



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]

Commented [JW2]: 10 marks

Question 2.1 [maximum 2 marks]

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

The BVI's insolvency regime can be described as creditor-friendly due to the insolvency procedures and procedural simplicity available to creditors under the insolvency framework. In a BVI insolvency creditors are deemed the key stakeholders and accordingly certain protection and options are available to them within the BVI insolvency framework.

Secured creditors can exercise their security interest outside insolvency process. Notwithstanding, note that the Insolvency Act (Revision 2020) (the "IA"), which applies to corporate insolvency and personal bankruptcy allows for the recognition and protection of the rights of secured creditors to enforce their security. For example:-

- s.15(4) IA provides that an arrangement shall not, except with the written agreement of the secured creditor or the preferential creditor, affect the rights of secured creditors to enforce his or her security interest or vary the liability secured by the security interest.
- s.175(2) IA provides that the liquidation of the debtor does not affect the right of a secured creditor to take possession of and realise or otherwise deal with assets of the company over which that creditor has a security interest.
- S.205(2) BVI Business Companies Act states that the [voluntary liquidation of a company] does not affect the right of a secured creditor to take possession of and realise or otherwise deal with assets of the company over which the creditor has a security interest.

In the context of individual bankruptcy s.298 IA allows a secured creditor to make an application for a bankruptcy order. Such secured creditors can make an application stating the full amount of the liability of the debtor to him or her and:-

- a) state that he or she is willing, in the event of a bankruptcy order being made, to give up his or her security interest for the benefit of the other creditors of the bankrupt; or
- b) give an estimate of the value of his security interest and make the application in respect of the full amount of the liability of the debtor to him or her less the estimated value of his or her security interest.

The effect of the bankruptcy order is that 1) the assets in the bankrupt's estate vest in the trustee without any conveyance, transfer or assignment and 2) the assets become divisible amongst the bankrupt's creditors in accordance with the IA.

Question 2.2 [maximum 2 marks]

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

In an insolvent situation, creditors can exercise significant influence by forming a creditor's committee which works with the liquidator to liquidate the company.

S.421 IA provides for the establishment of a creditors' committee, stating that the creditors of a company in liquidation, administration or administrative receivership or of a bankrupt may, by resolution passed at a meeting, establish a creditors' committee:-

- (a) in the case of a company in administration, at any time after the approval of the administrator's proposals;
- (b) in the case of a company in administrative receivership, at any time after the appointment of the administrative receiver;
- (c) in the case of a company in liquidation, at any time after the appointment of the liquidator; and
- (d) in the case of an individual, at any time after the bankruptcy order.

The functions of the creditors' committee are set out in s.422 IA as follows:

- (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.

The powers of the creditors' committee set out in s.422 are:-

- (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.

Furthermore, where the creditors' committee requires the attendance of the office holder at a meeting under s.422(2)(c) IA:-

- (a) the notice shall be signed in writing by a majority of the members of the committee; and
- (b) the meeting shall be fixed for a business day and shall be held at such time and place as the committee may agree with the office holder.

The designated representative of a committee member may sign a notice under subsection (3)(a) on the member's behalf.

Unless expressly permitted to do so by the Act or the Rules, a creditors' committee cannot give directions to the office holder.

Question 2.3 [maximum 2 marks]

With reference to the Insolvency Act, what powers are provided to the BVI Court in relation to the orders the Court can make in support of foreign insolvency proceedings?

Part XIX of the IA sets out the primary framework for the powers provided to the BVI court in relation to orders they can make in support of foreign insolvency proceedings. S.466 IA defines foreign proceedings as:-

“a collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy ...;”

S.467(3) IA sets out the court's powers in relation to the orders it can make; such orders includes:

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

S.467(5) IA states that in making an order under subsection (3), the Court may apply the law of the BVI or the law applicable in respect of the foreign 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.

S.8(1) IA set out the circumstances in which a company may be considered insolvent in the BVI. Such circumstances are as follows:

- a) if company fails to comply with the requirements of a statutory demand (exceeding USD2,000), within 21 days, that has not been disputed or set aside under s.157 IA. A statutory demand is a written demand for payment of a debt from a creditor - such demand being made in the form required under s.156 IA. Note the company can apply to set the statutory demand aside under s.157 IA within 14 days of the date of service.
- b) execution or other process issued on a judgment, decree or order of a BVI court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
- c) either:-
 - (i) "balance sheet insolvent" where the value of the company's liabilities exceeds its assets; liability is defined widely under s.10(1) IA and may include liability arising out of a contract, tort or bailment and may arise out of an obligation to make restitution. S.10(2) IA also states that liability can include those present, future or contingent, fixed or liquidated.

or

 - (ii) "cash flow insolvent" where the company is unable to pay its debts as they fall due; for example an inability to pay a debts that is due and not disputed is evidence of insolvency¹

Notwithstanding the statutory test set out in s.8 IA, the court retains its residual discretion to find circumstances where a company can be deemed to be insolvent.

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?

The appointment of voluntary liquidators is governed by BVI Business Companies Act, 2004 (the "BCA") and the BVI Business Companies Regulations (the "BCR"). Prior to 12 January 2023 s.199 BCA stipulated the appointment process of voluntary liquidators and only referred to "eligible individual". Note that such individual need not be a licensed insolvency practitioner, unless they are acting for a regulated entity. S.19(1) and s.19(2) BCR does however provide a description or categories of individuals who are eligible to be appointed as voluntary liquidator. Basically, that they must not be disqualified from being appointed as a liquidator or disqualified from acting as a liquidator.

¹ *Cornhill Insurance plc v Improvement Services Limited* [1986] 1 WLR 114

Commented [JW3]: 4.5 marks

The BCA was amended by the BVI Business Companies (Amendment) Act, 2022 and the BVI Business Companies (amendment) Regulations, 2022 (together the “Amendments”) which amended amongst other things, the rules relating to who can be appointed as voluntary liquidator in the BVI.

The new rules are that, after 1 January 2023, voluntary liquidators will be required to: -

1. Have certain qualification and experience (e.g. have at least 2 years liquidation experience, professional competence to liquidate a company, and appropriate professional qualification (e.g. law or accounting)); and hold an insolvency practitioner’s licence issued by the BVI Financial Services Commission); and
2. Satisfy the BVI residency requirement (i.e. physically have lived in the BVI for at least 180 days prior to their appointment; such residency being continuous or in aggregate).

If there is a joint liquidator appointed only one liquidator will need to satisfy this new residency requirement.

Any voluntary liquidator appointed prior to 1 January 2023 does not need to meet the qualification, experience or residency requirements but will continue to act on the relevant liquidation until it is concluded.

Question 3.2 [maximum 5 marks]

It is possible for the appointment of an overseas insolvency practitioner in relation to a BVI company. Answer the two questions below.

- (a) in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and

Many BVI companies are holding companies with multi-jurisdictional elements and assets situated outside of the BVI. It is therefore expedient (from a practical and cost efficiency perspective) to appoint insolvency practitioners from the jurisdiction in which the assets are situation in order to efficiently deal with the liquidation of those assets.

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

Pursuant to s.483 IA an overseas insolvency practitioner may be appointed. He or she does not need to be licenced in the BVI in order to act. However, he or she must act jointly with a BVI licensed insolvency practitioner or with the Official Receiver. The section states that an individual resident outside the BVI may be appointed to act as an insolvency practitioner jointly with a licensee or the Official Receiver if:-

- (a) where he or she is appointed by the Court, or in any other case the person or persons appointing him or her, is or are satisfied that:
 - (i) he or she has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;
 - (ii) he or she has given his or her written consent to act in the prescribed form;

Commented [JW4]: Not 'and' - it should be 'or'

Commented [JW5]: Be fully conversant with Financial Services legislation

Commented [JW6]: 5 marks

- (iii) he or she is not disqualified from holding a licence under s.477 IA;
 - (iv) he or she is not disqualified from acting in the case of a company or a foreign company, under s.482(2) IA or in the case of an individual, under subsection 482(3) IA;
 - (v) there is in force such security for the proper performance of his or her functions as may be specified in the Regulations; and
- (b) prior written notice of his or her appointment has been given to the [Financial Services Commission].

S.484 IA provides the FSC with a power to appear and be heard at any court hearing to appoint the overseas insolvency practitioner where the FSC can accept or object to such appointment. In practice therefore, a letter is first written to the FSC requiring confirmation that the FSC approves of the overseas insolvency practitioner's appointment.

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.

The types of liquidations available in BVI are as follows:

VOLUNTARY LIQUIDATION

There is no requirement for the company to be insolvent in order to put it into voluntary liquidation under the BCA. A voluntary liquidation is appropriate when the goal is to dissolve the company that is no longer needed. The aim is to pay any outstanding liabilities and distribute any remaining assets to those entitled and then to dissolve the company. A voluntary liquidation is pursued under Part XII, s.197(1) BCA if:

- (a) it has no liabilities; or
- (b) is able to pay its debts as they fall due;

A voluntary liquidator may be appointed by shareholder resolutions s.199(3) BCA or by the director's resolution s.199(2) BCA. If a voluntary liquidator is appointed the directors will need to make a declaration of solvency s.198(1)(a) and provide a liquidation plan s.198(1)(b) BCA.

Once appointed the voluntary liquidator must, within 14 days of the commencement of the liquidation, file notice of their appointment in the approved form; together with the declaration of solvency made by the directors, or an extract complying with the BCR; and a copy of the liquidation plan s.204(1)(a) BCA. The liquidator must also, within 30 days of the commencement of the liquidation advertise their appointment in the BVI Official Gazette 2.204(1)(b) BCA.

Pursuant to s.205(1) BCA from the commencement of the voluntary liquidation of the company the voluntary liquidator:-

- (a) Has custody and control of the assets of the company; and

Commented [JW7]: 3.5 marks

Commented [JW8]: There are 3 types:

Solvent voluntary liquidation under the BCA 2004

Insolvent liquidation by court application under the IA2003

The third is a voluntary insolvent liquidation by members qualifying resolution of 75% of members under section 159(3) the IA 2003 - this was missing in your answer.

Also see comments re provisional liquidation which insolvent liquidation and receivership which is not a liquidation at all

Commented [JW9]: In fact it can only be solvent for this type of liquidation

- (b) The directors of the company remain in office but cease to have any powers, functions, or duties other than those required or permitted under Part XII of the BCA

The principle duties of the voluntary liquidator are set out in s.206 BCA and are to:-

- a) take possession of, protect and realise the assets of the company;
- b) identify all creditors of and claimants against the company;
- c) pay or provide for the payment of, or to discharge, all claims, debts, liabilities and obligations of the company;
- d) distribute the surplus assets of the company to the members in accordance with the memorandum and articles;
- e) prepare or cause to be prepared a statement of account in respect of the actions and transactions of the liquidator; and
- f) send a copy of the statement of account to all members if so required by the liquidation plan required by section 198(1)(b).

The powers of voluntary liquidator are set out in s.207(1)(a)-(j) BCA.

The voluntary liquidator shall not, without the court's permission, carry on the voluntary liquidation for more than 2 years s.207(2) BCA.

Once completed the voluntary liquidator must file a completion statement with the Registrar s.208(1) BCA. The registrar will then strike the company from the Registrar of Companies 2.208(1)(a) BCA and issue a dissolution certificate s.208(1)(b) BCA. The voluntary liquidator will then advertise the dissolution with the BVI Official Gazette s.208 (3) BCA.

"SOFT TOUCH" PROVISIONAL LIQUIDATION

A "soft touch" provisional liquidation is a relatively, newly accepted insolvency practice in the BVI, which came about following *Constellation Overseas Limited et al*². Note that this is a well-established practice in other offshore jurisdiction, primarily used in aid of cross-border restructuring.

Following *Constellation*, a BVI company can be put into provisional liquidation where a scheme of arrangement is proposed. The aim generally, is to restructure the company's liabilities to avoid going into an insolvent liquidation and/or to alter distribution rights of shareholders and/or creditors in a liquidation. The key benefit is the s.174 IA automatic stay and moratorium (following the liquidator's appointment), which prevents individual creditor actions, which would interrupt or frustrate any restructuring efforts.

The scheme can be initiated by the company, any creditor or shareholder or the liquidator (where the company is being wound up). The scheme will need the sanction of the court but before that an application is made to the court to put the company into provisional liquidation. The scheme will need to be supported by more than 50% creditors in number and by 75% in value of those attending and voting in each class. Once approved by the court, the scheme is binding on all scheme creditors and/or shareholders including those who objected to the scheme or did not vote.

² BVIHC (Com) 2018/0206

Commented [JW10]: This is not a separate liquidation type - it is the commencement of court application for a liquidation under the Insolvency Act 2003.

INSOLVENT LIQUIDATION

When a company becomes insolvent an insolvent liquidation is appropriate and the directors are obliged to place the company into liquidation once they become aware of the company's insolvency or imminent insolvency, s.256 IA. If the directors fail to commence insolvency proceedings they may be held liable under the insolvent trading provisions.

An independent insolvency practitioner may be appointed by court order under s.162 IA or by the shareholders passing a qualifying resolution,³ s.159 IA. The liquidation is deemed to commenced from the date the liquidator is appointed.

Per s.175 the liquidator's general duties which are set out in s.185 IA begin from the time of the liquidator's appointment and includes taking possession of, protecting and realising the assets of the company for the benefit of the company's creditors. Note that an application can also be made by creditor, director, the company, the Attorney General or the FSC. The liquidator has 14 days from the date of their appointment to:

- a) advertise his or her appointment in accordance with the Rules;
- b) file notice of his or her appointment with the Registrar;
- c) serve notice of his or her appointment on the company in respect of which he or she was appointed; and
- d) if he or she has been appointed in respect of a company that is or has been a regulated person, serve notice of his or her appointment on the Commission.

The application is usually made on grounds of insolvency. S.8(1) IA set out the circumstances in which a company may be considered insolvent in the BVI. Notwithstanding the statutory test set out in s.8 IA, the court retains its residual discretion to find circumstances where a company can be deemed to be insolvent.

The liquidator's general powers are set out in s.186(1)-(6) IA, generally to carry out the functions and duties of a liquidator under the IA and the powers conferred on him or her by the IA.

To the extent that assets are available to the liquidator, the liquidator will make distributions according to the statutory order of priority set out in s.207 IA.

Pursuant to s.234(2) As soon as practicable after completing his or her duties in relation to the liquidation of a company, the liquidator must prepare and send to every creditor of the company whose claim has been admitted and to every member of the company, a final report. Liquidator must file the final report with Registrar.

³ S.59(3) defines a "qualifying resolution" as a resolution that is passed at a properly constituted meeting of the company by a majority of 75%, or if a higher majority is required by the memorandum or articles, by that higher majority, of the votes of those members who are present at the meeting and entitled to vote on the resolution.

RECEIVERSHIP

Commented [JW11]: Not a liquidation

The Insolvency Act, the Insolvency Rules, the Business Companies Act and the Conveyancing and Law of Property Act 1961 regulate the receivership and administrative receivership process.

Receivers are appointed under s.116(1) IA by either a debenture, charge or other instrument or by court application. The receiver must immediately notify the Registrar of their appointment, s.118(1) IA; administrative receivers must also, within 5 business days, advertise their appointment in the Gazette s.1118(2) IA and within 28 days of appointment administrative receivers must notify all creditors that the company is in receivership, s.119 IA. A receiver has the powers expressly or impliedly conferred on him or her, s.127(1) IA. Pursuant to s.127(2) IA, unless the charge or other instrument under which, or court order by which, the receiver was appointed expressly provide otherwise, a receiver may:-

- a) demand and recover, by action or otherwise, income of the assets in respect of which he or she was appointed;
- b) issue receipts for income recovered;
- c) manage, insure, repair and maintain the assets in respect of which he or she was appointed; and
- d) exercise, on behalf of the company, a right to inspect books or documents that relate to the assets in respect of which he or she was appointed in the possession or under the control of a person other than the company

The general duties of the receiver are laid out in s.128(1) IA and are those set out in the charge or other instrument which appointed him or her; to act in good faith and for the proper purpose; and to act in a manner that he or she believes, on reasonable grounds, to be in the best interest of the person in whose interest he or she was appointed.

S.136 IA requires the ordinary receiver to prepare and file with the Registrar a report of all payments and receipts during their appointment.

On the completion of his or her receivership, a receiver shall forthwith:

- a) give notice to:-
 - (i) the company, or if it is in administration or liquidation, the administrator or liquidator;
 - (ii) in the case of an administrative receiver, the creditors' committee, if any;
 - (iii) if the company is or has been a regulated person, to the Commission; and
- b) file a notice of completion with the Registrar and, if the company is or has been a regulated person, with the Commission

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?

Presumably Edale has issued a statutory demand under s.155(3) IA. Nevertheless, the loan agreement would be enforceable in accordance with the terms and methods stipulated therein. Provided the governing law of the loan agreement is BVI Law and the loan was secured by mortgage or charge over Swift's shares, Edale could take steps to recover the loan by out-of-court enforcement rights which are exercisable upon the occurrence of the relevant default/enforcement trigger, see s.66(5) BCA. Under s.66 BCA Edale would have a right to sell the shares or appoint a receiver who could vote, receive dividends and/or sell the shares.

Edale could also apply to court for a foreclosure order, if the security is a mortgage or if it is a charge with the ability to be converted to a mortgage.

If, however, the loan was unsecured, Edale would need to issue a statutory demand pursuant to s.155(2) IA. If Swift does not dispute the demand or set it aside under s.157 IA, and fails to comply with the requirements of the demand, within 21 days, Edale would be entitled to commence insolvency proceedings against Swift on grounds of insolvency. Edale would be able to prove Swift's insolvency in accordance to s.8(1)(a) that the company failed to comply with the requirements of a statutory demand within 21 days of service.

Edale could consider putting Swift into a "soft touch" provisional liquidation with a scheme of arrangement, following the principles in *Constellation Overseas Limited et al*⁴. The aim would be to restructure Swift's liabilities to avoid going into an insolvent liquidation and/or to alter shareholder and/or creditor distribution rights in the event of a liquidation. The key benefit is the s.174 IA automatic stay and moratorium (following the liquidator's appointment), which prevents individual creditor actions, which would interrupt or frustrate any restructuring efforts.

Edale could initiate the process, (i.e. put a scheme of arrangement together, apply to the court for a s.174 IA moratorium, and apply for the scheme's sanction by the court). The scheme will need to be supported by more than 50% creditors in number and by 75% in value of those attending at a meeting and voting in each class. Once approved by the court, the scheme is binding on all scheme creditors and/or shareholders including those who objected to the scheme or did not vote.

Alternatively, Edale could apply for the appointment of a liquidator under s.162(2)(b) IA. Per s.175 IA the liquidator will have custody and control of the assets of the company including Mosquito Island.

⁴ BVIHC (Com) 2018/0206

Commented [JW12]: 4 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.

Commented [JW13]: liquidation

Commented [JW14]: How - need access to records and accounting information. Why if it had a charge?

Commented [JW15]: Unlikely

The liquidator would act in accordance the general duties and powers set out in s.185 and s.186 IA which includes selling Mosquito Island for the benefit of the creditors.

The liquidator will then make distributions according to the statutory order of priority set out in s.207 IA.

Commented [JW16]: All of the creditors not just Edale if unsecured

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?

Commented [JW17]: 4.5 marks

So what recommendations to ABC? No mention that XYZ has been struck off and probably dissolved.

Discussion was required on the possible options to be considered by ABC:

1. Enforcement of a judgment under Reciprocal Enforcement of Foreign Judgments Act 1922 - the 8 conditions under the Act and issue with the 12 months and would an extension be required.
2. Appointment of a liquidator in DEF in UK and recognition in BVI; or the appointment of a receiver over shares of DEF who could then appoint a new director to deal with restoration of XYZ and assets; and
3. Restoration to the register of XYZ - was it just struck off or was it to be dissolved under the new law from 1/1/23 - any previously company struck off as at 30 June 2023 will be automatically dissolved on 1 July 2023. An application to the court would be required to restore XYZ.
4. Could ABC maybe apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares.

MEMORANDUM

TO: Principal
FROM: Candidate 202223-782
CLIENT: ABC Limited
MATTER: Options to recover English judgment debt in the BVI.
DATE: 31 July 2023

BACKGROUND and FACTS

[Background facts are as set out in question above].

ISSUES

1. Registration/recognition and Enforcement of the English judgement in the BVI;
2. Considerations for registration/recognition or enforcement;
3. The procedures; and
4. Prospects; and
5. Remedies.

CONCLUSION

ABC should apply for recognition and enforcement of the English judgment at common law using the English judgement as a cause of action. This is the alternative route considering that ABC is out of time for registering the judgement under CPR Part 72. ABC has a good chance

of obtaining a summary judgment (which will effectively provide ABC with the same terms as the English Judgement) because:

1. the English judgement is for a final and conclusive monetary judgement,
2. it does not fall within s.3(2) exceptions; and
3. is not subjected to an appeal.

ABC should seek an order for possession and sale of Mosquito Island per CPR Rule 53.

ANALYSIS

1. Legal Framework

The enforceability of foreign judgements in the BVI is governed by the Reciprocal Enforcement of Judgements Act 1922 (the “1922 Act”) and by the Eastern Caribbean Civil Procedure Rules 2000 (“CPR Rules”). The 1922 Act is relevant to judgements from relevant jurisdictions, namely England, Northern Ireland, Scotland, Bermuda, Bahamas, Barbados, Honduras, Guyana, Trinidad and Tobago, St. Vincent, Jamaica, Grenada, Australia and Nigeria, s.3, and s.6 1922 Act. Application for recognition and enforcement by way of a common law claim (with the foreign judgement being a cause of action), is also possible irrespective of the jurisdiction where the judgement was obtained.

Under s.2(1) 1922 Act “judgement” is defined as any judgment or order given or made by a Court in any civil proceedings... whereby any sum of money is made payable and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.

2. Registration or Recognition of foreign judgements

A foreign judgment must first be registered under the 1922 Act or recognised under common law before it can be enforced in the BVI. Once the judgement is formally registered it assumes the same force of a BVI judgment. Thus, the judgement will be enforceable in the same way as a BVI judgement, s.3(3)(a) 1922 Act.

PROCEDURE

Registration Under The 1922 Act

- Application for registration must be made without notice to the judgement debtor i.e. *ex parte* under CPR Part 72 and must include prescribed information, i.e.:
 - affidavit containing information about the judgement and whether the judgement is appealable and/or subject to an appeal.
 - certified copy of the foreign judgement
 - certified/authenticated translate English copy of the judgement.
- Registration must be made within 12 months from the date of the foreign judgement unless the BVI court grants a longer period on the basis that it is just and convenient to do so, s.3(1) 1922 Act.

- Court can order judgment creditor to give security for cost in respect of any subsequent proceedings brought to set aside the registration.

Application at Common Law

- Judgements not registrable under the 1922 Act must bring a claim in the BVI court with the foreign judgement as a cause of action at common law.
- Application made under CPR Part 8:
 - file a claim form;
 - statement of claim, which appends a copy of the foreign judgment; and
 - if judgement debtor not BVI domiciled the judgement creditor must obtain permission to serve the judgement debtor outside of the BVI.
- Judgment debtor is served under CPR Part 5 or CPR Part 7 where the judgement debtor is a resident.
- Reply or acknowledgement of service must be made by judgment debtor within 14 days of service or longer if service is outside of BVI. If the judgement debtor does not reply in time, judgement creditor can then apply for a summary judgement, which can then be enforced like any other BVI domestic judgement.

CONSIDERATIONS

1. Only money judgements for debt or for definite sums are enforceable under the 1922 Act; only final, conclusive judgement will be treated as a cause of action at common law.
2. s.3(2) Exceptions, i.e. circumstances where the registration will not be possible, or where the judgement will not be treated as a cause of action at common law:
 - a) The original court acted without jurisdiction;
 - b) The judgement debtor being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court;
 - c) The judgment debtor was not duly served with the process of the original court and did not appear, notwithstanding that he is ordinarily resident or carrying on a business within the jurisdiction of that court or agreed to submit to the jurisdiction of the court;
 - d) The judgement was obtained by fraud;
 - e) The judgement debtor satisfies the court that an appeal is pending or that he is entitled to and intends to appeal; or
 - f) The judgement relates to a cause of action which for reasons of public policy (or similar) could not have been entertained by the Court.
3. It is possible for the judgement debtor to apply to set aside the registration of the foreign judgement. However, judgement debtor will have to prove to the satisfaction of the court, that it is just and convenient to do so pending any appeal of the foreign judgement. It is also possible, under the common law application, for the judgment debtor to apply to stay or adjourn the enforcement application pending the outcome of the appeal of the foreign judgment.

4. The effectiveness of an enforcement proceedings is dependent on the existence of assets of the judgement debtor in the BVI against which to enforce the judgement.

PROSPECTS

ABC is out of time for making a registration application under the 1922 Act/CPR 72. An application for registration must be made within 12 months from the date of the foreign judgement. It is noted that the date of the foreign judgement is April 2022 more than 12 months ago.

The time limit for making an application under common law/CPR Part 8 is 12 years. ABC would therefore have better prospects of successful using this route.

REMEDIES

The available remedies are set out in CPR Part 45.2. They include:

- Charging order, CPR Part 48;
- Garnishee order, CPR Part 50;
- Judgment summons, CPR Part 52;
- seizure and sale of goods, CPR Part 46;
- possession and sale of land, CPR Part 53; and
- appointment of receiver (CPR Part 51).

LEGISLATION AND CASE LAW

Reciprocal Enforcement of Judgment Act (Cap 65) 1922
Eastern Caribbean Civil Procedure Rules 2000

*** End of Assessment ***

Commented [JW18]: 41.5 marks