



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 Insolvency Act specifically recognises and protects the rights of secured creditors to enforce their security. It should be noted that the fundamental principle underlying BVI insolvency law is the pari passu treatment of creditors. Secured creditors are not strictly speaking classed as creditors or considered as participating in the insolvency process. Their claims are directly against the assets of the company, which are subject to the security, so they fall outside of the liquidation. This is covered in section 175(2) of the Insolvency Act.

Pursuant to section 211 of the Insolvency Act 2003, a secured creditor is able to value the assets subject to the security interest and claim in the liquidation of a company as an unsecured creditor for the balance of his debt and surrender the security interest to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the full amount of his debt. Neither options are imposed in the Insolvency Act as they can remain outside the liquidation process.

Part XIX of the Insolvency Act provides the primary framework for the powers provided to the BVI Court to make orders in aid of foreign proceedings. The BVI Court can recognise certain insolvency proceedings and when making an order in aid of foreign proceedings, the BVI Court is able to apply the applicable BVI laws or the law of the applicable country.

It is worth noting that a CCA does not affect the right of a secured creditor to enforce its security interest or vary the liability secured by the security interest. The position here is the same when it comes to preferred creditors. Unless agreed in writing, a preferred creditor will not receive less than it would have received in a liquidation of the company had the company liquidation commenced on the same date as the CCA.

The common forms of security interest in the BVI granted over immovable property include legal mortgages, equitable charge, floating charge and mortgages and charges over shares in a BVI company. The holder of a legal mortgage over assets has 3 primary remedies in the event of a default under the mortgage or charge which are foreclosure on shares, selling the shares or appoint a receiver over the shares. A floating charge is often granted by a company over all its assets and the company is usually still permitted to dispose of assets that are subject to the floating charge

Question 2.2 [maximum 2 marks]

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

[The creditors of a company in liquidation can establish a creditors' committee at any time after the appointment of a liquidator by passing a resolution to that effect at a creditors' meeting. The functions of a creditors' committee include

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

Commented [JW2]: 2 marks

S. 338 Bankruptcy

Commented [JW3]: 2 marks

The powers of a Creditors' Committee include the ability to:

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

Question 2.3 [maximum 2 marks]

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

[The powers provided to the BVI Court include the following:

- Restraining the commencement or continuation of any proceedings, against a debtor or debtor's property
- Restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property
- Requiring any person to deliver up any property of the debtor or the proceeds of such property
- Ordering or granting relief to facilitate, approve or implement arrangements that will result in a co-ordination of BVI insolvency proceeding with a foreign proceeding
- Appointing an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate
- Authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding
- Staying or terminating or making any other order it considers 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.

[The circumstances in which a company will be considered insolvent in the BVI are covered under section 8 of the Insolvency Act 2003, a company will be considered as insolvent in the BVI in the following circumstances:

- i) It is proved to the satisfaction of the court that a company cannot pay its debts as they fall due
- ii) 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)
- iii) A company fails to satisfy (wholly or partly) execution or other process issued on a judgment, decree or order of the court in favour of a creditor of the company
- iv) A company fails to comply with the terms of a statutory demand and it is not successfully set aside under sections 156 and 157 of the Insolvency Act 2003.]

QUESTION 3 (essay-type questions) [15 marks in total]

Commented [JW4]: 1.5 marks

Question for reference to legislation - 467(3) IA 2003

Commented [JW5]: 4 marks

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 section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies (amendment) Regulations 2022 there have been 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 a voluntary liquidator of a company if he:

- Has liquidation experience of not less than 2 years
- Has professional competence to liquidate the specific company concerned
- Can demonstrate that he holds an insolvency practitioner's license and has appropriate professional qualification (such as law or accountancy) and experience of providing legal and financial advice or support to companies in the financial services sector
- Is fully conversant with 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.]

Commented [JW6]: 4 marks
Regulation 19 - also states is not disqualified and imposes residency requirement.

Commented [JW7]: Should be 'or' not 'and'

Question 3.2 [maximum 5 marks]

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

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

[a) An overseas practitioner can be appointed as liquidator of a BVI company, but only as a joint appointment. It is important to note that notification of the joint appointment must be given to the FSC and there is an eligibility requirement application necessary also. This is covered under section 483 of the Insolvency Act. As mentioned, the overseas insolvency practitioner must be appointed jointly with a BVI licensed insolvency practitioner or the Official Receiver. Prior written notice of such intended appointment must be provided to the FSC and the FSC has power to appear ne heard at the court hearing to appoint and object to the appointment if necessary.

b) Usually the foreign insolvency practitioner writes a letter to the FSC, providing required details (such as expertise and qualifications) and awaits confirmation that the FSC approved the appointment of the overseas insolvency practitioner, which is subject to Court approval, where relevant.]

Commented [JW8]: 1 marks
No answer to part (a) - saving costs, local expertise and assets in foreign jurisdiction
The candidate has included the answer for part (b) as part (a).

Commented [JW9]: This is the answer to part (b)
Plus: Not disqualified from holding a licence under s. 477, not disqualified from acting due being a director or auditor and must consent and have proper security in force. 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).

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 terminology in the BVI legislation differs from what we typically see in legislation in the neighbouring regions of Cayman Islands, The Bahamas, Bermuda etc. In the BVI, a liquidator is appointed in:

- voluntary liquidation (solvent) under the BCA
- insolvent liquidation (voluntarily) under the Insolvency Act by members resolution

Commented [JW10]: As well the information above in part (a) which is the answer to part (b) - must not be disqualified from holding a licence under s. 477, not disqualified from acting due being a director or auditor and must consent and have proper security in force. 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 [JW11]: 4 marks

Commented [JW12]: For relevant for this question

- insolvent liquidation by court application under the Insolvency Act

The appointment of a liquidator in an insolvent company can be achieved by way of an application to the BVI Court or by way of a qualifying resolution of the members. A qualifying resolution of the members of a company appointing a liquidator should not be confused with or referred to as a 'voluntary liquidation', which is a completely different procedure.

Commented [JW13]: Which requires 75% majority to pass under section 159 (3) BCA 2004

Insolvency is not required to place a company into voluntary liquidation under the provisions of the BCA. Voluntary liquidation under the BCA is not available to insolvent companies. A voluntary liquidation is commonly utilised where a company is no longer required by a business and it is to be dissolved. The procedure for voluntary liquidations is contained in Part XII of the BCA. It should be noted however that the BCA does refer to the Insolvency Act for certain definitions such as 'creditor' and 'liability' as set out in section 196A of the BCA.

Pursuant to section 197(1) of the BCA, a company can only be liquidated under Part XII if it has no liabilities or of its able to pay its debts as they fall due and the value of the assets is equal or exceeds its liabilities.

The directors of a company are required to make a declaration of solvency and approve a liquidation plan where its proposed to appoint a voluntary liquidator under section 198 of the BCA. Note that a liquidation plan is not required in some other jurisdictions such as the Cayman Islands and Bermuda.

Under section 199(1) BCA, a voluntary liquidator or two or more joint voluntary liquidators may be appointed by resolution of the directors or by resolution of the members. Unlike in an insolvent liquidation, a voluntary liquidator need not be a licensed insolvency practitioner unless the company is regulated.

Once appointed, the voluntary liquidator has 14 days to file the with the Registrar the following: Notice of his/her appointment in the approved form, the declaration of solvency made by the directors and a copy of the liquidation plan. The voluntary liquidator also must advertise his/her appointment within 30 days of the commencement of the voluntary liquidation.

For an insolvent liquidation by court application, there are two procedures for the appointment of a liquidator set out in Part VI of the Insolvency Act:

Commented [JW14]: See section 162 for the possible applicants . If company is the applicant then the application for the appointment of liquidator has to be advertised.

- the Court may appoint the Official Receiver or a liquidator over a BVI company pursuant to an application made under 162 of the Insolvency Act, or over a foreign company on an application made under 163 of the Insolvency Act
- Appointment of an 'eligible insolvency practitioner' by the members of a BVI company (as opposed to a foreign company) by way of a qualifying resolution.

Pursuant to section 168(1) an application for the appointment of a liquidator must be concluded on within 6 months after it is filed, unless the Court extends this timeframe. It should also be noted that the Court can only appoint a liquidator under section 159(1) if the company is insolvent, it is in the interests of the public and if the court is of the opinion that it is just and equitable.]

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 can issue a statutory demand against Swift Limited under Section 156 of the Insolvency Act. The demand requires Swift to pay the outstanding debt within 21 days and, if a company (Swift) fails to comply with the terms of a statutory demand and is not successfully set aside under sections 156 and 157 of the Insolvency Act they will be considered insolvent. If Swift were to fail on paying the debt after the statutory demand Edale could commence insolvency proceedings against them. Under the Act, the two main insolvency procedures are liquidation and administration. Under Section 162 of the BVI Insolvency Act, Edale may petition to the court for the winding up of Swift and if the court grants the order then a liquidator could be appointed.]

Enforcement of security interests with regards to the property on Mosquito Island, if the agreement contains a security interest such as a mortgage or charge over the property then Edale may enforce its security interest. Resulting from this, a receiver could be appointed to take control of and realize the property, with the proceeds used to pay the outstanding debt. This essentially entails the consideration of whether Edale is a secured or unsecured creditor, and this would allow us to determine the rights available to Edale and appropriate options such as seeking breaches of contract or debenture, legal or equitable charges.]

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 recognition of foreign judgments in the BVI is principally governed by the Reciprocal Enforcement of Judgments Act (REJA) 1922 and common law. There is also the Foreign Judgments (Reciprocal Enforcement) Act 1964 but there are doubts as to whether the 1964 Act is properly designated. It is important to note that the enforcement of a foreign judgment in the BVI is only effective to the extent that the judgment debtor / defendant has assets in the BVI, against which to enforce. ABC Limited,

Commented [JW15]: 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 [JW16]: 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. Could ABC maybe apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares

before making any application for registration or otherwise would need to identify any assets held in the territory.

The REJA is available to be utilised by ABC Limited as the Act extends to judgments given in the High Court of England Wales and Northern Ireland and the Court of Session in Scotland. The 1922 Act would extend to this judgment as per section 3(1), the 1922 Act extends to judgments given in the High Court of England and Wales. In conclusion, the enforcement would be effective as DEF Limited, being the debtor, has significant assets in the BVI.

The REJA allows for judgment of conclusive sums of money is made payable from the English High Court to be recognised by the BVI Court provided the judgment is registered within 12 months. The judgment was made in April 2022 , so the period to seek registration has lapsed. ABC could however seek of the BVI court that a longer period to file for registration on the basis that is just and convenient to do so.

As the \$2mn judgment from the English High Court meets the criteria of a judgment for a final and conclusive monetary sum for enforcement recognition in BVI, we should now determine if DEF limited has assets in the BVI. XYZ is a wholly owned subsidiary of DEF and WYZ has the power to control operations and assets we deem this as a realisable asset of DEF Limited.

ABC can seek for the following remedies to be brought on XYZ assets upon successful duly registration of the foreign recognition under the 1922 Act:

- A garnishee order
- A judgment summon
- A charging order
- An order for seizure and sale of appropriate property
- The appointment of a receiver of all property

The judgment will stand and the debt can be enforced provided that none of the below factors occurred:

- English Court acted without jurisdiction
- Judgment was obtained by fraud
- DEF Limited was not carrying on a business nor residing in England and did not voluntarily appear or otherwise submit or to submit]

*** End of Assessment ***

Commented [JW17]: 35.5 marks