



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.

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.

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.

Secured creditors can 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 or they can surrender their security interest to the liquidator for the benefit of creditors and claim in the liquidation as an unsecured creditor for the whole of his debt. The Insolvency Act does not impose either of the options on a secured creditor.

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?

A creditors' committee can:

- Call a meeting of creditors
- Require the liquidator to provide reports and information about the ongoing liquidation proceedings
- Require the liquidator to attend the committee to provide it with information and explanations about the ongoing proceedings as is reasonably required

Commented [JW4]: 1 mark

Powers only no functions

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 framework for the powers to make orders to support foreign proceedings. The BVI Court can recognise certain foreign insolvency proceedings and aid foreign representatives. Section 467 of the insolvency act sets out the powers the court has, to make an order.

Commented [JW5]: .5 mark

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.

A company is considered insolvent if:

- They are unable pay a debt their debts as they fall due.
- The liabilities exceed the value of its assets making it balance sheet insolvency. However, a company may not be considered insolvent if only the assets are lower for a short period.
- If a company fails to satisfy execution or other process issued on a judgement, decree, or order of the BVI Court in favour of a creditor of the company.
- If a company fails to comply with the terms of a statutory demand.

Commented [JW6]: 3.5 marks - no mention of the relevant sections

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?

Section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 have introduced new requirements in relation to non-Insolvency Act liquidators. Regulation 6(a)1A states that to be appointed as a voluntary liquidator a liquidator must:

- Have at least two years of liquidation experience;
- Have professional competence to liquidate the specific company concerned;
- Demonstrate that they have an insolvency practitioner's license and appropriate professional qualification and experience of providing legal and financial advice or support to companies in the financial services sector; and
- Be knowledgeable of the relevant financial services legislation connected to the business of the company to be liquidated like the Financial Services Commission Act and BVI 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

Overseas insolvency practitioners can be appointed as it can be helpful to appoint a practitioner from a jurisdiction where the assets are held. This reduces costs of travel and costs that relate to needing local expertise. In liquidations that occur for a longer time this is important as it will like involve disputes in multiple jurisdictions.

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

The overseas practitioner must be appointed jointly with a BVI licensed practitioner or the Official Receiver. Prior written notice of the intend appointment must be provided to the FSC. The FSC has the power to appear and be heard at the court hearing to point and object to the appointment of the overseas practitioner. The overseas practitioner usually writes a letter to the FSC provided the necessary details and the await the approval from the FSC

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.

There are three types of liquidations in BVI they are voluntary solvent liquidation, voluntary insolvent liquidation and insolvent liquidation commenced by court application.

Commented [JW7]: 3.5 marks

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

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

Commented [JW9]: 3 marks

detail experience and qualifications. Must 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.

Commented [JW10]: 4 marks

The procedures for voluntary liquidations are set out in Part XII of the BCA. To commence a voluntary liquidation the company must be able to pay its debts as they fall due, and their assets must exceed its liabilities or have no liabilities. When the appointment of a voluntary liquidator is proposed a declaration of solvency must be submitted by the directors and liquidation plan must be approved. A voluntary liquidator (or 2 jointly) may be appointed by resolution of directors or by a resolution of members. The liquidator must file their appointment with the Registrar within 14 days of their appointment.

The procedures for a voluntary insolvent liquidation to commence are set out in Part VI of the Insolvency Act. Section 159 states the members of a company may through a qualifying resolution appoint an insolvency practitioner as liquidator of the company. The resolution must be passed at a properly held meeting by a majority of 75% or more if required. Once the member resolve to appoint a liquidator they must notify the liquidator of their appointment.

The procedures for an appointment of liquidator by the Court are also set out in Part VI of the Insolvency Act. Section 162 states the Court may on the application from a relevant party appoint a liquidator if the company is insolvent, the Court believes that it is just and equitable to do so, or the Court believes that it is in the public interest to do so. The following parties may make an application to the court: the company, a creditor, a member, the supervisor of a creditors' arrangement in respect of the company, the Commission, the International Tax Authority, and the Attorney General.

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?

If Swift Limited don't receive the immediate payment in full, they can look at commencing legal action in the BVI. They can instruct a lawyer that is admitted in the BVI to commence proceedings in the BVI courts for breach of contract and demand the outstanding amount that they are owed.

Edale Limited can look to appoint an insolvency practitioner alongside a local BVI practitioner to commence insolvency proceedings. There are several remedies that allow Edale to realise the asset that while also allowing Swift to continue.

If Edale has security over the property, they can appoint a receiver to administer a receivership and realise the asset and receive payment totalling the amount that they are owed. They will also receive a higher order of priority in the case that Swift is put into winding up proceedings.

As Edale is a foreign company Part XVIII provides remedies for Edale to commence and participate in insolvency proceedings.

Commented [JW11]: 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 [JW12]: . If company is the applicant then the application for the appointment of liquidator has to be advertised.

Commented [JW13]: 2.5 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

Section 436 of the Insolvency Act provides rights for foreign creditors to commence and participate in BVI insolvency proceedings as a creditor in the BVI which Edale is. An insolvency practitioner will then look to assist Edale in retrieving the outstanding amount that they are owed by Swift.

Question 4.2 [maximum 9 marks]

In April 2022 ABC Limited, a company incorporated in England, was awarded a judgment in the English High Court against DEF Limited, also incorporated in England, for GBP 2 million. In an attempt to enforce its judgment, ABC Limited has discovered that DEF Limited has no realisable assets but is the 100% owner of XYZ Limited (a company incorporated in the BVI) which owns a number of unencumbered properties in BVI but is struck off of the Register, although not yet dissolved. The sole shareholder and sole director of DEF Limited has recently died.

Your principal has been asked to advise ABC Limited of its options to recover the judgment debt owed by DEF Limited. Prepare a memorandum for your principal, stating what options ABC Limited should be advised to consider in order to enforce its judgment debt?

ABC Limited can look to obtain a foreign judgment in the BVI, however this may only be practical if there are assets in BVI. As there are assets of XYZ Limited they can proceed to get their foreign judgment recognised. In BVI Law judgments for final and conclusive monetary sums can be enforced. The 1922 Reciprocal Enforcement of Judgments Act of 1922 only extends to the English High Court which is where the judgment was awarded. Once the judgment is registered, they can look at the remedies that are available under the Eastern Caribbean Civil Procedure Rules part 45.2 which provides ways the judgement can be enforced: either by a charging order, garnishee order, a Judgment Summons, seizure and sale of goods or by the appointment of a receiver.

ABC Limited must register the judgment within the 12 months it was awarded unless granted a longer period by the courts.

Since XYZ is a subsidiary of DEF and they have property, they are still able to recover the GBP 2 million or a part of the sum awarded from the assets of XYZ as the company is not fully dissolved yet. ABC can appoint a receiver in the BVI to administer the sale of and realisation of the assets (unencumbered property). Also, the shares of a company will usually cede to the shareholders beneficiary if there is none they may be passed to the state. Then either the shares and other assets of XYZ will be held by the beneficiary or the state.

ABC Limited can be considered a creditor of DEF and petition for the winding up of DEF. Since they have a subsidiary in BVI that would need to be wound up they can wind up XYZ and sell the property and if there are any other assets of the company and obtain the amount they are owed from the sale of the assets.

One item that ABC Limited should take into consideration is cost of these proceedings, as they will need to appoint legal representatives and an insolvency practitioner in the BVI to administer the proceedings. It might be worth getting valuation of the property that XYZ holds, because if after the proceedings and sale of assets they may only receive a fraction of the amount that they are looking to recoup. The legal costs incurred in the proceedings may be expensive to obtain a foreign judgment, apply to wind up DEF in England and to wind up its subsidiary. They can look at of commencing proceedings in a cost-effective way whilst retrieving a good amount that they are owed.

*** End of Assessment ***

Commented [JW14]: 4 marks
This answer required more details.
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

Commented [JW15]: You needed to list the 8 conditions

Commented [JW16]: And struck off and dissolved on 1 July 2023 so has to be restored

Commented [JW17]: Over DEF/XYZ once restored

Commented [JW18]: 31.5 marks