



**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 Insolvency Act 2003 protects the rights of secured creditors providing a basis for them to enforce their security. There is no timeline imposed on secured creditors for enforcing such claims. In liquidation, secured creditors' assets are excluded from the estate of the debtor but their rights to enforce are still not affected.<sup>1</sup> They can make claims submitted to trustee under section 338 Insolvency Act 2003 in the bankruptcy but not obliged to. It is up to them on when to take control of the security interest and sell it to recover debts owed. These security rights over assets (like mortgage, charge or pledge) provide secured creditors with priority over unsecured creditors and will be paid out of the proceeds before other claims are settled; which the liquidator must give effect to prioritizing the rights/claims of secured creditors.<sup>2</sup> Secured creditors can also appoint receivers to manage and sell the secured assets which maximises the recovery of debt. They also have rights to participate in creditors' meetings and vote on proposed actions like restructuring etc. Court order under section 476 of the Insolvency Act don't affect secured creditors' rights to deal with property that they have security interest over.

### Question 2.2 [maximum 2 marks]

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

The functions and powers of a Creditors' Committee are as follows:

- "Consulting with liquidation about matters relation to the liquidation matters;
- Considering reports from Liquidator in relation to the liquidation; and
- Assisting the Liquidator in discharging his functions."<sup>3</sup>

The powers they have are:

- "Calling a meeting of creditors;
- Require Liquidator to provide committee with reports & information concerning the Liquidation;
- Require Liquidator to attend committee to provide such information & explanation concerning insolvency proceeding as it reasonably requires; and
- Approving the liquidator's remuneration."<sup>4</sup>

### 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?

Under Part XIX of the Insolvency Act, the powers provided to the BVI court are as follows:  
(pg59)

<sup>1</sup> Section 175(2) of the Insolvency Act 2003

<sup>2</sup> Section 197(2) of the Business Companies Act 2004

<sup>3</sup> Section 422 of the Insolvency Act 2003

<sup>4</sup> Charlotte Walker and Janet Watson, Module 5B Guidance Text, British Virgin Islands Law 2022/2023, p 40.

Commented [JW2]: 1 mark

See section 15 company creditors arrangements, section 175 liquidations, section 338 bankruptcy, also section 211 and receiverships

Commented [JW3]: 2 marks

Commented [JW4]: 2 marks

- The Court can recognise foreign insolvency proceedings in certain jurisdictions, assist foreign representatives when needed and make such orders as necessary.
- The Court has the ability to apply foreign laws applicable to the liquidation or the applicable BVI laws in aid of the foreign proceedings.<sup>5</sup>
- The BVI can make the following orders under section 467(3) of the Insolvency Act 2003 which:
  1. Restrain the commencement or continuation of proceedings against a debtor;
  2. Restrain the creation or enforcement of any rights or remedy over a debtor's property; and
  3. Require persons to deliver up the debtor's property or proceeds of such sale;
  4. Grant relief to aid in arrangement that result in coordination of a foreign proceeding with BVI proceedings;
  5. Appoint and interim receiver over a debtor's property under such conditions or terms as the court deems appropriate;
  6. Authorise examinations of any debtor or interested party by the foreign representation; and
  7. Stay or terminate BVI proceedings as it considers appropriate.

**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.

Under section 8 of the Insolvency Act 2003, a company will be considered insolvent in the BVI in the following circumstances:

- (i) "A Company cannot pay its debts as they fall due (giving consideration to the case of *Cornhill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114)
- (ii) The value of the company's liabilities exceeds the value of its assets (consideration must be given to sections 10(1) and 10(2) of the Insolvency Act).
- (iii) A company fails to satisfy (wholly or partly) execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company.
- (iv) A company fails to comply with the terms of a statutory demand (and it is not successfully set aside under sections 156 and 157 of the Insolvency Act). A company is usually required to pay the debt within 21 days of service of the statutory demand."<sup>6</sup>

There are other criteria which must be satisfied under section 300(2) of the Insolvency Act which the court will consider when determining its order.

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

**Question 3.1 [maximum 5 marks]**

**Commented [JW6]:** 3.5 marks

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

Under regulation 6(a)1A of the **BVI Business (Amendment) Regulations 2022**, an individual can be appointed and act as a voluntary liquidator of a company if he:

**Commented [JW7]:** Also Regulation 19 - states must be not disqualified and imposes residency requirement.

<sup>5</sup> Section 467(5) of the Insolvency Act 2003

<sup>6</sup> Charlotte Walker and Janet Watson, Module 5B Guidance Text, British Virgin Islands Law 2022/2023, p 31

- a) Is professionally competent in this specific field of law and can liquidate the company concerned and well as have no less than 2 years of liquidation experience. Also, he should be able to demonstrate that he:
- I. "Holds an insolvency practitioner's licence; and
  - II. Has as appropriate professional qualification ((such as in law or accountancy) and experience of providing legal and financial advice or support to companies in the financial services sector; and
- b) Is fully acquainted with relevant financial services legislation connected to the business of the company to be liquidated, including the Financial Services Commission Act and BVI Business Companies Act."<sup>7</sup>

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

A company or other legal person cannot be appointed as a voluntary liquidator neither can a director of the company can act as a voluntary liquidator.

**Question 3.2 [maximum 5 marks]**

Commented [JW9]: 4 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**

Creditors might consider the appointment of an overseas insolvency practitioner in the following situations:

- I. Where assets of the debtor BVI company are held in another jurisdiction (overseas). The overseas insolvency practitioner may be appointed to manage and protect those foreign assets. This reduces various costs relating to the liquidation (like travel, using a local expert, etc.) which means potentially more money for creditors regarding their pay out.
- II. Where the BVI company has creditors overseas – appointing an overseas insolvency practitioner will be able to oversee the distribution of assets and ensure that all creditors are being treated fairly.
- III. Where the BVI company is subject to foreign insolvency proceedings in another jurisdiction, appointing an overseas insolvency practitioner will help the company to cooperate with such foreign proceedings and ensure the interests of all parties are protected.
- IV. Where the BVI company has complex cross-border issues involving multiple jurisdictions, the appointment of an overseas insolvency practitioner would be useful in managing and coordinating all proceedings where the company is a party to across all the jurisdictions involved.
- V. Where the BVI company has subsidiaries overseas then the appointment of an overseas insolvency practitioner would be useful in managing and overseeing those operations.

An individual outside of BVI can be appointed under section 483 of the Insolvency Act as an overseas insolvency practitioner provided the relevant requirements are met but it's important to note that they must be appointed jointly with a BVI licenced insolvency practitioner or the Official Receiver.

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

<sup>7</sup> Charlotte Walker and Janet Watson, Module 5B Guidance Text, British Virgin Islands Law 2022/2023, p 29



Under section 483 of the Insolvency Act, the process for appointing an overseas practitioner is as follows:

- I. Overseas insolvency practitioner must be appointed jointly with a BVI licenced insolvency practitioner/ Official Receiver. For such appointment to be valid, written notice of the appointment must be given to the FSC for consideration and the relevant condition under section 483(a)(i)-(v) of the Insolvency Act must be met. The FSC has the power to appear at the court hearing either to appoint or object to the proposed appointment. The foreign insolvency practitioner writes a letter to the FSC, explaining his level of expertise and qualifications and then waits for the FSC's approval of his appointment. There is no requirement for an overseas insolvency practitioner to be licenced in the BVI if acting jointly with a licensee or the Official Receiver.
- II. Also, an application can be made to the BVI court for such appointment by a creditor or any interested party if there are sufficient grounds for the appointment of the overseas insolvency practitioner. The company would be given notice of the application which it can then respond to such application at a hearing, and this gives the court the opportunity to hear any party in support or objecting to such application. Once the court is satisfied that an overseas insolvency practitioner is necessary, then an order will be made appointing the insolvency practitioner.

**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 BVI Business Companies Act 2004 provides for various types of liquidation in the BVI such as voluntary liquidation and a court -ordered liquidation. Voluntary liquidation is usually initiated by the shareholders or directors of a company. There are two types of voluntary liquidations such as: (1) members' voluntary liquidation ("MVL") and (2) creditors' voluntary liquidation ("CVL") and the procedures can be found under Part XII of the BCA. A MVL is commenced when the shareholders pass a resolution to wind-up the company voluntarily without the requirement of the company being insolvent. The company directors must file a declaration of solvency with the Registrar which states that the company is solvent and able to pay its debts in full within 12 months (section 197(1) of the BCA) along with approving a liquidation plan (Section 198 of the BCA). The shareholders then appoint a liquidator (under section 199(1) BCA) to conduct the MVL who will file notice of his appointment with the Registrar, the declaration of solvency and the liquidation plan in accordance with section 204 of the BCA. The liquidator then will advertise the liquidation in the Gazette, realise all the assets of the company, and pay off any liabilities (if need be although usually none), prepare a statement of account to present at the final general meeting to formally dissolve the company and distribute any remaining assets/funds to the shareholders. This procedure basically used where a company/ business is no longer needed and they opt to dissolve it.

On the other hand, a CVL is a process used when the company is insolvent, and a resolution is passed by the member of the company to wind up the company voluntarily although initiated by the company's directors. The insolvent company must advertise the commencement of the liquidation in the Gazette and in a local newspaper. The liquidator is responsible for collecting and realizing the assets of the company and paying off any creditors. The liquidator is appointed by the members to wind up the affairs of the company and to distribute any remaining assets of the company to its shareholders.

**Commented [JW10]:** 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.

**Commented [JW11]:** 2,5 marks

**Commented [JW12]:** You appear to be confusing the types of liquidation in the BVI with those in the UK. The three liquidation types in the BVI are  
1) a voluntary liquidation (solvent) under the BCA 2004;  
2) insolvent liquidation (Voluntarily) under section 159(3) the Insolvency Act 2003 by a members' qualifying resolution of 75% - you have not mentioned this is your answer.;  
3) insolvent liquidation by application to the court for an appointment of a liquidator under the Insolvency Act 2003

**Commented [JW13]:** MVL and CVL types are in the UK not BVI. Under BCA 2004 it's a solvent liquidation which you have included in this answer so I will give credit for that.

**Commented [JW14]:** Within 30 days of appointment

**Commented [JW15]:** No such thing as a CVL in BVI

Lastly, there is the option of a court ordered liquidation which is initiated by filing a petition by the company, a creditor or a member, the Attorney General or the FSC and by an order of the BVI court. Liquidators are usually appointed on the just and equitable ground and usually done in instances where there's a need to preserve the assets of the company. One type is compulsory liquidation whereby a creditor files a winding up petition in the BVI court and the BVI will make an order in respect of the application if it's satisfied that the debtor company is insolvent. This also leads to a liquidator being appointed by the court to wind up the affairs of the company under section 162 of the Insolvency Act which involves the liquidator collecting and realising all of the company's assets and paying off any creditors before distributing the remainder of the assets to the company's shareholders.

Conversely, a voluntary liquidation following a court order is also any option whereby a company, its directors or shareholders apply to the BVI court for this type of liquidation following a winding-up order which is similar to the CVL mentioned above.

#### 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?

Since Edale Limited has already demanded immediate repayment of funds loaned in full which I presume hasn't been set aside under sections 156 and 157 IA, after the 21 days have passed from the service of the demand, Edale Limited can commence insolvency proceedings against Swift Limited by filing a winding-up petition under section, §296 of the Insolvency Act, in the BVI court. If the BVI court is satisfied that Swift Limited is in fact insolvent in accordance with section 8(2) IA and clearly unable to pay its debts as they fall due then the court will make an order for the company to be wound up and a liquidator to be appointed. The liquidator will have to gather and realise all of the assets of Swift Limited and distribute them to creditors, including Edale Limited, as a way of paying back some (if not all) the debt owed on a pari passu basis. Other matters the court will need to satisfy itself with are laid out under section 300(2) IA.

Also, since Edale is a creditor of Swift Limited having given the money, it can issue a civil claim against Swift Limited, the debtor, for a due and outstanding debt. If the court finds in the creditor's favour (which it most likely will in this case as the money is owed), then Edale Limited can obtain a judgment for the debt. If Swift Limited fails to file an acknowledgement of service or defence, then Edale Limited, the creditor, may be able to obtain a default judgment. Alternatively, where (as is relatively common in debt enforcement claims) Swift Limited files a defence but has no real prospect of successfully defending the claim, the BVI court may give summary judgment in the Edale Limited's favour, which can result in a judgment without a full trial. If the judgment cannot be achieved on a summary basis, then proceedings may take some time to reach judgment depending on how complex the matter is, although an expedited is occasionally possible in exceptional cases.

**Commented [JW16]:** An application to appoint a liquidator

**Commented [JW17]:** Court has discretion to appoint liquidator: insolvent; just and equitable, public interest/ Application must be determined within 6 months after filing - possible to extend 3 months. If company is the applicant then the application for the appointment of liquidator has to be advertised.

**Commented [JW18]:** Insolvent liquidation

**Commented [JW19]:** Which section? I am not aware this exists.

**Commented [JW20]:** 2 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 [JW21]:** This section relates to bankruptcy not liquidation

**Commented [JW22R21]:** Its not a petition that is the UK - in the BVI under Section 162 (1) the Court may, on application by a person specified in subsection (2), appoint a liquidator of a company.

If the Swift Limited fails to pay the judgment debt, Edale Limited can (in appropriate circumstances):

- apply to the court to appoint a liquidator to take over Swift Limited;
- obtain a charging order over the Swift Limited's assets;
- apply to the court for the appointment of a receiver by way of enforcement; and/or
- obtain an attachment of debts order.

**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?

Question: We have been asked what options should ABC Limited consider to enforce its judgment debt.

There are various options available to ABC Limited to recover judgment debt which will be discussed below.

Since the judgement debt was handed down in the High Court of England, this is a jurisdiction to which the Reciprocal Enforcement of Judgments Act (Cap 65) 1992 (the "1992 Act") extends.<sup>8</sup> It allows the BVI court to recognise foreign judgments as well as having the option to rely on common law as another avenue available for the recognition of foreign judgments.

Judgment is defined under the 1992 Act as "any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of the Act, whereby any sum of money is made payable."<sup>9</sup> The judgment must be conclusive and for monetary sums to be enforced which is satisfied in the above facts as a sum of GBP 2 million was already awarded to ABC Limited as a final and conclusive judgment in the High Court of England. However, DEF Limited has no realisable assets but it's worth noting that it's 100% owner of XYZ Limited, a company incorporated in the BVI, which owns unencumbered property; despite being struck off the Register but not yet dissolved. A foreign judgment can only have the same effect as the jurisdiction who made such order to the extent that the DEF Limited has assets in the BVI (which is the case here), as its fully owned subsidiary is located in the BVI with unencumbered properties owned by it. In light of this and the fact that the shareholder has passed away, ABC Limited can still apply for the foreign judgment to be registered by the BVI Court under CPR Part 72 with the authentic English judgment exhibited in support of the application, so that it could be treated as a judgment having the same force and effect as if the judgment had been made in the BVI<sup>10</sup> and it would be just and convenient to do so considering the fact the shareholder is dead so really no loss.

<sup>8</sup> Section 3(1) of the Reciprocal Enforcement of Judgments Act 1992

<sup>9</sup> Section 2(1) of the Reciprocal Enforcement of Judgments Act 1992

<sup>10</sup> Section 3(3)(a) of the Reciprocal Enforcement of Judgments Act 1992

**Commented [JW23]:** 3 marks

You appear to be confused as which company is struck off.

This question required a memorandum to your principal with the options for 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. Could ABC maybe apply as an interested party to restore XYZ and then once restored appoint a receiver over its shares

**Commented [JW24]:** The 8 conditions are required for this answer

However, there is potentially a problem with getting this foreign judgment registered as this process should be done within 12 months of the judgment date (no later than April 2023). We are now in July which means more than 12 months have already passed. Therefore, ABC Limited would have to apply to the BVI court to grant an order of extension for registering the foreign judgment if the court finds it just and convenient to do so.<sup>11</sup> Once judgment is registered, it gains the same treatment as one with force and effect of a judgment been made in the BVI court from the date it is registered. Hence, the CPR remedies become available to AC Limited under CPR 45.2 which include: (1) a charging order; (2) a garnishee order; (3) a judgment summons; (4) an order for seizure and sale of goods; and (5) the appointment of a receiver. No notice has to be given to XYZ Limited in respect of such action.

Another option would be for ABC Limited to apply to court to set aside the strike off of DEF Limited which would reinstate the company and provide ABC Limited with the option of pursuing enforcement actions against DEF Limited's assets to satisfy the judgment debt. Sufficient grounds may need to be satisfied to have this company's strike off set aside.

ABC Limited can also apply to the BVI court for a liquidator to be appointed to wind up DEF Limited since it's current struck off. This will allow the liquidator to investigate the affairs of the DEF Limited, including the assets (subsidiary and properties owned by it) and be able to distribute them to creditors of the company such as ABC Limited. However, this may incur significant expenses which will probably affect how much the creditor is able to recover.

ABC Limited can also pursue a claim against the estate of DEF Limited, with the recent passing of the shareholder and sole director of the company, ABC Limited may be able to file a claim against the deceased individual's estate. Legal proceedings can be initiated in the BVI if that's where he's from to recover the judgment debt from the assets of the estate.

Usually under section 296(1) of the Insolvency Act— such application may not be made in respect of a liability incurred outside of the BVI unless liability is payable by virtue of a judgment or award.<sup>12</sup> Since the 1992 Act extends to awards handed down in the High Court of England, this would allow ABC Limited an avenue to pursue legal proceedings against the debtor. If England is a part of the convention, then ABC Limited can seek to enforce the award in the BVI by virtue of this but even if it's not there are other options available to the creditor.

In accordance with section 3(2) of the 1992 Act, the court will not order a judgement to be registered if:

- the court did not have jurisdiction to act on the matter;
- DEF Limited didn't submit to the jurisdiction;
- DEF Limited was not served with the process of the original court and didn't appear notwithstanding that it is carrying on business within the jurisdiction of that court of agreed to submit to the jurisdiction of the court;
- The judgment was obtained by fraud;
- DEF Limited satisfied court that appeal is pending; or
- Judgment related to a cause of action which couldn't be entertained by the court for public policy reasons.

In my opinion, none of these seem to apply. Hence, ABC Limited stands a good chance of getting the extension and being able to take action in recovering the debt owed.

Under common law, ABC Limited can pursue a cause of action in itself under the obligation by action doctrine, irrespective of where the foreign judgment was obtained. As long as ABC Limited is able to prove that the judgment was final and conclusive which can be done by

<sup>11</sup> Section 3(1) of the Reciprocal Enforcement of Judgments Act 1992

<sup>12</sup> Charlotte Walker and Janet Watson, Module 5B Guidance Text, British Virgin Islands Law 2022/2023, p 17

**Commented [JW25]:** DEF is not struck off XYZ is.

**Commented [JW26]:** A company is struck off in the BVI for non payment of fees or resignation of registered agent ( due to non payment of their fees) - all fees would have to be paid.

**Commented [JW27]:** DEF is not struck off XYZ is struck off in BVI.

**Commented [JW28]:** This section relates to bankruptcy not liquidation

exhibiting the English judgment awarding the 2 million, then ABC Limited can apply for summary judgment against DEF Limited.<sup>13</sup> It's not imperative to register the judgment as common law rules can be relied on to enforce the foreign judgment debt.

**\* End of Assessment \***

**Commented [JW29]:** 34 marks

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<sup>13</sup> Civil Procedure Rules, r50