



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]: 8 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.

Commented [JW2]: Correct answer

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.

Commented [JW3]: Correct answer

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 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.

Whilst secured creditors are not obliged to make a claim in the bankruptcy, they are able to do so under section 338 of the Insolvency Act. In order to make a claim the creditor must value the assets subject to the security and claim as an unsecured creditor for the remainder of the debt as an unsecured creditor. In the alternative the creditor can surrender their security interest to the trustee for the benefit of all creditors and claim as an unsecured creditor for the whole debt.

The BVI insolvency framework provides certain protections and options to secured creditors:

- i. Security Interests: Secured creditors in the BVI benefit from the creation of valid and enforceable security interests over the assets of the debtor.
- ii. Priority of Claims: In the event of insolvency proceedings, secured creditors generally enjoy a higher priority in the distribution of assets compared to unsecured creditors.
- iii. Receivership: A secured creditor has the option to appoint a receiver under the Act. This provides an avenue for secured creditors to protect and maximize the value of their collateral.
- iv. Enforcement of Security: Secured creditors have the right to enforce their security interests through various means, such as foreclosure, sale, or appropriation of the secured assets.

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:

- i. call a meeting of creditors;
- ii. require the liquidator to provide the committee with reports and information concerning the liquidation (as it reasonably requires);
- iii. require the liquidator to attend the committee to provide it with such information and explanations concerning the insolvency proceeding as it reasonably requires; and
- iv. The committee also has the power to approve the liquidators' remuneration.

Commented [JW4]: 1 mark

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

Commented [JW5]: 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 can recognise certain foreign insolvency proceedings and provide assistance to “foreign representatives”. The power to make such orders extends to designated countries, which include Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the United States. When making an order in aid of foreign proceedings, the BVI Court is able to apply the applicable BVI laws or the law of the applicable country.

Commented [JW6]: 0 marks

8 orders possible under section 467(3) IA2003

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.

- i. A company cannot pay its debts as they fall due.
- ii. The value of the company’s liabilities exceeds the value of its assets.
- iii. 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.
- iv. 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).

Commented [JW7]: 3.5 Marks

8 orders possible under section 467(3) IA2003

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?

From 1 January 2023 section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 the BVI Business Companies (Amendment) Regulations 2022 will introduce 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 [JW8]: 4 marks

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

Commented [JW9]: 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.

- (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) An overseas insolvency practitioner can be appointed as liquidator of a BVI company, but only as a joint appointment 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]

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.

In the BVI, a liquidator is appointed in:

- 1) voluntary liquidation (solvent) under the BCA:
Insolvency is not required to place a company into voluntary liquidation under the provisions of the BCA. Indeed, voluntary liquidation under the BCA is not available to insolvent companies. A voluntary liquidation is commonly utilised where a company is no longer required by a business and it is to be dissolved; that is, in the BVI it is not normally viewed as a form of “corporate rescue”. The principal purpose of a voluntary liquidation is to deal with the company’s assets, pay any liabilities in order to dissolve the (solvent) company.
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.
- 2) insolvent liquidation (voluntarily) under the Insolvency Act by members resolution:
Appointment of an “eligible insolvency practitioner” by the members of a BVI company (as opposed to a foreign company) by way of a qualifying resolution.
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 FSC116.

Commented [JW10]: 2.5 marks

Commented [JW11]: Generally to save costs, use local expertise and where the assets are located outside of the BVI.

Commented [JW12]: 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 [JW13]: 4 marks

Commented [JW14]: 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.

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:**
The Court may appoint the Official Receiver or a liquidator over a BVI company pursuant to an application made under 162 of the Insolvency Act, or over a foreign company on an application made under 163 of the Insolvency Act;

Commented [JW15]: 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. If company is the applicant then the application for the appointment of liquidator has to be advertised.

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?

Commented [JW16]: 2 marks

The question stated: with particular reference to the insolvency Act,

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.

As a general note, the specifics of Edale Limited's options would depend heavily on the terms and conditions of their loan agreement. This answer also assumes that Edale Limited is willing to take legal action against Swift Limited, and that Swift Limited is unable to or unwilling to pay its debt.

1. **Demand Letter:** Before engaging in any sort of legal action, it is often advisable to send a formal letter to the debtor. This letter can demand full repayment of the debt, propose a repayment plan, or propose some other kind of resolution. If Swift Limited does not respond favourably to this letter, Edale Limited might need to take further action.
2. **Mediation:** Mediation could be used to resolve disputes without going to court. A neutral third party helps the parties come to an agreement. This could result in a payment plan, debt forgiveness, or some other resolution. The benefits of mediation include cost savings and speed relative to going to court. However, mediation requires the consent of both parties.
3. **Legal Action:** If Swift Limited fails to repay the loan or reach a settlement, Edale Limited may decide to take legal action against Swift Limited.

Here, it's important to note that the options available to Edale Limited will largely depend on the jurisdiction in question. The BVI, where Swift Limited is incorporated, would most likely be the appropriate jurisdiction, unless the loan agreement specifically stipulates otherwise.

In relation to the insolvency option under the BVI Insolvency Act, 2003, assuming Swift Limited is insolvent or near insolvent, Edale Limited could consider the following options:

Statutory Demand: Under section 155 of the BVI Insolvency Act, Edale Limited could issue a statutory demand for the debt owed by Swift Limited. This is a formal demand for payment, and if the company does not comply within 21 days, it is presumed to be insolvent.

Insolvency Proceedings: If Swift Limited fails to pay within the stipulated period after the statutory demand has been served, Edale Limited could initiate insolvency proceedings under the BVI Insolvency Act.

4. **Appointing a Liquidator:** If Swift Limited is declared insolvent, Edale Limited could petition the court to appoint a liquidator to sell Swift Limited's assets, including possibly the Mosquito Island property, and distribute the proceeds to its creditors, including Edale Limited.

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?

Subject: Options for Enforcing Judgment Debt Owed by DEF Limited

Dear [Principal's Name],

ABC Limited, our client, is seeking advice on enforcing a judgment debt of GBP 2 million awarded by the English High Court in April 2022 against DEF Limited, a company also incorporated in England.

The primary challenge in this case is that DEF Limited apparently has no realisable assets within England, but wholly owns XYZ Limited, a BVI incorporated company with valuable unencumbered properties. However, XYZ Limited is currently struck off of the BVI Register, and the sole shareholder and director of DEF Limited has recently passed away.

Below are the potential options that we could advise ABC Limited to consider:

1. Restoration and Pursuing DEF Limited's Assets in XYZ Limited:

The most promising avenue for ABC Limited might be to seek the restoration of XYZ Limited to the BVI Register. The BVI Business Companies Act permits a company, its members, or its creditors to apply to the Court for the company to be restored to the Register. ABC Limited, as a creditor of DEF Limited, might be able to qualify for this process.

Once XYZ Limited is restored, ABC Limited could potentially enforce its judgment against the properties owned by XYZ Limited, arguing that XYZ Limited's assets are, in effect, DEF Limited's assets due to DEF Limited's 100% ownership of XYZ Limited. This route would likely require the assistance of local legal counsel in the BVI.

Commented [JW17]: 2 marks

Discussion was required on the possible options to be considered by ABC:

1. Enforcement of a judgment under Reciprocal Enforcement of Foreign Judgments Act 1922 - the 8 conditions under the Act and issue with the 12 months and would an extension be required.
2. Appointment of a liquidator in DEF in UK and recognition in BVI; or the appointment of a receiver over shares of DEF who could then appoint a new director to deal with restoration of XYZ and assets; and
3. Restoration to the register of XYZ - was it just struck off or was it to be dissolved under the new law from 1/1/23 - any previously company struck off as at 30 June 2023 will be automatically dissolved on 1 July 2023. An application to the court would be required to restore XYZ.
4. ABC may apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares.

Commented [JW18]: Correct as an interested party

Commented [JW19]: Under what Act? - the 8 conditions were required as was the 12 month expiry period for registration

2. Applying for Insolvency of DEF Limited:

ABC Limited could consider initiating insolvency proceedings against DEF Limited in the English courts. If DEF Limited is found to be insolvent, an administrator or liquidator will be appointed who can then take control of DEF Limited's assets, including its shares in XYZ Limited, and sell them to repay its creditors. However, this could be complex given that XYZ Limited is incorporated in the BVI and struck off the BVI Register but it might also be possible for the liquidator or administrator to apply to restore XYZ Limited to the BVI Register.

3. Post-death Claims Against the Director's Estate:

If the deceased sole shareholder and director of DEF Limited had personal assets, ABC Limited could potentially make a claim against his/her estate. However, this would depend on various factors, such as the deceased's liabilities, the size of the estate, and the laws regarding debt inheritance.

Sincerely,

I.H.

*** End of Assessment ***

Commented [JW20]: 29 marks