



**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 338 bankruptcy, also section 211 and receiverships

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

Insolvency Act Section 175 (2) sets out that secured creditors are not subject to insolvency proceedings. Therefore, the enforcement of secured claims is not stayed by the filing or processing of any insolvency proceedings available in the Insolvency Act.

Hence, since secured claims are intrinsically linked to specific assets subject to security, the rights of the secured creditor are not affected by insolvency proceedings and the free enforcement is rather recognised and protected by the Insolvency Act.

Any amounts that are not covered by security shall be claimed as unsecured amounts in the insolvency proceeding.

**Question 2.2** [maximum 2 marks]

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

According to the insolvency Act Section 421, after the appointment of a liquidator, creditors may commence a creditor's committee if a resolution allowing the constitution of such committee is approved in a creditors meeting.

Creditors' committee have the powers to call a meeting of creditors, reasonably request the provision of reports and information concerning the liquidation by the liquidator; request the attendance of the liquidator to the committee to provide information and explanations concerning the insolvency proceeding as it reasonably requires; approve the liquidator's remuneration; use their influence in the proceeding as a tool to actively engage in the proceeding.

**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?

According to Part XIX of the Insolvency Act, once a foreign proceeding is recognised, BVI courts can apply the local laws or laws of the foreign country in regard to which the proceeding was recognised to aid foreign representatives.

Among such powers, one can mention the stay of the commencement or continuation of any proceedings against the debtor or debtor's assets; stay of the creation, exercise or enforcement of any right or remedy over or against debtor's assets; requesting the deliver of debtor's property or the related proceeds; grant relief to facilitate, approve or implement arrangements that will have coordination results among the BVI and the foreign proceeding; appoint as interim receiver subject to the terms and conditions it renders appropriate; authorize the examination by the foreign representative of the debtor or any person that could be under such examination in the insolvency proceeding; and stay or terminate or render any other order court considers appropriate.

**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.

**Commented [JW3]:** 1 mark  
No functions- See section 422 of the IA 2003 for functions

**Commented [JW4]:** 1.5 marks  
467(30 IA 2003

**Commented [JW5]:** 4 marks

A company may be rendered insolvent under BVI Law:

In case proven to court's satisfaction that the company is unable to pay its debts as they fall due (factual perspective), as per Insolvency Act section 8 (1) (c) (ii);

In case proven to court's satisfaction that the value of the company's liabilities exceeds the value of its assets, or 'balance sheet insolvency'. For purposes of this circumstance, liabilities are understood as tort or bailment under an enactment in the contract, breach of trust arising from an obligation to make restitution, including debt and can be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion, according to Section 10 (1) and (2) of the Insolvency Act;

In case a company fails to satisfy, in a whole or partially, the execution or other process issued on a judgement, decree or order of the BVI Court in favour of a creditor to the company;

In case a company fails to comply with the terms of a statutory demand, understood as a written demand for payment of a debt that is due and payable in the format provided for in Section 156 of the Insolvency Act, and it is not successfully set aside under Sections 156 and 157 of the Insolvency Act.

Additionally, when referring to a Court appointment, the respective Court has discretion on deciding whether a company is considered to be insolvent.

### **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?

A voluntary liquidator can be anyone who is a licenced insolvency practitioner unless the company is regulated, that must be an "eligible individual" and who is not disqualified from being appointed and acting as a voluntary liquidator, according to the list provided for in Regulation 19 (2) of the BCA Regulations.

For purposes of being an "eligible individual" the voluntary liquidator needs to be a licenced insolvency practitioner who has given written consent to act in the prescribed form, is not disqualified from holding a licence under Section 477 nor from acting and there is in force a security for proper performance of his functions, according to Sections 476, 479, 482 (1) (a) – (e) and (2).

Nonetheless, after January 1, 2023, voluntary liquidators will need to comply with the following requirements: liquidation experience of no less than 2 years, holds professional competence to liquidate the company in question, is able to demonstrate that it holds an insolvency practitioner licence and has appropriate professional qualification and experience of providing legal and financial advice or support to companies in the financial services sector; and is fully conversant with relevant financial services legislation connected to the business of the company that will be liquidated, including the Financial Services Commission Act and BVI Business Companies Act, as per section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6.

**Commented [JW6]:** 4.5 marks

Must be resident in the BVI

**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

A creditor may consider the appointment of an overseas insolvency practitioner under Section 483 of the Insolvency Act when BVI companies have all or a substantial part of its assets located outside BVI territory and jurisdiction.

It is advisable that the overseas insolvency practitioner is domiciled where the assets are located abroad to facilitate the adoption of the necessary measures.

Also, a few requirements for the appointment are set forth in Section 483 of the Insolvency Act, which provides that where the overseas practitioner is appointed, the persons appointing such practitioner are satisfied that he/she has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made; has given his or her written consent to act in the prescribed form; is not disqualified from holding a licence under section 477; is not disqualified from acting in the case of a company or a foreign company, under subsection 482(2) or in the case of an individual, under subsection 482(3); here 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 Commission.

- (b) what is the process for such proposed appointment?

An application for the appointment of an overseas must be made to court. Following such application, a written notice shall be sent to FSC, as per Section 483 of the Insolvency Act, which may appear and be heard at the application hearing in order to challenge the appointment.

In parallel, in case the FSC intend to challenge the application appointment it can send a notice to the appointer informing about its intentions (Section 484 (2) of the Insolvency Act). If the appointer receives such notice it must withdraw from the appointment application unless the court approves the appointment at the hearing or if the FSC approves the appointment.

The overseas practitioner shall be appointed to act jointly with a BVI Licenced insolvency practitioner or the Official Receiver.

It is also worth to highlight that there is no need for the overseas insolvency practitioner to be licenced in BVI that is acting jointly with a licensee of the Official Receiver.

**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.

**Commented [JW7]:** 3.5 marks

**Commented [JW8]:** Saving cost, local expertise and assets located outside BVI

**Commented [JW9]:** 2 marks



BVI has three different types of liquidation proceedings: voluntary liquidation under BCA, insolvent liquidation under the Insolvency Act by members resolution; and insolvent liquidation by court application under the Insolvency Act.

According to Part XII of the BCA, voluntary liquidation is used when a company no longer serves its business purpose aiming to address the provisions concerning company's assets and liabilities for the company to be dissolved. The commencement of the voluntary liquidation does not require that debtor is in an insolvent state, actually, voluntary liquidation is not available for insolvent companies under BCA. Also, the existence of a security does not stop the commencement of the voluntary liquidation, but such security needs to be regarded by the liquidator that shall ensure the priority rights of such a claim.

On the other hand, the other types of liquidation available in BVIU require that debtor is deemed insolvent for legal purposes. An insolvent liquidation means a liquidation of a company where the assets of the company are insufficient to pay debtor's liabilities and the expenses of the liquidation, as per Section 244 of the Insolvency Act. This type of insolvency proceedings can arise from investigations developed within voluntary liquidation proceedings.

Within liquidation proceedings, a voluntary liquidator (or more) shall be appointed either by members' resolution (Section 159(3) of the Insolvency Act) or by courts' order (Section 162 of the Insolvency Act) and will have 14 days to file before Registrar a notice of his appointment, a declaration of solvency provided by company's directors and a copy of the liquidation plan, what will trigger the commencement of the voluntary liquidation proceeding.

In the 30 days following the commencement of the voluntary liquidation, the voluntary liquidator shall advertise its appointment. After the commencement of the voluntary liquidation, the voluntary liquidator takes custody and control of all company's assets and directors cease to have powers, functions, or duties.

#### 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?

BVI insolvency Law would apply to the matter because Swift is a company incorporated in the BVI, holds assets is carrying on business within BVI territory.

In this regard, Insolvency Act allows the creditors to an amount that exceeds USD 2,000 and that liabilities are immediately payable, pursuant to Section 296 (1) of the Insolvency Act, what fits the description of the Edale case above.

**Commented [JW10]:** For insolvent liquidation by members resolution a 75% majority for a qualifying resolution is required.

**Commented [JW11]:** You have confused the liquidation types here.

Under section 162 an application to the court to appoint a liquidator the appointment is not one of a voluntary liquidator.

The procedure whereby a declaration of solvency provided by company's directors and a copy of the liquidation plan for a solvent voluntary under the BCA 2004. A 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.

For a court application under 162 there a number of 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 [JW12]:** .5 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 [JW13]:** This is a bankruptcy section

Edale could also file a scheme of arrangements and applying for a meeting of creditors or shareholders, as provided for in Section 179A (1) of the Insolvency Act. For the purposes of filing a scheme of arrangements it is not required that the company is insolvent. In such a proceeding, an arrangement must later be submitted and approved by court.

**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?

BVI is not a party to international instruments that govern the recognition of foreign judgements. However, the **Reciprocal Enforcement of Judgements Act (Cap 65) 1922** provides general framework for recognition of foreign judgements from the High Court of England, Wales, Northern Ireland and the Court of Session in Scotland. As one can notice, the judgment that is to be enforced was rendered by the English High Court and thus, the 1922 Act applies to the matter.

In such a case, once the judgement is registered under Act 1922 it is deemed to have the same effects as if the original judgement was rendered by a BVI court and ABC Limited could then enforce such judgement against XYZ, since it is 100% owned by ABC.

In this case, XYZ liquidation shall not be complete without the settlement of all its liabilities of the admitted creditors.

**\* End of Assessment \***

**Commented [JW14]:** 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

**Commented [JW15]:** The answer required the 8 conditions and discussion re 12 months expiry and extension of time.

**Commented [JW16]:** 28.5 marks