



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 classified as creditors participating in the insolvency process as their claims are directly against the assets of the company. The assets are subject to security, falling outside the liquidation, therefore it is up to the creditor when to realize the asset. Secured interests can be obtained via legal mortgages, equitable charge, floating charge, mortgages and charges over shares, equitable charges, and pledges. While secured creditors are not obliged to make a claim in the bankruptcy Section 338 of the Insolvency Act allows them to. However, in order for secured creditor to make a claim they must: value the asset subject to security and claim the remainder of the debt as an unsecured creditor. Secured creditors also have the option of releasing their security interest to the trustee for the benefit of creditors and claim the full value of the debt as an unsecured creditor.

Commented [JW2]: .5 mark

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

Question 2.2 [maximum 2 marks]

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

The function of a creditors' committee include: (a) consulting with the liquidator about matters relating to the liquidation, (b) considering reports from the liquidator, and (c) assisting the liquidator in discharging his functions. Furthermore, the powers of a creditors' committee include the ability to: (a) call a meeting of creditors; (b) require the liquidator to provide the committee with reports and information concerning the liquidation; and (c) require the liquidator to attend the committee to provide information and explanations concerning the insolvency proceedings. The creditor committee also has the power to approve the liquidators' remuneration.

Commented [JW3]: 2 marks

Question 2.3 [maximum 2 marks]

With reference to the Insolvency Act, what powers are provided to the BVI Court in relation to the orders the Court can make in support of foreign insolvency proceedings?

Part XIX of the Insolvency Act provides the primary framework for the powers provided to the BVI Court to make orders in aid of foreign proceedings. The BVI Court is provided with the below powers in relation to orders that can be made: a) restraining the commencement or continuation of any proceedings, against a debtor or debtor's property; b) restraining the creation, exercise or enforcement of any right or remedy over against any of the debtor's property; c) requiring any person to deliver up any property of the debtor or the proceeds of such property; d) ordering or granting relief to facilitate, approve or implement arrangements that will result in a co-ordination of BVI insolvency proceeding with a foreign proceeding; e) appointing an interim receiver; f) authorising the examination by the foreign representative of the debtor; g) staying or terminating or making any other order it considers appropriate in relation a BVI insolvency proceeding.

Commented [JW4]: 2 marks

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.

Section 8 of the Insolvency Act details the below circumstances where a company will be considered insolvent in BVI:

- i) it is proved to the satisfaction of the court that a company cannot pay its debts as they fall due "a question of fact";
- ii) it is proved to the satisfaction of the court that the value of the company's liabilities exceeds the value of its assets "balance sheet insolvency";
- iii) a company fails to satisfy (wholly or partly) execution or other process issued on a judgement, 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 the Insolvency Act.

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?

Beginning 1 January 2023 section 299 of the BVI Business Companies (amendment) Act 2022 and Regulation 6 of the BVI Business Companies (amendment) Regulations 2022 introduced new requirements relating to non-solvency Act liquidators.

More specifically, Regulation 6(a)1A advised that in order for an individual to be appointed as a voluntary liquidator of a company he must:

- 1. Have liquidation experience no less than two years;
- 2. Have professional competence to liquidate the specific company concerned;
- 3. Demonstrate that he holds an insolvency practitioner's licence; and has appropriate professional qualification and experience of providing legal and financial advice or support to companies in the financial services sector; and
- 4. Knowledgeable of the relevant financial services legislation connected to the business of the company to be liquidated inclusive of the Financial Services Commission Act and BVI Business Companies Act.

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?

Section 483 of the Insolvency Act 2003 makes it possible for the appointment of an overseas insolvency practitioner in relation to a BVI company, but only as a joint appointment. Creditors might consider the appointment of an overseas insolvency practitioner practical and beneficial due to the

Commented [JW5]: 4 marks

Commented [JW6]: 3.5 marks

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

Commented [JW8]: Not known term

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

Commented [JW10]: 2 marks

cost savings in travel and local expertise required when there are substantial company assets held outside of the BVI.

The process for proposing such joint appointments is subject to notice and eligibility requirements. Section 483 of the Insolvency Act specifically states that:

- A) the BVI court or appropriate appointing officer is satisfied that:
 - a. they have sufficient expertise and qualifications
 - b. given written consent to act
 - c. not disqualified from holding a license under section 4777
 - d. not disqualified from acting under subsection 482(2) or (3)
 - e. there is security for proper performance of functions
- B) prior written notice of the intended appointment must be provided to the Financial Services Commission, whom also has the power to object the appointment

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.

The BVI is home to several holding and incorporated companies and is seen as an international offshore finance centre. Due to the BVI's economic make up, long-running corporate liquidations with multi-jurisdictional elements of asset tracing and making claims across jurisdictions are common. In BVI, liquidators are appointed in the following liquidations:

A) Voluntary liquidations (solvent) under the BCA

The purpose of a voluntary liquidation is to deal with Company assets and pay any liabilities to dissolve the Company. In accordance with section 197(1) of the BCA a company can only be liquidated under Part XII if it has no liabilities or if it is able to pay debts as the fall due and the value of the assets equal or exceeds its liabilities. Despite the registering of a security interest with the BVI registrar of Companies a company may still be put into voluntary liquidation. Finally, to propose a voluntary liquidator the directors of the company are required to make a declaration of solvency and approve a liquidation plan.

B) Insolvent liquidation (voluntarily) under the Insolvency Act by members resolution (which is not to be confused with a voluntary liquidation)

This is typically when a creditor commences formal insolvency proceedings under the provisions of the Insolvency Act, once they become aware that the company is insolvent and there is no prospect of recovering business, to avoid personal liability.

C) Insolvent liquidation by court application under the Insolvency Act

In accordance with Part VI of the Insolvency Act, there are two procedures required for the appointment of a liquidator such as via:

- A) the court appointing a liquidator over BVI company pursuant to an application made under 162 of the Insolvency Act or over a foreign company on application made under 163 of the Insolvency Act; and
- B) the members of a BVI company appointing an eligible insolvency practitioner by way of a qualifying resolution.

Commented [JW11]: 1.5 marks

Commented [JW12]: 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 [JW13]: Section 159(3) BCA 2004 and 75% majority for passing qualifying resolution required.

Commented [JW14]: 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 [JW15]: No a court application - its know as a members resolution insolvent liquidation under the IA2003

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?

One key factor that should firstly be considered is whether Edale Limited is a secured or unsecured creditor. This would in turn allow us to determine the appropriate rights available to Edale Limited and appropriate options such as seeking breaches of contract or debenture, legal or equitable charges.

However, firstly, as the amount owed to Edale Limited is above the prescribed minimum sum of USD 2,000, Edale Limited should issue a written demand for payment of the remain liability from Swift Limited in accordance with section 156 of the Insolvency Act.

Secondly, upon non-compliance with the statutory demand issued Edale Limited may petition for the court to appoint an official receiver over the asset purchased or a liquidator over Swift Limited pursuant to an application over a foreign company under 163 of the Insolvency Act as the Company has sufficient evidence to prove Swift Limited is unable to pay its non-disputed debts as they fall due.

Finally, The Enforcement of Judgements Act 1922 also allows for judgements or orders given in the High Court of England and Wales, Northern Ireland and the Court of Session in Scotland, amongst other countries, whereby final and conclusive sums of money is made payable to be recognized by the BVI Court. However, the key to enforcing a foreign judgment in BVI is ensuring the defendant, Swift Limited, has assets in BVI.

In this scenario Edale Limited can prove the following key elements:

1. Evidence of a conclusive sum outstanding funds; and
2. Swift Limited's possession of assets in BVI via the property purchased being housed on Mosquito Island

As such, Edale Limited could also seek judgement in the High Court of England (or another appropriate court under the 1922 act) and recognition of the foreign judgment against Swift Limited in BVI for the value of the unpaid loan. This would then allow Edale Limited the following remedies against Swift Limited:

1. A charging order;
2. A garnishee order;
3. A judgement summons;
4. An order for seizure and sale of the purchased property; or
5. The appointment of a receiver of the purchased property.

Commented [JW16]: 2.5 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]: Not required in this answer but it's the Reciprocal Enforcement of Judgments Act 1922

Commented [JW18]: Question states .. With to the Insolvency Act

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 Reciprocal Enforcement of Judgements Act (Cap) 65 1922 allows for judgements of conclusive sums of money is made payable from the English High Court to be recognized by the BVI Court provided the judgment is registered within 12 months.

Firstly, as the judgement was made in April 2022 the period to seek registration has lapsed. However, we would advise that ABC Limited to seek that the BVI court grant a longer period to file for registration on the basis that it is just and convenient to do so.

As we are sure the 2 million judgments from the English High Court meets the necessary criteria of a judgement for a final and conclusive monetary sum for enforcement recognition in BVI we now need to examine crucial issue of whether DEF Limited has assets in BVI. Because XYZ Limited is the wholly owned subsidiary of DEF Limited and XYZ Limited has the power to control operations, assets and make decisions we deem this as a realisable asset of DEF limited. Therefore, ABC can seek for the following remedies to be applied upon XYZ unencumber assets upon successful duly registration of the foreign recognition under the 1992 act:

1. A charging order;
2. A garnishee order;
3. A judgement summon;
4. An order for seizure and sale of appropriate property; or
5. The appointment of a receiver of all property.

Provided none of the below events occurred, in accordance with section 3(2) of the 1992 act, we anticipate a high probability of a successful judgement:

- (a) The English High Court acted without jurisdiction;
- (b) DEF Limited was not carrying on a business nor residing in England and did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court;
- (c) DEF Limited was not duly served with the process of the original court and did not appear;
- (d) The judgement was obtained by fraud;
- (e) DEF Limited satisfied the court that an appeal is pending or that they are entitled to and intend to appeal; or
- (f) The judgement related to a cause of action which for reasons of public policy could not have been entertained by the Court.

Finally, under common law, the BVI court allows for ABC Limited to seek a summary claim as the judgement received meets the definition and allows them to prove receipt of a final and conclusive monetary judgement.

*** End of Assessment ***

Commented [JW19]: 4.5 marks

This question required a memorandum to your principal with the options for ABC.

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

1. Enforcement of a judgment under Reciprocal Enforcement of Foreign Judgments Act 1922 - the 8 conditions under the Act were required and the issue with the 12 months and would an extension be required which you covered.
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 [JW20]: Judgment

Commented [JW21]: 35.5 marks