



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.

By section 211 of the Insolvency Act in respect of liquidations and section 338 Insolvency Act in respect of bankruptcies, a secured creditor may value the debtor's assets that are subject to the security interest and the claim in the liquidation as an unsecured creditor for the balance of the debt. Alternatively, the secured creditor may surrender its security to the liquidator, which will be applied for the benefit of the creditors as a whole and claim in the liquidation as an unsecured creditor for the whole debt.

These options are not mandatory because a secured creditor is not technically a creditor under the insolvency framework and the secured assets are not within the liquidation. The Insolvency Act expressly reserves the right of the secured creditor to enforce against the secured assets.

Question 2.2 [maximum 2 marks]

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

The Creditors' Committee's functions include consulting with the liquidator about matters relating to the liquidation, discussing and considering the liquidators' reports, and assisting the liquidator in carrying out his or her functions and discharge any other functions assigned to the Committee under the Act (s.422(1) Insolvency Act).

The powers of the Creditors' Committee include calling a meeting of creditors, requiring the liquidator to provide the Committee with reports and information relating to the insolvency as it may reasonably require and require the liquidator to attend a meeting before the Committee to provide it with information and explanations relating to the insolvency (s.422(2) Insolvency Act).

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 BVI Court can recognise certain "foreign proceedings" in a "relevant foreign country" and provide assistance to "foreign representatives" (as defined in section 466(1) Insolvency Act) under Part XIX of the Insolvency Act.

The wide powers bestowed on the BVI Court are set out in section 467(3) and include:

- (1) restraining the commencement or continuation of proceedings against the debtor or enforcement over the debtor's property;
- (2) requiring any person to delivery up to the foreign representative the debtor's property or proceeds thereof;
- (3) appointing an interim receiver over the debtor's property;
- (4) authorising the examination by the foreign representative of the debtor or any person who could be examined in the BVI in respect of the debtor's insolvency;
- (5) making such order or grant such relief as it deems appropriate.

Commented [JW2]: 1 mark

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

Commented [JW3]: 2 marks

Approving remuneration

Commented [JW4]: 1.5 marks

8 possible orders

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.

Corporate insolvency is defined in Part VIII Insolvency Act, together with the definitions set out in section 8 of the Act.

A company will be considered insolvent if:

- (1) it fails to comply with the requirements of a statutory demand that has not been set aside in accordance with section 157 of the Act (s.8(1)(a));
- (2) it fails to satisfy execution or other process on a judgment, decree or order of the BVI Court in favour of one of its creditors (s.8(1)(b));
- (3) it is proved to the Court's satisfaction that the value of the company's liabilities exceeds its assets (s.8(1)(c)(i) ("balance sheet insolvency");
- (4) it is proved to the Court's satisfaction that it is unable to pay its debts as they fall due (s.8(1)(c)(ii) ("cash flow insolvency").

As to balance sheet insolvency, the company's liabilities may be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion (s.10(2) Insolvency Act).

It will be more difficult for a creditor to argue that the company is insolvent if it is only balance sheet insolvent but still able to pay its debts as they fall due. In *BNY Corporate Trustee Services Limited v Neuberger Berman Europe Ltd* [2013] UKSC 28 (at para.42, citing the Supreme Court in the UK held that the Court's task (in respect of the balance sheet test in section 123(2) Insolvency Act 1986) is to consider

whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to be able to meet those liabilities. If so, it will be deemed insolvent although it is currently able to pay its debts as they fall due. The more distant the liabilities, the harder this will be to establish

As to the cash flow test, if a company persists in failing to pay a debt that is established as properly due to a creditor, i.e. not disputed, then the creditor is entitled to present a petition notwithstanding that the company appears to solvent (*Cornhill Insurance PLC v Improvement Services Ltd* [1986] 1 WLR 114.

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

Question 3.1 [maximum 5 marks]

Commented [JW6]: 4.5 marks

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

Must be resident in the BVI.

The BVI Business Companies (Amendment) Act 2022 and the BVI Business Companies Regulations (as amended by the BV Business Companies (Amendment) Regulations 2022) introduced new requirements for non-Insolvency Act liquidators from 1/1/23, which includes voluntary liquidators under the BCA.

Section 199(5) of the BVI Business Companies Act 2020 as amended by the BVI Business Companies (Amendment) Act 2022 provides that the Regulations may (a) in respect of non-Insolvency Act liquidators, provide for the qualifications or categories of individuals who are eligible to be appointed, or to act, as voluntary liquidators; and (b) without prejudice to section 201, provide the types of record voluntary liquidators must collect and retain and for what period

Reg 19(1A) of the Regulations as amended, provides that an individual is qualified to be appointed and act as voluntary liquidator if:

- he or she has no less than 2 years' liquidation experience;
- has professional competence to liquidate the company;
- can demonstrate that he or she;
 - o holds an insolvency practitioner's licence; or
 - o has an appropriate professional qualification (including law or accountancy) and experience of providing legal or financial advice or support to companies in the financial services sector; and
- is fully conversant 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.

Reg 19(2) of the Regulations still applies and sets out the categories of individuals who are disqualified from being appointed or acting as the voluntary liquidators of a company, including

- disqualified individuals in the BVI or an individual subject to an equivalent disqualification under the laws of a country outside the BVI;
- minors
- undischarged bankrupts
- individuals who are or have in the previous 2 years acted in a senior management position or equivalent

Reg 20 of the Regulations also remains in force and requires that the voluntary liquidator, or one of them if there are more than one, shall be a licensed insolvency practitioner in certain circumstances, which if the company has held various licences as set out in the Regulation.

Question 3.2 [maximum 5 marks]

Commented [JW7]: 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?

Given that the BVI is a very significant offshore jurisdiction and major player in the international services sector, it is unsurprising that BVI companies very commonly possess assets located worldwide and not just situated within the BVI. It is helpful for an overseas insolvency practitioner to be

appointed jointly with a BVI licensed insolvency practitioner (or the Official receiver pursuant to section 483 Insolvency Act) in cases in which any substantial assets are held in an overseas jurisdiction, as this helps to save costs in terms of local expertise, including of the asset itself and the market in which it is situated, and the cost of travel. This is likely to be more important in corporate insolvencies with very substantial assets or liabilities and where the issues are complex and assets held worldwide in multiple jurisdictions.

Prior written notice of the appointment of an intended appointment of an overseas liquidator must be given to the FSC pursuant to section 483(b) Insolvency Act. The proposed liquidator must also satisfy the requirements for appointment set out at section 483(a) of the Act. Those requirements are that he or she (whether Court appointed or not):

- has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;
- has given his or her written consent to act;
- is not disqualified from holding a licence under section 477 of the Act;
- 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) of the Act

and that there is in force such security for the proper performance of his or her functions as joint liquidator.

Where an application is made to Court for the appointment, an appointment hearing will be listed at which the Commission may appear and make representations to the Court for the purpose of objecting to the appointment (section 484(2) of the Act). Where the proposed appointment is not by the Court but by an appointing person or persons, the Commission may give notice to the appointer that it intends to apply to Court for an order that the overseas insolvency practitioner should not be appointed (section 484(2) of the Act).

Question 3.3 [maximum 5 marks]

Commented [JW8]: 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.

Voluntary (solvent) liquidation under the BCA

Voluntary liquidation under the BCA is only available to solvent companies and is utilised most often where the company is no longer required by a business. Its purpose is to dissolve the company, distribute and deal with its assets and pay its liabilities.

Part XII of the BCA sets out the procedure for voluntary liquidations, whilst also referring at section 196A BCA to the definitions in the Insolvency Act in respect of key terms.

By section 197(1), a company may only be liquidated under the voluntary procedure if it has no liabilities or is able to pay its debts as they fall due and the value of its assets equals or exceeds its liabilities. By section 197(2), a company may be liquidated even if there is a charge registered over its property under section 163 BCA and the liquidator must give effect to the rights and priorities of the company's secured creditors.

Where it is proposed that a voluntary liquidator is appointed, the directors must do the following (s.198(1)):

- (1) make a declaration of insolvency in the prescribed form that the company is solvent (in accordance with the requirements of section 198(1)(a) and section 198(2))
- (2) approve a liquidation plan which must:
 - a. Specify the reasons for liquidation of the company;
 - b. Provide a time estimate for the liquidation of the company;
 - c. State whether the liquidator is authorised to carry on the company's business if appropriate;
 - d. Provide the name and address of the proposed liquidators;
 - e. State whether the liquidator is required to send a statement of account to the members.

The voluntary liquidator (or two or more joint voluntary liquidators) may be appointed either by resolution of the directors (s.199(2)) or the members (s.199(3)).

Once appointed, the voluntary liquidator(s) must within 14 days file notice of his or her appointment and the declaration of solvency made by the directors as well as a copy of the liquidation plan (s.204.) The voluntary liquidation commences on the date the notice of appointment is filed. After the commencement of the voluntary liquidation, the liquidator(s) must advertise the appointment within 30 days (*ibid.*).

Insolvent voluntary liquidation under the Insolvency Act by members resolution

By s.159(3) Insolvency Act, the members of a company may appoint a liquidator (but not the Official Receiver, who may only be appointed by the Court by section 159(1) Insolvency Act) by a qualifying resolution, namely a resolution passed at a meeting of the company by a majority of 75%. Further restrictions apply if the company is regulated by the FSC, as set out in s.159(5).

The liquidation commences when the liquidator is appointed and continued until it is terminated in accordance with section 232 (s.160).

A liquidator has all the powers set out in section 186 of the Insolvency Act, save that, by section 182 of the Insolvency Act, those powers are curtailed during the period before the holding of the first creditors meeting to the powers expressly set out in section 182(a)-(d).

Insolvent liquidation by Court application under the Insolvency Act

Section 172(2) provides that a liquidator may be appointed by the Court on the application of:

- (a) The company;
- (b) A creditor of the company;
- (c) A member of the company;
- (d) The supervisor of a creditor's arrangement;
- (e) The FSC;
- (f) The International Tax Authority;
- (g) The Attorney General.

The Court will only appoint a liquidator under section 159(1) if the company is insolvent, on "just and equitable" grounds or if it is in the "public interest". Just and equitable grounds are fact based but

may include where the management of the company is in deadlock or there is a breakdown of trust and confidence. Public interest grounds are not restricted and could include circumstances in which a large number of stakeholders require the Court's protection.

As with a members' voluntary liquidation, the Court-ordered liquidation commences when the liquidator is appointed and continues until it is terminated in accordance with section 232 (s.160).

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?

Edale may wish to serve Swift with a statutory demand pursuant to section 155 Insolvency Act; if Swift does not apply to set aside the statutory demand under section 157 of the Act, then it will be deemed insolvent pursuant to section 8(1)(a) of the Act. Alternatively, Edale may wish to assert that Swift is insolvent on a cash flow basis as it has failed to pay its debts as they fall due, pursuant to section 8(1)(c)(ii). Section 446(1) of the Insolvency Act provides that foreign creditors have the same rights regarding the commencement of and participation in a BVI insolvency process as creditors in the BVI. It is worth noting that Swift has an obligation to commence insolvency proceedings in any event once its directors become aware that it is insolvent. The insolvency proceedings could be heard in the BVI Commercial Division, given the high value of the claim which significantly exceeds the threshold for claims in the Commercial Court.

Alternatively, Swift may dispute the debt or Edale may for other reasons wish to obtain judgment against Swift in the first instance, for example to avoid any cost risk if it considers that the debt may be disputed. It is unclear which jurisdiction (whether England and Wales or the BVI or any other jurisdiction) would be an appropriate jurisdiction as this would depend on the terms of the loan governing jurisdiction or other facts relating to the transaction.

If a judgment is obtained in the BVI, then Swift's failure to satisfy the judgment would be a ground for insolvency under section 8(1)(b) of the Act. If the judgment is obtained in the Courts of England and Wales, the judgment could be enforced in the BVI directly within 12 months of the date of judgment under the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 section 3(1), alternatively under the common law.

If the loan agreement with Swift did not provide for the creation of a mortgage or charge, Edale will be cautious to accept any new security for the loan. If Swift is unable to pay its debts to Edale as they fall due, it is likely that it is insolvent in accordance with section 8(1)(c)(ii) Insolvency Act. If Edale did accept security from Swift in consideration of a forbearance to sue on the unpaid debt, for example, it would need to be advised that the transaction may be liable to be set aside as a preference. If Swift

Commented [JW9]: 3.5 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.

goes into liquidation and the transaction takes place within 6 months of the appointment of the liquidator (s.245(1)(b) Insolvency Act) or if the transaction is deemed to be an “insolvency transaction”, i.e. it was entered into at a time when the company is insolvent or causes it to become insolvent, then Swift may lose the benefit of the security if the transaction is rendered void.

Edale will then wish to claim in the liquidation. If unsecured, Edale will need to submit a written claim and comply with any other requirements of the Insolvency Rules, rule 184 and/or as imposed by the liquidator. If Edale has security over the property, it should obtain a value of the property and consider whether to surrender such security in the property to the liquidator and then claim in the liquidation as an unsecured creditor. Alternatively, if secured, Edale may choose to enforce its security in the property outside the liquidation process.

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?

The judgment against DEF in ABC’s favour could be enforced in the BVI directly within 12 months of the date of judgment under the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 section 3(1), alternatively under the common law. Once recognised, it is treated from the date of enforcement as if it had been made in the BVI (*idem* s.2(3)(a)).

ABC will want to enforce over the assets owned by XYZ in the BVI. Those are prima facie available for ABC to enforce over, even though its judgment is against DEF, as DEF is the 100% owner of XYZ and its assets.

ABC may wish to apply in England and Wales for a charging order in respect of its judgment over DEF’s shares in XYZ, as this avoids the necessity of applying for recognition of the English judgment. By section 66(4), where the governing law of a mortgage or charge of shares in a company is not the law of the BVI, the mortgage or charge must comply with the requirements of its governing law in order for the mortgage or charge to be valid and binding on the company. The remedies available to a mortgagee or chargee are governed by the governing law and the instrument creating the mortgage or charge save that the rights between the mortgagor or mortgagee as a member of the company and the company shall continue to be governed by the memorandum and the articles of the company and the BCA (*ibid.*).

Notably, even though XYZ has been struck off, s.216(3) BCA provides that the fact that it is struck off the register does not prevent the company from incurring liabilities or a creditor from making a claim against the company and pursuing it through to judgment or execution. As such, XYZ may still be pursued to execution of the debt, even though it has been struck off. Accordingly, ABC may wish to realise the asset and recover its debt through the proceeds of sale of the property.

Commented [JW10]: 3.5 marks

This question required a memorandum to your principal with the options for ABC to consider.

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 [JW11]: How?

Commented [JW12]: This was required in the answer.

XYZ has been struck off but not dissolved. Once the company is dissolved, its assets will vest in the Crown *bona vacantia*. It will also be significantly more difficult to restore XYZ in order to enforce over its assets once it has been dissolved.

If XYZ was struck off under section 213(4) BCA after 1/1/23, the company will be dissolved on the date the Registrar publishes a notice of the striking off in the Gazette (s.216 BCA) as a result of the amendments to the BCA. By section 214(1) as amended, "Any person who is aggrieved by the striking off from the Register and dissolution of a company under sections 213 and 216 respectively may, within 30 days of the date of the notice published in the Gazette under section 213(5), appeal to the Court." As such, ABC would have a very short period during which to appeal to the Court in respect of the striking off, for example on the basis that XYZ has property that has not been distributed and ABC has a claim to such property. It is likely that the time limit has passed for such an appeal.

An application can be made to restore a company to the register under section 217(1) Business Companies Act. This can only be made by the company, a creditor, member or liquidator of the company (s.217(3)). ABC does not have a direct claim against XYZ as its claim is against DEF. The definition of a creditor is set out in s.9(1)(a) Insolvency Act and is that, "A person is a creditor of another person (the debtor) if he or she has a claim against the debtor, whether by assignment or otherwise, that is, or would be, an admissible claim in the liquidation of the debtor, in the case of a debtor that is a company or a foreign company." ABC would have a claim in the liquidation of XYZ on the basis of its judgment against DEF and, accordingly, would have standing to apply under section 217(1) BCA. An application must be made within 5 years of the notice published in the Gazette pursuant to section 217(3) as amended. The effect of the restoration to the Register is that the Company is deemed never to have been struck off (s.217(6)).

Having obtained a charge over the shares of XYZ, it may consider that it would be more valuable to sell the shares, appoint a receiver or exercise its rights and powers as charger in respect of the shares until such time as the debt owed to it by DEF is discharged (s.66(5), if the charge of shares is obtained pursuant to the law of the BVI).

*** End of Assessment ***

Commented [JW13]: 40 marks