



**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 formally classed as creditors that participate in the insolvency process in BVI. Secured creditors make their claim directly against the asset they retain a charge over, these assets therefore fall outside of the liquidation estate. Charges ought to be registered on the private register held at the company's registered office (mandatory per s162 of the BCA) – although the absence of registration would not render the charge null and void. However a prudent secured creditor should also register the charge publicly with the Registrar per s 163 – this public register dictates the priority of security.

Depending on the terms of the charge document a secured creditor can appoint a Receiver. The Receiver's primary duty will be those set out in the document (usually to recover the secured asset and sell it for the benefit of the secured creditor).

**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 concerning the liquidation, considering the liquidators' reports and assisting the liquidator in discharging their duties.

The powers bestowed upon a Creditors' Committee are: to call a meeting of the creditors, to require the liquidator to report to the Committee with reports or information concerning the insolvency proceedings and to require the liquidator to attend the Committee to provide it with such information or explanations as it requires.

**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?

Section 467(3) of the Insolvency Act states that the Court can make the following orders in support of foreign insolvency proceedings:

- Restraining the commencement or continuation of any proceedings against a debtor or their property;
- Restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
- Requiring any person to deliver up any property of the debtor or the proceeds of such property;
- Ordering or granting relief to facilitate, approve or implement arrangements that will result in a coordination of any BVI proceedings with the foreign proceedings;
- Appointing an interim receiver of any property for such term and subject to such conditions the Court deems appropriate;

**Commented [JW2]:** 1 mark

See section 15, company creditors arrangements, section 175 liquidations, section 338 bankruptcy, also section 211

**Commented [JW3]:** 2 marks

**Commented [JW4]:** 2 marks

- Authorising the examination by the foreign representative of the debtor or of any person who could be examined under BVI law; or
- Staying or terminating or making any other order it considers appropriate.

**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.

BVI legislation sets out statutory tests for insolvency, but it is worth noting from the outset that for Court appointments, the Court retains the ultimate discretion as to whether it should find that a company is insolvent. The statutory tests are:

- Section 8(1)(c)(ii) of the Insolvency Act – it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.
- Section (8)(1)(c)(i) of the Insolvency Act – it is proved to the satisfaction of the Court that the value of the company’s liabilities exceeds the value of its assets. It is worth noting that section 10(2) of the Insolvency Act states that ‘liabilities’ can be present or future, certain or contingent or fixed or liquidated.
- If a company fails to satisfy (in whole or in part) execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor.
- If a company fails to comply with the terms of a statutory demand and it is not set aside under 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]:** 3.5 marks

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

From 1 January 2023 the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies (Amendment) Regulations 2022 introduced new requirements for those eligible to be appointed as voluntary liquidators. Regulation 6(a)1A states that an individual is qualified to be appointed as act as a voluntary liquidator if he or she:

**Commented [JW7]:** Regulation 19 - also states must not disqualified to act and imposes residency requirement.

- Has liquidation experience of not less than 2 years;
- Has professional competence to liquidate the specific company concerned;
- Is able to demonstrate:
  - o They hold an insolvency practitioner’s license (issued by the FSC per the Insolvency Act section 476); and
  - o Has an appropriate professional qualification and experience of providing legal and financial advice or support to companies in the financial services sector; and
- 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 [JW8]:** Not 'and' - it should be 'or'

Section 476 of the Insolvency Act states that the FSC will grant a license if the following conditions are met:

- The individual is resident in the BVI and fit, proper and qualified to act;

**Commented [JW9]:** Answer required change in the law 1/1/23 is relevant to solvent voluntary liquidators

- The individual will be in compliance with the Act and the IP Regulations;
- The individual is not disqualified from holding a license; and
- The issuing of a license is not against the public interest.

Finally, under section 483 of the Insolvency Act an individual not resident in BVI can be appointed, so long as they are jointly appointed with a BVI licensed IP or the Official Receiver.

**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.

- in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and
- what is the process for such proposed appointment?

The BVI is the second-largest domicile in the world for the formation of offshore investment funds and company incorporations have become a fundamental part of the economy, overtaking agriculture along side tourism. As a result, the need to restructure local-based business is limited and the restructuring and insolvency industry is primarily focussed on the vast number of BVI registered asset holding vehicles and funds. These businesses typically hold assets outside of the BVI and across the globe, therefore a creditor may look to appoint an insolvency practitioner from a jurisdiction relevant to the asset profile of the business to take advantage of local knowledge that may assist in recoveries or litigation as needed. This also may help to reduce the costs of outside counsel and the need for the BVI based IP to travel unnecessarily.

Section 483 of the Insolvency Act allows for and dictates the rules around the appointment of an individual not resident in the BVI as an insolvency practitioner over a BVI registered entity. The overseas IP must be appointed jointly with a BVI based IP (or the Official Receiver). Prior written notice of the intended appointment must be provided to the BVI Financial Services Commission. In practice the overseas IP typically writes to the BVI FSC with relevant details such as the rationale for their appointment, their expertise and qualifications. The BVI FSC has the ability to object and to be heard at the Court hearing for the appointment (if applicable).

**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.

**Voluntary Liquidation under the Business Companies Act**

This type of liquidation is only available for solvent scenarios where a company is no longer required or has served its purpose and its winding up is desired by the members. The process to commence a voluntary liquidation under the BCA is relatively straightforward, the directors are required to make a declaration of solvency and approve a liquidation plan (section 198). The Voluntary Liquidator (or Joint Voluntary Liquidators) are then appointed by a resolution of the directors or the members of the company.

Liquidation of an Insolvent Company under the Insolvency Act

**Commented [JW10]:** 4 marks

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.

**Commented [JW11]:** 3.5 marks

**Commented [JW12]:** Not all of the procedure\_ Resolution required by directors/members. Directors have to make a Declaration of Solvency not more than 4 weeks old as well as prepare a Liquidation Plan and be accompanied by Statement of Affairs. Appointment cannot be more than 6 weeks after approval of Liquidation plan. a Notice of appointment, Declaration of Solvency and Liquidation plan to be filed within 14 days, appointment advertised in 30 days.



This type of liquidation is 'voluntary' in nature in the sense that the appointment is made by a qualifying resolution of the company's members but it is a distinct process to the BCA Voluntary Liquidation described above. Section 159(3) of the Insolvency Act states that a 'qualifying resolution' of the members is one that is passed at a properly constituted meeting with 75% of the members voting in favour. A meeting of the company's creditors must then be called under section 179 after which the liquidator will have access to the full powers of his office.

Liquidation of an Insolvent Company – Court appointment

Section 162 of the Insolvency Act details the provisions with respect to the appointment of a Liquidator by the Court. An application to the Court may be made by the company, a creditor, a member, the supervisor of a creditors' arrangement, the BVI FSC, and the Attorney General. Per section 159(1) the Court may only make an order for the liquidation of a company if it is insolvent, it is just an equitable to do so, or if it is deemed to be 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?

Edale Limited, following the non-payment of the instalments by Swift Limited, could be entitled to issue a statutory demand for the unpaid amount. Section 156 of the Insolvency Act states that a statutory demand is a written demand for payment of a debt that is due and payable. It is worth noting that Swift Limited may apply to have the demand set aside under sections 156 and 157 (if it is disputed for example) but the Court will have overall discretion as to whether it is sufficient to place Swift into Liquidation (discussed further below).

As a creditor of Swift Limited, Edale Limited, could apply to the Court under section 162 of the Insolvency Act for the company to be placed into Liquidation. Per section 159(1) the Court can only make an order for the liquidation of Swift Limited in limited circumstances (insolvency, on a just and equitable basis or in the public interest). On the facts, it would seem Edale's best argument is to apply to Court alleging Swift is insolvent which, if accepted by the Court, would be sufficient. Insolvency is defined as when a company is unable to pay its debts as they fall due (section 8(1)(c)(ii) of the Insolvency Act) or where it is proved to the satisfaction of the Court that the value of the company's liabilities exceed its assets (section 8(1)(c)(i)). Whilst the debt to Edale is almost certainly a liability per the definition in section 10(2), on the facts Swift's assets may still technically exceed its liabilities (given its presumed ownership of Mosquito Island).

Therefore non compliance with the aforementioned statutory demand could serve as helpful evidence for the Court to demonstrate Swift's inability to pay its debts in order to satisfy the insolvency test.

If successfully placed into liquidation, the effect of such an order is outlined in section 175(1) of the Insolvency Act. Broadly, the IP appointed will take custody and control of the assets of Swift (including

**Commented [JW13]:** 3 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.

Mosquito Island) and he or she will have the power to sell or realise any such assets for the benefit of the creditors distributing the proceeds to them if available (including, but possibly not exclusively, Edale Limited) under section 185(1).

**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?

The first issue ABC will need to deal with is preventing XYZ Limited from being dissolved otherwise its assets cannot be targeted in satisfaction of the debt. Per section 91(1) of the Business Companies Act all BVI registered entities must have a Registered Agent (otherwise it can be struck off the Register per section 213(1)). The facts to hand do not suggest that XYZ has been struck off for not having a RA but for some other reason – such as the non-payment of fees following the death of the shareholder/director. Therefore, we can assume that dissolution will not be immediate under the new provisions of the Business Companies (Amendment) Act 2022 and the changes to section 216.

ABC could therefore procure that the issues with the Registrar are satisfied and have XYZ restored to the Register – local legal advice and the assistance of the RA will be needed.

The next issue is recognition of the UK judgment debt in BVI. Fortunately for ABC, Part XIX of the Insolvency Act provides for the BVI Court to have the power to make orders in aid of certain foreign proceedings. The Court can also provide assistance to certain foreign representatives. The list of designated countries is limited but crucially for ABC, includes the United Kingdom. When making orders to aid foreign proceedings the BVI Court is able to apply the applicable BVI laws or the law of, in this case, the UK per section 467(5) of the Insolvency Act.

The Court has wide ranging powers to make orders to assist foreign proceedings including:

- restraining the commencement or continuation of any proceedings against XYZ or its property;
- restraining the creation, exercise or enforcement of any right or remedy over or against any of XYZ's property; and
- requiring any person to deliver up any property of the debtor or the proceeds of such property.

Any of the above may prove useful to ABC as it can be assumed they may not be the only creditor and as such they would like to be sure of some protection before the assets of XYZ are dissipated.

In addition, on 7 January 2021 the BVI government enacted an amendment to the Eastern Caribbean Supreme Court (Virgin Islands) Act which grants the Court the jurisdiction to award free-standing interim relief in aid of existing foreign proceedings including injunctive relief, the appointment of

**Commented [JW14]:** 3.5 marks  
This question required a memorandum to your principal with the options for ABC.

**Dissolution 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 UK liquidation for DEF then UK liquidator could take steps to restore XYZ as most likely now dissolved - see 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.

**Commented [JW15]:** Where struck off it would be dissolved 1 July 2023

receivers or third-party disclosure orders. Therefore, if the above assistance is not thought to be helpful, ABC could petition for the appointment of a Receiver.

A Receiver appointed by the Court (and not via the terms of a debenture) will be an agent of the Court and his powers will be defined by the Order document so ABC needs to be very clear, via their BVI counsel, as to what they would like the Receiver to do – we assume realise XYZ's interest in the unencumbered properties in BVI to repay the debt. Under section 128(1) the Receiver's primary statutory duty will be to exercise his powers in:

- good faith; and
- a manner he believes, on reasonable grounds, to be in the best interests of the person in whose interests he was appointed.

Finally, ABC could look to apply to the Court for the appointment of a liquidator over XYZ (via DEF Limited as the member) per section 162 of the Insolvency Act. Of the three grounds on which the Court can make the appointment (section 159(1)) ABC may find pursuing the 'just and equitable' argument successful. Typically this involves convincing the court that the appointment of a liquidator would be 'just and equitable' in the circumstances – such as there is no justification for the continued existence of the company or deadlock in the management of the company so it can no longer function. The death of the director/shareholder and (almost) dissolution of XYZ would be good evidence to present to the court to convince them that the appointment of a liquidator is the only route available to XYZ and to ABC to pursue its recoveries.

**\* End of Assessment \***

**Commented [JW16]:** 36.5 marks