



**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.

[The secured creditors are protected from insolvency proceedings because their claims are backed by the debtor's assets subject to the security and, therefore, are not included in the liquidation. Consequently, the secured claims can be enforced by the creditor whenever it aligns with the creditor's best interests. Hence, it is possible to state that secured creditors hold a claim against the debtor's assets over which security has been created to secure the creditor, so that the secured creditor is not a formal participant in the insolvency proceedings. Article 175 (2) of the BVI Insolvency Act 2003 set forth that: *Subsection (1) 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.*

Nevertheless, the secured creditors also has the option of participate in the insolvency proceeding by applying for the full amount of the liability and either (a) declaring that they are able to give up their security interest for the best interest of the other creditors of the bankrupt; or (b) providing an estimate of the value of his security interest and making the application based on to the full liability amount owed to them by the debtor, minus the estimated value of the security interest. In case of any creditor's amount is unsecured, he will be considered an unsecured creditor.

[In the case of any creditor's amount being unsecured, they will be considered an unsecured creditor.]

### Question 2.2 [maximum 2 marks]

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

[The functions of a Creditor's Committee include: (a) consulting with the liquidator about matters relating to liquidation; (b) evaluate reports from the liquidator, and (c) helping the liquidator in discharging his functions. Furthermore, the powers of a Creditor's Committee include: (a) convening a meeting of creditors, (b) demanding the liquidator to furnish the committee with reports and information pertaining to the liquidation, (c) summoning the liquidator to attend committee meetings and provide relevant information and explanations regarding the insolvency proceedings as reasonably needed, and (d) approve the liquidator's remuneration.]

### Question 2.3 [maximum 2 marks]

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

[Part XIX of the Insolvency Act sets out the powers that the BVI Court has when making decisions. For example, BVI Court, when recognizing a foreign insolvency proceeding and assisting a foreign representative, has the powers under article 467 (3) of the Insolvency Act to:

- a) Restrict the commencement or continuation of any proceedings against the debtor or debtor's property;
- b) Restrict the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;

**Commented [JW2]:** 1 mark  
Generally not affected by insolvency law in BVI. See section 15 company creditors arrangements, section 175 liquidations, section 338 bankruptcy, and receiverships

**Commented [JW3]:** No such thing in the IA2003. They are sections

**Commented [JW4]:** 2 marks

**Commented [JW5]:** 2 marks

- c) Require any person to deliver up any property of the debtor or the proceeds of such property;
- d) Grant relief to facilitate, approve or implement arrangements that will promote coordination between BVI insolvency proceedings with a foreign proceeding;
- e) Appoint an interim receiver over any property of the debtor and set conditions on the receiver that the court considers necessary for the appointed function;
- f) Authorize the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding;
- g) grant an order for stay or termination or any other appropriate order in relation to a BVI insolvency proceeding;
- h) make such order or grant such other relief as it considers appropriate.]

**Question 2.4 [maximum 4 marks]**

**Commented [JW6]:** 4 marks

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

[According to part I, section 8, of the British Virgin Islands Insolvency Act, a company or a foreign company is insolvent if: (a) the value of the liabilities of the company exceeds its assets (balance sheet insolvency - it is important to note that section 10(1) of the Insolvency Act sets out the definition of liability - under an Act, in contract, tort or bailment, breach of trust and arising from an obligation of restitution. Liability in these cases presupposes a debt. Further, section 10(20) of the Insolvency Act provides that liability may be present or future, certain or contingent, fixed or liquidated, sounding only in damages or may be ascertained by fixed rules or as a matter of opinion. Finally, it is important to point out that the BVI Court of Appeal in *Trade and Commerce Bank v Island Point Properties* confirmed that a company may no longer be considered insolvent if only for a short period the liabilities are in excess of the company's assets); or (b) the company fails to pay its debts when they fall due (the English case of *Cornhill Insurance PLC v Improvement Services Limited* establishes that the inability to pay an undisputed debt is sufficient evidence of insolvency); or (c) if an execution or other process issued on a judgment, decree or order of a British Virgin Islands Court in favour of a creditor of the company is not satisfied, in whole or in part; (d) if the company fails to comply with the requirements of a statutory demand, which has not been set aside under sections 156 and 157 of the Insolvency Act. A statutory demand is a written request for the debtor to discharge a certain debt, made by the creditor in the form required by section 156 of the Insolvency Act.]

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

**Question 3.1 [maximum 5 marks]**

**Commented [JW7]:** 3.5 marks

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

Regulation 19 - also states must into be disqualified to act and imposes residency requirement.

[From January 1, 2023, section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies (Amendment) Regulations 2022 introduced new requirements in relation to individuals who may be appointed as a voluntary liquidator of a company. The individual is now required to have (a) liquidation experience of not less than two years, (b) professional competence to liquidate the specific company he will be in charge of liquidating, (c) an insolvency practitioner's license and appropriate professional qualification (such as in law or accounting) and experience in offering legal and financial advice or supporting companies in the

**Commented [JW8]:** Not 'and' - it should be 'or'

financial services sector, (d) finally, be fully familiar with the relevant financial services legislation relating to the business of the company to be wound up, including the Financial Services Commission Act and the Business Companies Act of the British Virgin Islands.]

**Question 3.2 [maximum 5 marks]**

Commented [JW9]: 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?

[Under section 483 of the Insolvency Act, it is possible for an overseas insolvency practitioner (an individual resident outside the Virgin Islands) to be appointed as liquidator of a BVI company, but provided that it is a joint appointment with a liquidator licensed in the BVI or an Official Receiver. Given that it is common for the assets of a BVI company to be located in another jurisdiction, the appointment of an insolvency practitioner from the jurisdiction in which the assets are located is useful. While it is more expensive to appoint two insolvency practitioners, it may save on travel costs to the jurisdiction where the assets are located.

However, the process for such appointment requires prior written notice of the intended appointment to the FSC and the satisfaction by foreign insolvency practitioners of a number of conditions set out in the Insolvency Act, section 483(a)(i)-(v) such as (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*; (iii) *he or she is not disqualified from holding a licence under section 477*; (iv) *he or she is not disqualified from acting in the case of a company or a foreign company, under subsection 482(2) or in the case of an individual, under subsection 482(3)*; (v) *there is in force such security for the proper performance of his or her functions as may be specified in the Regulations*]. In addition, the FSC may appear before the Court and object to the appointment, under the section 484 of the Insolvency Act. In practice, the overseas insolvency practitioner usually writes a letter to the FSC, providing required details (such as expertise and qualification) and waits for the FSC's confirmation that it approves the appointment (which is further subject to the Court approval).]

**Question 3.3 [maximum 5 marks]**

Commented [JW10]: 3.5 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.

[It is possible to identify three types of corporate liquidation in the BVI, one of them being voluntary liquidation, for solvent companies, dealt with in the Business Companies Act ("BCA") and two of them being for insolvent companies, dealt with in the Insolvency Act, namely: insolvent liquidation (voluntarily) by qualifying members resolution and insolvent liquidation by court application. In addition, the Court may appoint an Official Receiver or a licensee liquidator (a) *of a company, on an application under section 162*; or (b) *of a foreign company, on an application under section 163* (Insolvency Act, section 159(1)).



(a) Voluntary liquidation (solvent) under the BVI Business Companies Act

**Commented [JW11]:** 2004

It is not necessary for the company to be insolvent for this type of liquidation. In reality, this type of liquidation is not even available to insolvent companies. This type of liquidation is used when a company is no longer needed by a business. The main purpose of voluntary liquidation is to distribute the company's assets (if any), pay off the debts (if any) and wind up the solvent company.

**Commented [JW12]:** In fact it has to be solvent

The voluntary liquidation procedure is set out in Part XII of the BCA. According to section 197(1) of the BCA, a company that can apply for a voluntary liquidation must (a) have no liabilities or (b) be able to pay its debts as they fall due and the value of its assets must be equal to or higher than the value of its liabilities.

The company may also be placed into voluntary liquidation despite the existence of a security interest registered with the BVI Registrar of Companies over the company's properties. The liquidator, however, must give effect to the rights of the secured party holding that preferential claim (BCA, section 197(2)).

In addition, the directors of the company will be required to make a declaration of solvency, under section 198 of the BCA, stating that they believe that: (i) the company is and will continue to be able to discharge, pay or provide for its debts as they fall due; and that (ii) the value of the company's assets equals or exceeds its liabilities (198(1)). In addition, they need to approve a liquidation plan (198(2)).

It should be noted that a director who makes a declaration of solvency without reasonable grounds does not discharge the liability to pay the debts, commits an offense and is convicted of a fine of \$10,000 (section 198(4)).

In summary, a voluntary liquidator or two or more joint liquidators may be appointed (a) by a directors' resolution passed in accordance with the requirements of subsection (2), section 199, of the BCA; or (b) by a members' resolution passed in accordance with the requirements of subsection (3), section 199, of the BCA.

**Commented [JW13]:** Not all of the procedure\_ Resolution required by directors/members. Directors have to make a Declaration of Solvency not more than 4 weeks old as well as prepare a Liquidation Plan and be accompanied by Statement of Affairs. Appointment cannot be more than 6 weeks after approval of Liquidation plan. a Notice of appointment, Declaration of Solvency and Liquidation plan to be filed within 14 days, appointment advertised in 30 days.

(b) insolvent liquidation (voluntarily) under the Insolvency Act by members resolution

According to section 159(3) of the Insolvency Act, a resolution will be a qualifying resolution if passed at a properly constituted meeting of the company and approved by a 75% majority or by an even greater majority if so required by the memorandum and articles of the company. (Insolvency Act, section 159, subsection (3)). Finally, members cannot appoint Official Receiver as liquidator and section 161 (2) requires the company to notify the liquidator as soon as possible of his or her appointment. There are also specific requirements if it is an FSC regulated company (159 (5)).

(c) insolvent liquidation by court application under the Insolvency Act

Section 162 of the Insolvency Acts sets out the procedure for the Appointment of Liquidator by the Court, which is supplemented by the Insolvency Rules as regards procedure. Such an application may be made by one or more of the following: (a) the company, (b) a creditor, (c) a member, (d) the supervisor of a creditors' arrangement, (e) the FSC and (f) the Attorney General. The Court may appoint a liquidator in accordance with section 159(1) of the Insolvency Act if (a) the company is insolvent, (b) the Court is of the opinion that it is just and proper or (c) it is in the public interest. According to section 168(1) of the Insolvency Act, such an application must be determined within six months of being made, unless the Court extends the time on a motivated basis, by virtue of special circumstances of the case. In addition, the Court may extend by only 3 months.

Regarding the definition of an insolvent company, this has been dealt with in Question 2.4 of this assessment.

Regarding liquidation for just and equitable reasons, the jurisdiction is statutory, which has been given a wide range of meanings under case law. However, it is possible to cite (a) lack of reason for the company to continue to exist; (b) deadlock in the management of the company, so that it can no longer operate; (c) loss of confidence in the management of the company, (d) evidence of fraud in the operation of the company, (e) where there has been a quasi-partnership and a breakdown of trust and confidence has occurred. On October 12, 2020, the case of Privy Council in *Chu v Lau* established criteria of what constitutes deadlock and quasi-partnership, for the purposes for the appointment of a liquidator on the ground that it is just and equitable. The application made by a member *may only be made with the leave of the Court, which shall not be granted unless the Court is satisfied that there is a prima facie case that the company is insolvent* (162 (3) of the Insolvency Act)).

Regarding the public interest, only the Attorney General and the FSC can enter such an application on that ground. The interpretation of the term is also broad, for example for the protection of a large number of members or investors.]

4.5 marks

**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?

[Considering that Swift Limited is a company incorporated in the British Virgin Islands and that Swift Limited purchased a property in Mosquito Island in the British Virgin Islands and that Edale Limited transferred USD 10,000,000 to Swift Limited but received only 4 instalments according of the loan agreement, it is possible for the creditor Edale Limited to make an application to place Swift Limited into liquidation ( as long as it proves that Swift Limited falls under the concept of insolvent) or into receivership.

Therefore, pursuant to section 162(2)(b) of the Insolvency Act, Edale Limited could make an application to the Court to place Swift Limited into liquidation as Swift Limited had failed to pay its debts when due (in the context of the loan agreement). This would allow a liquidator to be appointed over Swift Limited and its assets to be collected and sold for the benefit of creditors.

However, Receiverships are the most popular option in the BVI and an application must be made under Part IV of the Insolvency Act for a Receiver to be appointed. This will enable Swift Limited not to dissipate its assets and allow them to be liquidated for the benefit of Edale Limited. In addition, persons listed in section 116 (1) of the Insolvency Act may not be appointed to the office of receiver.

**Commented [JW14]: 5 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.

In the case of an out of court receivership (administrative receivership), the requirements of section 139 of the Insolvency Act must be complied with. In the case of an appointment of administrative receiver by Court, the requirements of section 143 of the Insolvency Act must be met. However, from the wording of question 4.1, there is no information that Edale Limited holds any instrument providing for the appointment of receiver in the event of the default of the loan-agreement, so it is more appropriate to assume that Edale Limited should apply directly to the Court for the appointment of a receiver.

The powers of the appointed Receiver over Swift Limited will be disciplined, in accordance with section 127(1) of the Insolvency Act, by the order issued by the Court appointing the receiver.

The powers available to the Receiver are set out in Schedule 1 of the Insolvency Act and it is worth mentioning the following powers: (1) *Power to take possession of, collect and get in the assets of the company and, for that purpose, to take such proceedings as he or she considers expedient to recover possession of any assets of the company;* (2) *Power to sell, charge or otherwise dispose of assets of the company.* (19). *Power to make or defend an application for the winding up of the company.*

Further, under section 129 of the Insolvency Act, a liquidator exercising a power of sale of assets in respect of which he has been appointed has a duty to the *creditors of the company, to the person claiming through the company an interest in assets in respect of which he has been appointed; and to the company, to obtain the best price reasonably obtainable at the time of the sale.* This is relevant in order to liquidate as quickly as possible Swift Limited's Mosquito Island property and recover Edale Limited's claim.

Importantly, under section 126(3) of the Insolvency Act, *If a liquidator is appointed in respect of a company in receivership, the agency of any receiver, including an administrative receiver, terminates with immediate effect.* But this does not mean that the receivership is terminated, only the agency of the receiver.

#### 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 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?

[According to the British Virgin Islands insolvency law, there are three viable options for ABC Limited to demand the payment of the debt recognized in the English High Court's judgement against DEF Limited: (i) the filing of an application under section 163(2)(b) of the Insolvency Act to place DEF Limited into liquidation, (ii) the filing of an application under Part IV of the Insolvency Act to appoint a Receiver over XYZ's shares, (iii) the request for the recognition of foreign judgement, based on the Reciprocal Enforcement of Judgments Act 1922.

#### Commented [JW15]: 6 marks

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

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

(i) For the commencement of an insolvent liquidation by court application under the Insolvency Act it would be necessary to prove that DEF Limited falls within the concept of insolvent under part I, section 8, of the British Virgin Islands Insolvency Act, as explained in question 2.4. Once a voluntary liquidator is appointed, he would be empowered to take custody of XYZ's shares and take control of the unencumbered property it holds. Following this, the realization of these assets could be used to pay DEF Limited's creditors (assuming XYZ has no outstanding liabilities).

(ii) As explained in the answer to question 4.1, by means of a Receivership, the interest and need to preserve the assets of DEF Limited could be demonstrated, so as to enable an application to be filed for the appointment of a Receiver over XYZ Limited. However, considering that it is struck off the register, it might be necessary to first carry out a restore application to place XYZ Limited back on the Register and only then proceed with the application to appoint a Receiver. The powers of the Receiver over XYZ Limited would be disciplined, in accordance with section 127(1) of the Insolvency Act, by the order issued by the Court appointing the receiver. But as stated in question 4.1, the Receiver would have the powers set out in Schedule 1 of the Insolvency Act, especially that of: *(1) take possession of, collect and get in the assets of the company [...]* *(2) sell, charge or otherwise dispose of assets of the company [...]* (19). *Power to make [...] an application for the winding up of the company [XYZ Limited].*

(iii) The recognition of foreign judgments in the BVI, which is primarily governed by the Reciprocal Enforcement of Judgments Acts (Cap 65) 1922 ("1922 Act"). Under section 2(1) of the 1922 Act, a judgment is defined as an order made by a court in any civil proceedings by which a person is ordered to pay a sum of money. Under the 1922 Act, only final and conclusive judgments for monetary sums can be enforced in the BVI, so declaratory, or for example injunctive judgments cannot be enforced in that jurisdiction.

The 1922 Act applies only to judgments delivered by the High Court of England Wales and Northern Ireland and the Court of Session in Scotland. The 1922 Act also extends to judgments rendered by the courts of the Bahamas, Barbados, Belize, Trinidad & Tobago, Guyana, St Lucia, Grenada, Jamaica and New South Wales (Australia).

Once there is recognition of the foreign judgment under the 1922 Act by the BVI Court, the judgment is dealt with from the day of registration as having the same force and effect as the judgment would have had if it had been rendered by the BVI Court. Thus, all the tools provided for in the ECSC Civil Procedure Rules 2000 (CPR) of BVI will be available to the applicant. By means of CPR 45.2, it is possible for the applicant to obtain (a) a charging order against the debtor, (b) a garnishee order, (c) a judgment summons, (d) an order for seizure and sale of goods, (e) the appointment of a receiver.

A foreign judgment may be registered in the BVI within 12 months of the date of the judgment, unless exceptionally the BVI Court sets a longer period on the ground that it is just and convenient to act in this way.

The judgment creditor must apply to the BVI Court under CPR Part 72, without the need to notify the judgment debtor, and the application must contemplate forms determined by BVI law, as well as exhibit as an attachment a duly authenticated copy of the judgment and details of any interest that has become due under the law of the country in which the judgment was issued. In addition, if necessary, the judgment should also be translated into English.

It is worth mentioning that the BVI Court may request the judgment creditor to give any security relating to the costs of the foreign judgment recognition procedure.

In addition, under section 3(2) of the 1922 Act, the Court is not authorized to grant the order if (a) the Court of origin has acted without jurisdiction over the case; (b) the judgment debtor has not appeared in the proceedings and is a debtor who does not conduct business or have a residence in the country of the court, (c) the judgment debtor was not duly served in the proceedings of the court of origin and has not appeared before the court of origin although he has a residence or conducts business in the jurisdiction of origin or has consented to submit to the jurisdiction of the court; (d) the judgment was obtained by fraud; (e) the judgment debtor convinces the BVI Court that the decision is appealable (and an appeal is pending or he/she intends to appeal), (f) the judgment is against public policy and could not have been issued by the Court.

Moreover, from a pragmatic point of view, it is worth thinking about enforcing a foreign judgment in the BVI only if the debtor has assets in the BVI. In the particular case, DEF Limited is the 100% owner of XYZ Limited - a company incorporated in the BVI- which owns a number of unencumbered properties in this jurisdiction. Therefore, from the point of view of ABC Limited, which has a claim of GBP 2 million against DEF Limited, the application for recognition of the foreign judgment in the BVI is logical.

In the present case, the judgment was rendered by the High Court of England, therefore the 1922 Act applies to the matter. However, it is important to note that the judgment was rendered in April 2022, so at today's date, July 2023, it would not be possible to proceed directly with an application for recognition before a BVI Court, without there being a reason that would legitimate the Court to extend this deadline.

On the other hand, ABC Limited has a Money judgment, i.e. a net and certain claim of GBP 2 million against DEF Limited, which owns 100 % of XYZ Limited incorporated in the BVI. In that sense, it would be interesting, once the recognition was granted, to obtain an order to garnish XYZ's shares and liquidate XYZ's assets. However, it is not clear from the wording whether the Money judgment meets the criteria of section 3(2) of the 1922 Act, which should be further analyzed.

**\* End of Assessment \***

**Commented [JW16]:** 42 marks