



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]: 1.5 marks
See also section 15 company creditors arrangements, and receiverships

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

While secured creditors have claims directly against assets (which are subject to the security) and therefore fall outside the insolvency process, the BVI Insolvency framework provides for an ability for secured creditors to participate because:

1. Secured creditors have the option of: (a) valuing the assets subject to the security and claim in the liquidation as an unsecured creditor for the balance of his debt; or (b) surrender the security interest to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole of his debt (under section 211 of the Insolvency Act).
2. Secured creditors have the option of making a claim in the bankruptcy (under section 338 of the Insolvency Act); and

Secured creditors are also protected by certain provisions including:

1. The appointment of a liquidator does not affect the right of a secured creditor to take possession or realise or otherwise deal with the assets over which the creditor has security (section 175(2) of the Insolvency Act); and
2. The requirement that a liquidator in a voluntary liquidation give effect to the priority of a claim of a secured creditor (section 197(2) of the Business Companies Act).

Question 2.2 [maximum 2 marks]

Commented [JW3]: 2 marks

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

The functions of a creditors' committee include, under section 422 of the Insolvency Act 2003: (a) consulting with the liquidator about matters relating to the liquidation; (b) considering the liquidator's reports; and (c) assisting the liquidator with the discharge of his functions.

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 (as reasonably required); (c) require the liquidator to provide the committee with information and explanations regarding the insolvency proceedings as reasonably required; and (d) approve the liquidators' remuneration.

Question 2.3 [maximum 2 marks]

Commented [JW4]: 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 ability for the BVI Court to make orders in aid of foreign proceedings such that the BVI Court can recognise certain foreign insolvency proceedings and provide assistance to "foreign representatives" in designated countries (including Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the United States). The BVI Court has powers under section 467 of the Insolvency Act to make orders including in respect of: (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 delivery up any property of the debtor or the proceeds

of that property; (d) appointing an interim receiver of any property of the debtor; (e) ordering or granting relief to facilitate, approve or implement arrangements to co-ordinate the BVI proceeding with a foreign proceeding; (f) authorising the examination by the foreign representative of the debtor or any person who could be examined in a BVI insolvency proceedings; or staying or terminating or making any other order the Court considers appropriate.

Question 2.4 [maximum 4 marks]

Commented [JW5]: 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 BVI in the following circumstances under section 8 of the Insolvency Act:

1. If the company fails to comply with the terms of a statutory demand (that is not successfully set aside under sections 156 and 157 of the Insolvency Act);
2. The company fails to satisfy (wholly or partly) execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company;
3. If the value of the company's liabilities exceeds the value of its assets (that is, "balance sheet insolvency"). Section 10 defines liability to be a liability to pay money or money's worth, and can be present or future, certain or contingent and fixed or liquidated; and
4. If the company is unable to pay its debts as they fall due.

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

Commented [JW6]: 4.5 marks

With reference to the relevant legislation, who can be appointed as a voluntary liquidator in the BVI after 1 January 2023?

Section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies (Amendment) Regulations 2022 provide requirements for who can be a voluntary liquidator in the BVI after 1 January 2023.

Section 199 of the BVI Business Companies (Amendment) Act 2022 provides that the regulations may provide for the qualifications or categories of individuals who are eligible to be appointed, or to act, as voluntary liquidators

Regulation 6(a)1A provides that an individual can be appointed to act as a voluntary liquidator of a company if he:

1. Has liquidation experience of not less than two years;
2. Has professional competence to liquidate the specific company;
3. Is able to demonstrate that he holds an insolvency practitioner's license and has an appropriate professional qualification (such as in law or accountancy) and experience of providing legal and financial advice or support to companies in the financial services sector; and
4. 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)

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

In addition to the above requirements, the individual must not be disqualified from acting as the voluntary liquidator of a company pursuant to Regulation 19(2) of the BVI Business Companies Regulation. Regulation 19(2) sets out individuals who are disqualified from being appointed or acting as the voluntary liquidator of a company, including a minor, an undischarged bankrupt, an individual who is, or at any time in the previous 2 years has been a director of the company or an affiliated company, and an individual who acts or at any time in the previous 2 years has acted in a senior management position in relation to the company or an affiliated company and whose functions or responsibilities have included functions or responsibilities in relation to the financial management of the company or an affiliated company.

Commented [JW8]: Also must be resident

Question 3.2 [maximum 5 marks]

Commented [JW9]: 4.5 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 creditor might consider the appointment of an overseas insolvency practitioner where the BVI company's assets are situated outside of the BVI and it would be helpful to have an insolvency practitioner: (a) from a jurisdiction in which the BVI company's assets are held; and/or (b) who has local expertise.

Commented [JW10]: And saving costs

The process for the appointment of an overseas insolvency practitioner in relation to a BVI company involves (under section 483 of the Insolvency Act):

- (a) the overseas insolvency practitioner being jointly appointed together with a BVI licensed insolvency practitioner or the Official Receiver;
- (b) the overseas insolvency practitioner satisfying the Court (or the person(s) appointing him) that: (i) he has sufficient qualifications and experience; (ii) he has given his written consent to act; (iii) he is not disqualified from holding a license under section 477 of the Insolvency Act; (iv) he 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); and (v) there is in force such security for the proper performance of his functions as may be specified in the Regulations;
- (c) giving prior written notice of the intended appointment to the Financial Services Commission. The Commission then has the power to appear and be heard at the court hearing to appoint and object to the appointment (section 484 of the Insolvency Act) although in practice, the foreign insolvency practitioner would write a letter to the Commission providing details of their expertise and qualifications and wait for the Commission's approval.

Question 3.3 [maximum 5 marks]

Commented [JW11]: 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.

There are three types of liquidation in the BVI:

- (a) voluntary liquidation of solvent companies under Part XII of the Business Companies Act. Section 197(1) of the Business Companies Act provides that a company can be liquidated if:

(a) it has no liabilities; or (b) it is able to pay its debts as they fall due and the value of the assets is equal or exceeds its liabilities. Section 198 provides that the directors of the company are required to make a declaration of solvency (ie that the directors believe that the company is, and will continue to be, able to discharge, pay or provide for its debts in full as they fall due) and approve a liquidation plan (no more than six weeks prior to the date of resolution to appoint a liquidator);

- (b) voluntary liquidation of insolvent companies under section 159 of the Insolvency Act by members resolution. Under section 159 of the Insolvency Act, a liquidator can be appointed by way of a qualifying resolution, being a resolution passed at a properly constituted meeting of the company by a majority of 75% or a higher majority as required by the memorandum and articles of the company;
- (c) insolvent liquidation by court application under section 162 of the Insolvency Act. Under section 162 of the Insolvency Act, an application can be made to the Court to appoint a liquidator. The application can be made by the company, a creditor, a member, the supervisor of a creditor's arrangement, the Financial Services Commission or the Attorney General. Under section 162(3), an application may only be made by a member with leave of the Court (which will not grant leave unless the Court is satisfied that there is a prima facie case that the company is insolvent); and
- (d) liquidation by court application under section 162(b) or (c) of the insolvency Act on the basis that the Court is of the opinion that it is (i) just and equitable that a liquidator should be appointed; or (ii) in the public interest for a liquidator to be appointed.

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?

On the assumption that Edale does not hold and security or security covering the entire outstanding amount owed by Swift, Edale can, pursuant to section 155 of the Insolvency Act, serve a statutory demand on Swift for the sums that are outstanding under the loan agreement. If Swift does not pay the statutory demand within 21 days of service, then Swift will be considered insolvent under section 8 of the Insolvency Act (which provides that a company is insolvent if it fails to comply with the requirements of a statutory demand that has not been set aside). This means that Edale can apply for the appointment of a liquidator under section 162 of the Insolvency Act on the basis that Swift is insolvent, and in Edale's capacity as a creditor of Swift.

If a liquidator is appointed, Edale can:

- (a) make a written claim in the liquidation for the outstanding amounts (on the assumption that Edale is an unsecured creditor). This will require Edale, under rule 184 of the Insolvency Rules, to submit a written claim to the liquidator containing details of the claim;

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]: 3.5 marks
First issues to resolve are 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.

- (b) value the assets subject to Edale's security interest (if Edale is a secured creditor) and under section 211 of the insolvency Act, claim in the liquidation as an unsecured creditor for the balance of its debt, or surrender the security interest to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole debt.

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?

Given that DEF Limited has no realisable assets other than its shares in XYZ Limited (a BVI company) and that DEF Limited's sole shareholder and director has recently died, ABC Limited should consider commencing liquidation proceedings against DEF Limited either in England or in the BVI or consider having the English judgment recognised in the BVI.

In respect of the liquidation route:

- (a) If liquidators are appointed over DEF Limited in England, it is possible for the liquidators to seek recognition and assistance from the BVI Court under Part XIX of the Insolvency Act. The BVI Court can recognise foreign insolvency proceedings and provide assistance to foreign representatives from the United Kingdom. Obtaining recognition and assistance from the BVI Court will allow the English liquidators to take steps to gain control of XYZ Limited in the BVI.
- (b) It is possible for foreign companies not registered or incorporated in the BVI to enter into liquidation in the BVI by way of Court appointment if the foreign company has sufficient presence of assets in the jurisdiction (here the assets will be the shares in XYZ Limited, a BVI company).

Once liquidators have been appointed over DEF Limited, the liquidators will be able to take steps to take control of XYZ Limited (ie by passing shareholder resolutions to replace XYZ Limited's existing directors with the liquidators) so as to sell off XYZ Limited's unencumbered properties in the BVI, and distribute those proceeds to DEF Limited, which can then be distributed to the creditors of DEF Limited as part of the liquidation process.

ABC Limited could also consider having its English judgment recognised in the BVI. This will require the English Judgment to be registered in the BVI under the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 which extends to judgments given in the High Court of England and Wales. Judgments for final and conclusive monetary sums and be enforced under the Act. However, the judgment must be registered 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 – here, ABC Limited may be outside the 12 month limited and may need to apply to the BVI Court for a longer period.

ABC Limited will need to apply to the BVI Court under CPR Part 72 to register the judgment. The application will need to contain certain information and exhibit a duly authenticated copy of the judgment and details of any interest that has become due.

Commented [JW14]: 6

This question required a memorandum to your principal with the options for ABC and recommendations. No discussion re the striking off and possible dissolution of XYZ or receivers over the shares.

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 - all of the 8 conditions under the Act were required and the 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.

Once the English judgment has been registered, ABC Limited will be able to take enforcement steps against DEF Limited's assets in the BVI, being the shares in XYZ Limited.

*** End of Assessment ***

Commented [JW15]: 42 marks