



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]

Commented [JW2]: .5 mark

See section 15, company creditors arrangements, section 175 liquidations, section 338 bankruptcy, and receiverships

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

The right of a secured creditor to enforce their claim against any security or deal with the underlying assets are not affected by the appointment of liquidators nor in a Company creditors' arrangement. Secured creditors are generally seen to be outside of the insolvency process as they maintain their right to enforce their claim against the asset, which typically should cover their claim in full. In the scenario it does not, pursuant to section 211 of Insolvency Act, a secured creditor has the option to value the assets subject to security interest and claim for the balance of debt in the liquidation as an unsecured creditor or surrender their security interest to liquidator for the benefit of all creditors and make claims as unsecured creditor. It is the secured creditor's discretion on when to exercise their right to enforce against the security for the optimal return and there is no specific timeframe for this to be done.

Question 2.2 [maximum 2 marks]

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

The Creditors' Committee's functions include advising the liquidator, reviewing reports from the liquidator, and assisting the liquidator in fulfilling their duties. A Creditors' Committee is granted powers to call for a meeting of creditors, request for report and information from the liquidator regarding the liquidation and require liquidator's attendance to provide explanation at committee meetings. The committee also has authority to approve 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 part XIX of the Insolvency Act, the BVI Court has authority to provide assistance to foreign representatives from designated countries and recognise certain foreign insolvency proceedings. Designated countries include, Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the USA. When BVI courts makes such an order to assist with foreign proceedings, the BVI court has the option to apply BVI laws or law of the relevant country. The BVI court is provided with powers which includes:

1. Restraining the initiation or continuation of legal actions, against a debtor or their asset;
2. Preventing the exercise or enforcement of any right or remedy over the debtor's asset;
3. Compelling individual to surrender the property of debtor or their proceeds;
4. Granting relief to facilitate coordination of BVI insolvency proceeding with foreign proceeding
5. Appointing an interim receiver for the debtor's property on terms that the court deems appropriate;
6. Authorising foreign representative to examine the debtor or any relevant individual to the insolvency proceeding as they would if the proceedings were in BVI; or
7. Issuing or terminating orders as appropriate in relation to a BVI insolvency proceedings.

Question 2.4 [maximum 4 marks]

Commented [JW3]: 1.5 marks

Consult and receive report

Commented [JW4]: 2 marks

467(3) IA 2003

There are 8 possible orders

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.

Pursuant to Section 8 of the Insolvency Act, the meaning of "insolvent" for a company includes the following:

- a) A company not able to meet its debts due. This is established in the English case of Cornhill Insurance Plc v Improvement Services Limited.
- b) The value of the company's liabilities is more than the value of its assets for a prolonged period of time i.e. company is balance sheet insolvent.
- c) A company is unable to fulfil a judgment, decree or order issued by BVI court in favour of a creditor in whole or in part.
- d) A company is unable to meet the requirements of a statutory demand and such statutory demand is not set aside pursuant to sections 156 and 157 of the Insolvency Act

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

Question 3.1 [maximum 5 marks]

Commented [JW6]: 5 marks

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

Pursuant to section 199(5) of the BVI Business Companies Act ("BCA"), a voluntary liquidator does not need to be a licensed insolvency practitioner, unless the company is regulated. However, they must be considered an "eligible individual." Any individual who is not prohibited from being appointed or serving as a voluntary liquidator can be selected. Pursuant to Regulation 19(2) of the BCA Regulations, the following individuals are disqualified from being appointed, or acting, as voluntary liquidator of the company -

- a) a disqualified person or an individual subject to an equivalent disqualification under the laws of a country outside the Virgin Islands;
- b) a restricted person or an individual subject to an equivalent restriction under the laws of a country outside the Virgin Islands;
- c) a minor;
- d) an undischarged bankrupt;
- e) an individual who is, or at any time in the previous 2 years has been, a director of the company or an affiliated company;
- f) an individual who acts, or at any time in the previous 2 years has acted, in a senior management position in relation to the company or an affiliated company and whose functions or responsibilities have included functions or responsibilities in relation to the financial management of the company or an affiliated company; and
- g) an individual who is a close family member of an individual specified in paragraph (e) or (f).

With effect from 1 January 2023, under amendments to the BVI Business Companies Act (As Revised), if there is only 1 voluntary liquidator, the liquidator must be a BVI resident. If there are more than 1 voluntary liquidator, at least 1 of them must be a BVI resident. In addition, the BVI voluntary liquidator must have at least 2 years of relevant experience in managing liquidations with the relevant qualification or licenses required as issued by FSC. Pursuant to the amended regulations, voluntary liquidators will also have to compile company books and records and provide the same to the company's former registered agent in BVI once the liquidation process is completed.

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

For instances where the BVI's company's assets are located outside of BVI, it is beneficial to appoint an insolvency practitioner from the jurisdiction where those assets are situated. This would minimize travel costs and expenses associated with local expertise which can be significant in liquidation cases that involve numerous disputes across various jurisdictions that may potentially go on for prolonged periods of time.

- (b) what is the process for such proposed appointment?

An overseas insolvency practitioner may only be appointed as liquidator of BVI company in a joint capacity. The requirement for a BVI license does not apply to an overseas insolvency practitioner who acts jointly with a licensee or the Official Receiver. As required, the overseas insolvency practitioner is to provide written notice of intended appointment to the Financial Services Commission (FSC) before proceeding with the appointment application. The written notice will usually also include experience and qualifications of the overseas insolvency practitioner. The FSC has the authority to express objections during the court hearing for the appointment of the overseas insolvency practitioner. Only upon the confirmation of the FSC's approval for the appointment of the overseas insolvency practitioner, then the overseas insolvency practitioner will proceed with the application to court.

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.

1. Pursuant to the BCA, Voluntary liquidation is not available to insolvent companies and is typically used to dissolve entities that have served their purpose. Part XII of BCA outlines the procedures for commencement of a voluntary liquidation. Pursuant to section 197(1) of BCA, to proceed with liquidation under this section, a company must either have no liabilities or be capable of paying debts as they fall due, and the value of assets is equal or exceeds its liabilities i.e. company must be solvent. The directors are required to make declaration of solvency and approve a liquidation plan.

Pursuant to section 199(1) BCA, the appointment of a voluntary liquidator or joint voluntary liquidators may proceed by resolution of directors or resolution of members. If a liquidator has already been appointed pursuant to the Insolvency Act, then a voluntary liquidator can no longer be appointed. Once appointed, the voluntary liquidator has 14 days to file the following with the Registrar: notice of appointment in the prescribed form, declaration of solvency made by directors and a copy of the liquidation plan. The voluntary liquidation commences on the date that the voluntary liquidator files notice of appointment with Registrar. The voluntary liquidator is also required to advertise their appointment within 30 days of commencement.

2. Pursuant to part VI of the Insolvency Act, liquidation can be commenced by the following 2 procedures:

Commented [JW7]: 3.5 marks
Section 483. IA 2003. Must consent Not be 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.

Commented [JW8]: 4 marks

- a. By court - The Court has authority to appoint the Official Receiver or a liquidator over a BVI company pursuant to an application made under Section 162 of the Insolvency Act, or over a foreign company on an application made under section 163 of the Insolvency Act; and
- b. By way of a qualifying resolution – The members of a BVI company (excluding foreign companies) can appoint an “eligible insolvency practitioner” by way of a qualifying resolution (no less than 75% of members approving the same, or higher if so stated in the memorandum and articles of the company)

The liquidation process begins when liquidator is appointed i.e. on the date that qualifying resolution is passed or court order appointing liquidator is made. Liquidation continues until terminated pursuant to section 232 of the Insolvency Act.

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?

If the loan agreement did not include a security charge over the property, Edale Limited can only proceed to issue a statutory demand to Swift Limited for all sums due, including any applicable interests. Upon the passing of 21 days after service of statutory demand, Edale Limited may apply to court to appoint a liquidator over Swift Limited. As it is deemed that the company is insolvent, as defined under Section 8 of the Insolvency Act since it is unable to meet its debt as they fall due. Edale Limited in this case will be an unsecured creditor to Swift Limited.

If the loan agreement includes a security charge over the property, as a secured creditor with secured interest over the property, Edale Limited may enforce its rights and appoint a receiver to take control of the property and conduct a sale campaign to realise the property to discharge the outstanding sums due to Edale Limited by Swift Limited.

If there are any other corporate guarantees or personal guarantees provided with the loan by other parties, Edale Limited may also issue the same statutory demand to these persons to demand payment of the balance sums due to Edale Limited. Upon passing of 21 days after service of statutory demand, if these persons fail to satisfy the statutory demand, Edale Limited may proceed to file application to appoint liquidator or initiate personal bankruptcy proceedings as these parties are similarly insolvent.

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

Commented [JW9]: See section 162 for the 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 [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]: 4 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 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

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?

1. ABC Limited should issue a statutory demand to DEF Limited to demand payment of the GBP2m judgment. Upon passing of 21 days of service, if the statutory demand remains unsatisfied, ABC limited should apply to the English court for winding up of DEF Limited. ABC Limited would be an unsecured creditor in the estate of DEF Limited in England.
2. Once a liquidator has been appointed to DEF limited, it is the liquidator's duty to realise the assets of DEF limited, which will include the shares of XYZ that owns unencumbered properties in BVI. As sole shareholder, the liquidator of DEF limited, will have the right to replace the director in XYZ limited and take control of the unencumbered properties in BVI. DEF Limited liquidator may as sole shareholder pass a qualifying resolution to appoint liquidator to XYZ limited if XYZ is insolvent or may appoint a voluntary liquidator if XYZ is solvent.
3. XYZ limited liquidator appointed will then take steps to realize the unencumbered properties in BVI and distribute dividends to creditors of XYZ and balance of funds to be made to DEF Limited as shareholder distribution (if XYZ is solvent). If XYZ is insolvent, then no funds will be distributed to DEF.
4. Upon receipt of distribution from XYZ, DEF liquidator then proceeds to make distributions to creditors of DEF, which includes ABC Limited. However, ABC will rank pari-passu with all other unsecured creditors of DEF and is not likely to recover the GBP2m judgment debt in full.
5. The liquidator of DEF limited may also consider applying directly to the BVI courts pursuant to part XIX of the Insolvency Act, to request assistance to foreign proceedings i.e. liquidation of DEF Limited in United Kingdom to request the delivery of the properties held by XYZ limited or appointing an interim receiver to realize these properties in BVI. This however is subject to the BVI courts being satisfied that XYZ and the properties under its name are assets of DEF limited and should be under the control of DEF limited and its liquidator. If there are creditors in BVI with claims against XYZ, it is possible that the BVI courts may view that granting of such order may be prejudicial to creditors of XYZ and refuse to grant such order.
6. Alternatively, as the sole shareholder and sole director of DEF limited has passed away, ABC limited may contact the person(s) who have inherited the shares in DEF limited upon the passing of the sole shareholder and director for satisfaction of the judgment debt. Presumably DEF limited had ongoing operations and the person(s) who have inherited the shares in DEF limited would not want DEF to be wound up or for a liquidator to be appointed over DEF limited and may proceed to sell the shares of XYZ limited and / or realize the unencumbered properties in BVI or find other ways to meet the judgment debt. The statutory demand will serve as a good leverage for negotiations with DEF limited.
7. If the director and sole shareholder is also a party to the suit where the judgment debt was awarded, ABC could potentially also claim against the deceased estate of the sole shareholder and sole director of DEF limited.

*** End of Assessment ***

Commented [JW12]: 38.5 marks