



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5B

BRITISH VIRGIN ISLANDS (BVI)

This is the **summative (formal) assessment** for **Module 5B** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 5B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial or Avenir Next font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment5B]**. An example would be something along the following lines: 202223-336.assessment5B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [JW1]: 10 marks

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

When is the appointment of a liquidator **deemed to commence**, when there has been a qualifying resolution passed to appoint a liquidator?

- (a) On the date of the order appointing the liquidator.
- (b) On the date the qualifying resolution is passed.
- (c) On the filing of the application to appoint a liquidator.
- (d) On the advertisement of the application to appoint a liquidator.

Question 1.2

In order to comply with section 156 of the Insolvency Act, **what timeframe** for payment of the debt (or to secure or compound for the debt), must a statutory demand require?

- (a) Within 14 days of the service of the statutory demand.
- (b) Within 21 days of the date of the statutory demand.
- (c) Within 21 days of the service of the statutory demand.
- (d) Within 14 days of the date of the statutory demand.

Question 1.3

Which of the following **is not able** to make an application for the removal of a liquidator?

- (a) A member of the company.
- (b) A creditor.
- (c) The creditors' committee.
- (d) A receiver.

Question 1.4

Where a receiver exercises a power of sale, the receiver owes a duty to obtain the best price reasonably obtainable at the time of sale. **To which one of the following is the duty owed to?**

- (a) The creditors, the shareholders, persons claiming an interest in the assets and the company.
- (b) The creditors, sureties, the shareholders and the company.
- (c) The creditors, sureties, persons claiming an interest in the assets of the company and the company.
- (d) The creditors, shareholders, sureties and persons claiming an interest in the assets of the company.

Question 1.5

A person is an “eligible insolvency practitioner”, able to be appointed over an insolvent BVI company, foreign company or an individual’s estate as a trustee in bankruptcy if:

- (a) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (b) He or she is a licenced insolvency practitioner; has advertised for his or her role; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (c) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding an appointment; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (d) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force an undertaking for the proper performance of his or her functions.

Question 1.6

Under the Reciprocal Enforcement of Judgments Act 1922, what is the **time period** during which a foreign judgment is registrable in the BVI?

- (a) Within 12 months of the date of judgment.
- (b) Within three (3) months of the date of trial.
- (c) Within six (6) months of the date of judgment.
- (d) Within six (6) months of the date of trial.

Question 1.7

Which one of the below **is not** an effect of the appointment of a liquidator over a company?

(a) The liquidator has custody and control of the assets of the company.

(b) The assets automatically vest in the liquidator.

(c) The directors remain in office but cease to have any powers.

(d) Shares in the company cannot be transferred.

Question 1.8

In a liquidation, what is the **vulnerability period** for an undervalue transaction in the case of a transaction entered into with a connected person?

(a) Two (2) years prior to the onset of insolvency and ending on the appointment of the liquidator.

(b) Two (2) years prior to the appointment of the liquidator.

(c) Six (6) months prior to the onset of insolvency and ending on the appointment of the liquidator.

(d) Five (5) years prior to the appointment of the liquidator.

Question 1.9

Which of the following **is not** a resolution that the directors of a company must pass in order to put in place a company creditors' arrangement?

(a) Stating that the company is insolvent or is likely to become insolvent.

(b) Approving a written proposal setting out how the creditors' rights will be varied or cancelled.

(c) Approving a liquidation plan and a declaration of solvency.

(d) Nominating an eligible insolvency practitioner to be appointed interim supervisor.

Question 1.10

When does a voluntary liquidation commence?

(a) When the directors of the company sign a declaration of solvency.

(b) When the directors of the company sign a liquidation plan.

(c) When the directors of the company pass the resolution appointing the voluntary liquidator.

(d) On the date the voluntary liquidator files a notice of appointment with the Registrar.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Commented [JW2]: .5 mark

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

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

Legal mortgages – Created by contract. Property title is transferred to mortgagee. Mortgagee rights will be defined in mortgage document – but commonly include a right to foreclose, sell the property, or appoint a receiver over the property following an event of default.

Other security – equitable charges, pledges, etc.

Essentially, under BVI law, if an event of default occurs under the security documents the security holder can enforce on their security and realise value for the underlying asset up to the value secured (value over and above the amount secured will redound to the mortgagor pursuant to its equity of redemption). This enforcement can occur after the company goes into liquidation.

Question 2.2 [maximum 2 marks]

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

A Creditors' Committee has the following functions and powers:

- To consult with the liquidator about matters relating to the liquidation proceedings;
- To receive and consider reports of the liquidator (including in relation to the liquidator's fees);
- To approve the liquidator's remuneration; and
- As a measure of last resort, to apply to the court for the removal of the liquidator (if required).

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 Court's powers are set out in Part XIX of the Act, and include the power to:

- stay legal proceedings (to give effect to the foreign moratorium);
- make orders for the distribution of assets or for property to be delivered up; and/ or
- appoint an interim receiver.

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.

Corporate insolvency is governed by Part VIII of the Act. Some definitions are included in section 8, but it should be noted that the Court retains discretion to determine if the company is in fact insolvent and if a liquidator should be appointed.

The circumstances are:

- the company is unable to pay its debts as they fall due;
- the company's liabilities exceed its assets (balance sheet insolvency);
- the company fails to execute on a court order; or
- the company fails to comply with a statutory demand which has not been set aside.

Commented [JW3]: 1 mark

Commented [JW4R3]: See section 422 IA 2003 for all of the functions and powers as you only have two functions and one of the powers

Commented [JW5]: .5 mark

There are 8 orders possible under section 467(3) IA2003.

Commented [JW6]: 4 marks

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, at least one of the liquidators appointed over a BVI company must be a BVI resident.

Further, each practitioners must be an "*eligible insolvency practitioner*" under section 482 of the Act:

- is a licensed insolvency practitioner;
- has given written consent to act in the insolvency in the prescribed form;
- is not disqualified from holding a licence; and
- there is in force such security for the proper performance of functions as may be specified in the regulations.

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?

First, from 1 January 2023, at least one of the liquidators appointed over a BVI company must be a BVI resident.

Further, the second liquidator must have:

- sufficient qualifications and experience to act in the insolvency proceedings (i.e. is qualified);
- has given written consent to act in the prescribed form;
- is not disqualified from holding a licence;
- there is in force such security for the proper performance of his or her functions as may be specified in the Regulations; and
- prior written notice of his or her appointment has been given to the FSC.

Requirements are set out in section 483.

It should be noted that the FSC may send a representative to the appointment hearing, and thus prior approval for the appointment should be obtained from the FSC ahead of time.

Question 3.3 [maximum 5 marks]

Commented [JW7]: .5 - for resident

This appears to be the answer to question 3.2(b) as 482 of the IA2003 does not deal with voluntary liquidators under the BCA 2004.

From 1 January 2023, section 199 of the BCA was amended by section 27 of the BVI Business Companies (Amendment) Act 2022, and Regulation 19 of the Regulations was amended by Regulation 6 of the BVI Business Companies (Amendment) Regulations 2022. Regulation 19 of the Regulations now provides that an individual is eligible to be appointed and act as a voluntary liquidator of a company under section 199 of the BCA. Please see the requirements under this legislation

Commented [JW8]: 2.5 marks

Commented [JW9]: No answer for this section: saving costs, local expertise and assets in jurisdiction outside BVI>

Commented [JW10]: This belongs to the answer for question 3.1 as it relates to voluntary liquidators.

Commented [JW11]: Which should be in the answer.

Commented [JW12]: 3

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.

(i) **Voluntary liquidation (solvent) under the BCA**

Used to dissolve companies that no longer have a use.

Procedure:

- Insolvency is not required to commence
- Must have no liabilities or is able to pay its debts as they fall due
- Director resolution is required
- Shareholder resolution required

See Part XII of the Act.

(ii) **Insolvent liquidation (voluntarily) under the Insolvency Act by members resolution**

Used when the company is in, or is approaching insolvency, and an orderly process is desired to either liquidate or restructure the company.

Procedure:

- Resolution is passed by a properly constituted meeting of the company's members by a majority of 75%, or a higher proportion as is required by the mems and arts; and
- Any additional requirements if the company is regulated by the FSC.

See section 159(3) of the Act.

(iii) **Insolvent liquidation by court application under the Insolvency Act**

Occurs when a stakeholder is dissatisfied and wishes to appointment independent management to the company.

An application may be made by the company, a creditor, a member, the supervisor of a creditor arrangement, the FSC, or the AG.

The application must be determined within 6 months, unless there are special circumstances in the opinion of the Court.

The Court may appoint a liquidator if:

- the company is insolvent;
- the Court is of the opinion that it is just and equitable to do so; or
- it is in the public interest to do so.

See section 159 and 162 of the Act.

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

Commented [JW13]: 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.

Commented [JW14]: What Act? You should have included at least s.197 (S.197-200 BCA 200)4

Commented [JW15]: 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 4.1 [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 ("**Edale**") has a number of options open to it in relation to the loan that it made to Swift Limited ("**Swift**").

It may simply demand payment.

Further, if payment is not made, for the purpose of the below advice, it is assumed that there has been an event of default under the loan agreement.

As a result, Edale, *qua* creditor, may make demand on a Swift *qua* debtor, for payment of a debt owed under the Facilities Agreement within 21 days under the statutory demand mechanics of the Act (see section 155).

The Court will then appoint a liquidator if the company is insolvent (section 211A). This liquidator would then satisfy the debt owed to Edale out of the assets in the company (subject to any security interests).

Separately, if Edale had a Share Pledge Agreement over the shares in Swift, Edale could also enforce under that agreement. Pursuant to the terms (which we don't know exists), Edale would likely have the power to sell the shares or otherwise appoint a receiver. In such circumstances, it is practice in the BVI to appoint an independent receiver, who will in turn then realise value for the shares. This will protect the mortgagee from any claims by the mortgagor under its equity of redemption, and will likely ensure that the best price reasonably obtainable in the circumstances is achieved.

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?

XYZ has been struck-off the register.

Commented [JW16]: 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 [JW17]: 1 mark

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. ABC could apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares

XYZ will remain in a status of hiatus for a period of 7 to 10 years, depending on its date of incorporation.

Pursuant to section 446 of the Act, foreign creditors have the same right of direct access to debtors as local creditors.

As such, as a creditor, ABC may apply to the Registrar to have XYZ restored.

The application to restore a company must be made in the prescribed form and must include the following: (a) name of the company, (b) date of the strike off, (c) declaration that the applicant has the right to apply for restoration, and (d) payment of the restoration fee and any other outstanding fees.

Once XYZ has been restored, As ABC does not hold 75% or more of the shares in DEF or XYZ, ABC will then have to apply to have company liquidated on the basis that it is just and equitable to do so (see section 159 and 162 of the Act). This would be on the basis that DEF owes a debt, and its only asset is the shares it holds in XYZ.

Independent liquidators will then likely be appointed to XYZ (so long as they are qualified), ABC will then put in a proof of debt, and will be paid out of the proceedings from the sale of the property held by XYZ.

*** End of Assessment ***

Commented [JW18]: 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 [JW19]: Not in force

Commented [JW20]: ABC is not a creditor of XYZ but DEF. ABC is an interested party may be able to restore XYZ.