



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.

Pursuant to s175 of the Insolvency Act, secured creditors are not regarded as "creditors" within the insolvency process. This means that they have direct access to the assets over which they enjoy security, and are not bound to participate in the insolvency proceeding or to adhere to particular timelines: they have the flexibility to decide when to (i) take control of and (ii) sell the relevant asset to procure the best return.

That said, under s338 of the Insolvency Act, a secured creditor is able to participate in the insolvency if it wishes to do so, by either declaring a value for the secured asset and claiming as an unsecured creditor for the balance, or by surrendering the secured asset to the liquidator and claiming as an unsecured creditor for the entire debt.

Question 2.2 [maximum 2 marks]

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

A creditors' committee's functions include consultation with the liquidator, providing assistance to him/her and reviewing reports from him/her. Their powers include the approval (or not) of liquidators' remuneration, convening creditors' meetings, and requiring the liquidator to provide either reports/written information or to attend on the committee to provide explanations (although this is subject to a reasonableness requirement).

Question 2.3 [maximum 2 marks]

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

The BVI Court is empowered to make a number of orders in support of foreign proceedings under s467 of the Insolvency Act. These include:

- Restraining the continuation or commencement of proceedings against the debtor or its property;
- Preventing the creation or exercise/enforcement of rights or remedies over the debtor's property;
- Ordering that a person delivery up property or its proceeds; and
- Authorising the examination of the debtor or any person (who can be examined under the domestic regime) by the foreign insolvency representative.

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.

A Company will be considered insolvent in the following circumstances:

Commented [JW2]: 1 marks
See section 15 company creditors arrangements, also section 211 and receiverships

Commented [JW3]: 2 marks

Commented [JW4]: 1.5 marks
8 possible orders under 467(3)

Commented [JW5]: 4 marks

- It is unable to pay its debts as they fall due, based on facts as proved to the satisfaction of the Court (s8(1)(c)(ii) of the Insolvency Act);
- It is proven to the satisfaction of the Court that the Company is balance sheet insolvent i.e. its liabilities (whether present or future, fixed or liquidated, certain or contingent) exceed its assets (s10(1) of the Insolvency Act). However, it should be noted that balance sheet insolvency for a short time only is insufficient *per* Trade & Commerce Bank v Island Point Properties;
- The Company fails to satisfy execution or other process issued on a judgment (including an order or decree) in favour of a creditor; and
- The Company does not satisfy a statutory demand which is also not set aside under ss156 or 157 of the Insolvency Act.

3.5 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?

Following the amendment of the Business Companies Act on 1 January 2023, a person is qualified to be appointed as a voluntary liquidator where all of the following criteria are met:

- The person has liquidation experience of not less than 2 years;
- The person has the necessary professional experience to liquidate the particular company;
- The person can show that they hold an insolvency practitioner's licence **and** the appropriate professional qualification and experience of providing legal/financial advice or support to companies in the financial services business; and
- The person is "fully conversant" with the financial services legislation related to the business of the particular company.

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.**

- in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and
- what is the process for such proposed appointment?

An overseas insolvency practitioner (OIP) is often appointed where all or a substantial part of the Company's assets are located outside of the BVI. In order to appoint an OIP, it is necessary to also appoint a local insolvency practitioner or the Official Receiver as joint office-holder.

In order to seek the appointment of an OIP, the Financial Services Commission (FSC) must be provided with prior written notice and afforded the opportunity to appear at the appointment hearing in order to object to the appointment should it wish to do so. Typically, the OIP will write a letter to the FSC setting out their qualifications and experience, whereafter the FSC may consider and provide written approval of the OIP's appointment (subject to Court approval as well).

Commented [JW6]: 3 marks
BVI Companies (Amendment) Act 2022 and Regulation 6 of BVI Business Companies (Amendment) Regulations 2022 as well Regulation 19 which also states must not be disqualified and imposes residency requirement.

Commented [JW7]: Not 'and' - it should be 'or'

Commented [JW8]: 2.5 marks

Commented [JW9]: Saves cost and local expertise

Commented [JW10]: Must not be disqualified from holding a licence under s. 477, not disqualified from acting due to being a director or auditor and must have proper security in force and consent.

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 following types of liquidation are available in the BVI:

- Insolvent liquidation: this is a process commenced by application to the Court under s 162 of the Insolvency Act, and is available where a company is insolvent within the meaning of the Insolvency Act (see Q2.4 above). The application may be brought by a member, a creditor, the supervisor of the company's creditor arrangement, the Attorney General or the Financial Services Commission. In addition, the application must be brought by the company when its directors become aware that it is insolvent and there are no prospects of trading out of that insolvency.
- Insolvent voluntary liquidation: this is a procedure commenced by a "qualifying resolution" passed by the company's members, and is available where the company is insolvent as set out above. Because the process is commenced by resolution no Court application is necessary, but there are requirements as to what constitutes a "qualifying resolution". S159(3) of the Insolvency Act requires that the resolution be passed at a properly convened meeting of members, and that the majority must be 75% or such higher percentage stipulated in the company's M&A.
- Solvent voluntary liquidation: this is a process for the winding up of a solvent company, and is not available to insolvent companies. This process is commenced by a resolution of either the directors or the members of the company, and the directors are required to make a declaration of solvency and approve a liquidation plan.

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?

Given that Edale Limited (**Edale**) is, by virtue of the unpaid accelerated sum due under the loan agreement, a creditor of Swift Limited (**Swift**), it has several options available.

First, Edale would be able to commence ordinary civil debt recovery proceedings in the BVI Court. However, recovery under such proceedings may be slow, and this can be an expensive method of debt collection, if Swift were to oppose the proceedings issued. Accordingly, this may not be a desirable option for Edale.

Commented [JW11]: 3.5 marks

Commented [JW12]: 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 [JW13]: Liquidation in BVI

Commented [JW14]: 3 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.

Second, Edale could issue a statutory demand pursuant to s156 of the Insolvency Act. This is a form of demand letter, requiring payment of the sum owed within 21 days of the date of service. The statutory demand must comply with the requirement set out in s156 of the Insolvency Act. If Swift fails to pay the demand within the 21 day period, and does not apply for the demand to be set aside within 14 days thereafter, Swift will be considered insolvent and Edale will therefore be able to commence proceedings for the insolvent (compulsory) liquidation of Swift. This would take the form of an application to the BVI court seeking the appointment of a liquidator to gather in Swift's assets (including the Mosquito Island property), realise them and distribute the proceeds between Swift's unsecured creditors.

Third, given that Swift has not satisfied the debt owed under the loan agreement, Edale could skip the statutory demand and pursue a winding up petition immediately. This is because the definition of insolvent in the Insolvency Act includes that the debtor company (in this case Swift) is unable to pay its debts as they fall due. Assuming therefore that the acceleration clause is valid and enforceable, and the debt has been properly accelerated, this could be led as evidence that the debt is due but has not been paid. However, this approach would be slightly riskier as Swift could conceivably find a way to dispute the facts underlying this e.g. by arguing that the debt is not actually due for whatever reason.

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?

Introduction

The shares in XYZ Limited constitute an asset of ABC Limited, and are therefore capable of being enforced against in the satisfaction of the money judgment made in the English High Court against it. Given that shares in a BVI company are, as a matter of general principle, BVI-situs assets, it may be possible to enforce against them in the BVI (rather than in England). However, in order to do so the English judgment will first need to be registered / recognised in the BVI Court under the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 (**REJA**), or the common law. Once recognition is obtained, ABC Ltd will be able to enforce the English judgment as if it were a judgment of the BVI Court (i.e. to make use of all of the applicable local enforcement mechanisms).

Recognition of the English judgment

England & Wales is one of the jurisdictions whose judgments are capable of enforcement under the REJA. On this basis, it would be open to ABC Limited to apply (pursuant to CRP Part 72) for the recognition of the English judgment pursuant to the REJA.

However, it should be noted that judgments are only registrable under REJA within the 12 months after the date of the judgment, unless an extension is granted by the BVI Court pursuant to s3(1) of

Commented [JW15]: 7 marks

On the right track.

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

the REJA, on the basis that it is just and convenient to do so. Noting that the English judgment was handed down in April 2022 so the statutory period expired in April 2023, ABC Limited will need to advance submissions as to why the BVI Court should exercise its s3(1) jurisdiction to extend the 12 month period and allow it to have the English judgment recognised.

In addition, a judgment (although theoretically registrable) will not be registered under REJA where any of the vitiating factors in s3(2) are present. These include that the judgment is contrary to BVI public policy, that the judgment was obtained by fraud, that there is a pending appeal, or various other factors. A key s3(2) factor in this scenario is that a judgment will not be recognised unless a judgment debtor who neither ordinarily resides nor carries on business in the BVI voluntarily appears or submits to the Court's jurisdiction.

We do not have details of the nature or background of the English judgment or the underlying cause of action, so we cannot say with certainty whether or not any of the s3(2) factors are present. Given the recent death of the sole director and shareholder of DEF Limited, there is a very real possibility that DEF Limited will not participate in the BVI proceedings or otherwise consent to the Court's jurisdiction given its present governance void. Since DEF Limited is not a BVI company, it cannot be said to ordinarily reside in the jurisdiction. We do not have details as to whether it conducts business in the BVI, but if not then it is possible that there will need to be a voluntary submission or appearance. If that is not forthcoming, the Court will decline to recognise the judgment.

As such, it will be challenging, but not necessarily impossible, to that the judgment recognised in the BVI.

Enforcement

Assuming that the judgment is recognised pursuant to the REJA as set out above, all of the enforcement remedies available to a BVI judgment creditor will be available to ABC Limited.

It must be borne in mind that the separate corporate personality of XYZ Limited means that the judgment debt **cannot** (without more) be enforced against the properties owned by XYZ Limited directly. However, it would be possible to appoint a receiver over the shares in XYZ Limited, the shares being an asset of DEF Limited.

Once the Receiver is appointed, he will first need to make application to have XYZ Limited restored to the Register, given that it **has recently been struck off but not dissolved.**

Assuming this has been done, the receiver can vote the share in XYZ Limited to appoint a director of his choosing, which director (potentially himself) can take steps to realise the properties. Depending on DEF's attitude to the proceedings, those proceeds can be distributed up to DEF and thereafter executed against in its hands as a matter of English law. Alternatively, if it appears that DEF may be unco-operative or obstructive, ABC limited could potentially obtain a garnishee order against XYZ Limited once the dividend has been declared but before it is actually paid (because it will then be a debtor of DEF Limited). This would mean that XYZ Limited is ordered to pay the sums owed to DEF Limited, directly to ABC Limited as judgment creditor.

An alternative to the receivership route would be to obtain an order for the sale of the share in XYZ Limited "as-is". This would necessitate (i) compliance with any restrictions on the transfer of those shares and (ii) locating a willing and able buyer to purchase XYZ Limited as a going concern.

Conclusion

Commented [JW16]: New law from 1/1/23 - automatic dissolution on 1 July 2023 for companies struck off as at 30 June 2023

In all the circumstances, there are a number of steps required to allow ABC Limited to enforce the judgment debt. It may be that any of the hurdles mentioned above jeopardises or entirely stops the process, but in theory the means to secure enforcement against the value sitting in XYZ Limited do exist.

*** End of Assessment ***

Commented [JW17]: 37.5 marks