BL would be could make the application and this must be done within 6 months³⁷. The court should appoint a liquidator if it finds that SL is insolvent³⁸.

Commented [JW22]: Generally liquidator

If there is some urgency due to risk of dissipation of assets by SL then interim relief may be sought³⁹ for the appointment of a provisional liquidator for example (if a liquidator has not yet been appointed), a creditor can apply for this relief⁴⁰. 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.

Commented [JW23]: No public interest

Secondly, receivership may also be an option for EL. The Act provides for a list of those who would be eligible to be the receiver over a BVI company⁴¹. There are various steps to follow in order to appoint a receiver⁴². 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 company⁴³ 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 receiver⁴⁴.

Depending on the detail, it may be that proceedings are commenced in the UK (if that is appropriate) and then under Part XIX of the Act some form of aid sought from the BVI court to assist those foreign proceedings⁴⁵. It may also be possible under the Eastern Caribbean Supreme Court (Virgin Islands) Act⁴⁶ to seek interim relief such as an injunction, receivers appointing or third party disclosure orders.

Commented [JW24]: Why?

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.

³⁵ Insolvency Act, s. 156 and 157

³⁶ Ibid, s.162

³⁷ Ibid, s.168

³⁸ Ibid, s.159(1)

³⁹ Ibid, s.170

⁴⁰ Ibid

⁴¹ Ibid, s. 116

⁴² Ibid, ss. 117, 118 and 139

⁴³ Ibid, s.126

⁴⁴ Ibid, s.142

⁴⁵ Ibid, ss. 466 and 467

⁴⁶ 2021

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 apply⁴⁷ 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 BVI⁴⁸. 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 application⁴⁹, 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 months⁵⁰ 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 judgment⁵¹. Once granted local enforcement mechanisms include⁵²: 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 notice⁵³. 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 ***

⁴⁷ Reciprocal Enforcement of Judgments Act (CAP)1922, s.3(1)

⁴⁸ Reciprocal Enforcement of Judgments Act (CAP)1922, s.2(1)

⁴⁹ Civil Procedure Rules (CPR) 72

⁵⁰ Reciprocal Enforcement of Judgments Act (CAP)1922, s.3(1)

⁵¹ Ibid, s,3(2)

⁵² Civil Procedure Rules (CPR) 45.2

⁵³ BCA, s.213(5)

Commented [JW25]: 5 marks - this question required a memorandum to your principal with the options for ABC.

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. Appointment of a liquidator in DEF in UK and recognition in BVI or the appointment of a receiver over shares of DEF who could then appoint a new director to deal with restoration of XYZ and assets; and
 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. Law from 1/1/23 - any previously company struck off as at 30 June 2023 will be automatically dissolved on 1 July 2023
 4. ABC could apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares.
- This answer should have had recommendations to ABC as a client.

Commented [JW26]: 35.5 marks