



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5B**

**BRITISH VIRGIN ISLANDS (BVI)**

This is the **summative (formal) assessment** for **Module 5B** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 5B.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

### **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial or Avenir Next font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment5B]**. An example would be something along the following lines: 202223-336.assessment5B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

## **ANSWER ALL THE QUESTIONS**

### **QUESTION 1 (multiple-choice questions) [10 marks in total]**

Commented [JW1]: 10 marks

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

#### **Question 1.1**

**When** is the appointment of a liquidator **deemed to commence**, when there has been a qualifying resolution passed to appoint a liquidator?

- (a) On the date of the order appointing the liquidator.
- (b) **On the date the qualifying resolution is passed.**
- (c) On the filing of the application to appoint a liquidator.
- (d) On the advertisement of the application to appoint a liquidator.

#### **Question 1.2**

In order to comply with section 156 of the Insolvency Act, **what timeframe** for payment of the debt (or to secure or compound for the debt), must a statutory demand require?

- (a) Within 14 days of the service of the statutory demand.
- (b) Within 21 days of the date of the statutory demand.
- (c) **Within 21 days of the service of the statutory demand.**
- (d) Within 14 days of the date of the statutory demand.

#### **Question 1.3**

Which of the following **is not able** to make an application for the removal of a liquidator?

- (a) A member of the company.
- (b) A creditor.
- (c) The creditors' committee.
- (d) **A receiver.**

#### **Question 1.4**

Where a receiver exercises a power of sale, the receiver owes a duty to obtain the best price reasonably obtainable at the time of sale. **To which one of the following is the duty owed to?**

- (a) The creditors, the shareholders, persons claiming an interest in the assets and the company.
- (b) The creditors, sureties, the shareholders and the company.
- (c) The creditors, sureties, persons claiming an interest in the assets of the company and the company.
- (d) The creditors, shareholders, sureties and persons claiming an interest in the assets of the company.

**Question 1.5**

A person is an “eligible insolvency practitioner”, able to be appointed over an insolvent BVI company, foreign company or an individual’s estate as a trustee in bankruptcy if:

- (a) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (b) He or she is a licenced insolvency practitioner; has advertised for his or her role; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (c) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding an appointment; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (d) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force an undertaking for the proper performance of his or her functions.

**Question 1.6**

Under the Reciprocal Enforcement of Judgments Act 1922, what is the **time period** during which a foreign judgment is registrable in the BVI?

- (a) Within 12 months of the date of judgment.
- (b) Within three (3) months of the date of trial.
- (c) Within six (6) months of the date of judgment.
- (d) Within six (6) months of the date of trial.

**Question 1.7**

Which one of the below **is not** an effect of the appointment of a liquidator over a company?

- (a) The liquidator has custody and control of the assets of the company.
- (b) **The assets automatically vest in the liquidator.**
- (c) The directors remain in office but cease to have any powers.
- (d) Shares in the company cannot be transferred.

**Question 1.8**

In a liquidation, what is the **vulnerability period** for an undervalue transaction in the case of a transaction entered into with a connected person?

- (a) **Two (2) years prior to the onset of insolvency and ending on the appointment of the liquidator.**
- (b) Two (2) years prior to the appointment of the liquidator.
- (c) Six (6) months prior to the onset of insolvency and ending on the appointment of the liquidator.
- (d) Five (5) years prior to the appointment of the liquidator.

**Question 1.9**

Which of the following **is not** a resolution that the directors of a company must pass in order to put in place a company creditors' arrangement?

- (a) Stating that the company is insolvent or is likely to become insolvent.
- (b) Approving a written proposal setting out how the creditors' rights will be varied or cancelled.
- (c) **Approving a liquidation plan and a declaration of solvency.**
- (d) Nominating an eligible insolvency practitioner to be appointed interim supervisor.

**Question 1.10**

**When** does a voluntary liquidation commence?

- (a) When the directors of the company sign a declaration of solvency.
- (b) When the directors of the company sign a liquidation plan.
- (c) When the directors of the company pass the resolution appointing the voluntary liquidator.
- (d) **On the date the voluntary liquidator files a notice of appointment with the Registrar.**

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 2 marks]**

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

Secured creditors are not technically classed as creditors in an insolvency process and their claim falls outside of a liquidation. They are therefore not time barred from enforcing a secured claim and the creditor decides when they take control of the security interest and when to sell the interest for the best return. However, should they enforce their security and not fully realise their debt, then they are able to prove as an unsecured creditor for the remainder of their debt and will rank alongside other creditors. The usual unsecured creditor protections will then apply.

**Commented [JW2]:** .5 mark  
See section 15 company creditors arrangements, section 175 liquidations, section 338 bankruptcy, also section 211 and receiverships

**Question 2.2 [maximum 2 marks]**

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

The creditors can appoint a creditor committee through a resolution at a creditors' meeting. The key function of a committee is to consult with the liquidator regarding matters relating to the liquidation. Through this, they will also consider reports from the liquidator and assist the liquidator in discharging his functions.

The powers of the committee include being able to call a meeting of creditors and requiring the liquidator to provide the committee with reports and information concerning the liquidation (as it reasonably requires). The committee also has the power to require the liquidator to attend the committee to provide the committee with information and explanations as it reasonably requires about the insolvency proceeding.

**Commented [JW3]:** 2 marks

**Question 2.3 [maximum 2 marks]**

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

The BVI Court may support certain foreign insolvency proceedings, with the designated countries being; Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the UK and the US. In general, the BVI court may make orders to aid foreign proceedings that are applicable to BVI laws or the laws of the applicable country.

The BVI Court has the power to provide a wide range of orders including to restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property. In addition, the Court may restrain the commencement or continuation of any proceedings, against a debtor or debtor's property and require any person to deliver up any property of the debtor or the proceeds of such property. They may order or grant relief to facilitate, approve or implement arrangements that will result in a co-ordination of BVI Insolvency proceedings with a foreign proceeding and appoint interim receivers over company property.

**Commented [JW4]:** 1.5 marks  
8 orders possible under section 467(3) IA2003.

Section 468 of the Insolvency Act also sets out certain matters which the Court is required to consider when making an order.

**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.

Whether a company is insolvent is based on the following four criteria:

- (1) Whether a company is unable to pay its debts as they fall due, and this is appropriately proven to the Court.
- (2) Where a company's liabilities exceed the value of its assets (the balance sheet test). Section 10(1) and 10(2) of the Insolvency Act defines the requirements for a liability. It is worth noting that the company is expected to need to have liabilities exceeding assets for more than a short length of time.
- (3) A 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.
- (4) Where a company does not comply with a statutory demand is such demand is not successfully set aside under sections 156 and 157 of the Insolvency Act.

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

**Question 3.1** [maximum 5 marks]

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

From 1 January 2023, section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies Regulations 2022 introduced the following requirements for an individual to be appointed as a voluntary liquidator in the BVI:

- 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 they hold an insolvency practitioner's license, has an appropriate professional qualification and has experience of providing legal and financial advice or support to companies in the financial services sector.
- 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?

**Commented [JW5]:** 3.5 marks

Reference to section 8 required

**Commented [JW6]:** 3.5 marks

Regulation 19 - also states must be not disqualified and imposes residency requirement.

**Commented [JW7]:** or has

**Commented [JW8]:** 4 marks

Also must not be 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.

It is possible for the appointment of an overseas insolvency practitioner under section 483 of the Insolvency Act. This would be particularly relevant where a creditor is aware that the debtor's assets lie outside of the BVI. This would reduce the costs of enforcement against such assets (e.g. travel) and brings local expertise which would make recovery more efficient and effective. This would be particularly useful in large, complicated insolvencies, with multiple jurisdictions involved.

The overseas insolvency practitioner must however be appointed alongside a BVI licensed insolvency practitioner (or the Official Receiver). The intention to appoint a foreign insolvency practitioner must be provided through a written notice to the FSC. The FSC then has the power to be heard at the relevant court hearing to appoint the IP to object to the appointment. In practical terms, the foreign insolvency practitioner is likely to write to the FSC ahead of the appointment with relevant expertise and qualifications. They would then obtain the FSC's support before going to the court for appointment.

**Question 3.3 [maximum 5 marks]**

With reference to the relevant legislation, detail the different types of liquidation in the BVI, along with the procedures required for the commencement of each type.

The key types of liquidation are voluntary (solvent), insolvent liquidation under the Insolvency Act by members resolution and insolvent liquidation by court application under the Insolvency Act.

To commence a solvent liquidation, the company must not be insolvent. This procedure is typically used when a company is no longer required and the business would like the entity dissolved. This does not rescue the company, but rather the main purpose of a voluntary liquidation is to deal with the company's assets, pay outstanding liabilities and ultimately to dissolve the company.

Part XII of the BCA sets out the procedure, whereby the company must fit the criteria of (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. **The directors of the company are then required to make a declaration of solvency and approve a liquidation plan.** This declaration of solvency must take place no more than six weeks prior to the date of the resolution to appoint a liquidator and if it found to not be based on reasonable grounds, the directors may be convicted and fined USD 10,000. Two or more joint voluntary liquidators may then be appointed via, (a) a resolution of the directors, or (b) a resolution of the members.

Once this resolution has passed, the voluntary liquidator has 14 days to file notice of their appointment with the declaration of solvency and liquidation plan. The liquidation commences when the notice of appointment is registered at the Registrar and the liquidator must also advertise their appointment within 30 days of the commencement of the liquidation.

To commence an insolvent liquidation by members resolution, a resolution must be passed as a qualifying resolution where a 75% majority of a properly constituted meeting vote in favour. There are additional restrictions if the company is regulated by the FSC and under Section 161(2), the company must provide notice to the liquidator of their appointment as soon as practicable.

**Commented [JW9]:** 5 marks  
See note below

**Commented [JW10]:** Declaration of Solvency not more than 4 weeks be accompanied by Statement of Affairs.



Once this resolution has been passed, the liquidator is appointed but will have restricted powers under section 182 of the Insolvency Act until the first creditors meeting (under section 179 of the Insolvency Act). These powers are limited to taking custody and control of assets the company is entitled to, disposing perishable goods and other assets where value is likely to be lost, protecting the company's assets and exercising other such powers conferred on a liquidator by section 186 as the Court may sanction.

Finally, to commence an insolvent liquidation by appointment by the court, section 162 sets out the required provisions. The application can be made to the court by any of the following: the company, a creditor, a member, the supervisor of a creditor's arrangement, the FSC and the Attorney General.

Pursuant to section 168(1), an application for the appointment of a liquidator must be determined within six months after it is filed (unless the Court extends this timeframe, up to 3 months based on special circumstances. The court may then use section 159(1) to appoint a liquidator if the company is insolvent, the Court is of the opinion that it is "just and equitable" or it is in the public interest". Just and equitable is largely based on case law and includes reasons such as a deadlock in the management of the company and evidence of fraud.

A member may only have a successful application if the member has a *prima facie* case that the company is insolvent. On the other hand, only the Attorney General and the FSC may appoint a liquidator under the grounds of public interest.

Initially under section 170 of the Insolvency Act, whilst an application for the appointment of a liquidator has been filed but not yet determined, the Court may appoint the Official Receiver as a provisional liquidator where there is a need to preserve the assets. This appointment will then end when the Court makes an order appointing the liquidator and the liquidation will formally commence.

#### 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?

Edale Limited is a foreign creditor of the BVI entity Swift Limited. On the basis that the contract demands full repayment of the loan when instalments are missed, Edale is a creditor of Swift and Swift is insolvent as they are not able to pay their debts as they fall due. Edale are able to apply to the court as a creditor of the company and demand that a liquidator is appointed as the company fulfils one of the criteria, being unable to pay its debts when they fall due. These powers fall under Section 162 of the Insolvency Act and subsequently, Sections 175 outline the effect of the appointment of a liquidator.

**Commented [JW11]:** See section 162 for the possible applicants . If company is the applicant then the application for the appointment of liquidator has to be advertised.

**Commented [JW12]:** 5 marks  
First issues to resolve 1. is it a secured or unsecured loan and 2. was the 'demand' already made a statutory demand? And if so the consequences of that which you have covered' Then options from there. if secured and E wants appoints a receiver or administrative receiver (if debenture) needs to check if registered charge on the Register of Charges and/or registered at the BVI Land Registry. If unsecured and liquidation option then it's a class action & concept of *pari passu* would mean % recovery of debt c.f. if secured creditor then E's rights outside of any liquidation and has priority.

Should Edale follow the liquidation route, they may be able to request that the court appoint a provisional liquidator under S170 if they have concerns that Swift will not protect the company's assets. The court will then appoint two or more liquidators and Edale may choose to apply to the court for their choice of liquidator appointed. This would give Edale more control over the process and would ensure that someone with the appropriate expertise and experience is appointed. This could be a foreign liquidator (providing the other liquidator is a BVI registered liquidator), but this may not be appropriate in this situation if the property is in the BVI.

**Commented [JW13]:** Do you mean licensed?

It is not immediately clear from the information whether Edale had taken security against the property purchased by Swift. If Edale has taken security, then they may not require an insolvency procedure to enforce their debt. Edale may be able to seize the property directly as a secured creditor and can realise the asset when they deem the correct time. They would need to prove that their debt is not being settled and that they have valid security. This would be the most effective solution, if possible, due to the control over the key asset held by Swift.

There also may be informal options available to Edale to re-negotiate the repayments with Swift, should they believe that will result in a better result than an insolvency procedure. This would rely on how strong their relationship is with Swift and would not offer the same protection that a court appointed insolvency procedure would.

A receivership may also be useful to Edale where there is a concern of dissipation of assets. If there are no further creditors of Swift, a receiver may be appointed by the court under section 116 of the Insolvency Act and S118-119 sets out the requirements of a receiver. The court appointed receiver could hold the property and sell it on behalf of the creditor. This would be particularly useful where security is held by Edale.

**Commented [JW14]:** Unlikely as property.

Finally, a corporate rescue is also another option. This is unlikely to be attractive due to the business having limited revenue and the main asset being easily realisable, but could be used to restructure the debt to make the payments more manageable.

**Commented [JW15]:** By what method? CCA and scheme of Arrangement? Provisional liquidation(soft touch)

#### Question 4.2 (maximum 9 marks)

**Commented [JW16]:** 5.5 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.

On the right track but some details and areas missing. Discussion required re XYZ Ltd strike off and possible dissolution. Recommendations required to ABC.

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?

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

Whilst the judgment is in England, the key asset in this case is in the BVI and therefore the use of the BVI reciprocity laws should be utilised. The first point to make is that the UK is one of the countries for which the BVI supports its insolvency proceedings and therefore there is a high likelihood that ABC's judgment would be recognised in the BVI. The BVI's recent adoption of the Judicial Insolvency Network, which has increased the efficiency and effectiveness of cooperation with foreign courts, such as the Court of England and Wales.

To enforce the debt, Part XIX of the Insolvency Act outlines the primary framework for the powers to be provided to the BVI court to aid foreign proceedings. The Court can then apply either the law of the BVI or the law of the applicable country. The first step to enforcing the judgment debt would therefore be to apply to the BVI to have the judgment recognised. This would evidence that the debt is owed and give powers to recover assets of the debtor held in the BVI.

The BVI Court's powers would then include appointing an interim receiver over any property of the debtor for such term and subject conditions as it considers appropriate. This means that the BVI court could appoint a receiver over the XYZ shares held by DEF Limited and once satisfied that the judgment is valid, transfer the ownership of the shares to ABC Limited against its outstanding debt (providing the value is less than £2m). ABC Limited would then be able to use these shares to realise the value in the company, whether it is through an asset sell off of the properties or a further sale of the business as a Going Concern.

Ahead of transferring the shares to ABC Limited, the BVI court would have to be comfortable that there are no other creditors that may be treated unjustly. They would also have to ensure that there are no secured creditors with charges against the properties, as these would have to be dealt with first. However, they will also have to ensure that appropriate haste is taken to prevent preferential or fraudulent dissipation of the properties held by DEF Limited.

Alternatively, ABC Limited could look to use the liquidation route to recover the assets. ABC Limited could use the UK judgment to liquidate DEF Limited in the UK and appoint its chosen liquidator (providing that it is the majority creditor). Once DEF Limited is in liquidation, the liquidator would take over the powers and responsibilities of the directors and be able to investigate and realise the company's assets. Once this appointment has taken place, the liquidator could apply to the BVI Court for recognition of the UK liquidation.

The liquidator may then be able to sell the assets of the XYZ in the BVI, through the 100% shareholding (and therefore full control) it holds in the UK through DEF Limited. The liquidator would have to reverse the strike off to commence this recovery strategy. The properties could be sold at a market value by the liquidator and after security is paid, the proceeds could be transferred through a company dividend to DEF Limited and to ABC via a dividend. The liquidator would then likely have to make a solvency statement and wind up the BVI company as a solvent liquidation. This route would require the BVI court to recognise the liquidator's appointment, which should not be an issue based on the close ties between the companies. It may however require a court hearing.

This route would be effective should the £2m debt be less than the value of DEF Limited. DEF Limited would be able to liquidate the BVI company and the excess assets would be paid to the general creditor body, or back to the shareholder of DEF Limited, which may be the inheritance estate of the sole shareholder and director.

Alternatively, non-insolvency routes could be explored whereby ABC Limited engages with the trustee of the sole shareholder of DEF's inheritance estate to agree the liquidation and full payment of the debt through voluntary routes. This would be appropriate should XYZ's properties be worth more than £2m. This would likely be a more efficient route.

**\* End of Assessment \***

**Commented [JW17]:** 40.5 marks