



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.

The Insolvency Act specifically recognises and protects the rights of secured creditors to enforce their security. Secured creditors are not strictly speaking classed as creditors or considered as participating in the insolvency process. Their claims are directly against the assets of the company, which are subject to the security, so they fall outside the liquidation. There are, therefore, no timelines for enforcing a secured claim. It is up to the secured creditor to determine when to take control of the security interest and when to sell it for the best return. The commencement of insolvency does not affect the rights of a secured creditor to enforce its right against the secured assets.

Commented [JW2]: .5 mark

See section 15 company creditors arrangements, section 175 liquidations, section 338 bankruptcy, 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: (a) consulting with the liquidator about matters relating to liquidation, (b) considering reports from the liquidator, and (c) assisting the liquidator in discharging his functions.

A creditors' committee's powers include the ability to:

- (a) call a meeting of creditors;
- (b) require the liquidator to provide the committee with reports and information concerning the liquidation (as it reasonably requires); and
- (c) require the liquidator to attend the committee to provide it with such information and explanations concerning the insolvency proceeding as it reasonably requires.

The committee also has the power to approve the liquidators' remuneration. Given the powers afforded to the creditors' committee, it is a useful tool should a creditor wish to take a more active role in the liquidation process.

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?

The BVI Court is provided with wide powers in relation to the orders that can be made, which include: (Insolvency Act, s 467(3))

- (a) restraining the commencement or continuation of any proceedings, against a debtor or debtor's property;
- (b) restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
- (c) requiring any person to deliver up any property of the debtor or the proceeds of such property;
- (d) ordering or granting relief to facilitate, approve or implement arrangements that will result in a co-ordination of BVI insolvency proceeding with a foreign proceeding;
- (e) appointing an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;

Commented [JW4]: 2 marks

- (f) authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding; or
- (g) staying or terminating or making any other order it considers appropriate in relation 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.

Set out below are the circumstances in which a company will be considered insolvent in the BVI. Whilst such statutory tests exist, on a Court appointment the Court retains residual discretion as to whether it should find that a company is insolvent and appoint a liquidator.

- It is proved to the satisfaction of the Court that a company is unable pay its debts as they fall due (a question of fact) [see Insolvency Act, s 8(1)(c)(ii)]. The well-known English case of *Cornhill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114 sets out that an inability to pay a debt that is due and not disputed, is sufficient evidence of insolvency.
- It is proved to the satisfaction of the Court that the value of the company's liabilities exceeds the value of its assets, or "balance sheet insolvency" [see Insolvency Act, s 8 (1)(c)(i)]. Section 10(1) of the Insolvency Act provides a wide definition of liability - under an enactment, in contract, tort or bailment, a breach of trust and arising out of an obligation to make restitution. Liability for these purposes includes a debt. In addition, section 10(2) of the Insolvency Act states that a liability may be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion. Notably, the BVI Court of Appeal in *Trade and Commerce Bank v Island Point Properties SA BVICA 2009/0012* confirmed that a company may not be considered balance sheet insolvent in circumstances where the value of a company's assets became lower than those of its assets for only a short period.
- A company fails to satisfy (wholly or partly) execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company.
- If a company fails to comply with the terms of a statutory demand and it is not successfully set aside under sections 156 and 157 of the Insolvency Act. A statutory demand is a written demand for payment of a debt that is due and payable, made by a creditor in the format required under section 156 of the Insolvency Act.

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

Question 3.1 [maximum 5 marks]

Commented [JW6]: 4. marks

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

Regulation 19 - also states not disqualified and imposes residency requirement.

From 1 January 2023 section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 the BVI Business Companies (Amendment) Regulations 2022 introduces new requirements in respect of non-Insolvency Act liquidators. Regulation 6(a)1A states that an individual is qualified to be appointed and act as a voluntary liquidator of a company if he:

- (a) has liquidation experience of not less than two years;
- (b) has professional competence to liquidate the specific company concerned;

- (c) is able to demonstrate that he:
- (i) holds an insolvency practitioner's licence; and
 - (ii) has as appropriate professional qualification (such as in law or accountancy) and experience of providing legal and financial advice or support to companies in the financial services sector: and
- (d) is fully conversant with relevant financial services legislation connected to the business of the company to be liquidated, including the Financial Services Commission Act and BVI Business Companies Act.

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

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.

Commented [JW8]: 3.5 marks

Must 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 and consent.

- (a) in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and
 - (b) what is the process for such proposed appointment?
- (a) Under section 483 of the Insolvency Act, an individual resident outside of the BVI can be appointed to act as an insolvency practitioner and sets out detailed requirements in this regard. It is common for BVI companies' assets (or a substantial part thereof) to be situated outside of the BVI. Accordingly, it is often helpful to appoint an insolvency practitioner from a jurisdiction in which such assets are held. From a practical standpoint, whilst there is another insolvency practitioner appointed (which has associated costs), it significantly reduces costs of travel and further costs relating to local expertise. This is particularly important in long-running liquidations which involve multiple disputes in different jurisdictions. However, the overseas insolvency practitioner must be appointed jointly with a BVI licenced insolvency practitioner or the Official Receiver.
- (b) In order to be so appointed, prior written notice of such intended appointment must be provided to the FSC. In circumstances where it is proposed that an overseas insolvency practitioner be appointed, the FSC has the power to appear and be heard at the court hearing to appoint (where applicable) and object to the appointment. In practice, the foreign insolvency practitioner usually writes a letter to the FSC providing required details (such as expertise and qualifications) and awaits confirmation that the FSC approves the appointment of the overseas insolvency practitioner (subject to Court approval, where relevant).

Question 3.3 [maximum 5 marks]

Commented [JW9]: 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. voluntary liquidation (solvent) under the BCA;

The procedure for voluntary liquidations is contained in Part XII of the BCA. However, it is noted that the BCA does refer to the Insolvency Act for certain definitions, such as "creditor" and "ability", as set out in section 196A of the BCA. Pursuant to section 197(1) of the BCA, a company can only be liquidated under Part XII if: (a) it has no liabilities, or (b) if it is able to pay its debts as they fall due and the value of the assets is equal or exceeds its liabilities.

In brief, where it is proposed to appoint a voluntary liquidator, the directors of the company are required to make a declaration of solvency and approve a liquidation plan. Under section 199(1) BCA, a voluntary liquidator or two or more joint voluntary liquidators may be appointed (a) by resolution of the directors, or (b) by a resolution of the members. The requirements for such resolutions are set out in section 199(2)-(4) of the BCA. There are a number of circumstances in which a voluntary liquidator may not be appointed, which include where a liquidator of the company has already been appointed under the Insolvency Act.

Once appointed, the voluntary liquidator has 14 days to file the following with the Registrar: 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. The voluntary liquidation commences on the date that the voluntary liquidator files a notice of appointment with the Registrar. The voluntary liquidator must also advertise his or her appointment within 30 days of the commencement of the voluntary liquidation.

2. insolvent liquidation (voluntarily) under the Insolvency Act by members resolution;

The liquidation of the company commences at the time at which the liquidator is actually appointed, i.e. the date the qualifying resolution is passed or the date of the Court order appointing the liquidator.

Pursuant to section 159(3) of the Insolvency Act, a resolution is a "qualifying resolution" if it is "passed at a properly constituted meeting of the company by a majority of 75 per cent" or a higher majority is required by the memorandum and articles of the company. There are restrictions and further procedural requirements if the company is regulated by the FSC. Members are not able to appoint the Official Receiver as liquidator. Section 161(2) requires the company to provide notice to the liquidator of his appointment, as soon as practicable.

3. insolvent liquidation by court application under the Insolvency Act.

Section 162 of the Insolvency Act sets out the primary provisions relating to the appointment of a liquidator by the Court, supplemented by the IR as regards the procedure. Such application may be made by one (or more) of:

- (a) the company;
- (b) a creditor;
- (c) a member;
- (d) the supervisor of a creditor's arrangement;
- (e) the FSC; and
- (f) the Attorney General.

Pursuant to section 168(1), an application for the appointment of a liquidator must be determined within six months after it is filed, unless the Court extends this timeframe. The Court will only extend the timeframe if it is satisfied that there are special circumstances that justify the extension and the order extending the period is made before the expiry or the relevant period. The Court's power to extend the timeframe is limited to three months.

The Court may only appoint a liquidator under section 159(1), if:

- (a) the company is insolvent;
- (b) the Court is of the opinion that it is "just and equitable"; or
- (c) it is in the "public interest"

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?

As the debtor company Swift Limited is a company incorporated in the BVI, the BVI Court has jurisdiction in its insolvency proceedings.

Edale Limited can issue a statutory demand against Swift Limited for the repayment of the outstanding amount in full, and if after 21 days upon service of the statutory demand it still fails to repay the loan, Edale can petition for the winding up of Swift Limited. In the interim, it can also apply for a freezing order against Mosquito Island, the property owned by Swift Limited within the BVI. Alternatively, Edale can also apply for court-appointed receivers over Mosquito Island based on the unpaid loan.

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?

ABC Limited can consider enforcing the English High Court judgment in the BVI under the Reciprocal Enforcement of Judgments Act 1922. It needs to be registered in the BVI within 12 months of the date of judgment, that is, before April 2023. If the judgment is successfully registered in the BVI, it can then enforce the debt by applying for charging orders over the properties in the BVI owned by XYZ, and subsequently an order for sale. Alternatively, it can also petition to wind up XYZ in the BVI.

Several issues arise in the facts that needs to be considered and addressed during the enforcement:

- (a) XYZ Limited being struck off the Register: ABC Limited needs first to apply to restore XYZ back to the register. The restoration of XYZ in the BVI needs to be done through DEF, its parent company, and instructions to be given by its directors/shareholders.
- (b) The sole shareholder and sole director of DEF Limited has recently died: ABC Limited needs to find out under English law and the company's constitutional documents who will be appointed as the director and shareholder of DEF under this circumstance, then it needs to request that person to restore XYZ in the BVI.

*** End of Assessment ***

Commented [JW10]: 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.

Commented [JW11]: In BVI - An application to appoint a liquidator under IA2003

Commented [JW12]: 2 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 r required 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 [JW13]: 35 marks