



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]

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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.

The BVI Business and Companies Act ('BCA') allows for a BVI company to grant security by way of a charge over its property/assets. A register of such charges must be kept at the company's registered office. There is also a public register of charges which is not mandatory but is generally used to determine the ranking of charges.

A secured creditor sits outside of an insolvency process as if the asset of the company is subject to a charge it falls outside of the insolvency estate. The secured creditor then has the option when to take control/enforce over the asset and the optimum realisation strategy.

The secured creditor may opt to participate in the insolvency process, and they can do this one of two ways:

1. Value its security and participate as an unsecured creditor for the shortfall; or
2. Surrender the charged asset to the insolvency estate and participate as an unsecured creditor for the full amount.

The decision is likely to be influenced by the expected rate of return to unsecured creditors and the expected value of the charged asset.

Question 2.2 [maximum 2 marks]

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

The creditors of a company in liquidation can pass a resolution to form a creditors' committee at anytime after the appointment of the liquidator.

Creditors may choose to form a committee if they want more involvement in the liquidation or more of an insight into the actions of the liquidator(s).

The functions of the creditors' committee are:

- To act as a consultative body for the liquidator(s)
- To review the reports of the liquidator(s)
- To help the liquidator(s) discharge its duties.

To do this the creditors' committee has certain powers which include:

- The ability to convene meetings of creditors;
- Require the liquidator to report to the committee.
- Require the liquidator to provide any information regarding the insolvency as it might reasonably require.

The committee can also approve the liquidator(s) remuneration.

Question 2.3 [maximum 2 marks]

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

Commented [JW3]: 2 marks

Commented [JW4]: 1.5 marks
8 orders possible

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 sets out the powers available to the BVI Court to assist with foreign proceedings.

The BVI Court can recognise foreign proceedings and provide assistance to foreign representatives:

Some of the powers under s467(3) of the Insolvency Act as follows:

- Preventing the start or continuance of proceedings against the debtor in the BVI;
- Preventing any action against the debtor's property in the BVI;
- Requiring the delivery of any property or proceeds of any property to the foreign representative;
- Appointing an interim receiver over any of the debtor's property situated in the BVI' Requiring the debtor or any person able to be examined under BVI Law to attend the foreign representative for examination; and
- Making an order it sees fit in relation to a BVI insolvency proceeding.

Question 2.4 [maximum 4 marks]

Commented [JW5]: 4 marks

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

Section 8 of the Insolvency Act sets out certain definitions which determine whether or not a company is insolvent. There are 4 circumstances in which a company can be defined as insolvent:

1. The cashflow test – if a company is unable to pay its debts as and when they fall due, under section 8(1)(c)(ii) of the Insolvency Act a company can be defined as being insolvent.
2. The balance sheet test – under section 8(1)(c)(i) if a company's liabilities exceeds its assets, it can be defined as being insolvent. A liability under the Insolvency Act can be defined as being either; present of future, certain or contingent, fixed or liquidated.
3. A company's failure to satisfy a judgment, decree or order of the BVI Court can be used as evidence of the company's insolvency; and
4. An outstanding statutory demand – if a statutory demand remains outstanding in excess of 21 days without being set aside, the company subject to the statutory demand can be deemed to be insolvent.

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

Question 3.1 [maximum 5 marks]

Commented [JW6]: 4.5 marks

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

Must be resident in the BVI

A voluntary liquidation is not an insolvency process, it is in fact a solvent liquidation. The directors of the company have to make a declaration of solvency for this process to be possible.

A voluntary liquidation is often used to streamline a group structure or simply when the purpose of the company no longer exists and the corporate entity is no longer required.

Given the nature of this liquidation prior to 1 January 2023, a voluntary liquidator did not need to be a licensed insolvency practitioner, except in the case of a regulated company, and an eligible liquidator was simply someone who was not disqualified from acting as such.

Under Regulation 19(2) of the BCA regulations some of the individuals who would be disqualified from acting as a voluntary liquidator are:

- Someone who has been disqualified from taking such a role in accordance with the laws of a different jurisdiction;
- A minor;
- An undischarged bankrupt;
- A director of the company (or an affiliated company) within the preceding 2 years;
- A member of the senior management of the company (or an affiliated company) within the preceding 2 years; or
- A close family member of the two prior categories.

However, from 1 January 2023 the amendments to the BVI BCA, under Regulation 6(a)1A set out the following requirements:

- Has 2 or more years of relevant liquidation experience
- Has the professional competence required to liquidate the company, specific to the business/industry not simply the liquidation process itself
- Holds either:
 - o An insolvency licence in the BVI; or
 - o An appropriate professional qualification e.g. accountancy or law.
- Is fully aware and knowledgeable of any financial services legislation connected with the company being liquidated.

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.**

- (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?

It is possible for an overseas insolvency practitioner to be appointed in relation to a BVI company.

An overseas insolvency practitioner cannot be the sole liquidator of a BVI company and must be jointly appointed with at least one BVI licenced insolvency practitioner.

Commented [JW7]: 5 marks

It is considered advantageous to have a multi-jurisdictional joint appointment in circumstances where the assets of the company are located outside of the BVI. Whether those assets be physical e.g. property or intangible e.g. a litigious claim against another company/person.

The joint appointment is an efficient way of ensuring the liquidators have the knowledge and collective experience to deal with the assets of the company.

There are also certain practical advantages such as a reduction in travel costs and time, no language barriers and local knowledge.

Under s483 of the Insolvency Act, an overseas insolvency practitioner may be appointed jointly, wither by the Court or another appointing person, if they are satisfied of the following:

- The overseas insolvency practitioner has sufficient qualifications and experience to act;
- Written consent to act has been provided;
- They are not disqualified from holding a licence;
- They are not disqualified from acting; and
- They have sufficient security in force.

In addition, prior written notice of the proposed appointment must be given to the FSC.

The FSC has the ability to appear at Court (if a Court appointment is proposed) or give notice to the person appointing – if it wishes to object to the appointment of the overseas insolvency practitioner. The appointment could only go ahead if the Court ordered it to do so.

In practice, ahead of a hearing/appointment, the insolvency practitioners would liaise with the FSC providing it with reasoning and the overseas insolvency practitioners CV before any formal notice would be required. They would only move ahead to the formal appointment process once the FSC had agreed to the appointment.

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 types of liquidation in the BVI:

1. Voluntary liquidation under the BCA
2. Liquidation under the Insolvency Act by members' qualifying resolution
3. Liquidation under the Insolvency Act by Court appointment

Voluntary Liquidation

A voluntary liquidation is a solvent winding-up of the company, the provisions for which are found in the BCA rather than the Insolvency Act.

For a company to be placed into voluntary liquidation the directors of the company must make a declaration of solvency and approve a liquidation plan. For a company to be solvent it must either have no liabilities or sufficient assets to meet its liabilities.

Commented [JW8]: 5 marks

The liquidator(s) may be appointed by either a resolution of the directors or a resolution of the members. If it is a regulated company there are further requirements for the appointment.

The appointed liquidator then has 14 days to file notice of the appointment with the registrar – the following documents need to be filed:

- Notice of appointment in the approved form;
- Directors' declaration of solvency; and
- A copy of the liquidation plan.

The liquidation commences on the date of the filing of the notice with the registrar.

Commented [JW9]: Appointment advertised in 30 days

Liquidation under the Insolvency Act – Members' Qualifying Resolution

Where a company is insolvent or the directors are not prepared to make a declaration of solvency it is possible for the liquidators to be appointed under the provisions of Part VI of the Insolvency Act.

The members can appoint an eligible insolvency practitioner, not the Official Receiver, by passing a members' qualifying resolution.

A members' qualifying resolution is one which is put to its members at a properly constituted meeting and is passed by a majority of 75% or more. The percentage may be higher if set out in the memorandum or articles of the company in question.

Once passed the company must notify the liquidator, who then has a duty to convene a meeting of the company's creditors. Until the meeting of creditors has taken place to ratify the appointment of the liquidator – the liquidators' powers are restricted to those that would allow them to protect the company's assets.

The liquidation commences when the members' qualifying resolution is passed.

Liquidation under the Insolvency Act – Court Appointment

Under s162 of the Insolvency Act, an application can be made to the Court to appoint either a liquidator or the Official receiver over a BVI company.

The following parties can make an application:

- The company;
- A creditor;
- A member;
- The supervisor of a CCA;
- The FCS; and
- The Attorney General.

The application must be heard within six months of filing unless the Court provides an extension. Upon hearing of the application the Court will only grant the order if it is satisfied of one of the following:

- The company is insolvent;
- It is just and equitable to wind up the company; or
- It is in the public interest to wind up the company.

The liquidation commences when the order is made.

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?

For the purposes of this analysis, I have assumed that when Edale and Swift entered into the loan agreement it was done so on the agreement that a charge would be provided to Edale over the property on Mosquito Island.

It is also assumed that the loan agreement and legal charge are governed under BVI Law.

Assuming that there are no other prior ranking charges over the property, which could be ascertained by checking Land Registry, the public register of charges and the mandatory register of charges the company is required to maintain at its registered office; Edale would have three options available to it under the charge:

1. Foreclose on the property
2. Sell the property
3. Appoint receivers over the property

If Edale did not believe the Mosquito Island property to hold sufficient value to repay the outstanding balance of the \$10m loan, under section 211 of the Insolvency Act, as a secured creditor it is able to value the assets subject to security and claim as an unsecured creditor for the balance of its debt.

Under s156 of the Insolvency Act, Edale could issue a statutory demand for the unsecured element of its claim and if that was not satisfied by Swift within 21 days, Edale could make an application to Court under s162 of the Insolvency Act for the appointment of a liquidator or the Official Receiver over Swift Limited.

Edale Limited would then participate in the liquidation process as an unsecured creditor for the shortfall in its security.

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

Commented [JW10]: 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 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.

Commented [JW11]: No public registers in BVI

Commented [JW12]: 6 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. 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 from 1/1/23 - any previously company struck off as at 30 June 2023 will be automatically dissolved on 1 July 2023. An application to the court would be required to restore XYZ.
4. Could ABC maybe apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares

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?

There are two potential routes available for ABC Limited to enforce its judgment debt against DEF Limited:

1. Application for a liquidation or administration of DEF Limited in England and the subsequent recognition of the English proceedings in the BVI; and
2. The recognition and enforcement of the judgment in the BVI.

Application for a liquidation or administration of DEF Limited in England and the subsequent recognition of the English proceedings in the BVI

Given that the sole director and shareholder of DEF Limited has recently died, it would appear that there is no one in situ to direct the company and realise its assets to meet its liabilities.

ABC Limited could apply to the English Court as a creditor of DEF Limited for the appointment of a liquidator over DEF Limited. The liquidator would then take control of DEF Limited and could seek recognition in the BVI to deal with the assets in the BVI.

Part XIX of the Insolvency Acts provides the BVI Court with the power to make orders to aid foreign proceedings, which includes recognition.

The UK is one of the designated countries to which the BVI courts will provide assistance. An English compulsory liquidation would qualify as a foreign proceeding as it is a collective judicial proceeding.

Once recognised the English liquidator could make an application to the BVI Registry to restore XYZ Limited to the register, which is possible given that XYZ Limited has not yet been dissolved.

The English liquidator acting on behalf of DEF Limited, as the only member of XYZ Limited, could make an application under s162 of the Insolvency Act to the BVI court for the liquidation of XYZ Limited – the application would be on the basis that it is just and equitable to wind up the company.

It is not possible to know from the information provided whether or not XYZ Limited is solvent or insolvent; however, given that the sole director and member of DEF Limited has recently died it may be prudent to assume that there no individual in charge of XYZ Limited.

The English liquidator could seek to be appointed over XYZ Limited, jointly with a BVI licenced liquidator in order to realise the assets of XYZ Limited, namely the unencumbered properties for the benefit of any creditors of XYZ Limited and ultimately DEF Limited as shareholder.

Any distribution to DEF Limited as shareholder would ultimately be distributed pari passu to the unsecured creditors of DEF Limited, including ABC Limited (assuming there were no secured creditors).

Recognition and enforcement of the judgment in the BVI

Commented [JW13]: Not without restoration of XYZ first, which is now dissolved.

Given that ABC Limited has recently discovered that DEF Limited, the judgment debtor, has assets in the BVI, being the shares in XYZ Limited, against which ABC Limited would look to enforce, it is appropriate to determine whether the judgment awarded by the High Court of England and Wales is capable of being registered and enforced in the BVI.

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

Commented [JW14]: 8 conditions under the Act

Under the 1922 Act, a judgment is defined as a judgment or order made by a court whereby a sum of money is made payable. The 1922 Act extends to judgments given in the Hog Court of England and Wales.

Given that ABC's judgment was awarded by the High Court of England and Wales and was for a defined monetary sum, being £2m, the judgment itself is capable of being recognised in the BVI.

The judgment was awarded in April 2022, for a foreign judgment to be capable of being registrable in the BVI, this must be done within 12 months of the judgment being awarded.

As it is now July 2023, the BVI Court must allow for a longer period of time to register the award on the basis that it is both just and convenient to do so. Otherwise the judgment is not capable of being registered in the BVI.

*** End of Assessment ***

Commented [JW15]: 42.5 marks