



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

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.

The Insolvency Act provides the following protections for secured creditors:

- a. A secured creditors' claim falls outside the insolvency process as they aren't creditors or considered to be participants of the insolvency process;
- b. There isn't a timeline for the secured creditor to enforce its interest in the secured claim;
- c. The liquidator in a voluntary liquidation is required to give effect to the rights of priority of the claim of a secured creditor as per section 197(2) of the Business Companies Act;
- d. The appointment of a liquidator does not have an effect on the secure creditor's right to take possession, realise or deal with the secured asset; and
- e. The secure creditor's right to take possession, realise or deal with the secured asset is not effected by orders made by the court under section 476 of the Insolvency Act.

Question 2.2 [maximum 2 marks]

Commented [JW3]: 2 marks

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

Upon the appointment of a liquidator, the creditors can establish a creditor's committee. The creditor's committee is tasked with:

- a. Consulting with the liquidator about liquidation matters;
- b. Considering liquidator's reports; and
- c. Assisting the liquidator in the discharge of their functions.

The creditor's committee has the power to:

- a. Call a meeting of the creditors;
- b. Require the liquidator to provide reports and information concerning the liquidation to the committee;
- c. Require the liquidator to attend the committee to provide information concerning the liquidation; and
- d. Approve the liquidator's remuneration.

Question 2.3 [maximum 2 marks]

Commented [JW4]: 1.5 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 8 orders possible under section 467(3) IA2003 were required

The Insolvency Act Part XIX provides the mechanism for the BVI Court to make orders in aid of foreign proceedings. Section 476(3) provides the BVI Court with a wide range of powers which includes but not limited to the below:

- a. Restraining the commencement or continuation of any proceedings, against a debtor or debtor's property;
- b. Restraining the creation, exercise or enforcement of any rights or remedy over or against any of the debtor's property;

- c. Requiring any person to deliver up any property of the debtor or the proceeds of such property; and
- d. Staying or terminating or making any other order it considers appropriate in relation to a BVI insolvency proceeding.

While the Insolvency Act Part XVII contains provisions based on UNCITRAL Model Law on Cross-Border Insolvency, it has not come into force.

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.

Insolvency Act Part VII governs corporate insolvency in the BVI. The below are the circumstances in which a company can be considered insolvent:

- a. It is proven to the court that a company is unable to pay its debts as they fall due;
- b. It is proven to the court that the value of the company's liabilities exceeds the value of the assets, or balance sheet insolvency;
- c. The company fails to satisfy (wholly or partly) execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor; and
- d. The company fails to comply with a statutory demand and is not successful in setting aside the statutory demand under section 156 or 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?

As of the 1 January 2023, section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies (Amendment) Act 2022 introduced a new requirement of the appointment of non-insolvency liquidators. In order for a person to be appointed as a voluntary liquidator they must:

- a. Have at least 2 years liquidation experience;
- b. Have professional competence to liquidate the specific company concerned;
- c. Can demonstrate that they hold an insolvency practitioner's license and have the appropriate professional experience; and
- d. Be fully conversant with relevant financial legislation connected to the business of the company.

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;

Commented [JW5]: 3.5 marks
Required mention of section 8 of the IA2003

Commented [JW6]: 3.5 marks

Commented [JW7]: Regulation 19 - also states must be not disqualified and imposes residency requirement.

Commented [JW8]: Not 'and' - it should be 'or'

Commented [JW9]: 3.5 marks

Section 483 of the Insolvency Act provides for the appointment of an overseas insolvency practitioner. An overseas insolvency practitioner is an individual who resides outside of the BVI. An overseas insolvency practitioner would be appointed in circumstances where for the example the assets of the company are situated outside of the BVI in an attempt to reduce costs.

Commented [JW10]: And have local expertise in the jurisdiction

(b) what is the process for such proposed appointment?

Commented [JW11]: 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. 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).

An overseas insolvency practitioner must be appointed to act jointly with a BVI licenced insolvency practitioner or the Official Receiver. Prior written notice of the appointment must be given to the FSC who has the power to appear, be heard and object to the appointment. The general practice however, is for the overseas insolvency practitioner to write to the FSC and seek approval of the appointment.

Question 3.3 [maximum 5 marks]

Commented [JW12]: 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.

The following are the different types of liquidations that exists in the BVI:

a. Voluntary liquidation

Commented [JW13]: Directors have to make a Declaration of Solvency not more than 4 weeks old and be accompanied by Statement of Affairs. Appointment advertised in 30 days.

The BCA Part XII provides the mechanism for a voluntary liquidation. A voluntary liquidation is only available to a solvent company. This is utilised where the company's assets are to be dealt with, pay any liabilities and dissolved the company. Pursuant to section 197(1) of the BCA, a company can be liquidated if it has no liabilities or if 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 are required to approve a liquidation plan and provide a declaration of solvency. The director is required to approve the liquidation plan no more than 6 weeks prior to the date of the resolution to appoint the voluntary liquidator. A voluntary liquidator may be appointed by a resolution of the directors or members. Upon appointment, the voluntary liquidator must file within 14 days with the Registrar notice of their appointment, director's declaration of insolvency and the approved liquidation plan.

b. Insolvent liquidation by members

The members of an insolvent BVI company can appoint an eligible insolvency practitioner by way of a qualifying resolution. A resolution is a qualifying resolution if it is passed at a properly constituted meeting of the company by a majority of 75% or a higher majority if required by the company's corporate documents as per section 159(3) of the Insolvency Act. The appointment of the liquidator is the commencement of the liquidation. The liquidator's power is restricted under section 182 of the Insolvency Act until the creditor's first meeting is held.

c. Insolvent liquidation by the court

An application for the appointment of a liquidator by the court can be made pursuant to section 162 of the Insolvency Act. An application can be made by the company, creditor, member, FSC, Attorney General or the supervisor of a creditor's scheme. The application is required to be determined within 6 months unless the court grants an extension. The court may appoint a liquidator if the company is insolvent, it is just and equitable or if it is in the public's interest. The date that the liquidator is appointed is the commencement of the liquidation.

Commented [JW14]: If company is the applicant then the application to the court for the appointment of liquidator has to be advertised

d. Provisional liquidator

Where an application is made for the appointment of a liquidator but it is yet to be determined or withdrawn, the court may appoint the official receiver or a provisional liquidator pursuant to section 170 of the insolvency act.

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?

Under the BVI insolvency regime, Edale Ltd as a foreign creditor has a right of direct access pursuant to section 446 of the Insolvency Act. This means that Edale Ltd has the same rights regarding the commencement of and participation in any BVI insolvency proceeding. Edale has the option to make an application under section 162 of the Insolvency Act for the appointment of a liquidator. Edale also has the option to initiate proceeding in England and have the judgment registered in the BVI under the 1922 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?

ABC's foreign judgment can be registered pursuant to the 1922 Act which extends to judgments of the High Court of England Wales and Northern Ireland. The foreign judgment must be final and the monetary sums conclusive in order for the judgment to be enforceable. Under the 1922 Act 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 the act, whereby any sum of money is made payable. ABC's foreign judgment fits the definition of a judgment. The judgment must be enforced within 12 months of the date of the judgment.

In order for the ABC's foreign judgment to be effective, DEF is required to have assets against which the foreign judgment can be enforced. Given that the BVI entity is struck and the sole director and shareholder has died it may be difficult to access the assets.

Commented [JW15]: 1 mark

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 [JW16]: Not in force

Commented [JW17]: 1.5 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. ABC could apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares.

Commented [JW18]: Name of the Act - the 8 conditions are required

Commented [JW19]: This has expired so needs extension

Commented [JW20]: new law from 1/1/23 - any previously company struck off as at 30 June 2023 will be automatically dissolved on 1 July 2023.

ABC can also choose to initiate insolvency proceedings against DEF Limited in England and then apply to the BVI for recognition as a foreign representative under Part XIX of the Insolvency Act. The BVI court has a wide range of powers including ordering the delivery up of any relevant property.

*** End of Assessment ***

Commented [JW21]: 31.5 marks