



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5B

BRITISH VIRGIN ISLANDS (BVI)

This is the **summative (formal) assessment** for **Module 5B** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 5B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial or Avenir Next font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment5B]**. An example would be something along the following lines: 202223-336.assessment5B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [JW1]: 10 marks

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

When is the appointment of a liquidator **deemed to commence**, when there has been a qualifying resolution passed to appoint a liquidator?

- (a) On the date of the order appointing the liquidator.
- (b) On the date the qualifying resolution is passed.**
- (c) On the filing of the application to appoint a liquidator.
- (d) On the advertisement of the application to appoint a liquidator.

Question 1.2

In order to comply with section 156 of the Insolvency Act, **what timeframe** for payment of the debt (or to secure or compound for the debt), must a statutory demand require?

- (a) Within 14 days of the service of the statutory demand.
- (b) Within 21 days of the date of the statutory demand.
- (c) Within 21 days of the service of the statutory demand.**
- (d) Within 14 days of the date of the statutory demand.

Question 1.3

Which of the following **is not able** to make an application for the removal of a liquidator?

- (a) A member of the company.
- (b) A creditor.
- (c) The creditors' committee.
- (d) A receiver.**

Question 1.4

Where a receiver exercises a power of sale, the receiver owes a duty to obtain the best price reasonably obtainable at the time of sale. **To which one of the following is the duty owed to?**

- (a) The creditors, the shareholders, persons claiming an interest in the assets and the company.
- (b) The creditors, sureties, the shareholders and the company.
- (c) The creditors, sureties, persons claiming an interest in the assets of the company and the company.
- (d) The creditors, shareholders, sureties and persons claiming an interest in the assets of the company.

Question 1.5

A person is an “eligible insolvency practitioner”, able to be appointed over an insolvent BVI company, foreign company or an individual’s estate as a trustee in bankruptcy if:

- (a) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (b) He or she is a licenced insolvency practitioner; has advertised for his or her role; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (c) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding an appointment; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (d) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force an undertaking for the proper performance of his or her functions.

Question 1.6

Under the Reciprocal Enforcement of Judgments Act 1922, what is the **time period** during which a foreign judgment is registrable in the BVI?

- (a) Within 12 months of the date of judgment.
- (b) Within three (3) months of the date of trial.
- (c) Within six (6) months of the date of judgment.
- (d) Within six (6) months of the date of trial.

Question 1.7

Which one of the below **is not** an effect of the appointment of a liquidator over a company?

- (a) The liquidator has custody and control of the assets of the company.
- (b) The assets automatically vest in the liquidator.**
- (c) The directors remain in office but cease to have any powers.
- (d) Shares in the company cannot be transferred.

Question 1.8

In a liquidation, what is the **vulnerability period** for an undervalue transaction in the case of a transaction entered into with a connected person?

- (a) Two (2) years prior to the onset of insolvency and ending on the appointment of the liquidator.**
- (b) Two (2) years prior to the appointment of the liquidator.
- (c) Six (6) months prior to the onset of insolvency and ending on the appointment of the liquidator.
- (d) Five (5) years prior to the appointment of the liquidator.

Question 1.9

Which of the following **is not** a resolution that the directors of a company must pass in order to put in place a company creditors' arrangement?

- (a) Stating that the company is insolvent or is likely to become insolvent.
- (b) Approving a written proposal setting out how the creditors' rights will be varied or cancelled.
- (c) Approving a liquidation plan and a declaration of solvency.**
- (d) Nominating an eligible insolvency practitioner to be appointed interim supervisor.

Question 1.10

When does a voluntary liquidation commence?

- (a) When the directors of the company sign a declaration of solvency.
- (b) When the directors of the company sign a liquidation plan.
- (c) When the directors of the company pass the resolution appointing the voluntary liquidator.
- (d) On the date the voluntary liquidator files a notice of appointment with the Registrar.**

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

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

[Firstly, a secured creditor may take control of and enforce its security interest against the debtor without participating in the insolvency process, in which case the secured creditor is, technically speaking, "falling outside" the liquidation.

Secondly, a secured creditor may also choose to make a claim in the liquidation pursuant to section 211 of the Insolvency Act 2003 by (a) valuing the secured assets and making a claim as an unsecured creditor for the remainder of its claim or (b) surrendering its security interest to the liquidator and claiming in the liquidation as an unsecured creditor for the entirety of its debts. For completeness, please note that the same applies to personal bankruptcy cases too: see section 338 of the Insolvency Act.]

Question 2.2 [maximum 2 marks]

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

[Under the Insolvency Act 2003, the general functions of a Creditors' Committee include:- (i) to consult with liquidators in respect of the conduct of the liquidation; (ii) to consider reports made by the liquidators; and (iii) to assist the liquidators in the discharge of their duties.

The general powers of a Creditors' Committee include:- (i) the power to call a creditors' meeting; (ii) the power to require the liquidators to provide it with reports and information about the liquidation (as reasonably required by it); (iii) the power to require the liquidators to attend the Committee to provide the Committee with such information and explanations in respect of the insolvency proceedings (again, as reasonably required by it); and (iv) the power to approve remuneration payable to the liquidators.]

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?

[Section 467(3) of the Insolvency Act 2003 confers various powers to the BVI Court in respect of foreign insolvency proceedings including:-

- (i) The power to restrain the commencement (or continuation) of any legal proceedings against a debtor or its property;
- (ii) The power to restrain the creation, exercise or enforcement of any right or remedy over or against any of the property of the debtor;
- (iii) The power to grant relief to facilitate, approve or implement arrangements that would result in coordination of local insolvency proceedings with foreign insolvency proceedings;
- (iv) The power to appoint an interim receiver of the debtor's property for such term and subject to such conditions as the Court deems fit;

Commented [JW2]: 1 mark

See section 15 company creditors arrangements, section 175 liquidations, receiverships

Commented [JW3]: 2 marks

Commented [JW4]: 2 marks

- (v) The power to authorize the examination by the foreign representative of the debtor or any person who can be examined in local insolvency proceedings; and
- (vi) The power to stay, terminate or make any other order that the Court deems fit in respect of a local insolvency proceeding.]

Question 2.4 [maximum 4 marks]

Commented [JW5]: 4 marks

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

[First, a company would be considered insolvent if the Court finds that, as a matter of fact, the company is unable to pay its debts as they fall due: see section 8(1)(c)(ii) of the Insolvency Act 2003; and the English case of *Cornhill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114.

Second, a company would be considered insolvent if the Court finds that the company is “balance sheet insolvent”, i.e. the value of its liabilities exceeds the value of its assets. In this regard, liability is widely defined and can be present or future, certain or contingent, fixed or liquidated: see section 10 of the Insolvency Act 2003. Please note that a company may not be considered insolvent if the value of its liabilities is higher than those of its assets only for a short period of time: see *Trade and Commerce Bank v Island Point Properties SA* BVICA 2009/0012.

Third, a company would be considered insolvent if it fails to satisfy (in whole or partly) execution or other process issued on a judgment, order or decree of the Court in favour of a creditor of the company.

Fourthly, a company would be considered insolvent if it fails to comply with a statutory demand duly made by a creditor of the company under section 156 of the Insolvency Act 2003 within 21 days of the service of the statutory demand on the company unless the statutory demand is successfully set aside pursuant to sections 156 and 157 of the Insolvency Act 2003.]

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

Question 3.1 [maximum 5 marks]

Commented [JW6]: 5 marks

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

[While the eligibility of voluntary liquidators is previously provided for in Regulation 19(2) of the Business Companies Act Regulation, this issue is now governed by Regulation 6 of the Business Companies (Amendment) Regulations 2022 from 1 January 2023 onwards. According to the said Regulation 6, a person can be appointed as a voluntary liquidator in the BVI after 1 January 2023 if:-

- (i) He/she has liquidation experience of not less than 2 years;
- (ii) He/she has professional competence to liquidate the company in question;
- (iii) He/she may demonstrate that he/she (1) holds an insolvency practitioner’s licence and (2) has appropriate professional qualification (such as qualification in accountancy or law) and experience in providing (financial or legal) advice or support to companies in the financial

Commented [JW7]: Not 'and' - it should be 'or'

services sector (For completeness, prior to 1 January 2023, insolvency practitioner's licences are not necessary for appointment as voluntary liquidators); and

- (iv) He/she is fully conversant with the relevant financial services legislation in respect of the business of the company in question including but not limited to the Financial Services Commission Act and the Business Companies Act.

Insofar as the insolvency practitioner's licences are concerned, according to section 476 of the Insolvency Act 2003, an individual may obtain a licence only if he/she meets the following conditions:-

- (i) He/she is a resident in the BVI and is fit, proper and qualified to act;
- (ii) He/she will act in compliance with the Insolvency Act 2003 and the Insolvency Practitioner Regulations;
- (iii) He/she is not disqualified from holding a licence: see section 482(2) of the Insolvency Act 2003;
- (iv) The issuance of a licence to him/her would not be contrary to the public interest.]

Question 3.2 [maximum 5 marks]

Commented [JW8]: 3.5 marks

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

- (a) in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and
- (b) what is the process for such proposed appointment?

[(a) A creditor might consider the appointment of an overseas insolvency practitioner under section 483 of the Insolvency Act 2003 where, e.g., large part of the assets of the BVI company is indeed situated outside the BVI, in which case an overseas insolvency practitioner may assist in conduct the liquidation in the place where the company's assets are held. Alternatively, where the liquidation of the BVI company involves disputes in foreign jurisdiction, an overseas insolvency practitioner is also beneficial since he/she may assist in handling such disputes in foreign jurisdiction directly.

Commented [JW9]: Local expertise and saving on costs

(b) Insofar as procedural matters are concerned, appointment of overseas insolvency practitioners can only be made in case of joint appointment, i.e. the overseas insolvency practitioners must be appointed jointly with a BVI licenced insolvency practitioner or the Official Receiver.

There is also an additional notification requirement: before the appointment is approved by the Court, prior written notice of the intended appointment must be provided to the BVI Financial Services Commission ("FSC"): see section 483 of the Insolvency Act 2003. In practice, the notification is generally done by issuance of a letter to the FSX providing details of the intended appointment. After the FSC is notified of the intended appointment, the FSC may appear and be heard at the court hearing for appointment and object to the appointment as it sees fit.]

Commented [JW10]: Also not disqualified from holding a licence under s. 477, not disqualified from acting due being a director or auditor and must have proper security in force and consent.

Question 3.3 [maximum 5 marks]

Commented [JW11]: 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.

[Generally speaking, there are three types of liquidation in the BVI:-

(i) Voluntary solvent liquidation under Part XII of the Business Companies Act:

This type of liquidation applies generally when a company is no longer required by a business to be dissolved, and thus the purpose of this type of liquidation is to deal with the solvent company's assets and pay its liabilities so that such company may be properly dissolved.

Procedurally speaking, the directors of the company should (a) make a declaration of solvency (for which they must have reasonable grounds to believe that the company is, and will continue to be, able to discharge its debts in full as they fall due) and (b) approve a liquidation plan.

Under section 199 of the Business Companies Act, one or more voluntary liquidator(s) may be appointed by directors' resolutions or by members' resolutions. Once appointed, the voluntary liquidator(s) would have 14 days to file (a) notice of appointment, (b) the said declaration of insolvency and (c) a copy of the liquidation plan with the Registrar of Companies. The liquidation would be deemed to commence on the date of filing of the notice of appointment, and the voluntary liquidator(s) should also arrange to advertise the appointment within 30 days of the commencement of the liquidation.

(ii) Voluntary insolvent liquidation under the Insolvency Act 2003 commenced by members' resolution:

Where the company is insolvent, members of such insolvent company may, by a majority of 75% (or a higher majority if required by the company's memorandum and articles), pass a resolution (known as a "qualifying resolution") appointing an "eligible insolvency practitioner" (which does not include the Official Receiver) as the liquidator(s) of the company pursuant to section 159(3) of the Insolvency Act 2003.

The liquidation would be deemed to commence at the time of appointment of the liquidator(s), i.e. the date on which the qualifying resolution is passed. The company should give notice to the liquidator(s) appointed as soon as practicable according to section 161(2) of the Insolvency Act 2003.

(iii) Involuntary insolvent liquidation under the Insolvency Act 2003 commenced by application to the Court:

An application may be made to the Court for appointment of liquidator(s) over a BVI company under section 162 of the Insolvency Act 2003 by (one or more of):- (a) the company itself, (b) a creditor of the company; (c) a member of the company; (d) the supervisor of a creditor's arrangement; (e) the FSC; or (f) the Attorney General.

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

The Court would appoint a liquidation over the company under section 159(1) of the Insolvency Act 2003 if it is satisfied that: (a) the company is insolvent; (b) it is "just and equitable" to do so; or (c) it is in the "public interest".

The liquidation would be deemed to commence at the time of appointment of the liquidator by the Court.]

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?

[The first option under the Insolvency Act 2003 is that Edale Limited ("E Ltd") may issue a statutory demand against Swift Limited ("S Ltd") in the BVI pursuant to section 156 of the Insolvency Act 2003 based on the liability of S Ltd to immediately repay the outstanding payments under the loan in full. If (i) S Ltd fails to make repayment accordingly within 21 days of service of the statutory demand and (ii) S Ltd did not (successfully) apply to set aside the statutory demand under sections 156 and 157 of the Insolvency Act 2003, the company would be deemed insolvent under the BVI law. In such circumstances, E Ltd may proceed to apply to the BVI Court for appointment of liquidator(s) over S Ltd so as to put S Ltd in liquidation. If E Ltd's application succeeds, liquidator(s) would be appointed over S Ltd who would realise the assets of S Ltd for the benefit of the general creditors of S Ltd. Even though E Ltd is a foreign creditor, section 446 of the Insolvency Act 2003 provides E Ltd with a right of direct access to participate in any insolvency proceedings in the BVI.

It should however be noted that, in such circumstances, the distribution of S Ltd's insolvent estate would be applied according to the statutory priority (see section 207 of the Insolvency Act 2003) with the unsecured creditors (including E Ltd) ranking behind, e.g., liquidation costs and expenses and preferential creditors. Within the class of unsecured creditors, remaining assets of S Ltd (if any) would also need to be shared on pari passu basis.

A slight variation of the first option is that, if S Ltd does not dispute the debt owed by it to E Ltd, E Ltd may directly take out application to the BVI Court to put S Ltd in liquidation without first issuing a statutory demand against S Ltd. This is because S Ltd may also be deemed as insolvent if it is unable to pay a debt that is due and undisputed: see section 8(1)(c)(ii) of the Insolvency Act 2003; and the English case of *Cornhill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114.

The second option is that E Ltd may bring civil proceedings against S Ltd for a money judgment before the BVI Court or the English Court (depending on the governing law of the loan agreement). (For completeness, should proceedings be brought and judgment be obtained in the UK, E Ltd will need to apply to the BVI Court within 12 months thereafter for recognition and registration of the same pursuant to the Reciprocal Enforcement of Judgments Act 1922.) After judgment is obtained in BVI or after a foreign judgment is recognized by the BVI Court, E Ltd may try to enforce its judgment in the BVI by applying for a charging order against S Ltd over the property brought by it in the BVI.

The third option under the Insolvency Act 2003 is that if S Ltd is keen to restructure or reorganize its debts owed to multiple creditors by resorting to a creditors' company arrangement under Part II of the Insolvency Act 200, E Ltd may take part in such creditors' company arrangement and negotiate

Commented [JW13]: 3 marks

First issues to resolve 1. is it a secured or unsecured loan and 2. was the 'demand' already made a statutory demand? And if so the consequences of that.' 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 [JW14]: the 8 conditions were required as was the extension on the 12 month issue

Commented [JW15]: Unlikely E would agree

with the board of directors of S Ltd with a view to maximize its returns under the arrangements. It must however be noted that the creditors' company arrangement can only be initiated by the directors of S Ltd. As such, E Ltd's role is relatively passive in this scenario.]

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?

[In summary, the best option appears to be that (i) ABC Limited should first apply to the English Court to put DEF Limited in liquidation and appoint liquidators over DEF Limited; and (ii) the liquidators appointed by the English Court over DEF Limited may apply to the BVI Court for recognition of their appointment, who may then appoint liquidator over XYZ Limited and recover assets of XYZ Limited for the benefit of general creditors of DEF Limited.

Initial actions to be taken by ABC Limited

ABC Limited, as judgment creditor of DEF Limited, may present a winding-up petition against DEF Limited in the UK. Upon winding-up of DEF Limited, and after creditors' meetings are convened, the English Court would proceed to appoint liquidators over DEF Limited who are duty bound to recover assets of DEF Limited for the benefit of the general creditors of DEF Limited (including ABC Limited). As creditor of DEF Limited, ABC Limited may closely monitor the action to be taken by the liquidators of DEF Limited to recover assets of DEF Limited.

For completeness, ABC Limited may also consider applying to wind up DEF Limited (as a foreign company) in the BVI notwithstanding the fact that DEF Limited was incorporated in the UK. To do so, ABC Limited must prove to the BVI Court that DEF Limited has sufficient presence of assets in the BVI. That said, since DEF Limited only own shares of DEF Limited in the BVI, it is unclear if the BVI Court would be satisfied that DEF Limited indeed has sufficient presence of assets in the BVI. Thus, it may be more prudent to wind up DEF Limited in the UK instead of in the BVI.

Further, theoretically speaking, ABC Limited may take other steps to enforce its judgment against DEF Limited in the UK. However, such steps are likely to be fruitless since DEF Limited has no assets in the UK.

Also, even though XYZ Limited (being a wholly owned subsidiary of DEF Limited) has substantial assets in the BVI, ABC Limited cannot enforce its judgment against such assets directly in the BVI since such assets are not owned by DEF Limited but XYZ Limited, which is a separate legal entity from DEF Limited.

Subsequent actions to be taken by liquidators of DEF Limited

Since DEF Limited is the 100% shareholder of XYZ Limited, liquidators of DEF Limited may then take steps to take control of XYZ Limited in the BVI.

Commented [JW16]: 4.5 marks

his question required a memorandum to your principal with the options for ABC and recommendations to ABC.

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

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

Commented [JW17]: Why not wind it up in the UK - see above comment.

Commented [JW18]: ABC could appoint a receiver over DEF shares - see comment above.

Commented [JW19]: See comment above

Commented [JW20]: XYZ is struck off and dissolved. Needs to be restored to the register first before anything can be done - application to the court to restore with reasons

First, since the liquidators of DEF Limited were appointed by the English Court but not the BVI Court, liquidators of DEF Limited should apply to the BVI Court for recognition of their appointment. Since liquidators of DEF Limited were appointed in the UK and the UK is a “designated country” under Part XIX of the Insolvency Act 2003, liquidators of DEF Limited may apply for (i) recognition of the English insolvency proceedings and their appointment by the English Court and (ii) assistance to be provided to the liquidators as “foreign representatives” from the BVI Court under Part XIX of the Insolvency Act 2003. Alternatively, while recognition may be sought from the BVI Court under common law, it has been held that insofar as assistance is concerned, Part XIX of the Insolvency Act 2003 has already provided a complete code to foreign representatives from “designated countries”: see *Net International Property Ltd v Adv Eitan Erez* BVIHMAP2020/0010 (CA). Since UK is a “designated country” under Part XIX of the Insolvency Act 2003, liquidators are recommended to seek both recognition and assistance from the BVI Court under Part XIX of the Insolvency Act 2003 (but not under common law). (For completeness, it is also noted that although Part XVIII of the Insolvency Act 2003 has not come into effect yet.)

Second, the liquidators of DEF Limited may exercise the rights attached to the shares of XYZ Limited and take control of XYZ Limited by, e.g., appointing the liquidators themselves or their representatives as directors of XYZ Limited. On the facts of this case, XYZ Limited has been struck off the BVI Companies Register before 2023 for unknown reasons (while the common reasons are non-payment of fees or not having a registered agent) and thus it is likely that XYZ Limited is now staying in a hiatus state on the Register for 7 or 10 years.

There would then be two options open to the liquidators of DEF Limited:- they may (a) take steps to restore XYZ Limited to the BVI Companies Register or (b) take steps to put XYZ Limited in liquidation voluntarily. In the present case, since (1) the main purpose of liquidators of DEF Limited to take control of XYZ Limited is to recover its assets for the benefit of DEF Limited and (2) it appears that XYZ Limited does not operate any business, it may not serve much meaning to restore XYZ Limited to the BVI Companies Register.

In the premises, the liquidators of DEF Limited should take steps to put XYZ Limited in liquidation voluntarily. Assuming XYZ Limited is solvent, the liquidators of DEF Limited may (qua sole shareholder of XYZ Limited) pass a “qualifying resolution” pursuant to section 159 of the Insolvency Act 2003 to appoint liquidators over XYZ Limited. Upon appointment, liquidators of XYZ Limited may convene creditors’ meeting and distribute assets to creditors of XYZ Limited. Thereafter, liquidators of XYZ Limited may return the assets of XYZ Limited (or sales proceeds of the same) to its shareholder, i.e. DEF Limited. Upon receipt of such assets/proceeds, the liquidators of DEF Limited may distribute them to general creditors of DEF Limited (including ABC Limited) in accordance with the statutory priority.]

* End of Assessment *

Commented [JW21]: Not correct - from 1/1/23 - any company previously struck off as 30 June 2023 will be dissolved on 1 July 2023.

Commented [JW22]: What options to ABC? Receiver of DEF shares, appoint new director, restore XYZ and deal with assets.

Commented [JW23]: Wont be able to deal with the assets unless its restored- dissolved company assets bona vacantia.

Commented [JW24]: 40 marks