



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.

The rights of a secured creditor are generally unaffected by the BVI insolvency framework. At the secured creditor's option, they may elect not to participate in a liquidation and instead possess and realize upon the collateral that serves as their security. However, a secured creditor may opt to participate in a liquidation if, for example, they are undersecured because the value of the collateral is less than the outstanding claim. In that instance, under the BVI insolvency framework the creditor has the option to (a) assess the value of the collateral serving as their security and file a claim in the liquidation for the unsecured balance, or (b) surrender the creditor's security interest and claim their entire outstanding debt as an unsecured claim. The options available to secured creditors under the BVI insolvency scheme serve to protect secured creditors by allowing the flexibility to elect an option which will yield the greatest financial result for that particular creditor based on their secured position.

Commented [JW2]: .5

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' committee has the power to call meetings of the creditors, require the liquidator to attend such meetings and provide information and commentary, and require the liquidator to provide reports and information requested by the committee. The committee also controls the remuneration of the liquidator. The functional effect of the power given to the committee is that it allows the creditors to take an activist role (if they choose) in the liquidation by compelling a free flow of information and discussion between the company's creditors and the liquidator.

Commented [JW3]: 1 mark

No functions - see s. 422 of the IA2003

Question 2.3 [maximum 2 marks]

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

Pursuant to Section 467 of the Insolvency Act, a BVI Court can make orders such as (1) an order staying actions against the debtor or its property in the BVI, (2) an order staying any action to create or enforce rights or remedies against the debtor's property in the BVI, and (3) an order compelling a person to deliver property of the debtor (or the proceeds thereof) to a designated person, in addition to other similar orders which seek to protect the debtor's assets in the BVI. Section 468 enumerates matters the Court must consider when making such orders.

Commented [JW4]: 1 marks

8 orders possible under section 467(3) IA2003.

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.

Part VIII of the Insolvency Act governs corporate insolvency generally. There are a couple of circumstances under which a Company might be considered insolvent:

Commented [JW5]: 4 marks

- (1) Pursuant to Insolvency Act s 8(1)(c)(i), a company may be considered insolvent if it is proved to the satisfaction of the Court that the value of the company's liabilities is greater than the value of its assets (i.e. balance sheet insolvency).
- (2) Pursuant to Insolvency Act s 8(1)(c)(ii), a company may be considered insolvent if it has proved to the satisfaction of the Court that the company cannot pay its debts as they come due (i.e. cashflow insolvency).
- (3) If a company fails to comply with the terms of a statutory demand and such demand is not set aside under Insolvency Act s 156 or s 157, a Court may consider the company insolvent.
- (4) Finally, if a company fails to satisfy a judgment in favour of a creditor, the Court may consider the company 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?

Following 1 January 2023, Section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies (Amendment) Regulations will govern the eligibility of individuals to serve as a voluntary liquidator. Such a potential voluntary liquidator will be considered eligible if they (1) have two or more years of liquidation experience, (2) have professional competence to liquidate the specific company at issue, (3) have an insolvency's practitioner's license, (4) have a relevant professional qualification, and (5) have a full working knowledge of the relevant legislation in the BVI.

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 creditor might consider appointing an overseas insolvency practitioner in conjunction with a BVI insolvency practitioner when the majority of the BVI company's assets are located in the foreign jurisdiction. While appointing two insolvency practitioners increases costs initially, the creditor is likely to see a better result when utilizing a foreign insolvency practitioner with local expertise and who is not required to travel to access assets. The process for appointing a foreign insolvency practitioner begins with writing a letter to the Financial Services Commissions (FSC) identifying the proposed practitioner's qualifications. Once the FSC approves based upon the prior written notice, the Court will approve the appointment (if required).

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.

Commented [JW6]: 4 marks

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

Commented [JW7]: 3 marks

There two questions with the answer merge,

Must not t 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. FSC must approve appointment and if it objects then it has right to apply to court. Court can approve the appointment at the hearing of the FSC's application (unlikely the court will appoint if FSC objects).

Commented [JW8]: And experience

Commented [JW9]: 3.5 marks

There are three primary types of liquidation in the BVI – First, voluntary (solvent) liquidation under the BVI Business Companies Act (BCA); Second, voluntary (insolvent) liquidation under the Insolvency Act commenced by resolution of the members, and; Third, insolvent liquidation by application to the court under the Insolvency Act.

Under the BCA Part XII, a solvent company may elect to liquidate (an insolvent company may not liquidate under the BCA). To commence a voluntary (solvent) liquidation, the directors of the company must first make a declaration of solvency and approve a liquidation plan. Then, a voluntary liquidator may be appointed by resolution of the directors or resolution of the members. Then, the liquidation commences under the supervision of the voluntary liquidator, who must be an eligible individual as defined in Section 199 of the BCA Amendment.

Under the Insolvency Act Part VI, a company may enter liquidation via a qualifying resolution of the members of the BVI company. Section 159(3) of the Insolvency Act governs the qualifying resolution, which must be passed at a meeting by a 75% majority. Until the first creditors' meeting, the liquidator's powers are restricted under section 182 of the Insolvency Act.

Under Part VI, s 162 or 163, a BVI company or foreign company may be placed into liquidation under the supervision of the Official Receiver or a liquidator by application to the Court. Multiple parties are permitted to make such an application, including the Company, a creditor, a member, a supervisor of a creditor's arrangement, the FSC, or the Attorney General. The Court is required to resolve the application for appointment of liquidation within six months under section 168(1).

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 may consider making a statutory demand against Swift Limited pursuant to Insolvency Act s 156. The statutory demand, which must be in writing, signed, and dated by Edale, will require Swift to pay or secure the debt within 21 days of service. If the Swift does not seek to set aside the demand and fails to comply, Swift will be considered insolvent.

If Swift is considered insolvent, then Edale may consider filing an application pursuant to Insolvency Act s 162 to have Swift placed into liquidation by court order. In order to make a successful application, under s 159(1), Edale will need to show the Court facts from which it can find Swift is insolvent which is demonstrated by Swift's failure to comply with statutory demand.

Edale may also consider initiating a scheme of arrangement with Swift by applying to the BVI Court for a meeting of creditors or shareholders. This informal insolvency process requires Edale (or Swift) to put forth a scheme for repayment of Swift's debt and the scheme must be approved by a vote of 75% or more of creditors, measured by value, and approved by the Court.

Commented [JW10]: 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 [JW11]: Court a discretion to make the order; insolvent, just and equitable and public interest. If company is the applicant then the application for the appointment of liquidator has to be advertised.

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.

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?

ABC's ultimate goal is to access the assets of defendant DEF's wholly-owned subsidiary, XYZ, which is incorporated in the BVI. ABC has three options: (1) register the foreign judgment under the 1922 Act and attempt to enforce it against assets of XYZ; (2) sue XYZ and rely on the common law doctrine of obligation by action, or (3) force XYZ into liquidation.

First, ABC might consider formally registering the foreign judgment under the 1922 Act. The judgment here qualifies as a "judgment" under the 1922 Act because it is for a conclusive sum (\$2MM GBP) and it may be enforced as an order from the High Court of England. After the judgment is registered in the BVI, the judgment has the same force and effect as if it had originally been obtained in the BVI. ABC may then seek to enforce the judgment against the assets of XYZ, as a wholly-owned subsidiary of DEF.

Second, ABC might consider suing XYZ directly and relying on the common law doctrine of obligation by action. Again, because the judgment is a conclusive judgment for money, once ABC proves the judgment, ABC may apply for summary judgment in the BVI court without relitigating the underlying issues. At that point, ABC may then seek to enforce the judgment against the assets of XYZ.

Finally, ABC might consider applying to the Court to put either/both of DEF and XYZ into liquidation by showing that placing the company in insolvency would be "just and equitable." ABC should argue that XYZ should be liquidated under the "just and equitable" standard because there is no justification for the company's continued existence – the sole shareholder of the parent company has died and XYZ has been struck from the Register. If the Court grants the application, ABC may then file its claim as an unsecured creditor of XYZ and attempt to satisfy its judgment.

*** End of Assessment ***

Commented [JW13]: 3 marks

This question required a memorandum to your principal with the options for ABC.
Discussion was required on the possible options to be considered by ABC:

1. Enforcement of a judgment under Reciprocal Enforcement of Foreign Judgments Act 1922 - the 8 conditions under the Act and issue with the 12 months and would an extension be required.
2. Appointment of a liquidator in DEF in UK and recognition in BVI; or the appointment of a receiver over shares of DEF who could then appoint a new director to deal with restoration of XYZ and assets; and
3. Restoration to the register of XYZ - was it just struck off or was it to be dissolved under the new law from 1/1/23 - any previously company struck off as at 30 June 2023 will be automatically dissolved on 1 July 2023. An application to the court would be required to restore XYZ.
4. ABC could apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares

Commented [JW14]: What Act? The 8 conditions required and issue with 12 month and extension.

Commented [JW15]: What Act?

Commented [JW16]: Its struck off and dissolve no legal proceedings allowed until restoration.

Commented [JW17]: 33 marks