



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]: .5 mark

Generally not affected by insolvency law in in BV1. See section 15, company creditors arrangements, section 175 liquidations, section 338 bankruptcy, and receiverships

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

Pursuant to s.211 of the Insolvency Act ("IA"), a secured creditor is able to:

- a) Value the assets subject to the security interest and claim in the liquidation of a company as an unsecured creditor for the balance of the 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 the debt.

However, the IA does not impose either option on a secured creditor and they can instead opt to remain outside the liquidation process.

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?

Under s.422 of the IA, the functions of a creditors' committee include:

- a) Consulting with the liquidator about matters relating to liquidation;
- b) Considering reports from the liquidator; and
- c) Assisting the liquidator in discharging 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 it reasonably requires); and
- c) Require the liquidator to attend the committee to provide it with such information and explanations concerning the insolvency proceeding as it reasonably requires.

Question 2.3 [maximum 2 marks]

Commented [JW4]: 0 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?

Required the 8 orders possible under section 467(3) IA2003.

The BVI Court is empowered to authorise a BVI insolvency practitioner to act in a foreign jurisdiction on behalf of a BVI insolvency proceeding, as permitted by the foreign law.

Further, under s.461 of the IA, notwithstanding that a BVI incorporated company is in liquidation in a foreign jurisdiction, the BVI Court has the power to order the appointment of a liquidator over the company in the BVI, by using either of the two routes of appointment.

Foreign companies not registered in the BVI can also enter into liquidation in the jurisdiction by way of court order if the company has sufficient presence of assets in the jurisdiction.

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) Under s.8(1)(c)(ii) of the IA, a company will be considered to be insolvent if it is proved to the satisfaction of the Court that a company is unable to pay its debts as they fall due (a question of fact). *Cornhill Insurance plc -v- Improvement Services Limited* [1986] 1 WLR 114 reinforces the point that an inability to pay a debt which is due and undisputed by the debtor is sufficient evidence of insolvency.
- b) A company will also be considered insolvent under s.8(1)(c)(i) of the IA if it is proved to the satisfaction of the Court that the value of the company's liabilities exceeds the value of its assets – "balance sheet insolvency." Section 10(2) of the IA provide that a liability may be present, or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion. However, in *Trade and Commerce Bank -v- Island Point Properties SA BVICA 2009/0012*, the BVI Court of Appeal confirmed that a company may not be considered balance sheet insolvent if the value of its assets dropped below the value of its liabilities only for a short period.
- c) A company will be considered insolvent if it fails to satisfy execution (wholly or partly) or other process issued on a judgment, decree, or order of the BVI Court in favour of a creditor of the company.
- d) If a company fails to comply with the terms of a validly served statutory demand which is not set aside under s.156 and s.157 of the IA, then the company will be considered to be insolvent.

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, s.199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies (Amendment) Regulations 2022 introduced new requirements in respect of non-Insolvency Act liquidators. Regulation 6(a)1A provides that an individual is qualified to be appointed and act as a voluntary liquidator of a company if he/she:

- (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/she:
 - (i) holds an insolvency practitioner's licence; and
 - (ii) has an appropriate professional qualification (i.e., law or accountancy) and experience of providing legal and financial advice or support to companies in the financial services sector; and

Commented [JW6]: 3.5 marks
Also Regulation 19 - also states not disqualified and imposes residency requirement.

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

- (d) is fully conversant with relevant financial services legislation concerned to the business of the company to be liquidated, including the Financial Services Commission Act and the BVI Business Companies Act ("BCA").

Question 3.2 [maximum 5 marks]

Commented [JW8]: 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) Section 483 of the IA provides that an individual resident outside the BVI is eligible to be appointed as an insolvency practitioner. It is common for BVI companies' assets (or a substantial part thereof) to be situated outside the BVI. As such, it is beneficial to appoint an insolvency practitioner from a jurisdiction in which such assets are held. Practically, if there is another insolvency practitioner appointed (which has associated costs), it can significantly reduce the costs of travel and costs relating to local expertise, which is a particularly important factor in long-running liquidations which may involve multiple disputes in several jurisdictions.

(b) An overseas insolvency practitioner must be appointed alongside a BVI licenced insolvency practitioner or the Official Receiver. To be appointed, prior written notice of such intended appointment must be provided to the FSC. The FSC has the opportunity to appear and be heard at the court hearing for the appointment of the proposed overseas insolvency practitioner and object to the proposed appointment.

Commented [JW9]: 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.

Practically, the overseas insolvency practitioner usually writes a letter to the FSC, providing required details (such as expertise and qualifications) and awaits confirmation that the FSC approves the proposed appointment of the overseas insolvency practitioner (subject to Court approval, where relevant).

Question 3.3 [maximum 5 marks]

Commented [JW10]: 4.5 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.

- (i) Voluntary liquidation (solvent) under the BCA;

This is commonly used when the company is no longer required by a business and is to be dissolved. The main purpose of a voluntary liquidation in the BVI is to deal with the company's assets (if any), pay any liabilities (if any) before dissolving the (solvent) company. The procedure for voluntary liquidations is set out at Part XII of the BCA, which also refers to the IA for certain definitions (i.e., "creditor").

Pursuant to s.197(1) of the BCA, a company can only be voluntarily liquidated 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 is equal to or exceeds its liabilities.

The directors of the company are required to make a declaration of solvency and approve a liquidation plan (s.198, BCA). A voluntary liquidator or two (or more) voluntary liquidators may be appointed (s.199(1), BCA) by (a) resolution of the directors; or (b) resolution of the members. The requirements of such resolutions are set out in s.199(2)-(4) of the BCA.

- (ii) Insolvent liquidation (voluntarily) under the IA by a members' resolution;

The members of a company can appoint a liquidator under s.159(2) of the IA by way of a qualifying resolution. The liquidation commences at the time at which the liquidator is actually appointed (i.e., the date on which the qualifying resolution is passed. The liquidation does not end until it is terminated pursuant to s.232 of the IA.

Under s.159(3) of the IA, 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 if required by the company's memorandum and articles of association. There are restrictions and further procedural requirements if the company is regulated by the FSC. Section 161(2) requires the company to provide notice to the liquidator of his/her appointment as soon as practicable.

Once a liquidator is appointed, their powers are restricted under s.182 of the IA to (a) taking into custody and control all the assets to which the company is or appears to be entitled; (b) disposing of perishable goods and other assets the value of which is likely to diminish if they are not immediately disposed of; (c) doing all such things as necessary to protect the company's assets; and (d) exercising such other powers conferred on the liquidator by s.186 of the IA as the Court may, on his or her application, sanction. The liquidator's powers remain limited to those above until the first meeting of creditors called under s.179 of the IA.

- (iii) Insolvent liquidation by court application under the IA.

A liquidator may be appointed by the Court on an application under s.162, IA by:

- (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.

Pursuant to s.168(1) of the IA, an application for the appointment of a liquidator must be determined within six months after it is filed, unless the Court extends this timeframe by a maximum of three months if it is satisfied there are special circumstances justifying the extension and the order granting the extension is made before the expiry of the initial six-month period.

Commented [JW11]: 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.

The Court may only appoint a liquidator under s.159(1), IA if:

- (a) the company is insolvent;
- (b) the Court is of the opinion that it is "just and equitable" to liquidate the company; or
- (c) it is in the "public interest" for the company to be liquidated.

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?

Section 446 of the IA provides foreign creditors with a right of direct access. Creditors have the same rights regarding the commencement of, and participation in, a BVI insolvency proceeding as creditors in the BVI. However, such a direct right of access does not affect the priority of claims in a BVI insolvency or the exclusion of foreign penal, revenue and social security claims from such a proceeding.

Accordingly, it is open to Edale Limited ("Edale") to serve Swift Limited ("Swift") with a statutory demand under s.155 of the IA in respect of the outstanding sum payable under the loan. Provided the requisite criteria of the demand is fulfilled by Edale (per s.155(2), IA), then unless Swift pays the debt or secures or compounds for the debt to the reasonable satisfaction of the Edale within (at least) 21 days of the date of service of the demand, and if Swift fails to make an application to set aside the demand within 14 days of being served (per s.156(2), IA), then it is open to Edale to make an application to the BVI Commercial Court under s.162(1) of the IA seeking the appointment of a liquidator over Swift.

Edale's entitlement to make such an application arises out of its capacity as a creditor of Swift under s.162(2), IA. If Edale validly serves a statutory demand on Swift, and there is (i) no substantive dispute put forward as to the debt, or part thereof so as to bring the amount below the prescribed minimum; (ii) no reasonable prospect of Swift establishing a set-off or counterclaim in an amount equal to or greater than the amount sought by Edale less the prescribed minimum; and (iii) no security interest held by Edale in respect of debt claimed and the value of the security interest is equal to or greater than the amount claimed by Edale less the prescribed minimum (per s.157(1), IA), then it is open to Edale to seek the appointment of a liquidator by the Court under s.162(1), IA since Swift will be deemed insolvent as it will be considered unable to pay its debts as they fall due.

It is not necessary for Edale to serve Swift with a statutory demand prior to making an application seeking the appointment of a liquidator over Swift. Edale is entitled to make such an application on the basis of Swift's breach of contract and the debt being owed. However, practically, it is useful to

Commented [JW12]: 3 marks

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

Commented [JW13]: Not in force

serve a statutory demand on the debtor first, since a debtor's failure to satisfy a statutory demand is prima facie evidence of insolvency and will strengthen the merits of a liquidation application.

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?

The BVI is not a party to any conventions or treaties in relation to the enforcement of local or foreign judgments. The recognition of foreign judgments in the BVI is principally governed by the Reciprocal Enforcement of Judgments Act 1922 ("REJA") and common law. REJA extends to judgments given in the High Court of England and so is applicable here.

Under s. 2(1) of REJA, a "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 REJA, whereby any sum of money is made payable. As such, only judgments which are for final and conclusive monetary sums can be enforced and any other judgment, whether declaratory, injunctive or otherwise, cannot be enforced.

Once the judgment of the English High Court is registered under REJA by the BVI Court, it is treated from the date of registration as being of the same force and effect as if the judgment had been made in the BVI. Accordingly, all the remedies available under the ECSC CPR will be available to ABC Limited ("ABC") against DEF Limited ("DEF"). Pursuant to CPR 45.2, these include (i) a charging order; (ii) a garnishee order; (iii) a judgment summons; (iv) an order for the seizure and sale of goods; and (v) the appointment of a receiver.

To register the English judgment in the BVI, ABC will be required to make an application for registration under Part 72, CPR. The application must contain certain prescribed information and must exhibit an authenticated copy of the English judgment and details of any interest that has become due under the law of England and Wales. The English judgment is registrable within 12 months of the date of the judgment (here, by April 2023), however the BVI Court has a discretion to extend this period if it deems it just and convenient to do so (per s.3(1), REJA).

The application seeking the registration of the English judgment can be made without notice to DEF. ABC should be made aware that the Court may order that ABC provide security for DEF's costs in relation to any proceedings that can be brought to set aside the registration.

Pursuant to s.3(2) of REJA, the BVI Court will not order the English judgment to be registered if:

- a) the English High Court acted without jurisdiction;
- b) DEF was neither carrying on business nor did it submit to the jurisdiction of the English High Court;
- c) DEF was not served with the process of the English High Court;
- d) the English judgment was obtained by fraud;

Commented [JW14]: 4.5 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. Could ABC maybe apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares

- e) DEF satisfies the BVI Court that an appeal is pending or that it is so entitled and intends to appeal; or
- f) the English judgment related to a cause of action which for reasons of public policy could not have been entertained by the Court.

It is not necessary for ABC to make an application under REJA to enforce its judgment debt against DEF. It is also open to ABC to utilise the procedures under the IA to seek recovery of its debt (i.e. through an application seeking the appointment of a liquidator), though ABC would simply join the queue of creditors in such a case in terms of recovery and may recover more of the principal debt through enforcement measures via REJA.

Before any of the foregoing can take place, it will be necessary for ABC to make an application under s.217 or s.218 of the BCA to have XYZ Limited restored to the BVI Register of Companies given its status as struck off and the entity holding the assets in the BVI which ABC wishes to enforce against.

*** End of Assessment ***

Commented [JW15]: 36.5 marks