



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]: 8 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.

Commented [JW2]: Correct answer

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.

Commented [JW3]: Correct answer

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.

A creditor who has security over in whole or on part of a company's asset is entitled to enforce its security without leave of the court and without reference to the liquidators. There is no stay on enforcement by secured creditors.

Commented [JW4]: .5 mark

Generally not affected by insolvency law in BVI. 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 functions of the creditors committee include

- 1) Consulting with the liquidator about matters relating to the liquidation
- 2) Considering reports from the liquidator
- 3) Assisting the liquidator in discharging his functions

The powers of a creditors' committee include

- 1) Call a meeting of creditors
- 2) Require the liquidator to provide the committee with reports and information concerning the liquidation (as it reasonably requires)
- 3) Require the liquidator to attend the committee to provide it with such information and explanations concerning the insolvency proceedings as it reasonably requires
- 4) Approve the liquidators' remuneration

Commented [JW5]: 2 marks

Question 2.3 [maximum 2 marks]

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

A foreign proceeding is defined as a collective judicial or administrative proceeding which is pursuant to insolvency law where the property and the affairs of the debtor are subject to control or supervision in a foreign court for the purpose of a corporate restructuring etc.

Part XIX of the Insolvency Act provides the framework for the powers provided to the BVI Court to make orders to aid foreign proceedings.

These include;

- 1) Restraining the commencement or continuation of any proceeding against a debtor or a debtor's property
- 2) Restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property
- 3) Requiring any person to deliver up on any property of the debtor or the proceeds of such property
- 4) Authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding

Commented [JW6]: 1 mark

8 orders possible under section 467(3) IA2003.

- 5) Staying or terminating or making any other order is considered appropriate in relation to a BVI insolvency proceeding

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.

Corporate insolvency is governed by Part VIII of the insolvency Act. A company is considered insolvent in the BVI if;

- 1) It is proved to the satisfaction of the Court that a company is unable to pay its debts as they fall due
- 2) It has proved to the satisfaction of the Court that the value of the Company's liabilities exceeds the value of its assets which is termed balance sheet insolvency, where section (10)(1) of the insolvency Act provides a definition of liability such that liability includes a debt for the purpose of an obligation to make restitution, in contract, tort or bailment, or breach of trust
- 3) A company fails to satisfy both in full or in part, execution of other processes issued on a judgement decree or order of the BVI court in favour of a creditor
- 4) A company fails to comply with the terms set under section 156 or 157 of the IA. A statutory demand for payment of a debt that is due or payable made by a creditor in the format required under section 156, and that payment has not been forthcoming within 21 days on service of the statutory demand

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?

Under the provisions of the Business Companies Act, insolvency is not required to place a company into voluntary liquidation, such as a business not being needed and to be dissolved, which is a type of corporate rescue in the BVI, and this procedure is contained in Part XII of the BCA

Unlike insolvent liquidations, a voluntary liquidator does not need to be licensed as an insolvency practitioner, unless it is a regulated company, however, must be an eligible individual. Additionally, any individual who has not been disqualified from being appointed or acting as a voluntary liquidator may be appointed.

However, since 1 January 2023, section 199 of the BVI Business Companies (amendment) act 2022 and regulation 6 of the BVI Business Companies (Amendment) Regulations now sets out new requirements in respect of non-Insolvency Act Liquidators. Regulation 6(a) 1A states that an individual is qualified to be appointed and act as voluntary liquidator of a company if

- 1) Has liquidation experience of two years
- 2) Has professional competence to liquidate the specific company concerned
- 3) Can demonstrate that he holds (a) an insolvency license and (b) has an appropriate qualification (i.e., law or accountancy) and has experience in providing legal and financial advice or support to companies in the financial services sector

Commented [JW7]: 3.5 marks

No reference to section 8 of IA2003

Commented [JW8]: 4.5 marks

Commented [JW9]: Regulation 19 - states not disqualified and imposes residency requirement.

Commented [JW10]: Not 'and' - it should be 'or'

- 4) Is fully conversant with the relevant financial services legislation connected to the business of the company to be liquidated including the financial services commission ACT and BVI Business Companies Act

Question 3.2 [maximum 5 marks]

It is possible for the appointment of an overseas insolvency practitioner in relation to a BVI company. Answer the two questions below.

- (a) in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and
- (b) what is the process for such proposed appointment?

Under section 483 of the Insolvency Act it is possible for an individual resident outside of the BVI to be appointed as an insolvency practitioner. The overseas practitioner however must be appointed jointly with a BVI licensed insolvency practitioner or the Official receiver and in order to do so, prior written notice of the appointment must be provided to FSC as per 483(b) of the insolvency Act. The Overseas practitioner must have sufficient qualifications, has written consent to act in prescribed form, is not disqualified from holding a license or from acting in the case of a company or a foreign company.

A creditor might consider the appointment of an overseas insolvency practitioner on the basis that whilst a company might have a top company or holding company based in the BVI jurisdiction, the principal place of business might be in another country, or debt is governed in another country, or more commonly the majority of the company's assets are located in another country and therefore it is helpful to appoint a liquidator where the assets are held. This significantly reduces costs associated with the liquidator, such as travel, and also increases the level of expertise in the case in that jurisdiction.

Question 3.3 [maximum 5 marks]

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

The three liquidation types in the BVI are

- 1) a voluntary liquidation (solvent) under the BCA
- 2) insolvent liquidation (Voluntarily) under the insolvency Act by a members' resolution;
- 3) Insolvency liquidation by court appointment under the Insolvency Act

Voluntary Liquidation

Under 199(1) of the BCA, a voluntary liquidation can be appointed by either (a) a resolution of the directors or (b) by resolution of the members. As per 199(2) the directors can appoint a liquidator on such times as (a) the expiration of such time specified in its memorandum or articles for the company's existence (b) if the memorandum or articles permits them to pass a resolution for appointment of a voluntary liquidator and the members have approved a plan. The members can be appointed on approval of the liquidation plan and can appoint a liquidator=.

Commented [JW11]: 4.5 marks

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).

The answers are in the wrong order to the questions

Commented [JW12]: 4 marks

Commented [JW13]: 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.

Insolvency (voluntary) Liquidation

Under 159 of the insolvency act 2003, a liquidator may be appointed by a members qualifying resolution to appointed an eligible insolvency practitioner as liquidator of the Company where a meeting of the company is passed by 75%, or if higher if determined by the MoA.

Under the Insolvency act 2003, section 161 appointment by members resolution cannot happen if an application to the court to appoint liquidators has been filed and served, or a liquidator has been appointed by the Court, or the person to be appointed has not yet provided consent in writing.

Insolvency Liquidation by Court Appointment

Under 162 of the IA, on application of a specified person being; the company, a creditor, a member, a supervisors of a CA in respect of the Company, the commission and the attorney general, the court can appoint a liquidator of a company under 159 of the IA if the company is insolvent, the court is under the opinion it is just an equitable that a liquidator be appointed or the court is under the opinion that it is in the public interest for a liquidator to be appointed

Commented [JW14]: If company is the applicant then the application for the appointment of liquidator has to be advertised. Application must be determined within 6 months after filing - possible to extend 3 months

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.

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.

Providing reasons, with particular reference to the Insolvency Act, what are the options open to Edale Limited against Swift Limited?

We understand that a financial contract is under consideration given that payment or delivery which will be affected by the exchange price are due to be performed at a certain time or within a certain period. This is the case given that Edale Limited is a company incorporated in England and Swift limited is incorporated in he BVI and therefore will be subject to different currencies. Edale Limited will have wanted payment in full on the basis that the exchange rate is subject to change over time and therefore payments in instalments would have led to changes in price to be received by Edale Limited.

Given that Edale Limited is a foreign company and potentially a foreign creditor, under 446 of the insolvency act this provides foreign creditors with a right of direct access as creditors have the same rights regarding the commencement of, and participation, in a BVI insolvency proceeding.

Commented [JW16]: Not in force

Given that Swift Limited as only repaid four months instalments then Edale Limited could firstly issue a statutory demand against the Swift Limited, in the BVI, to demand payment within 21 days on service of the statutory demand,. If there is failure to repay the amounts, then the a foreign representative could look to appoint a liquidator of the Company if the BVI court sees that Swift Limited is insolvent and it is just and equitable to do so.

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?

Memorandum

Options for ABC Limited with respect to the judgement awarded against DEF for the repayment of GBP 2m

As we understand a judgement is defined as any judgement or order given or made by a court in any civil proceedings where before or after the passing of the Act, whereby any sum of money is made payable, however this definition under 1992 Act only extends to judgements given in the High Court of England Wales and Northern Island and the Court session of Scotland. The recognition of foreign judgements in the BVI is principally governed by the Reciprocal Enforcement of Judgements Act (CAP65) 1992 (1992) Act and common law.

However we must be mindful that the enforcement of a foreign judgement in the BVI is only effective to the extent that the judgement debtor has assets in the BVI against which it can enforce. We understand that the judgement Debtor, ABC, has judgement against DEF who is the 100% owner of XYZ Limited, which is a company incorporated in the BVI. DEF does not have any realisable assets, however its does have shares held in the BVI jurisdiction.

Therefore, ABC could look to register the foreign judgement in the BVI Court under 1992 Act. As such once remedies such as the appointment of receiver over XYZ could be in place, if on the basis of the judgement, there is security in place over the shares of XYZ.

Given that the judgement was awarded in April 2022, a foreign judgement is only registrable within 12 months of the date of the judgement so therefore we would need to understand when the registration will take place. Given that it is July 2023 now, we have gone past the 12 months and therefore, we would need to seek approval from the BVI court that it is just and convenient to do so. We will need to get ABC to apply to Court under CPR Part 72.

What makes it more difficult is that XYZ limited is struck off the register. We understand that XYZ is not dissolved. Given the assets that XYZ limited has, by the way of incumbered properties, ABC could look to enforce the judgement, appoint a receiver over the shares of XYZ limited given that in the BVI

Commented [JW17]: 4 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]: the 8 conditions under the Act were required. And its judgment - no e.

Commented [JW19]: Extension required

Commented [JW20]: see 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.

there is a period of 10 years after being struck off. This will give ABC the options to recover the judgement.

Given that the sole shareholder and sole director of DEF has died, then ABC should also consider an appointment of director through the receiver over the DEF so that the affairs can be managed, and the company can then apply to the BVI court for the application of a liquidator.

*** End of Assessment ***

Commented [JW21]: Not correct - 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.

Commented [JW22]: ABC appointed a receiver over the shares in DEF and appointed a new director of DEF to restore XYZ and then dealt with the assets.

Commented [JW23]: 33 marks