



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]

Commented [JW2]: 1 mark
See also section 15, company creditors arrangements, section 338 bankruptcy, also section 211 and receiverships

Discuss the protections and options provided to secured creditors under the BVI insolvency framework.

Secured creditors are generally dealt with outside of the insolvency framework, with s175(2) of the Insolvency Act providing that core rights of secured creditors are unaffected by liquidation, for example. In this sense, secured creditors are protected from their claims being and the rate at which they are entitled to be paid depends on the net realisable value of the assets which secure their debts. Secured creditors therefore are able to enforce their security in accordance with the terms of their security agreement(s) with the debtor, with little legislative impediments. It is noted, however, that creditors whose debts are secured by floating charges may be affected by liquidation in that certain unsecured debts receive priority from realisation of assets secured by floating charges, pursuant to s131 and s208 of the Insolvency Act.

Question 2.2 [maximum 2 marks]

Commented [JW3]: 2 marks

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

These are dealt with by s422 of the Insolvency Act, which is quote below. However, speaking broadly, the creditors' committees functions are to consult with and assist the officer-holder as to the conduct of the liquidation, including voting on certain resolutions (including remuneration), on behalf of the creditor body, and its powers are to call creditors' meetings and demand reports, updates and explanations from the officeholder.

Functions

- (1) The functions of a creditors' committee are—
- (a) to consult with the office holder about matters relating to the insolvency proceeding;
 - (b) to receive and consider reports of the insolvency holder;
 - (c) to assist the office holder in discharging his or her functions; and
 - (d) to discharge any other functions assigned to it under this Act or the Rules.

Powers

- A creditors' committee may—
- (a) call a meeting of creditors;
 - (b) on giving the office holder reasonable notice, require him or her to provide the committee with such reports and information concerning the insolvency proceeding as the committee reasonably requires; and (Amended by Act 11 of 2004);
 - (c) on giving the office holder not less than 5 business days notice, require him or her to attend before the committee at any reasonable time to provide it with such information and explanations concerning the insolvency proceeding as it reasonably requires.

Question 2.3 [maximum 2 marks]

Commented [JW4]: 1.5 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?

8 orders possible under section 467(3) IA2003

Whilst the BVI has not adopted UNCITRAL Model Law on Cross-Border Insolvency, the BVI Court can under Part XIX of the Insolvency Act support foreign insolvency proceedings (of certain designated countries, including but not limited to major common-law countries such as UK, Australia, Canada, as

well as the USA) in a number of ways. These include recognition under Section 450 (with Section 454 thereafter providing the Court with wide powers to “grant any appropriate relief” where necessary to protect the assets of the debtor or in the interest of creditors), and the provision of assistance under Section 467, which is a list of assistance orders the Court may make – including appointing an interim receiver, staying proceedings, authorising the examination of persons who could be examined in BVI, and restraining the debtor’s property.

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.

Section 8(1) of the Insolvency Act deals with when a Company will be deemed insolvent, namely if any of the following are true:

- a) It has failed to meet a creditors’ validly served and issued statutory demand for payment (unless set aside under s157 of the Insolvency Act).
- b) A creditor of the company holds a wholly or partly unsatisfied judgment, decree or order against the company.
- c) Either its liabilities exceed its assets (i.e. balance sheet insolvent), or its unable to pay its debts as and when they fall due (i.e. cash flow insolvent).

For the purpose of determining the value of assets, the interpretation section of the Act (s2) includes a wide definition apparently aimed at encompassing all valuable property and rights which, it is noted, is not necessarily the same as the definition of an asset for accounting purpose. For liabilities, s10 provides the meaning for the purpose of the Act, which meaning is wide-ranging and includes present and future obligations, contingent liabilities, sounding only in damages, and any claim capable of being determined either by reference to rules or opinion. It excludes illegal or unenforceable liabilities.

Whilst not a point in reference to legislation, it is also noted that the Court of Appeal for the BVI has confirmed (in *Trade and Commerce Bank v Island Point Properties*) that a company will not be deemed insolvent under Section 8(1)(c)(i) (i.e. balance sheet insolvent) simply because its liabilities exceeded its assets for a short period of time only.

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

Question 3.1 [maximum 5 marks]

Commented [JW6]: 5 marks

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

A person may only act as a voluntary liquidator under the BVI Business Companies Act if they satisfy a number of conditions. It is noted that from 1 January 2023, the Business Companies (Amendment) Act 2022 and BVI Business Companies (Amendment) Regulations 2022 amended the Business Companies Act and related regulations, including to impose additional conditions on such persons on who may act as a voluntary liquidator. Arguably the most relevant of these new conditions is that only a person who satisfies a BVI residency test may act as a voluntary liquidator; however, a number of other conditions are also imposed.

Arguably the most relevant of these amendments is that a person who is “not resident in the Virgin Islands in accordance with section 2(2)” of the Business Companies Act is now disqualified from being

appointed as a voluntary liquidator, pursuant to a new subparagraph (h) at Regulation 19(2). Other persons. The other disqualifying criteria include the following (i.e. people who may not act as a voluntary liquidator):

- Is a disqualified person or equivalent outside of the Virgin Islands;
- Is a restricted person or equivalent outside of the Virgin Islands;
- Is a minor;
- Is an undischarged bankrupt;
- Is an individual who has been the director or in a position of senior management with respect to the financial management of the company in question (or an affiliated company) within the last two years, or any of their close family members.

In addition to not meeting any of the disqualifying criteria, persons must also meet the qualifying criteria set out at Regulation 19 (as amended by s6 of the Business Companies (Amendment) Regulations 2022), as follows:

- The person must have liquidation experience of at least two years
- Is professionally competent with regard to the specific company concerned
- Can demonstrate that they hold either of the following:
 - o An BVI insolvency licence; or
 - o An appropriate qualification and experience of providing legal or financial advice to companies in the financial sector;
- Is fully conversant with relevant financial services legislation connected to the business of
- the company to be liquidated, including the Financial Services Commission Act and BVI Business Companies Act.

Question 3.2 [maximum 5 marks]

Commented [JW7]: 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) As a major offshore financial centre, the vast majority of liquidations that take place in the BVI involve entities whose assets, and often creditors, are located outside of the jurisdiction. Accordingly, it can sometimes be useful to have a properly qualified insolvency practitioner who is either resident in or near, or has particular or special expertise on, the jurisdiction in which the assets are located.

By way of illustration, many BVI liquidations are of entities which sit at the top of structures whose ultimate assets are located in the PRC – these structures commonly include subsidiaries (and offices) in Hong Kong, which in turn own operational entities in PRC. In such a scenario, it is useful to have a liquidator based in Hong Kong who can be experienced with transactions and commercial conduct in the PRC who can assist the BVI liquidator with recovering assets out of PRC.

(b) To appoint an overseas insolvency practitioner, the following two conditions must be met (pursuant to s483(a) and (b), respectively):

- a. the Court or the person appointing that overseas IP must be satisfied that the person the sufficient qualifications and experienced, has consented to act, is not disqualified from holding a licence in the BVI, is not disqualified from acting otherwise under section 482(2), and whose proper performance of his or her functions is secured in accordance with the Regulations (i.e. professional indemnity insurance is in place).
- b. Written notice has been given to the commission.

In addition, Section 484 provides that the Commission may appear and be heard at a hearing at which an overseas IP is proposed to be appointed, or otherwise make its own application, that the overseas IP should not be appointed. Accordingly, in practice, section 483(b) and section 484 means that consent is required from the Commissioner, which involves the completion and filing with the commissioner of a prescribed form which states the reasons for the overseas IP being appointed, the experience and qualifications of the IP, and enclosing evidence of the overseas' IP's professional indemnity insurance. The Commissioner, if satisfied, will then respond by letter confirming that it does not object to the appointment of the Overseas IP.

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.

Voluntary liquidation (i.e. solvent liquidation) is dealt with in the Business Companies Act 2005 and may only take place if the company is solvent – pursuant to section 197 of the Business Companies Act, a company can only be liquidated in 'voluntary liquidation' if it either has no liabilities, or if it is able to pay its debts as and when they fall due *and* has assets in excess of its liabilities. Further, pursuant to s198 of the Business Companies a declaration of solvency is required to be made by the directors and filed with the Registrar when placing a company into voluntary liquidation, and a voluntary liquidator is obligated to tip a company into insolvent liquidation in the event that they become aware that the company is, or is likely to become insolvent. The purpose of a solvent liquidation is to orderly wind-up the affairs of, and dissolve, a solvent company which no longer serves the purpose for which it is incorporated. A voluntary liquidator is usually appointed by resolution of members or directors (pursuant to section 199 of the Business Companies Act). However, the Court may also that a company be placed into voluntary liquidation although this most commonly occurs when a company was previously dissolved through voluntary liquidation and a creditor or other person has applied to the court to restore said company.

Court-appointed liquidation (insolvent liquidation) is dealt with in the Insolvency Act (particularly Parts VI through XI), and the appointment of a liquidator by Sections 159 and 162 of the Insolvency Act. An application to appoint a liquidator may be made by either a creditor, member of the Company itself and relies on evidence that the company is either insolvent (common where an application is being made by a creditor or the company) or should be wound up on just and equitable grounds (more common in shareholder disputes). A third basis upon which the Court can wind up a company in insolvency is where it determines that it would be just in the public interest to do so. Commonly, the Court will impose additional fettering of the liquidator's powers when appointing a liquidator – these commonly include a requirement for a sanction if commencing proceedings on behalf of the Company, for paying or discharging classes of creditor's debts in full.

Commented [JW8]: 3.5 marks

Commented [JW9]: 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 [JW10]: 2004

Commented [JW11]: A company cannot be 'placed' into voluntary liquidation by the Court. When it grants an order for restoration and was in voluntary liquidation previously then it will continue as if it was not dissolved.

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.

Winding up by members (insolvent liquidation) is provided for in sections 159 and 161 of the Insolvency Act. In particular, the members must make a 'qualifying resolution' (i.e. a majority of at least 75%, or higher if so set out in the Company's M&As). Once the appointment has commenced, the process is largely the same as it would be if the company had been placed into insolvent liquidation by the Court, albeit with (generally) fewer limitations given the tendency of the Court to fetter the powers of a liquidator in the winding up order. It should be noted that the members may not appoint a liquidator if an application has been filed and served, or if a liquidator is already appointed by the Court, or if the person proposed to be liquidator has not consented.

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?

Option 1 – serve a statutory demand under s155 of the Act and, if payment is not received in full, apply to wind up Swift on the basis of the unsatisfied statutory demand pursuant to section 162 of the Insolvency Act. This application has the highest prospects of success, albeit arguably adds a layer of cost by having to serve the statutory demand. A liquidator would be then realise the property for the collective benefit of creditors.

Option 2 – make an application, in absence of a statutory demand, that the Court wind up the company under s162(1)(a) of the Act on the basis that it is insolvent under the cash-flow test, having not met payments as and when they fell due. Although Edale may, by taking this option, save some costs by not having to issue a statutory demand, it is likely to face significantly greater costs in overall given the greater evidential burden in convincing the court that the company is insolvent. It also fails to provide Edale with an opportunity to meet the payment.

Option 3 – seek a judgment in the BVI against Swift for sums due and, should that judgment remain unsatisfied, then a charging order or order of sale against the properties. This would allow Edale to enforce against the properties directly, although it is not clear from the facts whether this is an order which is likely to be granted.

Option 4 – seek to engage constructively with Swift, for example altering the terms of the loan agreement and/or entering a repayment arrangement for the overdue amounts. In consideration for such an alteration of the loan terms in Swift's favour, Edale might seek to also enter into a security agreement which entitles it to fix a charge to the properties enabling Edale to take enforcement action as a secured creditor in the future, should Swift default on the new loan terms, as amended.

Unfortunately for Edale, despite the significant sum loaned for the specific purpose of purchasing property, there is no evidence that Edale and Swift entered into a security agreement which secures the loan given by Edale against the property.

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 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.

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: Principal
From: 202122-612
Date: 2 February 2023

This memo sets out the options available to ABC Limited in order to enforce its GBP 2 million judgment debt against DEF.

A number of key issues are set out as follows:

- The sole director and shareholder of DEF has died recently, and therefore it is presumed that there is no management at the company with whom a dialogue can be opened.
- ABC has no direct claim against XYZ.
- DEF is not yet dissolved (the current date being 2 February 2023, prior to 2 July 2023 being the final date on which 'struck-off' exists as a status), but must have been already struck from the Register of Companies prior to 1 January 2023 (i.e. it is captured by the Transitional Provisions of the Business Companies (Amendment) Act 2022).

1. Seek to wind up of DEF in England

Notwithstanding the lack of realisable assets, its 100% interest in the BVI subsidiary XYZ will be of significant interest to a liquidator. Given the GBP 2 million judgment debt, steps could be taken in England to wind up DEF and it would appear, based on the information available to us, that this application has a high chance of success. It would be preferable to seek to appoint someone with experience in the BVI or similar offshore jurisdictions.

Following the winding up of DEF, the liquidator, as the sole shareholder of XYZ, could take steps to determine the reasons for which XYZ has been struck, appoint a controlling stake on the Board (i.e. replacing any previous directors), and bring XYZ back into good standing. Commonly, the reasons for which a company is struck is a lack of a registered-agent being appointed and/or unpaid fees owed to the Registrar. The rectification of these two issues is relatively straightforward, with the cost depending on the extent of unpaid fees owed to the Registrar.

By restoring XYZ and appointing a director, the director could take steps to realise the properties in the BVI and distribute the proceeds as an equity dividend to DEF, which would in-turn distribute the proceeds as unsecured creditors' dividend out of the liquidation of DEF.

Commented [JW14]: 7 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. ABC could apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares

The advantages of this option are that it is relatively legally simplistic – relying simply on an unsatisfied judgment debt in UK and ordinary corporate principles in appointing a director to sell property, and avoids the need to engage a BVI insolvency practitioner.

However, the effectiveness of this option is dependent on the number of other creditors of both DEF and XYZ. Ideally, no other creditors will exist. If ABC can confirm or has evidence supporting the position one way or another, that will assist in amending this analysis. At the very least, this should be explored. In addition, there are multiple layers of costs including the liquidation in UK – which is likely to include a significant administrative/regulatory cost burden – as well as the costs of restoration (currently unknown) and director’s fees in BVI (albeit most of these costs are likely to be necessary whatever option is taken).

2. Register UK judgment in BVI and seek further relief in respect of BVI assets of DEF

This option would be more legally complex and potentially difficult given the lack of any claim against XYZ and the fact that the BVI Court may be reluctant to grant a charging order against assets of a company which is, potentially, unable to defend itself in Court (given that the sole director and shareholder is deceased).

However, it does avoid the need to engage with an arguably unnecessary insolvency process in the UK – thus eliminating possible competing creditors at that level – and, depending on the relief obtained in BVI, may eliminate the possibility of competing creditors at the BVI level too.

ABC would first need to seek recognition of its judgment debt under the **Reciprocal Enforcement of Judgments Act 1922 (“1922 Act”)**, for which the judgment appears to meet the eligibility criteria given that it is a final money judgment made in the UK in April 2022 (less than twelve months prior to the date of this memo, 2 February 2023). It is noted that we understand that the judgment does not meet any of the disqualifying criteria set out in section 3(2) of the 1922 Act. This should be confirmed with ABC before it instructs us to make an application for registration.

Commented [JW15]: 8 conditions need to be fulfilled under the Act

It should be noted that whilst an application for registration of the judgment is not required to be served on the debtor, the Court may order security for costs. ABC should be aware of this.

Additionally, given that only c. 2 months remain until the end of the twelve months following the judgment in which it can generally be registered in BVI, it would be prudent to file, concurrently with the application for registration, and application for an extension of the twelve-month period on the basis that it is just and convenient to do so.

Following registration of the judgment, an array of relief is available to be sought which would assist in enforcing. In this case, relief which would be useful would be either a charging order over the share capital in ABC, which is solely owned by the judgement debtor, or an appointment of a Share Receiver over the share capital. Ideally, an appointment of a Share Receiver would be obtained, and the Share Receiver would take the same or similar steps which a liquidator of DEF would take – i.e, liaise with the Registrar of Companies to determine the reasons for the striking-off XYZ, rectify those issues to bring it back into good standing.

Time is of the essence in both cases. Pursuant to the amended Business Companies Act, XYZ needs to be brought back into good standing on or before 2 July 2023, or it will be dissolved and its assets will go *bona vacantia* to the Crown. Whilst this does not eliminate any recovery prospects, it significantly complicates the process and will likely increase costs.

As stated above, the main advantage of this option is that it maximises the possibility of avoiding competing creditors. The disadvantage is that it is a more complex legal route, with more points at which it could fail.

Nonetheless, based on the information available, and assuming ABC can act quickly, Option 2 would appear to have the highest 'net expected recovery' of the two options available.

*** End of Assessment ***

Commented [JW16]: 42 marks