



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.

Secured creditors can make an application pursuant to section 338 of the Insolvency Act 2003 which enables them to value the assets of the company that is subject to their security interest and then claim as an unsecured creditor for the balance of the value of their debt, or to surrender their security interest to the trustee for the general benefit of creditors and claim as an unsecured creditor for the whole value of their debt. Secured creditors aren't obliged to make such an application but may do so if they wish.

Commented [JW2]: .5 mark Generally not affected by insolvency law in in BVI. See section 15 company creditors arrangements, section 175 liquidations, section 338 bankruptcy, also section 211 and receiverships

Question 2.2 [maximum 2 marks]

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

A creditors committee can consult with the liquidator about matters relating to the liquidation, consider the liquidator's reports and assist the liquidator in discharging their functions. Creditors committees have the power to call a meeting of creditors, require the liquidator to provide reports and information to the committee as they may reasonably require and require the liquidator to attend the committee to provide such information and explanations about the insolvency proceedings as the committee may reasonably require.

Commented [JW3]: 1.5 marks - See section 422 IA2002 which lists the functions and powers of a 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 provides the BVI Court with powers to make orders in aid of foreign proceedings. Foreign proceedings are defined as "collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy" per section 466(1) of the Insolvency Act. The powers of the Court are set out in section 467(3), and are as follows:

- (a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;
- (b) subject to subsection (4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
- (c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
- (d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;
- (e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;
- (f) authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;

Commented [JW4]: 2 marks

- (g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or
h) make such other or grant such other relief as it considers appropriate.

Question 2.4 [maximum 4 marks]

Commented [JW5]: 4 marks

With reference to the relevant legislation, set out the circumstances in which a company will be considered insolvent in the BVI.

In accordance with section 8 of the Insolvency Act, a company will be considered insolvent if:

- the company cannot pay its debts as they fall due (section 8(1)(c)(ii));
- the value of the company's liabilities exceeds the value of its assets (section 8(1)(c)(i));
- execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company is returned wholly or partly unsatisfied (section 8(1)(b)); or
- the 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) (section 8(1)(a)).

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

Question 3.1 [maximum 5 marks]

Commented [JW6]: 3.5 marks

See Regulation 19 - see disqualification and imposes residency requirement.

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(a)1A of the BVI Business Companies (Amendment) Regulations 2022 introduced new requirements for voluntary liquidators in the BVI. The individual to be appointed must:

- (a) have liquidation experience of not less than two years;
- (b) have professional competence to liquidate the specific company concerned;
- (c) be able to demonstrate that he or she:
 - (i) holds an insolvency practitioner's licence; and
 - (ii) (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) be 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 [JW7]: Not 'and' - it should be 'or'

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) A creditor may consider appointing an overseas insolvency practitioner in circumstances where the BVI company's assets or a substantial part of them are situated outside of the BVI. Having an insolvency practitioner appointed who is closer to those assets may be more cost effective than having solely BVI based insolvency practitioners in terms of saving travel expenses and other expenses associated with needing to deal with assets which are situated in a foreign country.
- (b) Where a company wishes to appoint an overseas insolvency practitioner over a BVI company, that insolvency practitioner may only be appointed under a joint appointment with an insolvency practitioner who is resident and licenced in the BVI. Prior written notice of the overseas insolvency practitioner's appointment must be given to 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 liquidation in the BVI:

1. A voluntary liquidation pursuant to section 197(1) of the Business Companies Act;
2. An insolvent liquidation (which is entered into voluntarily by the members of the company by resolution) pursuant to the Insolvency Act; and
3. An insolvent liquidation that is ordered by the Court following an application pursuant to the Insolvency Act.

To put a company into voluntary liquidation, the directors must make a declaration of solvency and approve a liquidation plan. A voluntary liquidator or two or more joint voluntary liquidators may then be appointed by resolution of the directors, or by a resolution of the members (section 199(1) BCA).

To put a company into insolvent liquidation, either the Court will appoint the Official Receiver or a liquidator following an application made under section 162 Insolvency Act, or the members of the company can pass a qualifying resolution to appoint an eligible insolvency practitioner.

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 [JW8]: 3 marks
Section 483 sets out the circumstances. Must not be disqualified from holding a licence under s. 477, not disqualified from acting due to 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).

Commented [JW9]: 2 marks

Commented [JW10]: Under section 159(3) IA2003 - 75% majority of members required

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]: See section 162 for the possible applicants. 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.

Commented [JW13]: 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 to appoint 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.

It appears that no security was given to Edale in return for its loan, and it is therefore an unsecured creditor of Swift. On the assumption that Swift is an insolvent company within the meaning of section 8 Insolvency Act, Edale could bring an application for an order for the winding up of Swift pursuant to section 162 Insolvency Act. Edale could firstly serve a statutory demand on Swift pursuant to section 155 Insolvency Act for the balance of its debt, and if Swift fails to make payment of the debt or successfully set aside the statutory demand (following an application under section 156 Insolvency Act) then Edale can bring the claim on the basis that Swift is insolvent.

If the Court grants the order to wind up Swift, Edale could claim in the liquidation of Swift as an unsecured creditor. The BVI Court may make an order for the appointment of a liquidator over Swift. That could be two BVI based individuals, or it could appoint a liquidator based in England under a joint appointment with a BVI licenced insolvency practitioner. Here, we know that Swift purchased a property on Mosquito Island so there is an asset in the BVI that the liquidators can realise for the purposes of distribution to the creditors. There may therefore be limited benefit in having an overseas insolvency practitioner appointed unless there are other assets in other jurisdictions that can be realised.

Alternatively, Edale might bring a claim in England for payment of its debt and, if it obtains judgment in its favour that is likely to be considered as a money judgment and can therefore be registered as a judgment in the BVI for the purposes of enforcement. The Reciprocal Enforcement of Judgments Act (Cap 65) 1922 (1922 Act) and common law govern the registration of foreign judgments in the BVI. The judgment needs to have been given by the High Court in England & Wales and needs to be registered in the BVI within 12 months of the date it is given (although the BVI Court can extend the time for registration if just and convenient). An application to register it must be issued by Edale under CPR Part 72 and the application must contain information prescribed by CPR 72 and exhibit a certified copy of the judgment, and detail any interest that has accrued since judgment. Once the judgment is registered in the BVI, Edale could rely on it to enforce its debt against Swift's assets in the BVI, such as by obtaining a charging order against the property on Mosquito Island.

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 could bring a petition to wind up DEF in England, and if the Court grants an order winding up DEF then insolvency proceedings will be commenced in England. The English liquidator appointed in respect of DEF could make an application to the BVI Court for an order in aid of the English insolvency proceedings pursuant to section 467 Insolvency Act. Here we know that DEF's sole asset is shares in a BVI company that has been struck off but not yet dissolved. XYZ will firstly need to be restored to the register. The company or a creditor, member or liquidator of the company can make an application to the Registrar to restore the company to the register within seven years from the date of strike off from the register, provided that the company has not yet been dissolved. All outstanding fees and penalties

Commented [JW14]: The point was to discuss whether or not there was security for the loan.

Commented [JW15]: Not if its secured and the charge is registered at the Land Registry or on the Register of Charges of S.

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. ABC could apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares

Commented [JW17]: ABC is not a creditor of XYZ but is an interested party

Commented [JW18]: 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.

for late payment of fees will need to be settled (and a registered agent will need to be appointed if the registered agent has resigned) before the Registrar will restore the company to the register.

Once XYZ is restored to the register, the English insolvency practitioner could consider applying for a receiver to be appointed over XYZ. Whilst the insolvency practitioner could consider selling DEF's shares in XYZ, they aren't likely to realise very much and are likely to be insufficient to cover the debt. If XYZ had been dissolved following its striking off the register, then its properties would have vested in the Crown. However, since it has not been dissolved it still owns those properties. The appointment of a receiver is intended to preserve or recover assets or in aid of enforcement of judgments. The English insolvency practitioner can seek such an order under section 467(3)(e) Insolvency Act and the Court will appoint one where the applicant can show that usual methods of enforcement are insufficient to enforce the debt. Here, ABC owns no assets itself apart from its shares in XYZ. XYZ owns the properties and is entitled to the income they may generate or their value upon sale. The receiver must be eligible to act in accordance with section 116 Insolvency Act, and upon their appointment they must serve notice of their appointment on XYZ and file their notice of appointment with the Registrar (section 188 Insolvency Act).

An issue that the English insolvency practitioner will need to consider is the fact that DEF's sole shareholder and director has died. His shares, as ultimate beneficial owner of DEF, will pass to the beneficiaries of his estate, whether that is by way of intestacy or under the terms of a will. It is possible that the administrators/executors of the estate may have taken steps to administer the deceased shareholder/director's assets, including the properties owned by XYZ. If the deceased's administrators/executors have taken steps to dispose of the properties, then the English liquidator could seek orders from the BVI Court for the deceased's administrators/executors to account to DEF for the value of those properties, by seeking an order for 'such other relief' as the Court deems appropriate pursuant to section 467(3)(h) Insolvency Act.

*** End of Assessment ***

Commented [JW19]: Liquidator of DEF you mean?

Commented [JW20]: 33.5 marks