



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 mark
See section 15 company creditors arrangements, section 175 liquidations, section 338 bankruptcy, also section 211 and receiverships

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

If a liquidator is appointed it does not affect the rights of a secured creditor to realise, take possession or otherwise deal with those assets which the secured creditor has a security interest. A secured creditor is not necessarily classed as a creditor or considered to be participating in an insolvency process.

Section 211 of the Insolvency Act provides that a secured creditor is able to value the assets over which it has a security interest and claim in the liquidation of the company as an unsecured creditor for the balance of their debt, or surrender the security interest to the liquidator (so the general creditors can benefit) and make a claim in the liquidation as an unsecured creditor for the whole of their debt. However, they can choose to remain outside of the liquidation process as the Insolvency Act does not impose either of the previously mentioned options.

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 assisting a liquidator to discharge their duties, consider the reports issued by the liquidator and consult with the liquidator on matters relating to the liquidation.

The powers of a Creditor Committee include the ability to call a meeting of creditors, require the liquidator to attend the committee to provide it with information and explanations regarding the insolvency proceedings as it reasonably requires, require the liquidator to provide the committee with reports and information concerning the liquidation as it reasonably requires, and approve the liquidators' remuneration.

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 XIX of the Insolvency Act is the primary framework for powers that are given to the BVI Court to make orders in support of foreign insolvency proceedings.

There are eight powers that are provided to the BVI Court, as per section 467 of the Insolvency Act, these include:

- Requiring any person to deliver up any property of the debtor or any proceeds of the property of the debtor
- Restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property
- Staying or terminating or making any other order it considers appropriate in relation to a BVI insolvency proceeding
- Authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding.

Question 2.4 [maximum 4 marks]

Commented [JW3]: 2 marks

Commented [JW4]: 1.5 marks

Commented [JW5]: Yes eight - all were required

Commented [JW6]: 4 marks

With reference to the relevant legislation, set out the circumstances in which a company will be considered insolvent in the BVI.

The relevant legislation for a company that is insolvent is Part VIII of the Insolvency Act and the Insolvency Rules which includes procedural requirements. There are also some important definitions in section 8 of the Insolvency Act.

Four circumstances in which a company can be considered insolvent in the BVI are below, however, the Court retains residual discretion for finding a company to be insolvent and appointing a liquidator:

- 1) It is proved, and the Court is satisfied, that the company is not able to pay its debts as they fall due. There is a well-known English case law of *Cornhill Insurance plc v Improvement Services Limited* is sufficient evidence of insolvency
- 2) It is proved, and the Court is satisfied, that the company's assets are valued less than its liabilities, known as balance sheet insolvency. Sections 10(1) and 10(2) provide further detail around what a liability is. However, BVI case law *Trade and Commerce Bank v Island Point Properties* confirmed that a company is not considered balance sheet insolvent if the value of assets is lower than its liabilities for only a short time
- 3) A company fails to satisfy (in whole or in part) a judgment, decree or order of the court in favour of a creditor of the company
- 4) If a company does not comply with a statutory demand's terms and it is not successfully set aside as per 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?

A voluntary liquidator can be appointed under the BVI Business Companies Act 2004 ("BCA") over a company that is solvent. This is typically where a company is no longer required and is to be dissolved. The procedure for voluntary liquidations is found in Part XII of the BCA, with definitions for certain terms, such as creditor and liability, found in the Insolvency Act.

The BCA allows for an un-licensed insolvency practitioner to be appointed as a voluntary liquidator, except if the company is regulated. However, following an amendment in 2022, according to section 199 of the BVI Business Companies (Amendment) Act 2022 ("BCA 2022"), and Regulation 6 of the BVI Business Companies (Amendment) Regulations 2022 ("BCR 2022"), from 1 January 2023 there are new requirements for non-Insolvency Act liquidators. The new qualifications for a voluntary liquidator are:

- Has 2 or more years liquidation experience;
- Has professional competence to liquidate the company;
- Holds an insolvency practitioner's licence and has an appropriate qualification and experience of providing legal and finance advice or support to companies in the financial services sector; and
- Is fully knowledgeable in the relevant financial services legislation connected to the liquidating company's business, including the Financial Services Commission Act and the BCA.

Commented [JW7]: 3.5 marks
Regulation 19 (1) and (2) - also states not disqualified and imposes residency requirement.

Commented [JW8]: It should be 'or' not 'and'

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) If the insolvent company has assets situated outside of the BVI, a creditor might consider the appointment of an insolvency practitioner (“IP”) that sits in the jurisdiction in which those assets are held. This appointment of an overseas IP would bring additional local knowledge, expertise and advisor/legal contacts, as well as reducing potentially significant travel costs of the BVI appointee. These benefits would be important particularly in liquidations that are long running and involve multiple disputes in different jurisdictions.

(b) An individual resident outside of the BVI can be appointed as an IP provided it is a joint appointment alongside a BVI licenced IP or the Official Receiver, as per section 483 of the Insolvency Act. Prior written notice, including details of the overseas IP’s expertise and qualifications, must be provided to the FSC. The FSC may then approve the appointment subject to Court approval. The Court must also be satisfied that the overseas IP has given written consent to act, is not disqualified from holding a licence, is not disqualified from acting in the case of a company, foreign company or individual, and there is in force such security for the proper performance of their functions as specified in the regulations.

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.

There are three different types of liquidation in the BVI:

- 1) **Voluntary liquidation over a solvent company** – This type of liquidation is regulated by the BCA. The company in question must have either a) no liabilities; or b) be able to pay its debts as they fall due and have assets valued equal to or higher than its liabilities to be liquidated under Part XII of the BCA. The directors of the company are required to make a declaration of solvency and also approve a liquidation plan.

Section 199(1) of the BCA states that a voluntary liquidator, or two or more joint voluntary liquidators, may be appointed by a resolution of the directors or members with the requirements of such resolution included in section 199(2)-(4) of the BCA. The voluntary liquidation is deemed to commence once the **voluntary liquidator files a notice of appointment with the Registrar.**

- 2) Insolvent liquidation appointed voluntarily – This type of liquidation is regulated by the Insolvency Act and is brought by way of a members’ resolution. Section 159(3) of the Insolvency Act states that an eligible Insolvency Practitioner may be appointed via a qualifying

Commented [JW9]: 5 marks

S.483 IA2003

Commented [JW10]: 4 marks

Commented [JW11]: Section 197-200 BCA 2004. Not all of the procedure as well resolution required by directors/members, and a Declaration of Solvency (not more than 4 weeks old) aa Liquidation Plan (accompanied by Statement of Affairs). Appointment cannot be more than 6 weeks after approval of Liquidation plan.

Commented [JW12]: Notice of appointment, Declaration of Solvency and Liquidation plan to be filed within 14 days, appointment advertised in 30 days.

resolution from the members of the company, meaning that 75% or higher passed the resolution at a properly constituted meeting of the company.

The commencement of the liquidation is deemed the date that the qualifying resolution is passed. For regulated companies, notice must be given to the Commission at least 5 business days prior to the appointment of a liquidator.

- 3) Insolvent liquidation appointed by the Court – This type of liquidation is also regulated by the Insolvency Act and a liquidator is appointed by order of the Court. Section 162 of the Insolvency Act has the primary provisions for a Court appointed liquidation and is supplemented by the Insolvency Rules which includes the procedures.

An application by one or more can be made to the Court by the company, a creditor, a member, the supervisor of a creditor's arrangement, the FSC and the Attorney General as per section 162 of the Insolvency Act. A liquidator must be appointed within six months after the application is filed, unless the Court grants an extension which is limited to three months. The Court may appoint a liquidator, according to section 159(1), if the company is insolvent, the Court deems it to be just and equitable to appoint liquidators, or it is in the public interest.

Commencement of the liquidation is the date of the Court order appointing the liquidator.

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?

Firstly, Edale Limited ("Edale") should review the loan agreement to establish whether a charge has been created over Mosquito Island which would constitute Edale as a secured creditor. If Edale is confirmed as a secured creditor, next it would need to establish if the charge has been registered. Section 162 of the Insolvency Act requires charges to be registered privately, maintained on a register held by the company's registered office. Section 163 of the Insolvency Act provides for public registration of charges, although this is not mandatory. Generally speaking it is the public register that determines priority of the security. If Edale is a secured creditor it can claim directly against Mosquito Island and there are no timelines for enforcing the secured claim.

It may also be possible, subject to what is included in the loan agreement, for Edale to appoint a receiver over Mosquito Island without going through court which would be cheaper than any court appointment. A receiver appointment is governed by the Insolvency Act (Part IV), Insolvency Rules, as well as the BCA and Conveyancing and Law of Property Act 1961.

Commented [JW13]: 5 marks

First issues to resolve 1. is it a secured or unsecured loan - which you covered.

2. was the 'demand' already made a statutory demand? And if so what are the consequences of that?

Commented [JW14]: With Registered agent - not public

Commented [JW15]: Do you mean Land Registry?

If it is determined that Edal does not have a security over Mosquito Island then Edale would constitute as a general unsecured creditor. Edale could serve a statutory demand on Swift Limited ("Swift"), as per section 155 of the Insolvency Act, and if this was not complied with Edale could bring a winding up petition against Swift in the BVI Court. The winding up order could be for the appointment of a liquidator (as per section 162 of the Insolvency Act) or a provisional liquidator if interim relief is required, as per section 170 of the Insolvency Act.

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?

Dear Principal

This memorandum has been prepared to advise ABC Limited ("ABC") on the options available in the BVI to enforce the judgment that has been awarded to ABC in the English High Court against DEF Limited ("DEF") for GBP 2 million ("the Judgment").

Recognition of a foreign judgment

One option available to ABC is to seek recognition of the foreign judgment in the BVI which will mean all remedies that are usually available under the ECSC Civil Procedure Rules 2000 ("CPR") will be available. As per the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 ("1922 Act"), to ensure the enforcement of a foreign judgment is effective it must be established that the judgment debtor/defender holds assets in the BVI. I understand from correspondence with ABC that DEF wholly owns a subsidiary, namely XYZ Limited ("XYZ"), that is incorporated in the BVI and owns a number of unencumbered properties in the BVI.

Secondly, the Judgment must fit the definition of a judgment under the 1922 Act, which provides for any judgment or order given or made by a court in any civil proceedings where any sum is made payable, providing it is for final and conclusive monetary sums. The judgment must also be issued by a country that the 1922 Act extends to and it is only registrable within 12 months from the date of the judgment. As the Judgment is for the conclusive amount of GBP 2 million, and England is a country to which the 1922 Act extends, providing the Judgment has been issued no more than 12 months ago then it can be considered that the Judgment is registrable in the BVI.

Enforcement remedies available to ABC once the Judgment has been registered in the BVI, as per CPR Part 45, are a charging order, Garnishee order, Judgment summons, order for the seizure and sale of goods, or appointment of a receiver.

Commented [JW16]: 5 marks

This question required a memorandum to your principal with the options for ABC which you tried but no recommendations to 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

XYZ struck off

I note that XYZ has been struck off the Register but not yet dissolved. Companies that are struck off by the Registrar for non-payment of fees or not having a registered agent will stay in a hiatus state on the Register for seven or 10 years, dependent on its incorporation date. However, if XYZ was struck off post 1 January 2023 then the BCA, as amended in 2022, has amended section 216 of the BCA to state that a company struck off will be dissolved as of the date the Registrar publishes a notice of the striking off in the BVI Gazette. In either case, it may be possible to restore XYZ by submitting an application to the BVI Court.

*** End of Assessment ***

Commented [JW17]: 41 marks