



**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]**

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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]**

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**Question 2.1 [maximum 2 marks]**

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

Liquidation

Pursuant to section 175(2) of the BVI Insolvency Act 2003, the appointment of a liquidator does not affect the right of a secured creditor to take possession of and realise or otherwise deal with the assets of the company over which the creditor has a security interest. This means that the secured creditor's rights to the secured property are protected and the secured creditor can remain outside the liquidation process if they choose to.

In accordance with section 211(1) of the Insolvency Act 2003, a secured creditor has the option (but is not obliged) to:

- a) value the secured property and claim in the liquidation as an unsecured creditor for the balance of his/her debt; or
- b) surrender his/her security interest to the liquidator for the general benefit of all the creditors and submit a claim in the liquidation for the entirety of his/her debt.

Scheme of Arrangement

In contrast to liquidation, there is no express protection for the rights of secured creditors in relation to a scheme of arrangement under section 179A of the BVI Business Companies Act 2004.

Company Creditors' Arrangements

However, in the context of a company creditors' arrangement, section 15(4) of the Insolvency Act 2003 provides that a CCA does not affect the secured creditor's right to enforce its security interests, or vary the liability secured by the security interest, unless the secured creditor provides agreement in writing that it may.

**Question 2.2 [maximum 2 marks]**

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

Under section 422(1) of the Insolvency Act 2003, the functions of a creditors' committee are:

- (a) to consult with the office holder on matters relating to the insolvency proceeding;
- (b) to receive and consider the office holder's reports;
- (c) to assist the office holder with the discharge of his/her functions; and
- (d) to discharge any other functions assigned to the committee under the Act or the Insolvency Rules 2005.

The powers of a creditors' committee under section 422(2) include the power to:

- (a) call a creditors' meeting;
- (b) require the office holder to provide the creditors' committee with reports and information concerning the insolvency proceeding as is reasonably required by the committee, and on giving reasonable notice to the office holder; and
- (c) require the office holder to attend before the committee to provide it with such information and explanations concerning the insolvency proceeding as the committee reasonably requires, upon giving the office holder at least 5 business days' notice.

The creditors' committee also has the power to fix the office holder's remuneration under section 430(1).

**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 XVIII of the Insolvency Act 2003 (the "Act") contains provisions based on the UNCITRAL Model Law on Cross-Border Insolvency, but this part of the Act has not yet been brought into force.

This means that the BVI court may only rely on the powers contained in Part XIX of the Act when it comes to statutory powers relating to foreign insolvency proceedings. In accordance with section 467(2) of the Act, a foreign representative may apply to the BVI court for an order in aid of a foreign proceeding. A "foreign proceeding" is defined in section 466(1) as a collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency. A "relevant foreign country" is defined as a country, territory or jurisdiction designated by the BVI Financial Services Commission as a relevant foreign country for this Part of the Act.

The Commission has designated Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom, and the United States as relevant foreign countries for Part XIX.

Under section 467(3) of the Act, the BVI court has the power to:

- a) restrain the commencement or continuation of any proceedings, execution or other legal process against a debtor or in relation to any debtor's property;
- b) 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 belonging to the debtor or the proceeds of that property;
- d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in the coordination of a BVI 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) authorise the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding; or
- g) stay or terminate or make any other order it considers 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.

Definition of "Insolvent"

The meaning of "insolvent" is contained in section 8 of the Insolvency Act, 2003 (the "Act"). In accordance with section 8(1), a company is insolvent if:

- a) it fails to comply with the requirements of a statutory demand (as to which, please see further below) that has not been set aside under sections 156 and 157 of the Act;
- b) it fails to satisfy in whole or in part any execution or other process issued on a judgment, decree or order of the BVI court in favour of one of its creditors;
- c) a creditor proves to the BVI court's satisfaction that the company is balance sheet insolvent, meaning the value of the company's liabilities exceeds the value of its assets; or
- d) a creditor proves to the BVI court's satisfaction that the company is unable to pay its debts as they fall due and is therefore cash flow insolvent.

Statutory Demand

A statutory demand is a formal written demand served on a debtor seeking the payment of a debt that is due and payable. A statutory demand must comply with the formalities set out in section 155 of the Act and in Rule 149 of the Insolvency Rules 2005. Pursuant to section 155 of the Act, the debtor must be given at least 21 days to pay the debt or otherwise secure or compound for the debt to the creditor's reasonable satisfaction.

Under section 156 of the Act, a debtor has 14 days from the date of service of a statutory demand to apply to the BVI court to set it aside. In accordance with section 157 of the Act, the BVI court must set aside a statutory demand if it is satisfied that there is a substantial dispute as to whether the debt is owing or due, or the debtor has a reasonable prospect of establishing a set-off, counterclaim or cross-claim in an amount that is at least equal to the amount set out in the statutory demand less the prescribed minimum amount for which a statutory demand may be issued of US\$2,000. The test as to whether the debt is disputed on a genuine basis is that set out in *Sparkasse Bregenz Bank v Associated Capital Corporation* (Civil Appeal No 10 of 2002).

Balance Sheet Insolvency

Section 10(1) of the Act defines "liability" as a liability to pay money or money's worth, including a liability under an enactment, a liability in contract, tort or bailment, a liability for a breach of trust and a liability arising out of an obligation to make restitution, and a "liability" includes a debt. This is a

rather wide definition. Section 10(2) continues that a liability may be present or future, certain or contingent, fixed or liquidated, sounding only in damages, or capable of being ascertained by fixed rules or as a matter of opinion.

In *Trade and Commerce Bank v Island Point Properties* (SA BVICA 2009/0012), the Court of Appeal held that a company is not to be considered balance sheet insolvent where the value of its assets is lower than the value of its liabilities for only a short period of time.

#### Cash Flow Insolvency

The English case of *Cornhill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114 held that the inability to pay a debt that is due and not disputed is sufficient evidence of insolvency.

#### Court's Discretion

It should be noted that even if it is demonstrated that a company is insolvent in accordance with section 8 of the Act, the BVI court retains a discretion in section 162(1) as to whether it decides to appoint liquidators over the company.

### **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?

#### Voluntary Liquidation

There are three scenarios in which a liquidator may be appointed in the BVI:

1. voluntary solvent liquidation under the Business Companies Act 2004 (the "BCA");
2. voluntary insolvent liquidation under the Insolvency Act 2003 (the "Insolvency Act") following a members' resolution; and
3. involuntary insolvent liquidation following an application to court under the Insolvency Act.

Voluntary liquidation under the BCA is only available to a company that is solvent. It is normally used when a company is no longer required and its members want to dissolve it. Part XII of the BCA contains the provisions relating to voluntary liquidation. Under section 199(1) of the BCA, a voluntary liquidator, or two or more joint voluntary liquidators, may be appointed over a company by a) a resolution of directors passed under section 199(2), or b) a resolution of members passed under section 199(3).

Prior to 1 January 2023, a voluntary liquidator did not need to be a licensed insolvency practitioner unless the company was a regulated entity, but was required to be an "eligible individual". An eligible individual was anyone who was not disqualified from being appointed as acting as a voluntary liquidator under Regulation 19(2) of the Business Companies Regulations 2012 (the "Regulations").

From 1 January 2023, section 199 of the BCA was amended by section 27 of the BVI Business Companies (Amendment) Act 2022, and Regulation 19 of the Regulations was amended by Regulation 6 of the BVI Business Companies (Amendment) Regulations 2022. Regulation 19 of the Regulations

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now provides that an individual is eligible to be appointed and act as a voluntary liquidator of a company under section 199 of the BCA if the individual has been appointed on or after 15 October 2012 and:

- a) is qualified to act as a voluntary liquidator of a company under Regulation 19(1A); and
- b) is not disqualified from acting as the voluntary liquidator of a company under Regulation 19(2).

Regulation 19(1A) provides that an individual is qualified to be appointed and act as a voluntary liquidator of a company if he or she:

- a) has liquidation experience of at least two years;
- b) has professional competence to liquidate the specific company;
- c) is able to demonstrate that he or she:
  - i. holds an insolvency practitioner's licence issued by the BVI Financial Services Commission under the BVI Insolvency Act; or
  - ii. has an appropriate professional qualification such as law or accountancy and experience of providing legal and financial advice or support to companies in the financial services sector; and
- d) is fully conversant with the relevant financial services legislation connected to the business of the specific company that is being liquidated, including the Financial Services Commission Act and the BCA.

Regulation 19(2) disqualifies various categories of individuals from being appointed as the voluntary liquidator of a company, including:

- a) a disqualified person;
- b) a restricted person;
- c) an undischarged bankrupt;
- d) a person who has been a director or occupied a senior management position in the company or an affiliated company in the previous two years, or is a close family member of such a person; and
- e) an individual who is not resident in the BVI in accordance with section 2(2) of the BCA, which provides that a liquidator is considered to be resident in the BVI if before his/her appointment he/she has been living physically in the BVI for a period of not less than 180 days, whether continuously or in aggregate.

At least one joint voluntary liquidator must satisfy the residency requirement, pursuant to section 2(3) of the BCA.

Licensed Insolvency Practitioner

In relation to Regulation 19(1A)(c) above, section 196A(1) of the BCA defines "licensed insolvency practitioner" as a person holding a licence to act as an insolvency practitioner under section 476 of the Insolvency Act. Part XX of the Insolvency Act relates to the licensing of insolvency practitioners. Section 476 of the Insolvency Act provides that the Financial Services Commission may issue a licence to an individual if satisfied that issuing the licence is not against the public interest and that the applicant:

- a) is resident in the BVI and is fit and proper and qualified to act as an insolvency practitioner;
- b) satisfies the requirements of the Insolvency Act for the application and will comply with the Insolvency Act and the Insolvency Practitioner Regulations 2004; and
- c) is not disqualified from holding a licence under section 477 of the Insolvency Act.

#### Voluntary Liquidation under the Insolvency Act

There were no changes to the requirements for a voluntary liquidator appointed under section 159(2) of the Insolvency Act. Such a liquidator must be an "eligible insolvency practitioner", defined in section 482 of the Insolvency Act as a licensed insolvency practitioner.

#### **Question 3.2 [maximum 5 marks]**

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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?

As a large proportion of BVI companies are holding companies, it is common for liquidations of BVI companies to have a cross-border element.

A creditor might consider the appointment of an overseas insolvency practitioner ("OIP") over a BVI company where the company's assets and/or the company's creditors are located in a jurisdiction other than the BVI. Practically, the appointment of an OIP in the jurisdiction in which the company's assets and/or creditors are located will reduce the costs of travel and of obtaining local expertise. It will also assist with matters such as language barriers, arranging creditors' meetings in a suitable time zone and language, knowledge of the way in which banks and property and company registers operate (if the BVI company has subsidiaries in that jurisdiction), and the ability to liaise with local lawyers for the purposes of recognition of the appointment, disputes that are centred in that jurisdiction, and other steps to be taken in relation to the assets. The appointment of an OIP will particularly help where there are time-zone differences between the jurisdiction in which the assets are situated and the BVI.

Section 483 of the BVI Insolvency Act 2003 (the "Act") sets out the circumstances in which an overseas insolvency practitioner may be appointed to act as an insolvency practitioner jointly with a BVI-licensed insolvency practitioner or the Official Receiver. The circumstances are:

- a) where the appointment is by the court, the court is satisfied that, or where the appointment is by other persons, those persons are satisfied that:
- i. the OIP has sufficient qualifications and experience to act in the particular insolvency proceeding;
  - ii. the OIP has given written consent to act in the prescribed form;
  - iii. the OIP would not be disqualified from holding a licence under section 477 of the Act (because the OIP is a bankrupt or the subject of a disqualification order under section 260, or the subject of a bankruptcy restrictions order under section 410);
  - iv. the OIP is not disqualified from acting in the case of a company or a foreign company, under section 482(2) of the Act by virtue of having been a director or auditor of the company in the previous three years; and
  - v. there is in force such security for the proper performance of the OIP's functions as may be specified in the Insolvency Practitioner Regulations 2004; and
- b) prior written notice of the OIP's appointment must be given to the BVI Financial Services Commission ("FSC").

Prior written notice under section 483(b) is usually given to the FSC by way of a letter from the proposed OIP or the person seeking to appoint the OIP, providing details including the OIP's expertise and qualifications. The FSC may then confirm its approval of the appointment of the OIP. Alternatively, section 484(2) of the Act provides that upon receipt of notice under section 483(b) of the Act, the FSC may give notice that it intends to apply to the BVI court for an order that the OIP should not be appointed. In this situation, section 484(3) provides that the OIP should not be appointed unless either the FSC approves the appointment, or the court approves the appointment at the hearing of the FSC's application under section 484(2).

**Question 3.3 [maximum 5 marks]**

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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 different types of liquidation in the BVI:

1. voluntary solvent liquidation under the Business Companies Act 2004 (the "BCA");
2. voluntary insolvent liquidation under the Insolvency Act 2003 (the "Insolvency Act") by a qualifying members' resolution; and
3. involuntary insolvent liquidation under the Insolvency Act, following an application to the BVI court.

Voluntary Solvent Liquidation under the BCA

Part XII of the BCA contains the procedure for voluntary solvent liquidations, though it does refer to the Insolvency Act for certain definitions. This option is not available to a company that is insolvent. The procedure is normally used where a company is no longer required and the directors and

shareholders agree to dissolve it. The main purpose of this procedure is to collect in the company's assets, pay off any liabilities and distribute the surplus to members before dissolving the company.

Pursuant to section 197(1) of the BCA, a company may only utilise the BCA liquidation procedure if it has no liabilities, or it is able to pay its debts as they fall due and the value of its assets equals or exceeds its liabilities ie the company is solvent. Section 197(2) provides that a company may still use this procedure notwithstanding any charge registered in relation to the company's property, but the liquidator is bound to give effect to the rights and priority of the claims of the company's secured creditors.

The procedure for initiating a voluntary liquidation under the BCA is as follows:

1. where the company proposes to appoint a voluntary liquidator, the directors of the company must:
  - a. make a declaration of solvency in the approved form, stating that the company is and will continue to be able to discharge, pay or provide for its debts as they fall due, and that the value of the company's assets equals or exceeds its liabilities (section 198(1)(a)) and attaching a statement of the company's assets and liabilities (section 198(2)(b)); and
  - b. approve a liquidation plan, which specifies the reasons for the liquidation, the estimate of the time required to liquidate the company, whether the liquidator is authorised to carry on the business of the company, the name and address of each individual proposed to be appointed as liquidator, and the remuneration proposed to be paid to each liquidator, and whether the liquidator is required to send all members a statement of account prepared or caused to be prepared by the liquidator in respect of his/her actions or transactions (section 198(1)(b)); and
2. within 4 weeks of the date that the declaration of solvency is made (section 198(2)), and within 6 weeks of the date that the liquidation plan is approved by the directors (section 198(3)), one or more voluntary liquidators are appointed under section 199 of the BCA, either by a resolution of directors (if permitted by the memorandum and articles of association), or a resolution of members.

#### Voluntary Insolvent Liquidation under the Insolvency Act

Part VI of the Insolvency Act provides for two procedures for the appointment of a liquidator in an insolvency situation ie where the company is unable to pay its debts as they fall due, or does not have enough assets to equal or exceed its liabilities. The purpose of proceeding under the Insolvency Act is for the liquidator to collect in the company's assets and distribute in accordance with the statutory "waterfall". Where creditors in one class are unable to be paid in full, they are paid on a *pari passu* basis.

One procedure is voluntary insolvent liquidation. Pursuant to section 159(2) of the Insolvency Act, the members of a BVI company may voluntarily place a company in insolvent liquidation, by passing a "qualifying resolution" that appoints an eligible insolvency practitioner as the liquidator of the company. Section 159(3) provides that a resolution of members is a "qualifying resolution" if it is passed at a properly constituted meeting of the company by a majority of 75% of members present at the meeting who are entitled to vote, or a higher majority if a higher majority is required by the company's memorandum or articles of association.

In accordance with section 161(1) of the Insolvency Act, the members may not appoint a liquidator if there is a pending application with the BVI court to appoint a liquidator over the company, or a liquidator has been appointed by the court, or the proposed appointee has not consented in writing to the appointment.

Following the members' resolution, under section 161(2), notice of the appointment must be given to the liquidator as soon as possible. In accordance with section 182 of the Insolvency Act, the liquidator has limited powers until the first creditors' meeting is held under section 179.

This procedure is not available to a foreign company (section 159(4)) and if the BVI company is regulated by the Financial Services Commission, the members of the company are unable to appoint a liquidator unless at least 5 business days written notice of the resolution has been given to the Commission.

#### Insolvent Liquidation by Court Application under the Insolvency Act

The second type of insolvent liquidation under the Insolvency Act is "involuntary" and made by an application to the BVI court.

Section 159(1) of the Insolvency Act provides that the court may appoint either the Official Receiver or an eligible insolvency practitioner as the liquidator of a BVI company on an application under section 162, or of a foreign company on an application under section 163.

In accordance with section 162(2) of the Insolvency Act, an application to court to appoint a liquidator may be made by the company itself, a creditor, a member (with leave of the court if there is a *prima facie* case that the company is insolvent), the supervisor of a creditors' arrangement relating to the company, the Financial Services Commission (if the company is regulated), the International Tax Authority, or the Attorney General.

The application must be advertised in accordance with section 165 of the Insolvency Act. If the company is the applicant, advertisements must be placed at least 7 days before the date of the hearing. If the applicant is anyone else, adverts must be placed at least 7 days after service of the application on the company, but at least 7 days before the hearing.

Under section 162(1), the court has discretion to appoint a liquidator if it determines that the company is insolvent within the meaning of section 8(1) of the Insolvency Act, or the court is of the opinion that it is just and equitable to appoint a liquidator, or the court is of the opinion that it is in the public interest to appoint a liquidator. Only the Attorney General, Financial Services Commission or International Tax Authority may apply to appoint a liquidator under the ground that it is in the public interest to appoint one (section 162(4)). Such reasons may be that the protection of a number of members or investors is required.

The "just and equitable" ground has been used where there is no justification for the company to continue to exist, there is a deadlock in the management of the company to the extent that it is unable to operate any longer, there is loss of confidence in the company's management, evidence of fraud in the way the company has been managed, or there is a quasi-partnership and there has been a breakdown of trust and confidence.

Pursuant to section 168(1), the application must be determined within 6 months after it is filed, but the court may extend this period if there are special circumstances to justify an extension, by a period of up to 3 months at a time.

#### 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?

Assuming that negotiations have failed, Edale Limited ("Edale") has the following options against Swift Limited ("Swift"):

1. make a claim for a breach of contract and enforce the subsequent judgment;
2. apply to appoint liquidators over Swift;
3. serve a statutory demand on Swift and then apply to appoint liquidators; or
4. seek to appoint a receiver over the property on Mosquito.

##### Claim for Breach of Contract

Edale could bring a claim for breach of contract against Swift to recover the balance of the loan. The court to which such a claim could be made would depend on whether there is any jurisdiction clause in the loan agreement, but if the loan agreement is silent, the BVI court would have jurisdiction over Swift to hear the claim because it is a BVI company. Edale could then seek to enforce any resulting judgment against Swift in the BVI to recover the Mosquito property, as well as in any other jurisdictions where Swift has assets.

##### Liquidation of Swift

However, such a claim would likely take time and involve a full trial (if disputed), and so a quicker and cheaper option will be to appoint liquidators over Swift. Under section 175(1) of the Insolvency Act 2003 (the "Act"), with effect from the commencement of the liquidation of a company a liquidator has custody and control of the company's assets. The general duties of a liquidator are set out in section 185(1) of the Act, which are to take possession of, protect and realise the company's assets and distribute the assets or the proceeds of realisation in accordance with the Act. Section 186 of the Act and Schedule 2 of the Act provide a liquidator with powers to sell or otherwise dispose of property of the company. If Edale were to appoint a liquidator over Swift, the liquidator would have the power to dispose of the property on Mosquito and distribute the proceeds of sale to Edale and Swift's other creditors.

Edale is a creditor of Swift and, as such, has standing under section 162(2)(b) of the Act to apply for the appointment of a liquidator over Swift under section 159(1) of the Act, on the ground that Swift is

**Commented [JW6]:** 5 marks -good answer. 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.

insolvent. In accordance with section 162(1) of the Act, the court has discretion to appoint a liquidator over Swift if it determines that Swift is insolvent within the meaning of section 8(1) of the Act.

In accordance with section 8(1), a company is insolvent if:

- a) it fails to comply with the requirements of a statutory demand that has not been set aside under sections 156 and 157 of the Act;
- b) it fails to satisfy in whole or in part any execution or other process issued on a judgment, decree or order of the BVI court in favour of one of its creditors;
- c) a creditor proves to the BVI court's satisfaction that the company is balance sheet insolvent (that the value of the company's liabilities exceeds the value of its assets); or
- d) a creditor proves to the BVI court's satisfaction that the company is unable to pay its debts as they fall due (the company is therefore cash flow insolvent).

Edale does not have an order or BVI judgment against Swift at this point and so b) does not apply.

Section 10(1) of the Act defines "liability" as a liability to pay money or money's worth, including a liability under an enactment, a liability in contract, tort or bailment, a liability for a breach of trust and a liability arising out of an obligation to make restitution, and a "liability" includes a debt. Section 10(2) continues that a liability may be present or future, certain or contingent, fixed or liquidated, sounding only in damages, or capable of being ascertained by fixed rules or as a matter of opinion.

In this case, Swift has a liability to Edale to pay money under a contract (the loan agreement). The terms of that contract are that the failure to pay one or more instalments results in the whole loan being due to be repaid. If Edale is able to prove that its claim exceeds Swift's assets, Swift will be considered to be insolvent under c).

Alternatively, the English case of *Cornhill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114 held that the inability to pay a debt that is due and not disputed is sufficient evidence of cash flow insolvency under d). This means that if Edale is able to prove to the BVI court's satisfaction that its claim under the loan agreement is due and not disputed, and that Swift is unable to pay it, Swift will be deemed insolvent.

If Edale has evidence of Swift's financials (such as financial statements), it may be able to proceed with applying directly to appoint a liquidator under sections 159 and 162 of the Act. It will have to prove its case and there is a risk that Swift could successfully defend the application on the basis that it is not insolvent.

#### Statutory Demand

The most straightforward option for Edale to prove that Swift is insolvent will be to serve a statutory demand on Swift. If Swift fails to comply with the statutory demand, or to set it aside, it will be deemed insolvent within the meaning of section 8(1) of the Act and Edale's application to appoint liquidators is likely to be successful.

A statutory demand is a formal written demand that is served on a debtor demanding the payment of a debt that is due and payable. It must comply with the formalities set out in section 155 of the Act and in Rule 149 of the Insolvency Rules 2005, including that it must be in writing, specifying the nature

of the debt and its amount, and be dated and signed by the creditor or an authorised person. Pursuant to section 155 of the Act, the debtor must be given at least 21 days to pay the debt or otherwise secure or compound for the debt to the creditor's reasonable satisfaction.

Under section 156 of the Act, Swift would have 14 days from the date of service of a statutory demand to apply to the BVI court to set it aside. In accordance with section 157 of the Act, the BVI court must set aside a statutory demand if it is satisfied that there is a substantial dispute as to whether the debt is owing or due, or the debtor has a reasonable prospect of establishing a set-off, counterclaim or cross-claim in an amount that is at least equal to the amount set out in the statutory demand less the prescribed minimum amount for which a statutory demand may be issued of US\$2,000. The test as to whether the debt is disputed on a genuine basis is that set out in *Sparkasse Bregenz Bank v Associated Capital Corporation* (Civil Appeal No 10 of 2002).

#### Provisional Liquidation

If there is a risk that Swift will dissipate its assets, or that the property on Mosquito needs urgently to be maintained or it will devalue in the period it takes for a liquidation application to be determined, Edale may apply under section 170 of the Act for a provisional liquidator to be appointed after the main liquidation application has been filed, but for the period it takes to determine the liquidation application. Edale would have standing to apply as a creditor under section 170(2)(a) and (c) of the Act, as the applicant for the appointment of a liquidator and a creditor of Swift's.

Under section 170(4) of the Act the court has discretion to appoint a provisional liquidator if the company consents, or the court is satisfied that a provisional liquidator is necessary to maintain the value of the company's assets. There must be a good arguable case that a ground exists for the appointment of a provisional liquidator, and the court must be persuaded that it should exercise its discretion to maintain the current position in respect of the company's assets (*Akai Holdings Limited v Brinlow Investments Limited* BVIHCV 134 of 2006). The powers of a provisional liquidator are limited to those necessary to maintain the value of the assets (section 171 of the Act).

For Edale to successfully apply for a provisional liquidator over Swift, it would likely have to show that the property on Mosquito needs to be maintained to keep its value and that Swift is not undertaking maintenance, or that Swift is seeking to sell the property. Based on these facts, it is unlikely that there is a risk to justify the appointment of provisional liquidators.

#### Receivership

If the loan is secured on the property, and the security documentation provides the necessary power, Edale could appoint a receiver over Swift's assets, with the powers expressly conferred by the security documentation (section 127(1) of the Act). Alternatively, Edale could seek to appoint a receiver by way of court application, with the receiver having the powers set out in the court order. These may include a power of sale of the property on Mosquito, in which case the receiver owes a duty under section 129 of the Act to obtain the best price reasonably obtainable.

However, appointing a liquidator is most likely the better option since a) the threat of an application or service of a statutory demand is more likely to obtain a better outcome if Swift is actually solvent and simply avoiding payment, and b) if the value of the property has decreased, a liquidator will take control over all of Swift's assets and Edale will be able to share in the whole of the liquidation estate.

#### Conclusion

The best of the options open to Edale are to either apply for the appointment of liquidators directly, or to first serve a statutory demand on Swift and apply to appoint liquidators once the period to satisfy the statutory demand has expired, and if there is no application to set it aside. Given that the more straightforward (and therefore likely cheaper and quicker) method to appoint liquidators will be to serve a statutory demand first, that would be the approach that is advised.

#### 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?

#### Introduction

The key questions to consider are:

1. Can the judgment of the English High Court in favour of ABC Limited ("ABC") be enforced in the BVI against DEF Limited ("DEF")?
2. If the answer to 1 is yes, what methods of enforcement may be used in respect of XYZ Limited ("XYZ")?
3. Are there any other options for otherwise claiming the debt?
4. Does the fact that XYZ has been struck off the Register but not yet dissolved impact the enforcement of the judgment?

#### Enforcement of the English Judgment

The BVI is not a party to any conventions or treaties in relation to the enforcement of foreign judgments. The legislation governing the recognition of foreign judgments in the BVI is the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 (the "REJA").

Under section 2(1) of the REJA, "judgment" is defined as any judgment or order that is given or made by a court in any civil proceedings, where any sum of money is ordered as payable. Clearly ABC's judgment against DEF falls within this definition, as it was given by the English High Court in civil proceedings for a sum of money (GBP 2 million).

In accordance with section 3(1) of the REJA, only judgments given in the courts of certain jurisdictions may be registered and enforced under the REJA, but judgments of the High Court of England, Wales and Northern Ireland are included within this list. Section 3(1) provides that a foreign judgment is registrable within 12 months of the date of judgment, unless the BVI court grants a longer period on the basis that it is just and convenient to do so. ABC's judgment was granted in April 2022, which is

Commented [JW7]: 8 marks

Commented [JW8]: The question required a memorandum to your principal with the options for ABC.

Commented [JW9]: There are 8 conditions to a successful application act this Act

more than 12 months ago, and so ABC will need to apply to extend that period. It is suggested in the facts that it only became clear that there were assets of DEF's in the BVI when the other attempt to enforce the judgment failed. This would be an argument for extending the period.

An application to register the judgment has to be made in accordance with the Eastern Caribbean Supreme Court Civil Procedure Rules ("CPR") Part 72. The application may be made without notice, but will need to be supported by evidence given in an affidavit that exhibits the judgment, specifies the amount of interest due, states the name, trade or business and usual or last known place of business of both ABC and DEF, and states to the best of the information or belief of the deponent that ABC is entitled to enforce the judgment and that to date it has not (in whole or in part) been satisfied.

If the BVI court grants the application and ABC's judgment is registered in the BVI, section 3(3)(a) of the REJA provides that the judgment will be treated from the date of registration as having the same force and effect in the BVI as if it were a judgment of the BVI court. As a result, all of the methods of enforcement of judgments that are available under the CPR will be able to be utilised to enforce ABC's judgment.

Overall, assuming that the BVI court considers it to be just and convenient to extend the registration period for ABC's judgment, ABC's judgment can be registered in the BVI and treated as if it were a BVI judgment.

#### Enforcement Methods

CPR 45.2 provides that a judgment or order for the payment of a sum of money may be enforced by a charging order under Part 48, a garnishee order under Part 50, a judgment summons under Part 52, an order for the seizure and sale of goods under Part 46, or the appointment of a receiver under Part 51. The two most relevant of these for ABC are a charging order and the appointment of a receiver.

CPR 48.1 provides that a judgment debt may be enforced by charging "stock", which is defined as including securities, shares and dividends arising therefrom. DEF's shares in XYZ will fall within this definition. The procedure according to Part 48 is for ABC to apply for a charging order with evidence in support setting out the amount of the judgment that remains due, and providing evidence that DEF owns 100% of XYZ. The evidence must also identify whether anyone else is believed to have an interest in the shares. The BVI court may make a provisional charging order first, without a hearing, and will then list a hearing to consider whether to make a final charging order.

If ABC is granted a final charging order over DEF's shares in XYZ, ABC will then have to apply to the court for an order to sell the shares in XYZ in order to realise any funds.

Alternatively, as XYZ owns unencumbered properties in the BVI, ABC may wish to apply for the appointment of a receiver by way of equitable execution under CPR Part 51, to obtain payment of the judgment debt from the income or capital assets of DEF in the BVI. Specifically, ABC may wish to seek the appointment of receivers over DEF's share capital in XYZ, in order to realise its judgment debt from the unencumbered properties in the BVI. ABC will need to apply to the BVI court to seek an order permitting the receivers to sell or otherwise dispose of those properties in order to pay ABC the monies due under its judgment debt. ABC will need to prove that DEF owns all of XYZ.

ABC will need to consider whether selling the shares in XYZ will satisfy its judgment debt (and indeed whether there will be a market for the sale of those shares), or if it is better that the individual properties owned by XYZ are sold. ABC will need to factor in that the receivers will have fees that need to be paid and so receivership will not be the cheapest option.

### Other Options

ABC is not a creditor of XYZ's and so has neither the standing nor grounds to seek to appoint liquidators over XYZ in the BVI under sections 159 and 162 of the Insolvency Act 2003 (the "Act"). Depending on the relevant provisions of English law, ABC could apply to wind up DEF in England on the basis of the unsatisfied judgment, and then DEF's liquidators could seek the assistance of the BVI court with a view to collecting DEF's assets.

In accordance with section 467(2) of the Act, a foreign representative may apply to the BVI court for an order in aid of a foreign proceeding. A "foreign proceeding" is defined in section 466(1) as a collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency. A "relevant foreign country" is defined as a country, territory or jurisdiction designated by the BVI Financial Services Commission as a relevant foreign country for this Part of the Act. The United Kingdom is such a designated country and so an English insolvency practitioner appointed over DEF could make an application to the BVI court for assistance.

Under section 467(3) of the Act, the BVI Court has the power to assist in a number of ways, including by ordering a person to deliver up property belonging to the debtor, or for an interim receiver to be appointed over property belonging to the debtor. A liquidator appointed over DEF could therefore apply for assistance to appoint a receiver over DEF's shares in XYZ, with power to sell the underlying properties belonging to XYZ.

Alternatively, the BVI court has the power to appoint a liquidator over a foreign company under section 163 of the Act, if the court is satisfied that the company is insolvent, and that it has a connection with the BVI. Under section 8(1) of the Act, DEF would be deemed insolvent because it is unable to pay the judgment debt which has fallen due. If ABC also registers the judgment in the BVI, DEF will be deemed insolvent because there is an unsatisfied order of the BVI court under section 8(1). Under section 163(2) a foreign company has a connection with the BVI only if it has assets in the BVI, or business in the BVI, or there is a reasonable prospect the appointment will benefit creditors. DEF has assets in the BVI in the form of the shares in XYZ. ABC could therefore seek to appoint liquidators over DEF in the BVI, who will then have the power to collect in DEF's assets, which will include XYZ.

### XYZ's Status

XYZ was struck off the Register, but not dissolved, prior to 1 January 2023. Under the transitional provisions in the Business Companies Act 2004 (the "BCA"), which came into force on 1 January 2023, XYZ had until 30 June 2023 to apply to be restored to the Register, failing which it would be dissolved. However, we are told that its sole shareholder and director of its parent company DEF recently passed away, and so it is unlikely that DEF has taken any steps to restore XYZ to the Register. On 1 July 2023, XYZ will be deemed dissolved. It is then possible that XYZ's property will pass to the Crown *bona vacantia*. Further, section 215(1) provides that XYZ, its directors, members and any liquidator or receiver will not be able to carry on any business or in any way deal with the assets that belong to XYZ.

XYZ must therefore be restored to the Register in order for ABC to be able to satisfy its judgment debt against the property belonging to XYZ. In accordance with the transitional provisions in the BCA, an application may be made to the BVI court under section 218 of the BCA to restore XYZ to the Register. According to section 218(2), an application may be made by a variety of people, including a person with a potential legal claim against the company, or any other person who can establish an interest in having XYZ restored to the Register. ABC could be said to have a potential legal claim against XYZ,

**Commented [JW10]:** ABC could appoint a liquidator in DEF then the liquidator make an application for recognition and restoration of XYZ at the same time, and deal with its assets - its not known if XYZ is solvent or insolvent but if insolvent then once restored liquidator could apply for XYZ liquidation.

**Commented [JW11]:** Or could ABC appoint a receiver over DEF's shares then the receiver could appoint a new director of DEF and restore XYZ. ABC could appoint a receiver over XYZ's shares directly but not if its struck off so key is restoration of XYZ.

**Commented [JW12]:** Exactly - first step

given that it may seek the appointment of receivers over it. Separately, ABC could be said to have an interest in having XYZ restored because XYZ is property of DEF's against whom ABC has an enforceable judgment.

The grounds for restoring in section 218(1) that ABC can rely on are the purpose of restoration is to initiate legal proceedings against the company, or make an application for any of XYZ's property that has vested in the Crown *bona vacantia* to be returned to XYZ, subject to the consent of the Crown signified by the Financial Secretary, or that it is just and fair to restore in all the circumstances. The court will need to be satisfied that XYZ has a registered agent, and that all fees and penalties have been or will be paid.

#### Conclusion

There are a number of options for ABC to pursue in the BVI. XYZ will need to be restored to the Register in order to take any of these options.

ABC will then need to decide whether it is more cost-effective to either register the judgment in the BVI and obtain a charging order over DEF's shares in XYZ, or appoint receivers over DEF's shares in XYZ. Alternatively, ABC may wish to appoint liquidators over DEF in England who may then seek the assistance of the BVI court, or try to appoint liquidators over DEF by the BVI court, who may then collect in DEF's assets.

**\* End of Assessment \***

**Commented [JW13]:** This should have been in the form of recommendations to ABC as a client. It was based on a real life example. Given the struck off position of the subsidiary and thus inability to pursue it directly the judgment creditor opted for the appointment of a receiver over the parent company's shares for the receiver to appoint a new director who would make the application to restore the BVI subsidiary.

**Commented [JW14]:** Well done. Good effort - 48 marks