



**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 are not considered creditors participating in an insolvency process. As their claims are directly against the assets of the company, they are able to enforce their security outside of the insolvency process. However, secured creditors are able to make a claim under section 338 of the Insolvency Act. Also, a secured creditor is able to apply for a bankruptcy order. As general rule for the claim or the application, the secured creditor needs to give the value of their secured interest, and any excess would be treated as unsecured. Also, on a claim, a secured creditor have the alternative to surrender their security interest to the trustee for the benefit of all creditors and claim as an unsecured creditor for the whole debt.

**Commented [JW2]:** .5 mark

See section 15, company creditors arrangements, section 175 liquidations, also section 211 and receiverships

**Question 2.2 [maximum 2 marks]**

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

The functions of a Creditors' Committee include consulting with the liquidator about matters relating to liquidation, considering reports from the liquidator, and assisting the liquidator in discharging his functions. The Committee has the power to call a meeting of creditors, require the liquidator to provide the committee with reports and information concerning the liquidation as it reasonably requires, require the liquidator to attend the committee to provide it with such information and explanations concerning the insolvency proceeding as it reasonably requires, and approve the liquidators' remuneration.

**Commented [JW3]:** 2 marks

**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?

According to the part XIX of the Insolvency Act, the BVI Court is provided with wide powers in relation to the orders that can be made in aid of foreign proceedings. Section 467 states that the Court may "restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property; subject to subsection (4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property; require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property; make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding; appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate; authorise the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor; stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or make such order or grant such other relief as it considers appropriate."

**Commented [JW4]:** 2 marks

**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.

Section 8(1) of the Insolvency Act provides some definitions of when a company is considered insolvent. This section establishes that "A company or a foreign company is insolvent if—

- (a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;
- (b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
- (c) either—
  - (i) the value of the company's liabilities exceeds its assets; or
  - (ii) the company is unable to pay its debts as they fall due"

But the Court retains residual discretion to find that a company is insolvent and appoint a liquidator. So, the facts established in Section 8(1) must be proved to the satisfaction of the Court.

**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 an amendment of the section 199 of the Business Companies Act and an amendment of the Regulation 6 of the Business Companies Regulations entered into force. This amendment introduces new requirements in respect of non-insolvency act liquidators.

The new regulation states that an individual is qualified to be appointed and act as a voluntary liquidator of a company if he has a liquidation experience of not less than two years, has professional competence to liquidate the specific company concerned, is able to demonstrate that he holds an insolvency practitioner's licence and has an appropriate professional qualification and experience of providing legal and financial advice or support, and is fully conversant with relevant financial services legislation connected to the business of the company to be 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's common for BVI companies' assets to be situated outside the BVI, and so it is often helpful to appoint an insolvency practitioner from the jurisdiction in which the assets are located, because it significantly reduces cost of travel and adds local expertise.

**Commented [JW5]:** 4 marks

**Commented [JW6]:** 3,5 marks  
Regulation 19 - also states must not disqualified and imposes residency requirement.

**Commented [JW7]:** Not 'and' - it should be 'or'

**Commented [JW8]:** 4 marks

An overseas insolvency practitioner needs to be appointed jointly with a BVI licenced insolvency practitioner or Official Receiver. In order to be appointed, prior written notice of the appointment must be provided to the Financial Services Commission, and the FSC has the power to appear and to be heard the appointment hearing and object to the appointment. In practice the foreign insolvency practitioner writes a letter to the FSC providing details such as expertise and qualifications and awaits confirmation that the FSC approves the appointment.

**Commented [JW9]:** 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 and consent.

### Question 3.3 [maximum 5 marks]

**Commented [JW10]:** 4.5 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, broadly speaking, three types of liquidation in the BVI:

First, there is a solvent voluntary liquidation regulated in the Business Companies Act. This type of voluntary liquidation is not available to insolvent companies and is intended to deal with the assets of the company when is no longer required in the business. According to the part XII of the BCA, to appoint a voluntary liquidator, the directors of the company are required to make a declaration of solvency and approve a liquidation plan. A voluntary liquidator or two or more joint liquidators may be appointed by a resolution of the directors or by a resolution of the members. Once appointed, the voluntary liquidator has 14 days to file with the Registrar a notice of his or her appointment in the approved form, the declaration of solvency made by the directors and a copy of the liquidation plan. Voluntary liquidation commences on the date that the voluntary liquidator files a notice of appointment with the Registrar.

**Commented [JW11]:** Advertised within 30 days

Second, there is an insolvent voluntary liquidation by members resolution regulated in the Insolvency Act. In this case, the appointment of a liquidator occurs by a qualifying resolution of the members. A company is obliged to commence formal insolvency proceedings when its director or directors become aware that the company is insolvent and there is no prospect of the company trading its way out of difficulties. The qualifying resolution needs to comply with the requirements set out in the section 159(3) of the Insolvency Act. According to section 161(2) of the Insolvency Act, where the members resolve to appoint a liquidator under section 159(2), the company shall, as soon as practicable, give the liquidator notice of his or her appointment.

Third, there is an insolvent liquidation by Court application regulated in the Insolvency Act. According to section 162(2) of the Insolvency Act, an application may be made by one or more of the following: the company, a creditor, a member, the supervisor of a creditors' arrangement in respect of the company, the Commission, the International Tax Authority and the Attorney General. The requisites for the application are established in section 162(1). The company must be insolvent, the Court is of the opinion that it is just and equitable that a liquidator should be appointed or the Court is of the opinion that it is in the public interest for a liquidator to be appointed. Also, the Court may appoint a provisional liquidator, when there is an urgent need to preserve the company's assets or its business, according to section 170 of the Insolvency Act.

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

#### Question 4.1 [maximum 6 marks]

**Commented [JW12]:** 2 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?

One option to Edale Limited is to commence an insolvent liquidation by Court application. As Edale is a creditor of Swift Limited it can file a petition for winding-up. The Court may issue a winding-up order if it is satisfied that Swift is insolvent or that it is just and equitable to wind up the company, according to section 162 of the Insolvency Act. This option allows Edale to initiate the liquidation process and potentially recover its debt through the liquidation proceedings.

Another option is to file a statutory demand based on section 155 of the Insolvency Act. If Swift fails to comply with the terms of the statutory demand and its not successfully set aside under section 156 of the Insolvency Act, Edale can use this as evidence of Swift insolvency to support a winding-up petition.

#### 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?

As DEF Limited has no realisable assets in England, seek for the enforcement of the judgment in England would be futile. Probably the option with most chances of success is seek to restore XYZ Limited on the BVI Register -according to section 218 of the Business Companies Act a creditor or any person who can establish an interest in having the company restored to the Register may apply to the Court to restore a company- and then initiate a liquidation process of XYZ Limited, to take control of the assets. When XYZ Limited is under liquidation in the BVI, ABC Limited can initiate a liquidation process in England against DEF Limited to finally take over realizable assets and recover the debt recognized in the judgment, under the rules of Chapter VI of UK Insolvency Act 1986 (compulsory winding-up by the Court).

**\* End of Assessment \***

**Commented [JW13]:** 1.5 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 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

**Commented [JW14]:** 34 marks