



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]: 9 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.

Commented [JW2]: Correct answer

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.

Since secured creditors are not strictly classified as creditors in BVI insolvency or considered as participating in the insolvency process – they have direct claims against the assets of the company which are subject to security. They have no timelines to enforce the secured claim and it is up to the creditor to determine when to take control of the asset and when to sell it. A secured creditor may decide to give up his security to the benefit of other creditors and claim the full amount of his claim – or assess the value of the secured security and deduct that value from his full claim – thereby seeking the net amount as an unsecured creditor/claim.

Commented [JW3]: .5 mark

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 a Creditors' Committee include a) consulting with the liquidator about matters relating to the liquidation b) considering reports from the liquidator and c) assisting the liquidator in discharging his functions. A Creditors' Committee has the following powers a) call a creditors meeting b) require the liquidator provide the committee with reports and information concerning the liquidation and c) require the liquidator attend the committee and give it information and explanations about the insolvency proceeding as reasonably required. The committee also has the powers to determine the liquidators remuneration.

Commented [JW4]: 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?

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 foreign insolvency proceedings and provide assistance to foreign representatives. In addition on 7 January 2021 the BVI government enacted an amendment to the Eastern Caribbean Supreme Court (Virgin Islands) Act which provides that the Court now has jurisdiction to grant free standing interim relief in aid of existing or anticipated foreign proceedings. Such relief includes injunctive relief, the appointment of receivers and third-party disclosures.

Commented [JW5]: .5 mark

You needed to list the 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.

Corporate insolvency is governed by Part VIII of the Insolvency Act, with procedural requirements provided for under the IR. In addition some important definitions are provide in sections 8 of the Insolvency Act. The following are the circumstances that a company will be considered insolvent;

Commented [JW6]: 4 marks

1. It is proved to the satisfaction of the Court that that a company is unable to pay for its debts as they fall due.
2. It is proved to the satisfaction of the Court that the value of a company's liabilities exceeds its assets or "balance sheet insolvency".
3. A company fails to satisfy (wholly or partly) execution or other process issued on a judgement, decree or order of the BVI Court in favour of a creditor of the company.
4. If a company 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.

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

Question 3.1 [maximum 5 marks]

With reference to the relevant legislation, who can be appointed as a voluntary liquidator in the BVI after 1 January 2023?

From this date Section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies (amendment) Regulations 2022 will introduce new requirements in respect of non-insolvency Act liquidators. Regulations 6(a)1A states that an individual is qualified to be appointed and act as a voluntary liquidator of a company if he:

- a) Has liquidation experience of not less than 2 years;
- b) Has professional competence to liquidate the specific company concerned;
- c) Is able to demonstrate that he i) holds an insolvency practitioners' license and ii) has an appropriate professional qualification (such as in law or accountancy) and experience of providing legal and financial advice or support to companies in the financial services sector; and
- d) Is fully conversant with 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 an individual resident outside of the BVI can be appointed to act as an insolvency practitioner and sets out detailed requirements in this regard. It is common for a BVI company to have assets in foreign jurisdictions and in some circumstances the appointment of a foreign insolvency practitioner can lead to more efficient costs in terms of local expertise, travel etc. The insolvency practitioner must be appointed jointly with a BVI licensed insolvency practitioner or the Official Receiver. In order to be appointed, prior written notice of such intended appointment must be provided to the FSC. In circumstances where it is proposed that an overseas insolvency is to be appointed, the FSC has the power to appear and be heard at the court hearing to appoint (where applicable) and object to the appointment. In practice the foreign insolvency practitioner usually

Commented [JW7]: 4 marks

Commented [JW8]: Also Regulation 19 - also states must not be disqualified and imposes residency requirement.

Commented [JW9]: Not 'and' - it should be 'or'

Commented [JW10]: 3.5 marks
There were two questions - answer has been merged

writes a letter to the FSC, providing details (such as qualifications and expertise) and awaits confirmation that the FSC approves the appointment of the overseas practitioner (subject to court approval where necessary).

Commented [JW11]: Not disqualified from holding a licence under s. 477, not disqualified from acting due being a director or auditor and must have proper security in force and consent. 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]

Commented [JW12]: 3 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.

In the BVI the following types of liquidations can occur:

1. Voluntary (solvent) liquidation under the BCA. The procedure here is contained in Part XII of the BCA. Here the directors of a company are required to make a declaration of solvency and approve a liquidation plan and appointed a liquidator by resolution of the members or directors. Should a liquidator at any point discover that the value of the company's liabilities exceeds its assets or the company is unable or unwilling to pay its debts as and when they fall due – he must send a written notice to the Official Receiver, call for a creditor's meeting within 21 days of the notice – and such meeting is then considered the first meeting of creditors under the Insolvency Act – as this is now an insolvent liquidation.
2. Insolvent liquidation (voluntary) under the Insolvency Act by members resolution. Pursuant to section 159(3) of the Insolvency Act a company may be placed into liquidation if a qualifying members resolution is approved at a meeting by more than 75% of its members; and
3. Insolvent liquidation by court application under the Insolvency Act. Section 163 of the Act sets out the primary provisions relating to the appointment of the liquidator by the Court. Such application can be made by one or more of a) the company b) a creditor c) a debtor d) the supervisor of a creditors arrangement e) the FSC or f) the Attorney-General.

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.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Question 4.1 [maximum 6 marks]

Commented [JW14]: Court has discretion to appoint liquidator: insolvent; just and equitable, public interest/ Application must be determined within 6 months after filing - possible to extend 3 months. If company is the applicant then the application for the appointment of liquidator has to be advertised.

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]: 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.

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

From the onset it is not clear whether Edale is a secured or an unsecured creditor -and in addition whether it is secured by the underlying property in the BVI. This position could potential influence Edale's options that it would explore. Any charge Edale may have could stipulate which foreign jurisdiction that security is governed by for example. Should Edale have a legal mortgage over the property it has three primary options 1) to foreclose on the shares 2) sell the shares or 3) appoint a receiver over the shares.

Section 446 of the Insolvency Act stipulate provides foreign creditors with a right of direct access. Creditors have the same rights regarding the commencement of, and participation in a BVI insolvency

Commented [JW16]: Not in force

proceeding as creditors in the BVI. However such right of direct access does not affect the priority of claims in a BVI insolvency proceeding or the exclusion of foreign penal, revenue and social claims from such a proceeding.

Thus Edale may apply for liquidation of Swift. Corporate insolvency is governed by Part VIII of the Insolvency Act, with procedural requirements provided for under the Insolvency Rules. If Swift fails to comply with the terms of a statutory demand – as issued by Edale - and it is not set aside under sections 156 and 157 of the Insolvency Act –Swift is considered insolvent and Edale may thus apply to Court for Swift’s liquidation.

Edale may also consider a Company Creditors’ Arrangement (CCA) as Section II in the Insolvency Act. This requires a Supervisor and given the relative simplicity of a Court insolvency application and process has not gotten a good track record in the BVI.

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?

We thank you for the opportunity to afforded to ourselves to advise you in the matter of ABC Limited’s recovery options.

The statutory framework for restructuring, reorganisations and insolvency in the BVI is principally codified in the Insolvency Act, 2003, the Insolvency Rules, 2005 which are largely creditor friendly – and the BVI Business Companies Act, 2004. The Insolvency Act was largely modelled on the UK’s Insolvency Act, 1986. The fundamental principle underlying BVI insolvency law, which closely follows English law, is the parri passu treatment of creditors. Accordingly, subject to contractual arrangements to the contrary and a small class of preferential creditors, unsecured creditors share equally in the assets of an insolvency company – which are made available for distribution. English case law continues to be persuasive.

In light of the BVI’s position as an international financial centre (third most important centre in 2017) the BVI Commercial Court has significant experience in dealing with multi-jurisdictional work.

As ABC Limited has an unfulfilled statutory demand against DEF Limited and DEF Limited is the sole owner of XYZ Limited – we recommend applying to the BVI Court for the liquidation of XYZ Limited under the Insolvency Act. Since XYZ Limited has a number of unencumbered assets – it is our opinion that ABC Limited’s best recovery is against the distribution of these assets in liquidation.

The liquidation of XYZ Limited is an attractive option considering that its sole director and shareholder is now deceased – which unfortunate fact makes any other arrangements impossible or difficult to progress procedurally in the absence of said director.

Commented [JW17]: 2 marks
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 required to in answer 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

Commented [JW18]: Cannot occur until its restored - its struck off and dissolved on 1 July 2023 - see comment above

Commented [JW19]: Cannot occur until its restored - its struck off and dissolved on 1 July 2023 - see comment above

The liquidators' duties will be towards unsecured creditors and upon appointment Section 175(1) sets out in detail the effect of appointment of the liquidator – importantly the liquidator will have the custody and control of the company's assets and the power to sell those assets. While the assets do not vest automatically with the liquidator, this is achieved by a Court application. The directors of XYZ Limited cease to have any powers or functions other than those authorised by the liquidator. Since the director of XYZ Limited is deceased – we consider this an appropriate circumstance to expedite the recovery of ABC Limited's claims.

A liquidation will provide further advantages to ABC Limited to improve its recovery by testing for the following which may yield more value:

- 1) any unfair preference
- 2) any undervalue transaction
- 3) a voidable assignment of assets or
- 4) extortionate credit transactions.

We would further recommend establishing a creditors committee – which is available under BVI insolvency law – at this point there is limited understanding of other creditor potential claims on XYZ Limited – and this would be a useful tool to expediting the distribution of XYZ Limited assets.

Our firm is ready to execute in the above advised manner at short notice.

*** End of Assessment ***

Commented [JW20]: 31.5 marks