



**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.

Commented [JW2]: Correct answer

#### **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 fundamentally provides protection and options to secured creditors under the BVI insolvency framework. As per section 175(2) of the Insolvency Act and conscious that secured creditors claims are claims directly linked to the assets of the pertinent company, they will fall outside of the liquidation which leaves secured creditors without a strict timeline to submit a claim.

In light of the above, secured creditors have the option to either submit their claim to the trustee of a bankruptcy and relinquish their security interest for the benefit of all creditors or rather to submit the claim and value the assets subject to the security and claim as an unsecured creditor for the remaining debt as per section 338 of the Insolvency Act. In addition, the secured creditors are the highest-ranking creditors in regard to a company placed into liquidation therefore they would have the highest protection and take priority over unsecured creditors.

To the contrary, the scheme of arrangement under the BVI insolvency framework is not beneficial for secured creditors as it does not indicate any protection for the rights provided to secured creditors or preferential creditors.

**Question 2.2 [maximum 2 marks]**

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

Under the Insolvency Act 2003, an insolvent company that has been placed into liquidation can choose to form a creditors' committee which functions alongside the appointed liquidation, allowing creditors to have a say in the liquidation proceedings. A creditors' committee can be formed at any time after the appointment of a liquidator, but a resolution must be passed within a creditors' meeting. The liquidator in certain circumstances has to submit for approval from both the Court and approval or supervision of the creditors' committee of the liquidator's remuneration.

According to section 421 of the Insolvency Act, which lays out the powers of a creditor's committee as 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); and
- Require the liquidator to attend the committee to provide it with such information and explanations concerning the insolvency proceeding as it reasonably requires."

Further to the above, a creditor's committee can also come into play within a bankruptcy as per part 1 of Schedule 4 of the Insolvency Act 2003. The creditors' committee in this regard can give approval for an appointed trustees actions within the bankruptcy. In contrast, part 2 of

**Commented [JW3]:** 1 mark

See section 15 company creditors arrangements, , also section 211 and receiverships

**Commented [JW4]:** 1 mark

No functions - see section 422 of IA 2003 which is the relevant section

Schedule 4 of the Insolvency Act 2003 details the powers that a trustee can utilize without approval from the creditors' committee.

**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 explains the powers provided to the BVI Court in relation to the orders that the Court can make in support of foreign insolvency proceedings. The countries which the BVI Court can support with regard to foreign proceedings are as follows:

- Australia
- Canada
- Hong Kong
- Japan
- Jersey
- New Zealand
- The United Kingdom; and
- The United States

Any order subject to the provisions laid out in Part XIX of the Insolvency Act in relation to a foreign proceeding and according to section 467(5) of the Insolvency Act can apply either the applicable BVI insolvency laws or the law of the above applicable country. The BVI Court is presented with the powers to impede the commencement or continuation of proceedings, impede the creation, exercise or enforcement of rights against the insolvency estate, ordering relief to assist with arrangement to coordinate between the two jurisdictions, and ceasing any order where deemed 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.

In the BVI, insolvency is not required to place a company into voluntary liquidation under provisions detailed in the Business Companies Act ("BCA"), therefore voluntary liquidation applied under the BCA is not applicable to insolvent companies. Nevertheless, there are circumstances where a company in voluntary liquidation becomes insolvent and unable to pay its debts as they fall due. In this case, the voluntary liquidator must inform the Official Receiver of these findings and call the first meeting of creditors as per section 179 of the Insolvency Act and typically the existing voluntary liquidator is appointed as liquidator.

An insolvent company is a company that can no longer meet its financial obligations as they fall due and within the BVI's insolvency framework, Part VIII of the Insolvency Act encompasses all requirements related to determining the insolvency of a company. Section 8(1)(c)(ii) of the Insolvency Act expresses that if the BVI Court is satisfied that the company is unable to pay its debts as they fall due a company is insolvent and section 8(1)(c)(i) further details that this is the same for a company whose liabilities exceed its assets. Similarly, section 10(1) and section 10(2) define liabilities as they pertain to a conclusion of insolvency.

**Commented [JW5]:** 1 mark

8 orders possible under section 467(3) IA2003.

**Commented [JW6]:** 4 marks

Insolvency is also determined in the company is unable to satisfy, partially or wholly, implementation of a judgement or order from the BVI Court intended to benefit the creditor of the company. Moreover, any company that fails to comply with the terms set out in the statutory demand and is not 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?

Amendments made to the BVI Business Companies Act 2004 and the BVI Business Companies Regulations 2022 came into effect after 1 January 2023. The principal changes made to the aforementioned insolvency legislation will allow for a more streamlined process of dissolution and restoration. Section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies (Amendment) Regulations 2022 establishes new requirements for non-Insolvency Act liquidators.

Concerning the appointment of voluntary liquidators, regulation 6(a)1A of the BVI Business Companies (Amendment) Regulations 2022 expresses the need for the appointed individual to now be qualified to act as a voluntary liquidator only if they meet the following requirements. The potential appointee must:

- Have liquidation experience of at least two years;
- Have professional competence to liquidate the pertinent company;
- Have the ability to demonstrate that they hold an insolvency practitioner's license and/or has a professional qualification i.e., law or accountancy; and
- Have knowledge applicable to financial services legislation relevant 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; and
- (b) what is the process for such proposed appointment?

According to section 438 of the Insolvency Act, an individual located outside of BVI can be appointed to act as an insolvency practitioner in relation to a BVI company. The requirement to be a licenced insolvency practitioner in order to be appointed as liquidator is not applicable for overseas insolvency practitioners if they are acting alongside a BVI licenced insolvency practitioner or the Official Receiver. Due to the jurisdictions cross-border activities, companies incorporated or registered in the BVI often have assets that fall outside of the BVI.

The appointment of an overseas insolvency practitioner allows them to take charge of the assets outside of the BVI while the BVI insolvency practitioner prioritizes remaining assets in BVI is crucial to maximize the recover of assets for the estate limiting travel that would be occurred.

**Commented [JW7]:** 4 marks

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

**Commented [JW8]:** 4 marks

**Commented [JW9]:** S.483 IA2003



In most cases, the appointment streamlines communication between the creditors in multiple jurisdictions and cuts costs on instructing for local experts' assistance.

In order for an overseas insolvency practitioner to be appointed, written notice must be made to the BVI Financial Services Commission ("FSC") in advance stating the details of the intended appointment and qualifications which they hold. The prospective overseas insolvency practitioner typically waits for written agreement of the appointment from the FSC prior to the court hearing. The FSC has the right to appear at the court hearing for the appointment and has the power to object under the section 484 of the Insolvency Act.

### 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.

Pursuant to section 170 of the Insolvency Act, interim relief can be provided by an appointment of the Official Receiver or a licenced insolvency practitioner as a provisional liquidator. The pending appointment order of a liquidator enables the Court to determine if interim relief is needed. With the aim to apply for the appointment of a provisional liquidator, the proposition of an appointee must be made the original application of appointment, the company, a creditor, a member, the FSC, or any person entitled to apply for appointment.

Pursuant to section 162 of the Insolvency Act, an application to appoint a liquidator can be made by the company, a creditor, a member, the supervisor of a creditor's arrangement, the FSC, and the Attorney General. The appointment must be just and equitable.

Pursuant to section 197(1) of the BVI Business Companies Act 2004 a solvent company can be placed into voluntary liquidation if it has no liabilities and can prove that it's a going concern. In this regard, the directors of the company are obliged to make a declaration of solvency with the belief that the company will remain solvent and approved the proposed liquidation plan. A voluntary liquidator or joint voluntary liquidators can be appointed by resolution of directors or resolution of members.

### 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?

**Commented [JW10]:** Must not be disqualified from holding a licence under s. 4 be77, not disqualified from acting due to being a director or auditor and must have proper security in force and consent.

**Commented [JW11]:** 2 marks

1. Solvent voluntary liquidation BC 2004
2. Insolvent liquidation by court application under IA 2003; and
3. voluntary insolvent liquidation by members resolution under 159(3) requiring 75 % majority to pass resolution - this is not included in your answer

**Commented [JW12]:** Not a separate procedure to an application to the court for an insolvent liquidation under s162 IA 2003

**Commented [JW13]:** If company is the applicant then the application for the appointment of liquidator has to be advertised. 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.

**Commented [JW14]:** Has to be solvent

**Commented [JW15]:** Not all of the procedure. Resolution required by directors/members. Directors have to make a Declaration of Solvency not more than 4 weeks old as well as prepare a Liquidation Plan and be accompanied by Statement of Affairs. Appointment cannot be more than 6 weeks after approval of Liquidation plan. a Notice of appointment, Declaration of Solvency and Liquidation plan to be filed within 14 days, appointment advertised in 30 days.

**Commented [JW16]:** 0 marks - question not answered

**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?

TO: ABC Limited

SUBJECT: Request for advice for enforcement of judgement debt against DEF Limited (a company incorporated in England)

Please be advised that the British Virgin Islands are not a member of any convention or treaties regarding enforcement of local and foreign judgements. The BVI is primarily pursuant to the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 (the "1922 Act") with regard to recognition of foreign judgements. In this case, the 1922 Act extends to judgments given in the High Court of England Wales and Northern Ireland which is applicable to the judgement against DEF Limited.

Our research has led us to declare that pursuant to section 3(3)(a) of the Reciprocal Enforcement of Judgments Act 1922, it would be advisable to register the foreign judgment with the BVI Court, ensuring that the upon the date of DEF Limited's judgment would be as effective as if it was made in the BVI. In order to register a judgement, the DEF Limited judgement must be within 12 months from the original date judgment approval and DEF Limited of the would be required to apply to court under Part 72 of the ECSC Civil Procedure Rules 2000 ("CPR").

Essentially, DEF Limited would need to provide all pertinent documentation relevant in the English judgement to the BVI Court and the information that has been provided thus far indicates that the Court will order the judgement as there are no restrictions as per section 3(2) of the 1922 Act which would be found true. If we are able to obtain specific details related to the encumbered properties and assets held by XYZ Limited, it would be crucial to the success of the BVI judgement due to the fact that DEF Limited is required to show a specified sum in the judgement.

Moreover, an alternative option is to not register the foreign judgement in BVI as it is possible to try and enforce the debt from XYZ Limited without doing so. However, this could potentially complicate matters regarding retrieving books and records, multi jurisdiction communication etc.

Additional Information

The date that XYZ Limited was struck off by the Register is important to determine because as of 1 January 2023, the Registrar has the ability to dissolve the company by publishing notice of the striking-off as per section 216 the BVI Business Companies (Amendment) Act 2022 and BVI Business Companies (Amendment) Regulations 2022

**Commented [JW17]:** 2.5 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 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]:** Answer required the 8 conditions and the issue of 12 months expiry and extension required.

**Commented [JW19]:** Struck off and dissolved so how is it be enforced?

**Commented [JW20]:** And? It will be automatically dissolved on 1 July 2023 so court application required to restore it.

The UNCITRAL Model Law on Cross-Border Insolvency ("UNCITRAL Model Law") has not yet been adopted by the BVI and although Part XVIII of the Insolvency Act presents the provisions related to UNCITRAL Model Law it is deemed to be unlikely that this adoption will occur. Therefore, cross-border cooperation derived from the UNCITRAL Model Law which is frequently use in the England will not assist with the recovery of judgement debts from XYZ Limited owed by DEF Limited.

**Commented [JW21]:** Not adopted in BVI - irrelevant to answer

**\* End of Assessment \***

**Commented [JW22]:** 28.5 marks