



**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).
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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]: 8 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.

Commented [JW2]: Correct answer

(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.

**Commented [JW3]:** Correct answer

**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 British Virgin Islands (BVI) is known for its robust insolvency framework, which provides extensive protection to creditors, especially secured creditors. Below are some of the protections and options provided under BVI insolvency law.

**Commented [JW4]:** .5 mark

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

1. **Priority in Payment:** Secured creditors, or creditors who have a security interest over a specific asset or property of the debtor, have a higher priority than unsecured creditors in insolvency proceedings. This means that they are likely to recover a larger percentage, if not all, of the debts owed to them compared to unsecured creditors.
2. **Enforcement of Security:** Secured creditors can enforce their security interest outside of the insolvency proceedings. This can be done regardless of whether the debtor is in liquidation or not. For example, a secured creditor could repossess and sell the asset over which it has security to recover the money owed.
3. **Appointment of Receiver:** Secured creditors can apply to the court to appoint a receiver over the asset in which they have security. The receiver would then manage and, if necessary, sell the asset to repay the debt owed to the secured creditor.
4. **Creditors' Meetings and Voting Rights:** Secured creditors also have rights during creditors' meetings. They can vote on proposals, and their claims are considered in decision-making processes. However, their voting right is limited to the unsecured portion of their debt, if any.
5. **Influence on Insolvency Practitioner:** If the debtor company goes into administration, the secured creditors have the right to influence the choice of insolvency practitioner and, as such, the course of the insolvency proceedings.
6. **Challenge Unfair Transactions:** Secured creditors can also challenge unfair transactions. The BVI insolvency law allows creditors to challenge transactions at an undervalue and unfair preferences given by the debtor within certain time periods before the commencement of the insolvency proceedings.
7. **Creditor's Right to Petition for Winding Up:** If the debtor company fails to pay a debt exceeding a certain amount, secured creditors can present a winding-up petition to the court.

It's important to note that the debtor's assets are distributed according to the statutory order of priority, which provides secured creditors with a higher priority. The exact rights and remedies available to secured creditors will depend on the terms of the security agreement and the specific circumstances.]

#### Question 2.2 [maximum 2 marks]

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

[The Insolvency Act 2003 of the BVI provides a comprehensive framework for insolvency procedures and the rights of stakeholders within those procedures. One of the notable features is the provision for a Creditors' Committee. The committee is formed from the body of creditors and is tasked with representing their interests and working in liaison with the liquidator during the course of the liquidation process.

Here are the primary functions and powers of a Creditors' Committee under the BVI Insolvency Act 2003:

1. **Oversight and Liaison:** The committee acts as a bridge between the liquidator and the general body of creditors. This is to ensure that the actions of the liquidator are transparent and in the best interests of the creditors.

Commented [JW5]: 1 mark

See section 422 of the IA 2003 for the functions and powers listed therein.

2. **Consent for Certain Actions:** There are certain actions for which the liquidator might require the consent of the committee. This includes the disposal of assets, starting or defending legal proceedings, or entering into certain agreements.
3. **Review Liquidator's Fees:** The committee can play a role in determining or reviewing the remuneration of the liquidator. If there's a dispute over the liquidator's fees, the committee's viewpoint would be critical.
4. **Receive Reports:** The liquidator has a duty to periodically report on the progress of the liquidation. The committee is one of the main recipients of such reports and can, therefore, monitor the progress of the liquidation and intervene if necessary.
5. **Call for Meetings:** The committee can call for meetings with the liquidator to discuss specific issues related to the liquidation.
6. **Advisory Role:** The committee can provide guidance or advice to the liquidator concerning any aspect of the liquidation process.
7. **Initiate Action against Liquidator:** If the committee believes that the liquidator is not performing his/her duties properly, it has the power to initiate action against the liquidator, which could even include seeking the liquidator's removal.
8. **Approval of Compromises:** If the liquidator decides to come to a compromise with debtors or other stakeholders, such a compromise might require the approval of the Creditors' Committee.
9. **Filling of Vacancy:** If a liquidator's position becomes vacant, the committee may be involved in the appointment process for a new liquidator.
10. **Other Powers and Functions:** The specific powers and functions of a Creditors' Committee can vary depending on the circumstances of the liquidation and the specific terms of the insolvency proceedings.

It's important to understand that the committee does not replace or overshadow the powers of the liquidator. Instead, it acts as a supervisory and collaborative body that ensures that the interests of the creditors are duly represented and protected.]

### 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?

[The Insolvency Act 2003 of the BVI makes a number of provisions for the courts to assist with foreign insolvency proceedings. This reflects the recognition that many BVI businesses operate internationally, and insolvency proceedings in one jurisdiction may have significant effects in others.

According to Part XVIII of the Insolvency Act 2003 (which is titled "Cross-Border Insolvency"), the courts in BVI have a broad range of powers to assist with foreign proceedings. This part was designed to implement the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, although with some modifications.

Here are the primary powers that the BVI courts have in relation to orders they can make in support of foreign insolvency proceedings:

**Commented [JW6]:** .5 mark  
The answer should have listed the 8 orders possible under section 467(3) IA2003.

1. **Recognition of Foreign Representative and Foreign Proceedings:** Under the Act, the BVI court has the power to recognize a foreign representative (such as a foreign liquidator or trustee in bankruptcy) and the foreign insolvency proceedings that they are overseeing<sup>1</sup>.
2. **Granting Relief:** Once a foreign proceeding is recognized, the court has extensive discretionary powers to grant relief that is necessary for the protection of the assets of the debtor or the interests of the creditors<sup>2</sup>. This can include staying proceedings against the debtor, entrusting the administration or realization of the debtor's assets located in BVI to the foreign representative, or granting any additional relief that may be available to a local insolvency practitioner under BVI law.
3. **Examination of Witnesses and Taking Evidence:** The court can order the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities<sup>3</sup>.
4. **Cooperation and Direct Communication with Foreign Courts and Foreign Representatives:** The BVI court can communicate directly with, and request information or assistance from, foreign courts or foreign representatives, and it can provide them with information or assistance in relation to the insolvency proceedings.<sup>4</sup>
5. **Coordination of Concurrent Proceedings:** In the case of concurrent insolvency proceedings in BVI and another jurisdiction, the court can order coordination of those proceedings, with the aim of ensuring the most efficient and fair administration of the debtor's assets<sup>5</sup>.

These powers are designed to enable efficient and effective cross-border insolvency proceedings, promoting cooperation and coordination between jurisdictions. However, they are subject to various conditions and restrictions, and the court will always need to consider the interests of local creditors and the need to ensure equitable treatment for all parties involved.]

#### Question 2.4 [maximum 4 marks]

Commented [JW7]: 4 marks

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

#### [Introduction

The British Virgin Islands (BVI) Insolvency Act 2003<sup>6</sup> provides an extensive framework for dealing with insolvency situations and elucidates the various conditions under which a company will be considered insolvent.

#### Conditions for Insolvency

##### 1. Insolvency Test

<sup>1</sup> Insolvency Act 2003, Part XVIII, Section 467.

<sup>2</sup> Insolvency Act 2003, Part XVIII, Section 469.

<sup>3</sup> Insolvency Act 2003, Part XVIII, Section 471.

<sup>4</sup> Insolvency Act 2003, Part XVIII, Section 472 & 473.

<sup>5</sup> Insolvency Act 2003, Part XVIII, Sections 470 to 480.

<sup>6</sup> British Virgin Islands Insolvency Act 2003, Part I.



The BVI Insolvency Act lays out a fundamental test of insolvency: the cash-flow test. Under Section 8(1)(a) of the Act, a company is deemed insolvent if it is unable to pay its debts as they fall due<sup>7</sup>.

## 2. Statutory Demand

Another circumstance that may cause a company to be deemed insolvent is related to the statutory demand. Under Section 8(1)(b) of the Act, a company is considered insolvent if an unsatisfied judgment or order for a sum exceeding the prescribed amount is made against it<sup>8</sup>. If a company fails to satisfy a statutory demand for a debt exceeding the statutory minimum (currently \$2,000) within the 21-day period, it is presumed insolvent, according to Section 155 of the Act<sup>9</sup>.

## 3. Balance-Sheet Insolvency

Balance-sheet insolvency is not directly considered as a test of insolvency in BVI. However, the Act under Section 8(1)(c) considers a company insolvent if the value of its liabilities exceeds its assets. This test is typically relevant for winding-up proceedings<sup>10</sup>.

### Conclusion

In conclusion, the insolvency conditions for a company in the BVI are primarily determined by the cash-flow insolvency test and statutory demand. Balance-sheet insolvency plays a less central role. The legislation's clear criteria aim to offer a solid framework for understanding and handling insolvency situations, thereby ensuring a fair and effective process for all involved parties. As always, it is recommended to consult with legal professionals when dealing with these matters to ensure a comprehensive understanding and appropriate action.]

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

#### Question 3.1 [maximum 5 marks]

Commented [JW8]: 4.5 marks

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

[The British Virgin Islands (BVI) Business Companies Act (BCA) 2004, as amended in 2022, and the Insolvency Act 2003, provide the legislative backdrop for company liquidations in the BVI, including the appointment of a voluntary liquidator. Post 1<sup>st</sup> January 2023, the appointment of voluntary liquidators in BVI is guided by new requirements introduced by the BVI Business Companies (Amendment) Act 2022 and the BVI Business Companies (Amendment) Regulations 2022.

#### Eligibility Criteria for Appointment as Voluntary Liquidator Post 1<sup>st</sup> January 2023

As per the BVI Business Companies (Amendment) Act 2022 and Regulation 6 the BVI Business Companies (Amendment) Regulations 2022, an individual can be appointed and act as a voluntary liquidator of a company under the following circumstances<sup>11</sup>:

<sup>7</sup> British Virgin Islands Insolvency Act 2003, Section 8(1)(a)

<sup>8</sup> British Virgin Islands Insolvency Act 2003, Section 8(1)(b).

<sup>9</sup> British Virgin Islands Insolvency Act 2003, Section 155.

<sup>10</sup> British Virgin Islands Insolvency Act 2003, Section 8(1)(c).

<sup>11</sup> British Virgin Islands Business Companies (Amendment) Act 2022, Section 199.

1. The individual possesses not less than two years of liquidation experience<sup>12</sup>.
2. The individual demonstrates professional competence to liquidate the specific company in question<sup>13</sup>.
3. The individual can prove that they hold an insolvency practitioner's licence and have an appropriate professional qualification in a related field, such as law or accountancy. Additionally, they should have experience in providing legal and financial advice or support to companies in the financial services sector<sup>14</sup>.
4. The individual should be fully conversant with the relevant financial services legislation related to the business of the company to be liquidated, including the Financial Services Commission Act and the BVI Business Companies Act<sup>15</sup>.

**Commented [JW9]:** Not 'and' - it should be 'or'

It is crucial to note that any individual not disqualified from being appointed or acting as a voluntary liquidator can be appointed, unless they appear in the list of disqualified individuals as set out in Regulation 19(2) of the BCA Regulations<sup>16</sup>.

**Commented [JW10]:** You could have listed them .  
Must now also be resident in the BVI

The updated legislative framework for voluntary liquidation in the BVI, effective from 1 January 2023, establishes new, more rigorous requirements for individuals to be appointed as voluntary liquidators. These requirements, which emphasise experience, professional competence, and familiarity with relevant legislation, aim to enhance the efficiency and effectiveness of voluntary liquidation proceedings in the BVI.]

### Question 3.2 [maximum 5 marks]

**Commented [JW11]:** 3 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?

**Commented [JW12]:** Local expertise . Saving of costs and assets in foreign jurisdiction outside BVI

[The BVI Insolvency Act 2003 is designed to accommodate insolvency proceedings in an increasingly interconnected global business environment. This flexibility is particularly highlighted in its provisions allowing for the appointment of an overseas insolvency practitioner in relation to a BVI company.

#### (a) Considerations for Appointing an Overseas Insolvency Practitioner

1. *Operations and Assets Located Overseas:* If a significant portion of the BVI company's operations, assets, or both are situated overseas, the creditors might consider the appointment of an overseas insolvency practitioner<sup>17</sup>. A practitioner familiar with the legal, economic, and business environment of the area can expedite and optimize the process of managing and realizing such assets.

<sup>12</sup> BVI Business Companies (Amendment) Regulations 2022, Regulation 6(a)1A.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> BVI Business Companies Regulations, Regulation 19(2).

<sup>17</sup> British Virgin Islands Insolvency Act 2003, Section 483(2)(a).

2. *Overseas Creditors*: In scenarios where the majority of creditors are located outside of the BVI, an overseas insolvency practitioner could be more beneficial. This individual's proximity and familiarity with local legal and business practices could streamline communication and liaison efforts with these creditors<sup>18</sup>.
3. *Cross-border Legal Issues*: Insolvencies involving complex international or cross-border legal issues might warrant the need for an overseas practitioner. These professionals often have specialized knowledge and experience in dealing with such complexities, providing invaluable expertise during the insolvency process<sup>19</sup>.

### Appointment Process of an Overseas Insolvency Practitioner

The process of appointing an overseas insolvency practitioner, in line with the BVI Insolvency Act 2003, is fairly comprehensive<sup>20</sup>:

1. *Proposal by Creditors*: An overseas insolvency practitioner's appointment begins with a proposal by a creditor or a group of creditors. The proposed individual must satisfy the statutory eligibility requirements for insolvency practitioners as outlined in the BVI Insolvency Act 2003.
2. *Application Submission*: The proposal is submitted either as part of an application to initiate insolvency proceedings or subsequently as an application to replace the existing liquidator.
3. *Consent of Practitioner*: The overseas practitioner must express consent to act in the proceedings. This is usually documented via a 'consent to act' and a declaration specifying no existing conflict of interest or other restrictions that may hinder their performance.
4. *Court Approval*: The appointment of the overseas insolvency practitioner is subject to approval by the BVI Court. Factors taken into consideration include the practitioner's qualifications, experience, the complexity of the insolvency case, and potential conflicts of interest.

### Conclusion

The BVI Insolvency Act 2003 recognizes the complexity of global business operations and the potential need for overseas expertise. While appointing an overseas insolvency practitioner can be beneficial in certain circumstances, the process is closely regulated. The BVI Court ensures that the proposed individual satisfies all eligibility requirements and is well-equipped to handle the unique demands of the insolvency case, providing a safeguard for the interests of all stakeholders involved.]

### 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.

<sup>18</sup> Ibid., Section 483(2)(b).

<sup>19</sup> Ibid., Section 483(2)(c).

<sup>20</sup> Ibid., Sections 158-162.

#### Commented [JW13]:

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

Additionally must not be 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 [JW14]: 2 marks

#### Commented [JW15]: There are 3 types of liquidation in the BVI

1. Solvent voluntary liquidation BC 2004
2. Insolvent liquidation by court application under IA 2003; and
3. voluntary insolvent liquidation by members resolution under 159(3) requiring 75 % majority to pass resolution - this type of liquidation is not included in your answer

## [Introduction

Liquidation in the British Virgin Islands (BVI) is governed by the BVI Insolvency Act 2003 and the BVI Business Companies Act 2004<sup>21</sup>. The liquidation process is designed to facilitate the orderly winding up of a company's affairs, enabling the settlement of claims by its creditors, and the distribution of remaining assets to its shareholders. This paper outlines the various types of liquidation in the BVI and the procedures for initiating each type.

### 1. Voluntary Liquidation

Voluntary liquidation, outlined in Part XII of the BVI Business Companies Act, is initiated by the shareholders or directors of a company that is solvent<sup>22</sup>.

#### 1.1. Procedure for Commencing Voluntary Liquidation

- *Declaration of Solvency*: The directors of the company must make a declaration of solvency stating that the company is and will continue to be able to discharge its debts as they fall due<sup>23</sup>.
- *Appointment of a Liquidator*: A liquidator is appointed by resolution of the directors or by the shareholders. The liquidator is responsible for winding up the affairs of the company<sup>24</sup>.
- *Filing of Necessary Documents*: The appointed liquidator is required to file notice of his/her appointment, a copy of the declaration of solvency, and a copy of the liquidation plan with the Registrar within 14 days of appointment<sup>25</sup>.

### 2. Creditors' Voluntary Liquidation

A creditors' voluntary liquidation, as defined under the BVI Insolvency Act 2003, is initiated when a company is insolvent and the directors of the company call a meeting of the members and creditors to appoint a liquidator<sup>26</sup>.

#### 2.1. Procedure for Commencing Creditors' Voluntary Liquidation

- *Resolution of Insolvency*: The directors must make a resolution that the company is insolvent and that it is advisable to wind up<sup>27</sup>.
- *Meeting of Creditors and Members*: A meeting of the creditors and members is called to appoint a liquidator<sup>28</sup>.
- *Appointment of Liquidator*: The creditors and members, at their respective meetings, can nominate a person to act as liquidator<sup>29</sup>.

### 3. Compulsory Liquidation

<sup>21</sup> British Virgin Islands Business Companies Act, 2004.

<sup>22</sup> Ibid., Section 197(1).

<sup>23</sup> Ibid., Section 198(1).

<sup>24</sup> Ibid., Section 199(1).

<sup>25</sup> Ibid., Section 201(1).

<sup>26</sup> British Virgin Islands Insolvency Act, 2003, Section 161(1).

<sup>27</sup> Ibid., Section 162(1).

<sup>28</sup> Ibid., Section 162(1)(a).

<sup>29</sup> Ibid., Section 169(2).

**Commented [JW16]:** What section of the BCA 2004?

**Commented [JW17]:** 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.

**Commented [JW18]:** No such procedure in BVI as creditors voluntary liquidation.

**Commented [JW19]:** Insolvent liquidation

Compulsory liquidation, also outlined in the BVI Insolvency Act 2003, is initiated by the court on the application of a creditor, member, liquidator, or supervisor of a debtor in a creditor's arrangement, or the Financial Services Commission<sup>30</sup>.

### 3.1. Procedure for Commencing Compulsory Liquidation

- *Filing of Application:* An application for compulsory liquidation is filed with the BVI Court, stating the grounds for liquidation<sup>31</sup>.
- *Court Hearing:* The court hears the application and, if satisfied with the evidence, can make an order for the company to be put into compulsory liquidation<sup>32</sup>.
- *Appointment of Liquidator:* The court will appoint a liquidator to wind up the affairs of the company<sup>33</sup>.

### Conclusion

The BVI legal framework provides various methods of liquidation, each tailored to different situations and the company's solvency status. The processes of initiation reflect the intent to protect the interests of creditors and shareholders alike, ensuring an orderly winding up of the company's affairs.]

## 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?

### [Introduction

The crux of the matter between Edale Limited and Swift Limited lies in Swift's inability or unwillingness to fulfill its loan repayment obligations. The situation necessitates a detailed exploration of Edale's options under the British Virgin Islands Insolvency Act 2003, in order to recover the debt owed to them by Swift.

The intricate nature of the insolvency framework in the British Virgin Islands (BVI), combined with the cross-jurisdictional elements of the dispute – with Edale being a company incorporated in England, and Swift in the BVI – adds a layer of complexity to the case. However, the BVI's robust insolvency laws, specifically the BVI Insolvency Act 2003, provide a diverse range of remedies for Edale Limited. This following are the viable options for Edale Limited under the BVI Insolvency Act 2003.

### 1. Demand Payment

<sup>30</sup> Ibid., Section 162(1)(b).

<sup>31</sup> Ibid., Section 162(2).

<sup>32</sup> Ibid., Section 167.

<sup>33</sup> Ibid., Section 170.

Commented [JW20]: insolvent

Commented [JW21R20]: What section of the IA 2003?

See section 162 for all of the possible applicants. If company is the applicant then the application for the appointment of liquidator has to be advertised. 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 [JW22]: 1 mark

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.

The first option for Edale Limited would be to demand immediate repayment from Swift Limited, as it has already done according to the facts presented. If Swift Limited fails to repay the loan within the stipulated time, Edale can initiate legal proceedings<sup>34</sup>.

## 2. Initiate Insolvency Proceedings

### 2.1. Commence Creditors' Voluntary Liquidation

Edale Limited, as a creditor, can push for a creditors' voluntary liquidation if it can prove that Swift Limited is unable to pay its debts<sup>35</sup>.

### 2.2. Apply for Compulsory Liquidation

Edale Limited may apply to the court for a compulsory liquidation order against Swift Limited. This is plausible if Swift Limited is insolvent and cannot pay its debts as they become due. The court would need to be satisfied that Swift is unable to pay its debts<sup>36</sup>.

## 3. Secure an Insolvency Practitioner

Edale Limited could hire a licensed insolvency practitioner to recover the debt. The practitioner could act as a receiver or manager, taking control of Swift's assets, including the property purchased, with the objective of recouping the outstanding loan amount<sup>37</sup>.

### 4. Negotiate for an Arrangement

Edale Limited could negotiate an arrangement with Swift Limited, under which the latter agrees to repay the loan in a different manner, e.g., extended payment duration or reduced repayment amount. This arrangement should ideally be legally binding<sup>38</sup>.

## Conclusion

As Edale Limited has various options under the British Virgin Islands Insolvency Act 2003 to recover its funds, the most suitable route will depend on Swift Limited's financial condition, the value of its assets, and the legal advice Edale Limited receives.]

### 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?

## [MEMORANDUM

<sup>34</sup> British Virgin Islands Insolvency Act 2003, Section 8.

<sup>35</sup> Ibid., Section 168.

<sup>36</sup> Ibid., Section 162.

<sup>37</sup> Ibid., Section 180.

<sup>38</sup> Ibid., Section 194.

**Commented [JW23]:** No such procedure in the BVI or do you mean the UK?

**Commented [JW24]:** Insolvent liquidation application to appoint a liquidator.

**Commented [JW25]:** Question states particular reference to the Insolvency Act,

**Commented [JW26]:** 4.5marks

**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 were required in the answer 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

**TO:** Principal  
**FROM:** [Your Name]  
**DATE:** [Current Date]

**SUBJECT:** Available options for ABC Limited to recover judgment debt from DEF Limited

## Introduction

The memorandum analyses various strategies ABC Limited could adopt to recover a judgment debt of GBP 2 million from DEF Limited. Despite DEF Limited having no realisable assets, it fully owns XYZ Limited, a company incorporated in the BVI with unencumbered properties. The complication arises from the fact that XYZ Limited is struck off the Register, but not dissolved, and the sole shareholder and director of DEF Limited is deceased. Each section in this memorandum delves into a different approach that ABC Limited can pursue to enforce its judgment debt.

## 1. Reviving XYZ Limited

### 1.1 Legal Basis for Revival: Striking off and Restoration under the BVI Business Companies Act

The BVI Business Companies Act, 2004, provides the legal framework for the striking off and restoration of companies incorporated in the BVI<sup>39</sup>. A company that has been struck off the register continues to exist but is incapacitated in its operations. The Act stipulates that while a company is struck off, it cannot commence legal proceedings, carry on any business or deal with its assets, or defend any legal proceedings.

However, it's important to note that a struck-off company can apply for restoration. Under section 217 of the Act, a struck-off company or a creditor or member of the company can apply to the Registrar of Corporate Affairs to restore the company to the register<sup>40</sup>. The Act allows for an application for restoration to be made at any time within seven years of the date on which the company was struck off the register<sup>41</sup>.

In the context of ABC Limited's scenario, this provision provides a legal avenue for pursuing the restoration of XYZ Limited. Once reinstated, XYZ Limited would regain its capacity to own its assets legally and carry on its business, paving the way for ABC Limited to enforce its English judgment against the unencumbered properties held by XYZ Limited in the BVI.

### 1.2 Application to the Court: Considerations and Process

Application to the court for the restoration of XYZ Limited offers a more forceful approach to ensure the company's reinstatement. However, this course of action demands a thorough understanding of the considerations and steps involved in the process. As provided under Section 218 of the BVI Business Companies Act, 2004, an application for restoration to the register can be made to the court by a creditor, a former director, a member, or a liquidator<sup>42</sup>.

To successfully make an application for the restoration, it's paramount for ABC Limited to prove its status as a creditor of DEF Limited, the parent company of XYZ Limited. Given that DEF Limited owes ABC Limited a judgment debt, this requirement is likely to be fulfilled. The

**Commented [JW27]:** The new law from 1.1.23 - those companies struck off as at 30 June 2023 will be dissolved on 1 July 2023 so an application to the court to restore XYZ is required.

**Commented [JW28]:** Or interested party which ABC is.

<sup>39</sup> BVI Business Companies Act, 2004, s. 213.

<sup>40</sup> Ibid, s. 214.

<sup>41</sup> Ibid, s. 217.

<sup>42</sup> Ibid, s. 218.

application process further involves providing evidence that it's just for the company to be restored to the register.

The court, considering the application, can restore the company to the register on such terms and conditions as it deems fit<sup>43</sup>. This may include appointing a person to manage the affairs of the company in order to protect the interests of the creditors and the members<sup>2</sup>. In this context, if the application is successful, the court may also make provisions for the management of XYZ Limited, especially considering that the sole director of DEF Limited is deceased.

However, it's important to note that the court process might be more costly and time-consuming than an application to the Registrar. ABC Limited should weigh these factors against the potential benefits of a successful restoration, particularly the ability to enforce its English judgment against the properties owned by XYZ Limited in the BVI.

## 2. Enforcing the English Judgment in the BVI

ABC Limited may consider enforcing its English High Court judgment in the BVI, leveraging the provisions in the Eastern Caribbean Supreme Court (Virgin Islands) Act<sup>44</sup>. The Act allows for foreign judgments to be registered and enforced in the BVI.

The enforcement of the English judgment against DEF Limited in the BVI can also be achieved via a common law action on the judgment or statutory registration<sup>45</sup>. The former involves commencing fresh proceedings in the BVI based on the English judgment, while the latter entails registering the English judgment under the Foreign Judgments (Reciprocal Enforcement) Act, 1922.

The process of common law action involves submitting the original judgment to the BVI court, which will treat it as a debt that DEF Limited owes to ABC Limited. This action can enable ABC Limited to assert a claim on DEF Limited's assets, including its shareholding in XYZ Limited.

In contrast, statutory registration allows the English judgment to be registered and enforced in the BVI as if it were a judgment initially obtained there<sup>46</sup>. However, it's important to note that statutory registration is subject to certain limitations, such as the requirement for reciprocity between the BVI and the foreign country, which may make it infeasible in some instances.

ABC Limited may consider enforcing the English judgment directly against DEF Limited to gain control over DEF Limited's 100% ownership of XYZ Limited. This course of action would subsequently provide a pathway to the assets owned by XYZ Limited, thus allowing ABC Limited to recover the judgment debt.

## 3. Initiating Insolvency Proceedings Against DEF Limited

### 3.1 Rationale for Insolvency Proceedings

Initiating insolvency proceedings against DEF Limited in England could offer a strategic approach for ABC Limited to recover its judgment debt. If DEF Limited is indeed insolvent, it means that it is unable to pay its debts as they fall due, making it a candidate for insolvency proceedings under English law<sup>47</sup>.

<sup>43</sup> Ibid, s. 218(2).

<sup>44</sup> Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap 80.

<sup>45</sup> The Foreign Judgments (Reciprocal Enforcement) Act, 1922.

<sup>46</sup> Ibid, s. 2.

<sup>47</sup> UK Insolvency Act 1986, s. 123.

Commented [JW29]: What are the 8 conditions of that Act?



This strategy may be particularly relevant if DEF Limited's insolvency can be proven or reasonably suspected, as DEF Limited's inability to satisfy the judgment debt suggests financial distress. The aim of initiating insolvency proceedings would be to assert control over DEF Limited's assets, including its 100% shareholding in XYZ Limited. This could potentially allow ABC Limited to enforce its claim against XYZ Limited's assets in the BVI, thus increasing the likelihood of debt recovery<sup>48</sup>.

### 3.2 Role of the Insolvency Practitioner

Once insolvency proceedings are initiated, an insolvency practitioner would be appointed to oversee DEF Limited's affairs. The practitioner's role would primarily include investigating the financial affairs of DEF Limited, reviewing its transactions, and identifying any irregularities that may indicate fraudulent or unfair practices<sup>49</sup>.

If the insolvency practitioner discovers transactions at undervalue involving DEF Limited - that is, transactions where DEF Limited has sold assets or transferred funds for significantly less than their true value - the insolvency practitioner may have the power to reverse or set aside these transactions under the English Insolvency Act 1986<sup>50</sup>. The same applies to preferential transactions, where DEF Limited has given preferential treatment to certain creditors over others<sup>51</sup>.

Reversing such transactions could recover assets that were unfairly or unlawfully removed from DEF Limited's estate, increasing the pool of assets available for distribution among creditors, including ABC Limited. Moreover, if DEF Limited transferred assets to XYZ Limited under these conditions, the practitioner may take action to recover them.

### Conclusion

ABC Limited has several potential options for enforcing its judgment debt against DEF Limited. A thorough evaluation of costs, duration, and likelihood of success for each option should be conducted to determine the most advantageous route.]

\* End of Assessment \*

Commented [JW30]: 29 marks

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<sup>48</sup> Ibid, s. 236.

<sup>49</sup> Ibid, s. 235.

<sup>50</sup> Ibid, s. 238.

<sup>51</sup> Ibid, s. 239.