



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]: 9 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.**

Commented [JW2]: incorrect

Commented [JW3]: Correct answer

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]

Commented [JW4]: 2 marks

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

The protections and options provided to secured creditors under the BVI insolvency framework include:

1. The BVI Insolvency Act 2003 (Insolvency Act) provides that any order made by the BVI court in exercise of the powers under Part XIX (Orders in aid of Foreign Proceedings) does not affect the rights of secured creditors of a BVI company. On the sale of the assets subject to a security interest, secured creditors are paid first, up to the level of their debts. If there are insufficient funds from the disposal of the assets subject to the security interest, the secured creditor will rank as an unsecured creditor for any shortfall.
2. The Insolvency Act 2003
3. Section 221 of the Insolvency Act 2003 provides that a secured creditor may— (a) value the assets subject to the security interest and claim in the liquidation of a company as an unsecured creditor for the balance of his or her debt.
4. There is no express protection for the rights of secured creditors under a scheme of arrangement.
5. A Company Creditors Arrangement (CCA) will not, without the express written agreement of the secured creditors of a company affect their respective rights.
6. Following the appointment of the liquidator, no one may bring or continue any action or proceedings against the firm, with the exception of secured creditors, and subject to a court order to the contrary since secured creditors are not classed as creditors participating in the liquidation process.
7. The rights of a secured creditor to manage property over which they have a security interest are unaffected by an order made according to section 476 of the Insolvency Act. Neither shall the right of a secured creditor to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest be affected per section 467 (4).
8. Section 338 of the Insolvency Act allows a secured creditor to make a claim in a bankruptcy. Subsection 1 provides that a secured creditor may— (a) value the assets subject to the security interest and claim in the bankruptcy as an unsecured creditor for the balance of his or her debt; or (b) surrender his or her security interest to the

trustee for the general benefit of creditors and claim in the bankruptcy as an unsecured creditor for the whole of his or her debt.

Question 2.2 [maximum 2 marks]

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

After the liquidator has been appointed, the creditors have the authority to pass a resolution establishing a creditors' committee and appointing its members. The committee must be comprised of a minimum of three members and a maximum of five. Its primary responsibilities include consulting with the liquidator, reviewing and evaluating the liquidator's reports, providing assistance to the liquidator, and fulfilling any other duties assigned to it by the relevant legislation or regulations. Furthermore, the committee is empowered to convene a meeting of creditors and summon the liquidator to attend. It is also notified of any court applications seeking approval for the liquidator's remuneration. In the event of valid reasons, the creditors' committee has the right to request the court to dismiss the liquidator.

Commented [JW5]: 1.5 marks - See section 422 of the IA2003

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 powers provided to the BVI Court in relation to the orders the Court can make in support of foreign insolvency proceedings as provided in the Insolvency Act include:

1. Part XIX of the Insolvency Act provides a fundamental legal basis for support to be given to foreign solvency proceedings from specific authorized countries, which are currently restricted to: Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom, and the United States. According to section 467 (2) of the Insolvency Act of 2003, a foreign representative can apply for an order under section (3) from the Court in support of the foreign proceeding for which they are authorized.
2. The Court is empowered under subsection (3) to:
 - (a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;
 - (b) [subject to subsection (4),] restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
 - (c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
 - (d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;
 - (e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;
 - (f) authorise the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;
 - (g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or

Commented [JW6]: 2 marks

(h) make such order or grant such other relief as it considers appropriate. (4) An order under subsection.

3. The Court is able to apply the law of the Virgin Islands or the law applicable in respect of the foreign proceeding as per section 467 (5). The Court in determining an application under section 467, shall be guided by what will best ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with —
- (a) the just treatment of all persons claiming in the foreign proceeding;
 - (b) the protection of persons in the Virgin Islands who have claims against the debtor against prejudice and inconvenience in the processing of claims in the foreign proceeding;
 - (c) the prevention of preferential or fraudulent dispositions of property subject to the foreign proceeding, or the proceeds of such property;
 - (d) the need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a Virgin Islands insolvency; and
 - (e) comity.

These powers granted to the BVI Court aim to enable cross-border insolvency cooperation, promote efficiency, and protect the interests of creditors and stakeholders involved in foreign insolvency proceedings.

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.

The Insolvency Act, 2003 (the "Act") is the main piece of legislation governing insolvency in the BVI. A company is deemed insolvent in the BVI under the following circumstances, under the Act:

1. A company is deemed to be insolvent under the Insolvency Act 2003 if it fails to satisfy a valid statutory demand that has not been set aside under section 157 (section 8 (1) (a). In **Cornhill Insurance PLC v Improvement Services Ltd & Others**¹ the court held that where a creditor's debt was clearly established, the creditor had a right to present a winding-up petition, even though it appeared that the company was solvent, as the persistent non-payment of the debt suggested that the company was unable to pay its debts. Section 149. (1) of the Insolvency Rules provides that the minimum sum for which a statutory demand may be issued is \$2,000.
2. The requirements of a statutory demand are prescribed in section 155 of the Act. They include that the demand shall:—
 - (a) be in respect of a debt that is due and payable at the time of the demand and that is not less than the prescribed minimum;
 - (b) be in writing and shall specify the nature of the debt and its amount;
 - (c) be dated and shall be signed by the creditor or by a person authorised to make demand on the creditor's behalf;
 - (d) require the person to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the date of service of the demand on him or her or such longer period as may be prescribed; (Amended by Act 11 of 2004)

¹[1986] 1 WLR 114.

- (e) state that if the demand is not complied with, application may be made to the Court for the appointment of a liquidator or a bankruptcy trustee, as the case may be; (Amended by Act 11 of 2004)
- (f) set out the rights of the person to make application to set the demand aside under section 156; and
- (g) comply with and be served in accordance with the Rules

The Court in *Richard Fogerty (Joint Official Liquidator of Trade and Commerce Bank) v Island Point Properties SA*² considered the construction and effect of ss. 8(1)(a) and 167(1)(a) of the Act and at paragraph 29 stated:

Section 8(1) of the Act, in my view, does no more than set out the circumstances under which a company is considered to be insolvent. It does not go on to say that the appointment of a liquidator must follow as a consequence. In short, it contains no language which may be interpreted as limiting or removing the court's inherent jurisdiction. Further, s. 167 of the Act does not contain any language which may be construed as limiting the court's discretionary powers expressly granted thereunder, or which in any way subjugates that discretion so as to accord force to either s. 8(1)(a) or s.156.

Consequently, the court found that the Court had the broad authority to exercise its discretion in various ways, such as appointing a liquidator, dismissing an application, or issuing any other appropriate order. This discretionary power is reinforced by section 167 of the Act. Thus, the court can review the underlying statutory demand and exercise discretion, even when the respondent has not filed an application to challenge the demand within the stipulated 14-day period, as mandated by section 8(1)(a).³

3. If execution or other process issued on a judgment, decree or order of the BVI court in favour of a creditor is returned wholly or partly unsatisfied (section 8 1 (b)); or
 - i. Either the value of the company's liabilities exceeds its assets (balance sheet insolvency) (section 8 (1) (c) (i)). Section 10 (1) states that "liability" means a liability to pay money or money's worth including a liability under an enactment, a liability in contract, tort or bailment, a liability for a breach of trust and a liability arising out of an obligation to make restitution, and "liability" includes a debt. Further a liability may be present or future, certain or contingent, fixed or liquidated.
 - or
 - ii. the company is unable to pay its debts as they fall due (cashflow insolvency) (section 8 1 (c) (ii)).

The threshold test that is applied by the Court in determining whether there is a substantial dispute was stated by Sir Dennis Byron, Chief Justice, as he then was in *Sparkasse Bregenz Bank AG v Associated Capital Corporation*.⁴

The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company

² BVIHCVP2009/0012 (delivered 13th August 2010, unreported).

³ <http://vlex.com/vid/insolvency-disputes-the-effect-845898173>, Mondaq, Insolvency Disputes: The Effect Of Failing To Challenge A Statutory Demand.

⁴ BVIHCVP2002/0010 (delivered on 18th June 2003).

could be wound up. To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding.

Additionally, Section 209 of the BVI Companies Act provides a company is insolvent if— (a) the value of its liabilities exceeds, or will exceed, its assets; or (b) it is, or will be, unable to pay its debts as they fall due.

It is significant to highlight that insolvency processes in the BVI can be complicated and that a variety of methods, including voluntary liquidation, creditors' winding-up petitions, and schemes of arrangement, are available to address insolvency. These procedures include court oversight and could have particular guidelines that must be followed.

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

Question 3.1 [maximum 5 marks]

Commented [JW8]: 5 marks

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

On 1 January 2023, the BVI Business Companies Act, 2004 was amended by the: (1) BVI Business Companies (Amendment) Act, 2022; and (2) the BVI Business Companies (Amendment) Regulations, 2022. The Amendments affected all companies incorporated or registered in the BVI.

Section 2 of the BVI Business Companies Act was amended by the BVI Business Companies (Amendment) Act 2022 where the previous definition of voluntary liquidator was deleted and substituted by the following definition: "voluntary liquidator" means a liquidator who is resident in the Virgin Islands and appointed under section 199 or an Insolvency Act liquidator, and any reference to "liquidator" shall be construed in that context. Further subsection 2 prescribes that for purposes of the definition of "voluntary liquidator" in subsection (1), a liquidator is considered to be resident in the Virgin Islands if, prior to his or her appointment as voluntary liquidator, he or she has been living physically in the Virgin Islands for a period of not less than 180 days, whether continuously or in aggregate.

Subsection 3 goes on to mandate that where joint liquidators are appointed (a) at least one of the joint liquidators shall be a person who satisfies the requirement of subsection (2); and (b) the requirement of subsection (2) shall not apply to the other joint liquidator if he or she is resident outside the Virgin Islands.

If, however prior to the coming into force of the 2022 amendment, a person was appointed as a voluntary liquidator in respect of a company, the person's appointment shall continue to the

conclusion of the voluntary liquidation and the restrictions provided in subsections (2) and (3) shall not apply to such person in relation to that voluntary liquidation.

Under section 199 of the Business Companies Act 2004 (the BCA), a voluntary liquidator may be appointed by resolution of the directors pursuant to section 199(2) or by resolution of members pursuant to section 199(3) only if the company is solvent.

The 2022 amendment made changes to section 199 where subsection (5) was repealed and replaced with the following subsection: "(5) 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."

The BVI Business Companies (Amendment) Regulations 2022 provides by the amendment to Regulation 19 that:

- An individual is eligible to be appointed and to act as a voluntary liquidator of a company if the individual has been appointed on or after 15 October, 2012 and
- (a) is qualified to be appointed and act as a voluntary liquidator of a company if he or she (a) has liquidation experience of not less than 2 years;
 - (b) has professional competence to liquidate the specific company concerned;
 - (c) is able to demonstrate that he or she (i) holds an insolvency practitioner's licence issued by the Commission pursuant to the Insolvency Act; or (ii) has an appropriate professional qualification (such as in law or accountancy) and experience of providing legal or financial advice or support to companies in the financial services sector; and
 - (d) (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.

Further the individual must not be disqualified from acting as the voluntary liquidator of a company or holding a licence.

Question 3.2 [maximum 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

A creditor may consider the appointment of an overseas insolvency practitioner where the company is regarded as being insolvent i.e. it is cash flow insolvent, unable to pay its debts when they fall due, the value of its liabilities exceeds its assets or when the creditor serves a valid statutory demand and the company fails to pay the debts within the relevant period. Additionally, if execution of a judgment or other order of a BVI court against it is returned wholly or partly unsatisfied.

In an insolvent liquidation control of the company's affairs is transferred to an independent insolvency practitioner, who is tasked with seizing, safeguarding, and realizing the company's assets for the benefit of the creditors.

Commented [JW9]: 3 marks

Commented [JW10]: Not correct answer. Saving costs, local expertise and assets located in other jurisdictions require someone within it.

An overseas insolvency practitioner can be appointed and does not need to obtain a licence from the Financial Services Commission to act as the liquidator of a company if the overseas insolvency practitioner acts a joint liquidator with a licensed insolvency practitioner in the BVI. To be eligible to be appointed as joint liquidator, an overseas insolvency practitioner must: have sufficient qualifications and experience to carry out the appointment; have consented in writing to act as liquidator in the prescribed form; not be disqualified from acting as liquidator under the Act; and given prior notice of the proposed appointment to the FSC Commission and satisfy the requirements of section 483 of the insolvency Act.

Commented [JW11]: Must have proper security in force. FSC must approve appointment and if it objects then it has right to apply to court. Court can approve the appointment at the hearing of the FSC's application (unlikely the court will appoint if FSC objects).

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

The process for the proposed appointment of the overseas insolvency practitioner must comply with the relevant provisions of the Insolvency Act more specifically sections 483 484 and 162. The Creditor is empowered by section 162 (2) (b) to file at the Court office an application to appoint a liquidator stating the grounds on which the appointment is sought and stating the name of the proposed overseas liquidator and/ local liquidator; and affidavit in support attaching a notice of eligibility and consent to act signed by the liquidator named in the application.

Section 162 (1) provides that the Court can appoint a liquidator of a company under section 159(1) if— (a) the company is insolvent; (b) the Court is of the opinion that it is just and equitable that a liquidator should be appointed; or (c) the Court is of the opinion that it is in the public interest for a liquidator to be appointed.

The creditor must file an application in accordance with Rules 155 and 156 of the Revised Insolvency Rules and must serve the company a sealed copy of the application and the supporting affidavit within 14 days of the application being filed as required by Rule 157 (1).

Rule 161 states that the advertisement of an application to appoint a liquidator shall state— (a) the name of the company in respect of which the appointment is sought and the address of its registered office or, in the case of a foreign company, the address at which the application was served; (b) the name and address of the applicant; (c) the date on which the application was filed; (d) the venue fixed for the hearing of the application; (e) the name and address of the legal practitioner acting for the applicant; and (f) that any person intending to appear at the hearing of the application, whether to support or oppose the application, shall give notice of his or her intention in accordance with rule 162. The application is publicly announced in the BVI Gazette and in any newspaper(s) chosen by the creditor for a period of at least seven days. When the Court makes the Order appointing the liquidator, the Court will notify the liquidator of the appointment and send a sealed copy of the order on the appointee to him or her as soon as is practicable as required by Rule 167.

Question 3.3 [maximum 5 marks]

Commented [JW12]: 3.5 marks

With reference to the relevant legislation, detail the different types of liquidation in the BVI, along with the procedures required for the commencement of each type.

The Insolvency Act, the Insolvency Rules and The BVI Business Companies Act 2004 (BCA) serve as the main statutes regarding insolvency in the BVI. These include insolvency pertaining to individuals and company insolvency. The different types of liquidations are:

1. **Voluntary Liquidation Under the BCA** - A voluntary liquidator may only be appointed under Section 199 of the Business Companies Act of 2004 (the BCA) if the company

is solvent and by resolution of the directors in accordance with Section 199(2) or by resolution of the members in accordance with Section 199(3). A liquidation plan must also be submitted by the directors. From 1 January 2023 section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 of the BVI Business Companies (Amendment) regulations 2022 introduced new requirements in respect of non-Insolvency Liquidators. Regulation 6(a)1A indicates that an individual is eligible to be appointed and to act as a voluntary liquidator of a company if the individual has been appointed on or after 15 October 2012 and (a) is qualified to act as a voluntary liquidator of a company and is not disqualified from acting as the voluntary liquidator of a company. Further the individual is qualified to be appointed and act as a voluntary liquidator of a company if he or she (a) has liquidation experience of not less than 2 years; (b) has professional competence to liquidate the specific company concerned; (c) is able to demonstrate that he or she (i) holds an insolvency practitioner's licence issued by the Commission pursuant to the Insolvency Act; or (ii) has an appropriate professional qualification (such as in law or accountancy) and experience of providing legal or financial advice or support to companies in the financial services sector; and (d) 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.

2. Voluntary insolvent Liquidation under the Insolvency Act by members resolution- In order to carry out this type of insolvent winding up of the company, the members of a company may, by way of a qualifying resolution of a majority of at least 75% of the members with voting rights), appoint a licensed insolvency practitioner as liquidator pursuant to section 159 (3) of the Insolvency Act 2003. The members must give notice as soon as possible to the liquidator of the appoint per section 161 (2) of the Act.

3. Insolvent Liquidation by court application - The BVI Court is empowered to appoint an official receiver or liquidator over a BVI Company once an application is filed in accordance with section 162 of the Insolvency Act. In the case of a foreign company the application must be made pursuant to section 163 of the Insolvency Act. The application can be made by 1) a member, 2) the company, 3) a creditor, 4) The FSC, 5) the Attorney General, 6) the supervisor of a creditor's arrangement.

The application for the appointment of the liquidator must be considered and determined by the Court within six months after it is filed. However, the court can extend the timeframe. The Court can only exercise its discretion to appoint the liquidator if the company is insolvent, it is in the public interest and the court is of the opinion that it is just and equitable.

4. Schemes of arrangement- A scheme is a statutory agreement between a company and its creditors or shareholders, involving accommodation or "give and take." It is governed by the BCA. The BVI Court interprets schemes broadly, but they are used to reorganize share capital, restructure liabilities, or alter distribution rights. Scheme proceedings can be initiated by the company, creditors, shareholders, or a liquidator. However, a creditor or shareholder must provide the company's support.⁵

5. Company's creditors arrangements – The Insolvency Act and the Insolvency Rules are the governing statutes for this type of procedure. A CCA is an arrangement between a company and its debtors that allows the parties to vary the rights of creditors and cancel the liability of a debtor in whole or in part. The legislative framework for a CCA is set out in Part II of the Insolvency Rules, 2005 (IR). The process is initiated by

Commented [JW13]: Not required for this question.

Answer should include: 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 [JW14]: Not a liquidation

Commented [JW15]: Not a liquidation

⁵ https://www.campbellsllegal.com/wp-content/uploads/2020/12/010_BRITISH_VIRGIN_ISLANDS.pdf

the company's director(s) proposing an arrangement and nominating an interim supervisor to act. The director(s) must pass a resolution stating the company is insolvent or likely to become insolvent, and a written proposal must be approved to set out how creditors' rights will be varied or cancelled. A CCA does not affect the right of a secured creditor to enforce its security interest or vary the liability secured by the security interest. The proposal must be approved by a majority of creditors representing 75% or more in value, and the supervisor will be appointed.

6. In terms of **Personal Bankruptcy** the provisions set out in Part V of the Insolvency Act includes: insolvency set off (section 150 of the Insolvency Act; agreements to subordinate debts (section 151 of the Act); and statutory demand (section 155 of the Act).

Commented [JW16]: Not a liquidation

7. **Individual creditors arrangement – Under section 46 (Division 3 Individual creditors arrangement a debtor is an individual** who intends to make or who has made a proposal under this Division; and who nominates an eligible insolvency practitioner to act as interim supervisor for the purposes of the proposal. The debtor must provide the nominated insolvency practitioner with - (i) a copy of the proposal; (ii) a statement of assets and liabilities made up to a date no earlier than 4 weeks prior to the date upon which it is provided to the nominated insolvency practitioner; and (iii) a notice of intention to appoint the nominated insolvency practitioner as interim supervisor.

The nominated insolvency practitioner may accept appointment as interim supervisor, by delivering to the debtor a copy of the notice. The appointment of the interim supervisor takes effect from the time when he or she delivers the endorsed notice to the debtor. The appointment of an interim supervisor is not effective. The acceptance takes place within 5 business days of the date of receiving the notice of intention to appoint him or her as interim supervisor from the debtor.

Commented [JW17]: Not a liquidation

QUESTION 4 (fact-based application-type question) [15 marks in total]

Question 4.1 [maximum 6 marks]

Edale Limited, a company incorporated in England, and Swift Limited, a company incorporated in the BVI, entered into a two-year loan agreement for the purchase of a property on Mosquito Island in the BVI. Under the terms of the loan agreement, Edale Limited transferred USD 10,000,000 to Swift Limited who then purchased the property. Swift Limited only repaid four months' instalments under the agreement and, as per the terms of the agreement, Edale Limited demanded immediate repayment in full.

Providing reasons, with particular reference to the Insolvency Act, what are the options open to Edale Limited against Swift Limited?

The Insolvency Act 2003 (the IA), with the Insolvency Rules 2005 serving as a supplement, codifies nearly all of the insolvency legislation in the British Virgin Islands (BVI). Pursuant to section 446 of the Insolvency Act Edale Limited as a foreign creditor being incorporated in England has the same rights regarding the commencement of, and participation in, a Virgin Islands insolvency proceeding as a creditor in the Virgin Islands. It is noteworthy however that this section is not yet in force and is still not an effective part of the Act.

Commented [JW18]: 1 mark

Commented [JW19R18]: 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.

Edale Limited therefore would have to seek to recover the sum of USD 10,000,000 from Swift by commencing insolvency proceedings in England where it is incorporated, and then apply

Commented [JW20]: Not in force

to the BVI Court for an order in aid of foreign proceedings. Further the property on Mosquito Island is an asset in the BVI, thus under section 467 (1) of the Insolvency Act which states that " For the purposes of this section "property" means property that is subject to or involved in the foreign proceeding in respect of which the foreign representative is authorized , Edale can assert that the property which was purchased with its funds is property subject to foreign proceedings.

An application for an order in aid of the proceedings in which they are appointed may be made to the BVI courts under Part XIX of the function by a foreign representative appointed to function in a "relevant" foreign nation. England (United Kingdom) is currently among the applicable recognized nations. Edale Limited, by commencing proceedings in England has the right to apply to the courts of the BVI for orders in aid.

Additionally, under section 467 (2), a foreign representative may apply to the Court for an order under subsection (3) in aid of the foreign proceeding in respect of which he or she is authorized. Edale's foreign representative would be empowered to make the appropriate application to the BVI Court for the relevant order.

The BVI Court under section 467(3) has jurisdiction to make an order upon the application of Edale Limited to: (a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property; (b) subject to subsection (4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property; (c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property; (d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding; (e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;

Under section 468 the BVI Court should consider the following in determining Edale's application under section 467. These are:

(1) In determining an application under section 467, the Court shall be guided by what will best ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with—

- (a) the just treatment of all persons claiming in the foreign proceeding;
- (b) the protection of persons in the Virgin Islands who have claims against the debtor against prejudice and inconvenience in the processing of claims in the foreign proceeding;
- (c) the prevention of preferential or fraudulent dispositions of property subject to the foreign proceeding, or the proceeds of such property;
- (d) the need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a Virgin Islands insolvency; and
- (e) comity.

Edale's foreign representative may need to apply for the appointment of a liquidator in the BVI, if the grounds to do so can be established. Further if security has been granted over the property in Mosquito Island Edale may seek enforcement against the company following the default in payment.

Question 4.2 [maximum 9 marks]

Commented [JW21]: 4.5 marks

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

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

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

Advise on the options available to ABC Limited on the recovery of the judgment debt owed by DEF Limited

In order to enforce the judgment awarded in the English High Court against DEF Limited, ABC Limited has to register the judgment in the BVI High Court pursuant to the Reciprocal Enforcement Judgments Act 1922 (the 1922 Act). The award of 2 million GBP must be for a final judgment.

The judgment may be registered within 12 months of the date of the judgment or if that time has expired an application will have to be made to the BVI court for an extension. The application for registration of the Judgment must be made under Civil Procedure Rules ("CPR") Part 72 which states:

"72.2 An application to have a judgment registered in the High Court may be made without notice to the court but must be supported by affidavit evidence – (a) exhibiting the judgment or a verified, certified or otherwise duly authenticated copy of it and, if the judgment is not in the English language, an English translation of it certified by a notary public or authenticated by affidavit; (b) specifying the amount of the interest, if any, which under the law of the country of the original court has become due under the judgment up to the time of the application; (c) stating the name, trade or business and the usual or last known place of abode or business of the judgment creditor and the judgment debtor respectively, so far as is known to the deponent; and (d) stating to the best of the information or belief of the deponent – (i) that the judgment creditor is entitled to enforce the judgment; and either (A) that at the date of the application the judgment has not been satisfied; or (B) the amount in respect of which it remains unsatisfied; (ii) that the judgment may be ordered to be registered for enforcement under any relevant enactment; and (iii) that the registration would not be or be liable to be, set aside under any relevant enactment.

The Court will consider the circumstances necessitating the request for the extension and consider whether it is just and convenient to do so. The judgment will not be registered if any of the conditions specified by section 3(2) of the 1922 Act exist, namely:

- I. If the original court acted without jurisdiction;
- II. If a judgment debtor who neither carried out business nor was ordinarily resident in the original jurisdiction, did not voluntarily appear or otherwise submit or agree to submit to that jurisdiction;

III. The judgment debtor was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or carried on business within or agreed to submit to that jurisdiction;

IV. The judgment was obtained by fraud;

V. The judgment debtor satisfies the BVI courts that an appeal is pending, or that he is entitled and intends to appeal against the judgment in the case that registration is sought under the 1922 Act; or

VI. The judgment was in respect of a cause of action which, for reasons of public policy or similar reason, would not have been considered by a BVI court.

The BVI Court will consider factors such as service, fairness and public policy in granting the application to enforce the foreign judgment. The same enforcement remedies available under the CPR and any other enactment which is available for a judgment which was made by the BVI Court is also available to the Judgment awarded by the English high court once it has been registered and recognised.

CPR highlights various types of enforcement remedies available in relation to a money judgment such as what ABC Limited has been awarded. These include

- Charging order (CPR Part 48).
- Garnishee/attachment order (CPR Part 50).
- Judgment summons (CPR Part 52).
- Order for the seizure and sale of goods (CPR Part 46).
- Order for the possession and sale of land (CPR Part 53).
- The court can also appoint a receiver (CPR Part 51).⁶

Because 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, ABC Limited can file an application for the appointment of a liquidator over DEF Limited and its subsidiary XYZ Limited under the Insolvency Act 2003. ABC Limited can file a claim in the BVI Court under Part 45 for the possession and sale of the properties to get satisfaction for the debt owed.

ABC Limited is also able to make a claim under the common law for enforcement of the Judgment. This will however be more time consuming because filing a claim under the common law entails filing a motion for summary judgment under Part 15 of the CPR and following all the set procedures under the CPR for the same. In accordance with the 1922 Act, the registration of a foreign judgment can be completed within one month whereas the application to the Court under the common law will take a longer period of time. Issues such as service of the claim on the debtor and whether the enforcement will be resisted can also prolong the timeline for completion of the High court proceedings. Since DEF Limited is incorporated in England there may be a need to have service effected in England. This will necessitate another application for permission to be served out of the jurisdiction. Noting that the sole shareholder and sole director of DEF Limited has recently died, service the claims should be made on the estate of the sole director. Additionally, before the application for a liquidator may be made a statutory demand for the debt due can be made on the estate and an application for interim relief to prevent the heirs from disposing of the estate of the deceased before the Court can grant the application for the appointment of the liquidator and enforcement of the judgment debt.

⁶ <https://uk.practicallaw.thomsonreuters.com>, Enforcement of Judgments in the British Virgin Islands: Overview by Alex Hall Taylor QC and Richard Brown, *Carey Olsen*

It must also be noted that in the absence of fraud, a claim in respect of a judgment debt is barred after 12 years from the date of the judgment. Furthermore, interest accrued on a judgment debt is not recoverable after 6 years from the date on which it became due. Consequently, ABC Limited should move with expedition to ensure that the Judgment is registered in the BVI to obviate the need for any unnecessary applications to the court for extension of time. The BVI is a creditor friendly jurisdiction, and the Court will assist creditors in realising their claims once it is just and convenient to do so and not contrary to public policy.

*** End of Assessment ***

Commented [JW22]: 35.5 marks