



**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]: 8 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.

Commented [JW2]: Correct answer

**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 [JW3]: 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.

[ By the appointment of a liquidator, it does not affect the right of the secured creditor to take possession over the assets in which the creditor has security on. They have the right to realise the said asset(s).  
Although claims each has its class that will rank *pari passu*, where the secured creditors will be first in line to receive dividends for their claims together with interest thereon, therefore secured creditors are not strictly speaking classed as a creditor or considered participating in the insolvency process. Their claims are directly against the assets of the company which are subject to security, so they fall outside of the liquidation. There are absolutely no timelines for enforcing a secured claim. Then it is up to the secured creditor to determine when to take control of the security interest and when to sell the asset for the best return. Referring to Section 175(2) of the Insolvency Act.  
Should the secured creditor fail to disclose its security by the time that the bankruptcy order is made, then it will be deemed that he gave up its security for the benefit of other creditors. However, in Section 299(2) the secured creditor will be able to make an application for relief in the event that an honest mistake was made.]

**Commented [JW4]:** 1/2 mark. See section 15, company creditors arrangements, 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?

[A bankruptcy matter is a creditor driven process. In the event that a secured creditor has assets which they rely on their security from, they can decide how the assets are being dealt with.

*A creditors' committee's powers include the ability to;*

1. *Call a meeting of creditors;*
2. *Require the liquidator to provide the committee with reports and information and explanations concerning the liquidation (as it reasonable requires); and*
3. *Require the liquidator to attend the committee to provide it with such information and explanations concerning the insolvency proceedings as it reasonable requires.*
4. *They also have the power to approve the liquidators' remuneration.]*

**Commented [JW5]:** 1 mark

Only powers no function - sees 422 IA2003

**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 19 of the Insolvency Act provides the primary framework for the necessary powers which is provided to the British Virgin Islands Court to make orders in respect of "foreign proceedings". In terms of Section 468 of the Insolvency Act, it is set out as to how the Court is required to consider certain matters when considering an order of court to be made.

The BVI Court is provided with the following powers in relation to the orders that can be made:

**Commented [JW6]:** 2 marks

- (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 or 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 of any property of the debtor for such term and subject to such conditions as it considers appropriate;*
- (f) authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding; or*
- (g) staying or terminating or making any other order it considers appropriate in relation a BVI insolvency proceeding.]*

**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.

[In terms of section 467(3) of the Insolvency Act, a BVI court can make the following orders:

- (a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;*
- (b) subject to subsection (4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;*
- (c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;*
- (d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;*
- (e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;*
- (f) authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;*

**Commented [JW7]:** 0 marks

This answer is for question 2.3.

(g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or

(h) make such other or grant such other relief as it considers appropriate”.

In summary it can be said that the BVI Court has the power to recognise foreign proceedings and can extend such powers to provide assistance to the following countries namely: Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the USA]

### 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?

[Here we can refer to Section 199 of the BVI Business Companies (Amendment) Act on 2022 as well as Regulation 6 of the BVI Business Companies (Amendment) Regulations 2022. This will introduce new requirements iro Non Insolvency Act Liquidators.

“Further we refer to Regulation 6(a)1A which states than and individual is qualified to be appointed and act as voluntary liquidator.

- (a) Has liquidation experience of not less than two years;
- (b) Has professional competence to liquidate the specific company concerned;
- (c) Is able to demonstrate that he:
  - (i) Holds an insolvency practitioner’s licence; and
  - (ii) Has as appropriate professional qualification (such as law or accountancy) and experience of providing legal and financial advice or support to companies in the financial services sector; and
- (d) Is fully conversant with relevant financial services legislation connected to the business of the company to be liquidated, including 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?

[(a) A foreign insolvency practitioner can be appointed as liquidator of a BVI company, but only as a joint appointment. Creditor’s can consider the appointment of a foreign insolvency practitioner if all requirements were met during the application process.

- (b) The Foreign IP must be appointed jointly with a BVI licenced IP or the Official Receiver.
  - (i) Prior written notice of such intended appointment must be provided to the FSC.

Commented [JW8]: 4 marks

Regulation 19 - also states must not be disqualified and imposes residency requirement.  
Not 'and' - it should be 'or'

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

Commented [JW10]: 2 marks

Commented [JW11]: Local expertise, location of the assets outside BVI and saving of costs

Commented [JW12]: Under section 483 of IA2003



(ii) The FSC have the power to appear in court hearing to appoint. They may object.

(iii) In the letter submitted to the FSC from the foreign IP, details such as expertise and qualifications are required. If the FSC is in favour of this appointment, they will approve the appointment and submit a confirmation letter to same. (Also, where relevant subject to court approval)]

**Commented [JW13]:** Also not 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.

### Question 3.3 [maximum 5 marks]

**Commented [JW14]:** 4 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.

[

#### 1. **Voluntary Liquidation (solvent) under the BCA:**

- Voluntary liquidation under the BCA is not available to insolvent companies. It is utilised where a company is no longer required by a business, and it is to be dissolved. In the BVI it is not normally viewed as a form of “corporate rescue”. It is important to note that if you take this process that the company has no liabilities and is able to pay its debts.
- Application of this Part - Article 197 of the Business Companies Act states the following:
  - “(1) A company may only be liquidated under this Division if— (a) it has no liabilities; or (b) it is able to pay its debts as they fall due and the value of its assets equals or exceeds its liabilities. (Amended by Act 5 of 2012)
  - (2) A company may be liquidated notwithstanding that there is a charge registered in respect of the company’s property under section 163 and the liquidator shall be bound to give effect to the rights and priority of the claims of the company’s secured creditors.

**Commented [JW15]:** 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.

#### Declaration of solvency – Article 198 of the Business Companies Act.

(1) Where it is proposed to appoint a voluntary liquidator under this Division, the directors of the company shall—

(a) make a declaration of solvency in the approved form stating that, in their opinion—

LAW OF VIRGIN ISLANDS BVI Business Companies Act 139 Revision Date: 1 Jan 2020

(i) the company is and will continue to be able to discharge, pay or provide for its debts as they fall due; and

(ii) the value of the company’s assets equals or exceeds its liabilities;

(Substituted by Act 5 of 2012)

(b) approve a liquidation plan specifying—

(i) the reasons for the liquidation of the company;

(ii) their estimate of the time required to liquidate the company;

(iii) Whether the liquidator is authorised to carry on the business of the company if he or she determines that to do so would be necessary or in the best interests of the creditors or members of the company;

(iv) the name and address of each individual to be appointed as liquidator and the remuneration proposed to be paid to each liquidator; and (v) whether the liquidator is required to send to all members a statement of account prepared or caused to be prepared by the liquidator in respect of his or her actions or transactions. (2) Subject to section 204(2), a declaration of solvency has no effect for the purposes of this Division unless— (a) it is made on a date no more than 4 weeks earlier than the date of the resolution to appoint a voluntary liquidator; and (b) it has attached to it a statement of the company’s assets and liabilities as at the latest practical date before the making of the declaration.

(Amended by Act 12 of 2006)

(2A) A statement of the company's assets and liabilities shall be in the approved form. (Inserted by Act 12 of 2006)

(3) A liquidation plan has no effect for the purposes of section 203(1)(e) unless it is approved by the directors no more than 6 weeks prior to the date of the resolution to appoint a voluntary liquidator. (Amended by Act 26 of 2005)

(4) A director making a declaration of solvency under this section without having reasonable grounds for the opinion that the company is and will continue to be able to discharge, pay or provide for its debts in full as they fall due, commits an offence and is liable on summary conviction to a fine of \$10,000.

## 2. Insolvent Liquidation (Voluntary) under the Insolvency Act by Members resolution

- "Pursuant to section 159(3) of the Insolvency Act, a resolution is a "qualifying resolution" if it is "passed at a properly constituted meeting of the company by a majority of 75 per cent" or a higher majority is required by the memorandum and articles of the company. There are restrictions and further procedural requirements if the company is regulated by the FSC116. Members are not able to appoint the Official Receiver as liquidator. Section 161(2) requires the company to provide notice to the liquidator of his appointment, as soon as practicable."

## 3. Insolvent Liquidation by Court Application under the Insolvency Act

- An appointment of a liquidator by the Court, supplemented by the IR as regards the procedure. Such application may be made by one or more of:
  - (a) the company;
  - (b) a creditor;
  - (c) a member;
  - (d) the supervisor of a creditor's arrangement;
  - (e) the FSC; and
  - (f) the Attorney General.]

**Commented [JW16]:** 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.

## 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?

[My advice would be for them to apply for judgement.

Under the 1922 Act, "judgment" is defined as any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of the Act, whereby any sum of money is made payable. Accordingly, only judgments for final and conclusive monetary sums can be enforced and any other judgment, whether declaratory, injunctive or otherwise, cannot be enforced.

**Commented [JW17]:** 0 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.

The 1922 Act extends only to judgments given in the High Court of England Wales and Northern Ireland and the Court of Session in Scotland. It also extends to judgments given in the courts of the Bahamas, Barbados, Belize, Trinidad & Tobago, Guyana, St Lucia, Grenada, Jamaica and New South Wales (Australia).]

**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?

[Once a foreign judgment is duly registered under the 1922 Act by the BVI Court, it is treated from the date of registration as being of the same force and effect as if that judgment had been made in the BVI. Accordingly, all the remedies usually available under the CPR will be available. Pursuant to CPR 45.2, these include: (i) a charging order; (ii) a garnishee order; (iii) a judgment summons; (iv) an order for seizure and sale of goods; and (v) the appointment of a receiver.

The foreign judgment is registrable within 12 months of the date of judgment, unless the BVI court grants a longer period on the basis that it is just and convenient to do so. In order to register a judgment, a judgment creditor must apply to court under CPR Part 72. The application must contain certain prescribed information and must exhibit a duly authenticated copy of the judgment and details of any interest that has become due under the law of the country in which judgment has been entered. This may also include a certified / authenticated translation of the judgment into English (if necessary). The application can be made without notice to the judgment debtor. The court can order the judgment creditor to give security for costs in relation to any proceedings that can be brought to set aside the registration.

Pursuant to section 3(2) of the 1922 Act, the Court will not order a judgment to be registered in the event that:

- (a) the original court acted without jurisdiction;
- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court;
- (c) the judgment debtor was not duly served with the process of the original court and did not appear, notwithstanding that he is ordinarily resident or carrying on a business within the jurisdiction of that court of agreed to submit to the jurisdiction of the court;
- (d) the judgment was obtained by fraud;
- (e) the judgment debtor satisfies the court that an appeal is pending or that he is entitled to and intends to appeal; or

**Commented [JW18]:** 4 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 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 [JW19]:** Name of the Act?

(f) the judgment related to a cause of action which for reasons of public policy (or similar) could not have been entertained by the Court.

At common law, the courts treat any final and conclusive monetary judgment as a cause of action in itself under the doctrine of obligation by action, irrespective of the jurisdiction where the judgment was obtained. The judgment creditor must prove the judgment and show that it is a final and conclusive monetary judgment for a specified sum. If those matters are established, a retrial of the issues in the action is not necessary. The creditor can instead apply for summary judgment.]

**\* End of Assessment \***

**Commented [JW20]:** 25.5 marks