



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]: 9 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.

Commented [JW2]: 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.

Some of the key protections and options available to secured creditors are:

- They are entitled to enforce their security interest in the assets of the company in insolvency proceedings;
- They have priority over unsecured creditors in the distribution of assets in an insolvency proceeding;
- They can appoint a receiver to manage and sell the assets that are subject to their security interest; and
- They may bid for the sale of the assets of the company in the insolvency process, whether individually or through a receivership process.

Question 2.2 [maximum 2 marks]

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

The main functions of a creditor committee are as follows:

- Consult with the liquidator or receiver;
- Provide direction to the liquidator or receiver;
- Oversee the actions of the liquidator or receiver; and
- Made decisions on behalf of the creditors.

The powers of a creditors' committee include:

- Inspect books and records of the company or other entity under liquidation or administration;
- Apply to the court for directions or orders relating to the administration of the estate;
- Call meetings of creditors to discuss matters relating to the administration of the estate; and
- Retain professional advisors to assist in carrying out any functions or duties

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?

Under the Insolvency Act, 2003 of the British Virgin Islands (BVI), the BVI court has broad powers to make orders in support of foreign insolvency proceedings. These powers are set out in XVI of the act, which deals with Cross-Border Insolvency.

The BVI court can make the following orders in support of foreign insolvency proceedings:

Commented [JW3]: .5 mark

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

Commented [JW4]: 1 mark

see section 422 of IA 2003 for functions and powers

Commented [JW5]: 1.5 marks

8 orders possible under section 467(3) IA2003.

- Recognition of foreign representative
- Stay of proceedings
- Assistance to foreign representative
- Modification of foreign proceeding
- Coordination of proceedings

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.

Under the Insolvency Act, 2003 of the British Virgin Islands (BVI), a company will be considered insolvent in the following circumstances:

- The company is unable to pay its debts as they fall due – cash flow insolvency;
- The company's liabilities exceed its assets – balance sheet insolvency;
- Inability to pay or failure to comply with a statutory demand within 21 days; or
- Fail to satisfy a judgment debt within 14 days

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?

Under the BVI Business Company Act, 2004, as amended by the BVI Business Companies (Amendment) Act, 2021, which came into force on 1 January 2023, a person is eligible to be appointed as a voluntary liquidator of a BVI Company if he:

- has liquidation experience of not less than two years and has professional competence to liquidate the specific company;
- holds an Insolvency Practitioner's licence and has the appropriate professional qualifications and expertise; and
- is fully knowledgeable with the relevant financial services legislation connected to the Companies' business to be liquidated.

Question 3.2 [maximum 5 marks]

It is possible for the appointment of an overseas insolvency practitioner in relation to a BVI company. Answer the two questions below.

Commented [JW6]: 4 marks

Commented [JW7]: 3.5 marks
Regulation 19 - also states must not be disqualified and imposes residency requirement.

Commented [JW8]: 2022 along with BVI Business Companies (Amendment) Regulations 6 & 19

Commented [JW9]: Not 'and' - it should be 'or'

Commented [JW10]: 3.5 marks

- (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) A creditor may consider the appointment of an overseas insolvency practitioner in relation to a BVI company if the company has assets or operating in another jurisdiction and there is a need to coordinate management and realisation of those assets. The appointment of an overseas insolvency practitioner can help to ensure that the interests of all stakeholders are protected and that the assets are realised efficiently and effectively.

Commented [JW11]: Saving costs and local expertise.

(b) The process for the appointment of an overseas insolvency practitioner in relation to a BVI company is governed by the Insolvency Act, 2003. The following steps are generally required:

Commented [JW12]: 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.

Application to the Financial Services Commission (FSC)

Usually for an overseas insolvency practitioner to be appointed prior written notice of the intended appointment is provided to the FSC along with details of the proposed overseas insolvency practitioner such as expertise and qualification. The FSC then provide a confirmation of their approval.

Application to the BVI Court

Alternatively, an application can be made to the BVI court to appoint the overseas insolvency practitioner, the FSC has the power to object to the appointment.

Appointment of a BVI Insolvency Practitioner

In both case mention above the overseas insolvency practitioner must be appointed jointly with a BVI licenced insolvency practitioner.

Question 3.3 [maximum 5 marks]

Commented [JW13]: 0 mark

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.

The two types of liquidation in the British Virgin Islands (BVI) are voluntary and compulsory liquidation. The relevant legislation governing liquidation in the BVI is the Insolvency Act, 2003.

Voluntary Liquidation:

Voluntary liquidation occurs when a company resolves to wind up its affairs and ceases to carry on its business. There are two types of voluntary liquidation:

- **Members' voluntary liquidation (MVL):** this is when the company is solvent, and the directors sign a declaration of solvency. The company's members then pass a special resolution to wind up the company and appoint a liquidator.
- **Creditors' voluntary liquidation (CVL):** this is when the company in insolvent and the directors believe that the company cannot continue to trade. The directors call a meeting of the company's creditors, where a liquidator is appointed.

Commented [JW14]: No there are 3 - two voluntary and court appointed,

- 1.voluntary solvent liquidation under section 197(2) of the Business Companies Act 2004 (the "BCA");
- 2.voluntary insolvent liquidation under section 159(3) of the Insolvency Act 2003 (the "Insolvency Act") following a members' resolution - qualifying resolution of 75%; and insolvent liquidation following an application to court under the Insolvency Act

Commented [JW15]: Section 197-200 BCA 2004 - Director must prepare liquidation plan. Declaration of Solvency not more than 4 weeks old 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 [JW16]: Terms are UK not BVI.

- 1.voluntary solvent liquidation under section 197(2) of the Business Companies Act 2004 (the "BCA");
- 2.voluntary insolvent liquidation under section 159(3) of the Insolvency Act 2003 (the "Insolvency Act") following a members' resolution - qualifying resolution of 75%; and
3. insolvent liquidation following an application to court under the Insolvency Act.

In both cases the liquidator is responsible for collecting and distributing the company's assets among the creditors and shareholders in accordance with the Insolvency Act.

Compulsory liquidation

Compulsory liquidation occurs when a court orders the winding up of a company. The procedure for compulsory liquidation is as follows:

- The petitioner files a winding-up petition with the court, stating that the company is unable to pay its debts.
- The court will then issue a summons to the company to appear before it to answer the petition.
- If the court is satisfied that the company is unable to pay its debts, it will make a winding-up order.
- The court will then appoint a liquidator, who is responsible for collecting and distributing the company's assets among the creditors and shareholders in accordance with the Insolvency Act.

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 Edale Limited and Swift Limited are incorporated in different jurisdictions, it is necessary to consider the applicable law governing the loan agreement. However, assuming that the loan agreement is governed by the law of the British Virgin Islands (BVI), below are some possible options open to Edale Limited against Swift Limited under the Insolvency Act of the BVI:

File a winding-up petition

Under the Insolvency Act, a creditor may file a winding up petition against a debtor company if the debtor company is unable to pay its debts as they fall due. As Swift Limited has failed to pay its due as it is due, Edale Limited may consider filing a winding-up petition against Swift Limited to recover the outstanding amount.

Appoint a Liquidator

If Swift Limited is insolvent, Edale Limited may consider appointing a liquidator to take control of the company's assets and distribute them to the creditors in accordance with the Insolvency Act.

Claim as a Creditor

If Swift Limited goes into liquidation, Edale Limited can submit a claim as a creditor to recover the outstanding amount owed under the loan agreement.

Scheme of Arrangement

Commented [JW17]: Not the BVI terms. No petition to wind up but an application to the court under section 162 for the appointment of a liquidator
See section 162 for the possible applicants . If company is the applicant then the application for the appointment of liquidator has to be advertised. 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.

Commented [JW18]: 1 mark
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 [JW19]: This a UK term. An application to court is to appoint a liquidator

Swift Limited can make an application through to the BVI Court to ensure into a compromise or arrangement with the Edale Limited. However, the arrangement must be approved by at least 75% of the creditors and it is binding on all creditors once it is approved by the court and filed with the Registrar.

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?

To: Your Principal

From: 20223-860.assessment 5B

Subject: Enforcement of Judgement debt owed by DEF Limited

Background

ABC Limited has obtained a judgement in the English High Court against DEF Limited for GBP 2million but has discovered that DEF Limited has no realisable assets. However, DEF Limited is the 100% owner of XYZ Limited. Which owns several unencumbered properties in the British Virgin Islands but is struck off the Register and not yet dissolved. Additionally, the sole shareholder and sole director of DEF Limited has recently died. Below are some options for ABC Limited to consider in order to recover the judgment debt:

Restoration

ABC Limited can consider applying to restore XYZ Limited to the Register in the BVI in order to enforce its judgement debt. Once the restoration is successful ABC Limited can claim against the unencumbered properties to recover its judgement debt. It should be noted that the law will change 1 January 2023 whereby company will be dissolved on the date the Registrar publishes a notice of striking off in the Virgin Islands Office Gazette, which means that no claims will be able to be brought against the Company. However, it is important to note in instance such as this where the company is believed to have assets Registrar would not usually strike off a company administratively. Nevertheless, ABC Limited should utilise these 8 months period to arrange to restore the Company because it is uncertain what will become of the assets should be Registrar decide to refer the company for further investigation as, the Financial Services has the option to dissolve the company and transfer the assets to the crown.

It is important to note when considering this option that foreign judgement such as this is registerable within 12 months of the date of the judgment, which means that ABC limited must register this judgement debt by April 2023.

Peruse a claim against the estate of the deceased shareholder

As the sole director and shareholder has recently died, ABC Limited may consider pursuing a claim against DEF Limited's deceased shareholder (Ultimate beneficial owners) estates for

Commented [JW20]: 1.5 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

Commented [JW21]: Judgment. Under what Act and what are the 8 conditions?

Commented [JW22]: new law from 1/1/23 - any previously company struck off as at 30 June 2023 will be automatically dissolved on 1 July 2023 so it means an application to the court for restoration

Commented [JW23]: Not correct. As dissolved company the assets vest in the Crown. Registrar has power to investigate.

Commented [JW24]: Its already passed 12 months so extension required.

the amount owed to ABC Limited. The option is viable only if the estate has assets that can be used to satisfy the debt.

Dispute Resolution

ABC Limited can consider engaging in alternative dispute resolution, such as mediation or arbitration, with the aim of reaching a settlement with DEF Limited estate or its representative. This option is cost effective and efficient mean of resolving the judgment debt.

Conclusion

In closing the specific circumstances will determine the best course of action for ABC Limited. It is highly recommended that ABC Limited seeks legal advice before taking any action.

*** End of Assessment ***

Commented [JW25]: 25.5 marks