



**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 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: **[studentnumber.assessment5B]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. 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 **7 pages**.

**ANSWER ALL THE QUESTIONS****QUESTION 1 (multiple-choice questions) [10 marks in total]**

Commented [CW1]: 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.

Commented [CW2]: Correct 1 mark

**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.

Commented [CW3]: Correct 1 mark

**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 [CW4]: Correct 1 mark

**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.

Commented [CW5]: Correct 1 mark

**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.

Commented [CW6]: Correct 1 mark

**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 3 months of the date of trial.
- (c) Within 6 months of the date of judgment.
- (d) Within 6 months of the date of trial.

Commented [CW7]: Correct 1 mark

**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.

Commented [CW8]: Correct 1 mark

**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.

Commented [CW9]: Correct 1 mark

**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.

Commented [CW10]: Correct 1 mark

**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 [CW11]: Correct 1 mark

**QUESTION 2 (direct questions) [10 marks]**

Commented [CW12]: 10 marks

**Question 2.1 [maximum 2 marks]**

Commented [CW13]: 2 marks, good answer

With reference to the relevant legislation, in what circumstances can a liquidator be removed from office?

Pursuant to section 187(1) of the BVI Insolvency Act, the liquidator can be removed from office if:

the liquidator:

- is not eligible to act as an insolvency practitioner in relation to the company,
- breaches any duty or obligation imposed on him by the BVI Insolvency Act, the BVI Insolvency Rules or any other applicable law in the BVI; or
- fails to comply with any direction or order of the Court made in relation to the company; or

the Court is satisfied that:

- the liquidator's conduct of the liquidation is below the standard that may be expected of a reasonably competent liquidator,
- the liquidator has an interest that conflicts with his role as liquidator; or
- for some other reason, the liquidator should be removed as liquidator.

Section 187(2) provides directions as to the persons who may apply for the removal of liquidator.

**Question 2.2 [maximum 2 marks]**

Commented [CW14]: 2 marks

A liquidator is appointed to a BVI incorporated company by the Court. In what circumstances would an officer of that company be deemed to have committed an offence pursuant to the fraudulent conduct provisions? You are required to make reference to the relevant legislation.

Pursuant to section 289 (1) of the BVI Insolvency Act a person who is or has been an officer of the company is deemed to have committed an offence of fraudulent conduct if, at any time while he is an officer of the company or during the period of 12 months prior to the commencement of the liquidation, he has:

- (a) made or caused to be made any gift or transfer of, or charge on, or has caused, permitted or acquiesced in the levying of any execution against the company's assets; or
- (b) concealed or removed any of the company's assets since, or within, sixty days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.

Notwithstanding the above, pursuant to section 289 (2) an officer of the company will not be guilty of a fraudulent conduct offence under this section:

- (a) by reason of conduct constituting an offence (with respect to gift or transfer etc, under subsection (1)(a)) which occurred more than five years before the commencement of the liquidation; or
- (b) if he proves that, he had no intent to defraud the company's creditors, at the time of the conduct constituting the offence.

**Question 2.3 [maximum 2 marks]**

Commented [CW15]: Comprehensive answer, 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?

Pursuant to Part XIX of the Insolvency Act, in particular section 467, the BVI Court, upon the application of the foreign representative for an order in aid of the foreign proceedings,

has the powers to make such order, while applying the BVI law or applicable law in relation to the foreign proceeding. The Court can recognise the foreign proceedings and provide assistance to the foreign representative.

The Court has the following powers: to restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor its property; to restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property; to require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property; to order or grant relief to facilitate, approve or implement arrangements that will result in a co-ordination of a BVI insolvency proceeding with a foreign proceeding; to appoint an interim receiver of any of the debtor's property for such term and subject to such conditions as it considers appropriate; to authorise the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding; to stay or terminate or make any other order it considers appropriate in relation to a BVI insolvency proceeding; or to order or grant such other relief as it considers appropriate.

It is noted that the above order should not affect a secured creditor's right to deal with the debtor's property over which he has a security interest. In addition, section 468 provides for the considerations the Court should make when determining the foreign representative application to make such order, such as the economic and expeditious administration of the foreign proceeding and consistency with, *inter alia*, fair treatment among creditors in the foreign proceedings and protection of BVI creditors in the foreign proceedings.

**Question 2.4 [maximum 4 marks]**

**Commented [CW16]:** Good answer, 4 marks

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

Set out below the circumstance in which a company will be considered insolvent in BVI:

1. Pursuant to section 8(1)(c)(i) of the Insolvency Act, if the value of the company's liabilities exceeds the value of its assets. This is the test of "balance sheet insolvency" which should be proved to the Court's satisfaction. A wide definition for liability is in section 10, *inter alia*, "liability to pay money including a liability under an enactment, contract, tort or bailment, for a breach of trust and a liability arising out of an obligation to make restitution, and a debt. It may be present or future, certain or contingent...". It is noted that in the case of *Trade and Commerce Bank v Island Point*, the BVI Court of appeal establish that a company may not be considered balance sheet insolvent in a case where its assets' value became lower than those of its assets for only a short period.
2. Pursuant to section 8(1)(c)(ii), the company is unable to pay its debts as they fall due. This is a question of fact and it should be proved to the satisfaction of the Court. In the case of *Cornhill Insurance Plc v Improvement Services Limited* it was set out that inability to pay a debt that is due and not disputed, is sufficient evidence of insolvency of a company.
3. Pursuant to section 8(1)(a), if the company fails to comply with the terms of a statutory demand (which is a written demand for payment of a debt that is due and payable, made by a creditor in the format required pursuant to section 156 of the insolvency Act), and it is not successfully set aside under section 156 and 157 of the Insolvency Act.
4. Pursuant to section 8(1)(b) if the company is unsuccessful in execution or other process issued on a judgment, decree or order of a BVI Court in favour of a creditor of the company is returned wholly or partly unsatisfied.

It is noted that notwithstanding the above statutory tests, on a Court appointment case the Court retains residual discretion as to whether it should find that a company is insolvent and appoint a liquidator.

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

Commented [CW17]: 15 marks

**Question 3.1 [maximum 5 marks]**

Commented [CW18]: 5 marks

With reference to the relevant legislation, explain the steps a liquidator must take when preparing to terminate a liquidation.

Pursuant to section 232 of the Companies Act, a termination of liquidation of a company occurs on the date of one of the following, (whichever happen first) and the steps the liquidator must take when preparing to terminate a liquidation are also set up below:

- (a) the Court makes an order to terminate the liquidation under sections 233, which means that at any time after the liquidator was appointed over the company the Court can make an order to terminate the liquidation if it is satisfied that it is just and equitable to do so (the court must consider the justice and equity of the outcome<sup>1</sup>). An application to the Court under this section 233 may be made by the liquidator, a creditor, a director or a member of the company or the Official Receiver. Prior to the Court making the order, the liquidator may be required by the Court to file a report with respect to any matters relevant to the application. It is important to note that it is for the Court discretions to determine the terms and conditions of such order as it considers appropriate and, on making the order or at any time thereafter, the Court may give further directions or make such other order as it considers fit in connection with the termination of the liquidation. From the date of such order the company ceases to be in liquidation. within ten days of the date of the order, a sealed copy of the order should be filed with the Registrar.
- (b) the liquidator filed a certificate of compliance as he required to do under the provision of section 234(2). As soon as practicable, after the liquidator completed his duties in relation to the liquidation of the company, he is required to prepare his final. The final report must be sent to every creditor of the company whose claim has been admitted by the liquidator and to every member of the company. The liquidator needs to prepare and include in the final report a statement of realisation and distribution in respect of the liquidation and a statement that all known assets of the company have been disclaimed, realised, or distributed without realisation; that all proceeds of realisation have been distributed; and that there is no reason why, in the liquidator's opinion, the company should not be struck from the Register, and dissolved. In addition, the report needs to include a summary of the grounds upon which a creditor or member may object to the striking of the company from the Register. The liquidator needs to file with the Registrar a copy the final report and the statement realisations and distributions sent to the creditors and members of the company.
- (c) the Court makes an order under section 234(4) exempting the liquidator from compliance with 234(2) (having to file a certificate of compliance). The liquidator can make an application to the Court to be exempted from preparing and sending its final report to every creditor of the company whose claim has been admitted and to every member of the company; or modify the whole provision with respect to the final report. These are all for the Court discretion to determine.

<sup>1</sup> As it has been described by Justice Dawson in Mallet & Mallet



Pursuant to section 235, once the appointment ended, the liquidator or provisional liquidator can apply to the Court for their release and it is for the Court's discretion to grant the release unconditionally or upon such conditions as it considers fit, or it may even withhold it. Once the liquidator is released, he is discharged from all liability in respect of any act or default of his in relation to the administration of the company. It is important to note that the Court can still make an order under section 254 (remedy against delinquent officers and others) against a liquidator who has been released. A liquidator who obtains his release under this section shall file a notice in the prescribed form with the Registrar.

Pursuant to section 236, the Insolvency Rules, 2005 shall provide for the dissolution of a company on the termination and completion of the liquidation of the company. However, it is noted that there is a *lacuna* in the IR in this respect, as no such procedure had been legislated for. Finally, it is important to note that, although rare, a company may not be dissolved upon the termination of its liquidation and an application to the Court is for the termination but also for the purpose that it can continue its business. In summary and in practice, once a liquidation is completed, the liquidator files its final report, being released and the liquidation is terminated, the liquidator will write to the Registrar / FSC for the dissolution of the company.

### Question 3.2 [maximum 5 marks]

Commented [CW19]: Excellent answer 5 marks

In relation to a voluntary (solvent) liquidation, please set out: (i) the red flags that would lead a voluntary liquidator to identify the company as insolvent; and (ii) the steps that are required of the voluntary liquidator in the event insolvency is identified. Please ensure that you refer to the relevant legislation.

The procedure for voluntary liquidations is contained in Part XII of the BVI Business Companies Act (BCA). Under section 197(1) of the BCA a company can only be liquidated under this Part, i.e. considered voluntary liquidation if it has no liabilities or is able to pay its debts as they fall due and the value of the assets is equal or exceeds its liabilities.

Pursuant to sections 209, Division 2 of the BCA, if a voluntary liquidator discovers, during the course of its investigations, that (a) the value of the company's liabilities exceeds, or will exceed, its assets; or (b) the company is, or will be, unable to pay its debts as they fall due<sup>2</sup> (those are the two red flags for that would lead a voluntary liquidator to identify the company as insolvent for the purpose of Division 2), the voluntary liquidator is required to immediately send a written notice to the Official Receiver. Pursuant to section 209 (2) at any time the voluntary liquidator of a company in voluntary liquidation is of the opinion that the company is insolvent, he shall forthwith send a written notice to the Official Receiver in the approved form. It is noted that if the company is regulated by the Financial Services Commission (FSC), a written notice should also be sent to the FSC. (note that violation of this requirement can lead to conviction to a fine of \$25,000- sections 209(3)).

The additional steps that are required of the voluntary liquidator in the event insolvency is identified are as follows: Pursuant to section 210, subsequently to sending the notice to the Official Receiver the voluntary liquidator must then call a meeting of the creditors of the company within 21 days of the date of the notice. This meeting is treated as if it was the first meeting of the creditors of a company called under section 179 of the Insolvency Act (by a liquidator appointed by the members of a company and sections 179 and 180 of the Insolvency Act shall apply to the calling and holding of such a meeting, for instance, a notice of the meeting shall be sent to all known creditors and the notice shall be advertised; before the meeting, at the request of creditors the liquidator shall provide a list of all known creditors

<sup>2</sup> Section 209 (1) of the BCA

and other information concerning the affairs of the company as reasonable; during the meeting the liquidator needs to report to the meeting on any exercise by him of his powers since his appointment. The powers of the voluntary liquidator in this case are detailed in section 182 of the Insolvency Act such as taking control of and protect the assets, and from this stage he shall act and perform his duties detailed in sections 185 such as take possession of, protect and realise assets of the company in order to distribute them in accordance with the Act.

If a voluntary liquidator who identified insolvency and filed a notice to the Official Receiver, is not an eligible licenced insolvency practitioner with respect to the company (since that is not a requirement for a voluntary liquidator to be appointed in a voluntary liquidation), the Official Receiver may apply to the Court for the appointment of himself or an eligible licensed insolvency practitioner as the liquidator of the company and the Court may make the appointment subject to such conditions as it considers appropriate.<sup>3</sup>

Pursuant to section 211 of the BCA, from the time that a voluntary liquidator first becomes aware that the company is or will not be insolvent, he shall conduct the liquidation as if he had been appointed liquidator under the Insolvency Act.

### Question 3.3 [maximum 5 marks]

Commented [CW20]: Very comprehensive answer, 5 marks

Referring to legislation (where relevant), explain where a receiver, appointed over the assets of a BVI company, would find his or her powers.

The Insolvency Act 2003 and the BVI Insolvency Rules Part VI regulate receivership and administrative receivership, in addition to the BCA and the Conveyancing and Law of Property Act 1961. Part IV of the Insolvency Act provides legislative framework within which a receiver may be appointed, the process for the appointment, the scope of powers and his duties, and allows receivers to be appointed either pursuant to the terms of the debenture or by a court order.

Receiver can be appointed by the Court; under a debenture or other instrument; or under or in accordance with any other enactment. Pursuant to section 127(1) of the Act a receiver has the powers expressly or impliedly conferred on him, if he was appointed out of court, by the charge or other instrument by which he was appointed; or if he was appointed by the Court, his powers are those which are granted under the Court order under which he was appointed. Thus, it is very important to ensure, when drafting the initial appointing documents or the order to the Court that the powers are specified in detail and sufficient breadth of the powers is provided/ being requested.

Statutory power are also set out in section 127 (2), whereby, unless the charge or other instrument under which, or Court order by which, the receiver was appointed expressly provides otherwise, a receiver can demand and recover income of the assets in respect of which he was appointed; issue receipts for income recovered; manage, insure, repair and maintain the assets; and exercise a right to inspect books or documents that relate to the assets in the possession of a person other than the company.

The Act also regulates administrative receiverships and under the BVI law administrative receiver can be appointed pursuant to a floating charge over all or substantially all of the company's assets and undertaking or can be appointed by the Court<sup>4</sup>. In light of the wide powers often provided to an administrative receiver, the Insolvency Act imposes a number of requirements and duties on the administrative receiver. Pursuant to section 144 (2) unless and to the extent that the debenture or other instrument by which an administrative receiver

Commented [CW21]: Not relevant to this question

<sup>3</sup> *Idem*, s 210 (4)

<sup>4</sup> *Idem*, s 142(1)

is appointed provides otherwise, the powers conferred on an administrative receiver of a company by the debenture or other instrument by which he was appointed include the powers specified in Schedule 1.

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

**Commented [CW22]:** 9 marks

**Question 4.1 [maximum 6 marks]**

**Commented [CW23]:** 4 marks

In September 2020 Harrison Holdings Limited, a company incorporated in England, brought a claim against Maximilian Properties Limited, a company incorporated in the BVI, in the English High Court. Maximilian Properties did not attend the hearing and Harrison Holdings was awarded judgment in the sum of USD 5,000,000.

Candidate failed to identify that the judgment is unlikely to be registrable. Candidate makes no reference to the common law.

Maximilian Properties has significant assets in the BVI. Giving reasons, with particular reference to the Reciprocal Enforcement of Judgments Act 1922, what options should Harrison Holdings be advised to consider in order to enforce its foreign judgment debt?

The recognition of foreign judgements in the BVI is primarily governed by the Reciprocal Enforcement of Judgements Act (CAP 65) 1922 (1922 Act) and common law.

Prior to the enforcement of Harrison's foreign judgment, it is important to consider from a practical standpoint, whether Maximilian has assets within the jurisdiction against which Harrison can enforce, i.e. BVI. In the scenario presented in this question it has significant assets in the BVI which makes the application for registration effective. Since BVI has a simplified registration procedure for recognition of judgments obtained in England<sup>5</sup>, upon registration, such foreign judgment may be enforced by the BVI High Court without re-examination of the merits of the case. In addition, under the 1922 Act, the judgment follows the definition of any "judgement made by a court in any civil proceedings, whereby any sum of money is made payable"<sup>6</sup>. Thus, judgement obtained by the English High Court, satisfies the definition of a "judgement" as it illustrates a final and conclusive monetary sum that can be enforced. It is noted that the procedure for registration is set out in the CPR Part 72 and includes registration of the foreign judgment within 12 months of the date of the judgement unless extended by the BVI Court; registration application by Harrison which contain certain prescribed information and exhibits of the duly judgment. Note that the BVI court will not register a judgment if it is proven that Maximilian was not properly served with process in the foreign territory (UK) and therefore did not appear. (it is noted that the questions specifically ask about the enforcement options therefore only brief reference to the registration procedure has been provide).

**Commented [CW24]:** The question specifically states that Harrison did not appear so it is therefore unlikely that the Court will make an order registering the judgment.

Pursuant to sections 3(3)(a), once the foreign judgement is duly registered by the BVI Court under the 1922 Act it is treated from the registration date as being of the same force and effect as if the judgement had been made in the BVI. Accordingly, judgment creditor can apply to request an enforcement order from the court and all the remedies usually available under Eastern Caribbean Supreme Court (ECSC) Civil Procedure Rules 2000 (CPR) will be available<sup>7</sup>. For instance, foreign judgements can be enforced pursuant to CPR 45.2 which includes the following:

- a charging order (CPR Part 48) whereby, for instance, Harrison will impose a lien over Maximilian assets in the amount of its debt, i.e. US\$5m.
- a garnishee order (CPR Part 50) whereby, for instance, Harrison will get paid from a third party who will deduct payments directly from Maximilian's bank account.

<sup>5</sup> Act 1922, section 3(1)

<sup>6</sup> Act 1922, section 2(1)

<sup>7</sup> CPR Part 45, Rule 45.1

- a judgement summons (CPR Part 52) whereby, for instance, Maximillian will need to appear in court, and be examined.
- an order for seizure and sale of goods (CPR Part 46).
- the appointment of a receiver to obtain payment of the judgment debt from the income or capital assets of Maximillian (CPR Part 51).

Additional options for enforcement are the ones set out in the Insolvency Act, for instance:

- Pursuant to section 155, Harrison can service of a statutory demand based on the judgment debt.
- Since Harrison has an unpaid money judgment against a BVI company it can seek to enforce that judgment by applying to the court to appoint a liquidator over the judgment debtor company (Maximilian) under the Insolvency Act 2003.
- Harrison may apply to appoint a liquidator over Maximillian to wind it up on the basis of cash flow insolvency. Separate recognition/registration of the foreign judgment is not necessary, and there is no strict requirement to issue a formal statutory demand for payment before applying to appoint a liquidator, provided there is sufficient evidence of the existence of the foreign judgment debt and non-payment by the judgment debtor.<sup>8</sup>
- If Maximillian is in insolvency proceeding, Harrison can file its claim in the liquidation proceeding as any other BVI creditor.
- enforcement of creditors rights pursuant to section 446 whereby Harrison, a foreign creditor, can access to a BVI proceeding and has the same rights regarding the commencement and participation in BVI proceeding.
- finally, various options for Maximillian to provide Harrison with registered charge or security in the form of pledge.

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<sup>8</sup> Enforcement of judgments and arbitral awards in the British Virgin Islands: overview by Alex Hall Taylor QC and Richard Brown, Carey Olsen ([https://uk.practicallaw.thomsonreuters.com/8-619-5733?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/8-619-5733?contextData=(sc.Default)&transitionType=Default&firstPage=true))

**Question 4.2 [maximum 9 marks]****Commented [CW25]:** 5 marks

Peralta Limited, a company incorporated in England, and Santiago Limited, a company incorporated in the BVI, entered into a loan agreement for the purchase of a property on Moskito Island in the BVI. Under the terms of the loan agreement, Peralta transferred USD 10,000,000 to Santiago and Santiago successfully purchased the property. Subsequently, Santiago failed to make any of the loan repayments pursuant to the repayment clauses. As a result of this failure, Peralta made a demand for immediate repayment in full, as it was entitled to do under the agreement. Santiago failed to make any repayments in full or in part.

Providing reasons, with particular reference to the Insolvency Act, what options should Peralta Limited be advised to consider in order to enforce the debt owed to it by Santiago Limited?

Pursuant to section 155 of the Insolvency Act Peralta should consider making a statutory demand in a writing, dated and signed by Peralta. The statutory demand should specify the nature of the debt and the amount owed by Santiago. The statutory demand will require Santiago to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the Peralta within 21 days of the date of service of the demand on Santiago. if the demand is not complied with, application may be made by Peralta to the Court for the appointment of a liquidator or a trustee, as the case may be. In this case Peralta can be a secured creditor with a security over the property in Moskito Island and therefore in respect of the debt, the full amount of the debt shall be specified in the demand, but the demand shall specify the nature of the security interest, and the value which Peralta places on it at the date of the demand and reduce the security value. Pursuant to sections 156, Santiago may apply to the Court to set the statutory demand aside.

**Commented [CW26]:** The question does not specify that Peralta is a secured creditor.

If Santiago fails to comply with the terms of the statutory demand and it is not successfully set aside under section 156/157, Santiago will be considered insolvent for the purpose of commencing insolvency proceeding. An application by Peralta to the Court can be made Pursuant to sections 162 whereby Peralta may apply to appoint a liquidator over Santiago to wind it up on the basis of cash flow insolvency.

**Commented [CW27]:** Candidate fails to specify the subsection under 162 pursuant to which Peralta would make its application to appoint a liquidator.

Once liquidation has been commenced, Peralta as a secured creditor, pursuant to section 211 can value the assets subject to the security interest and claim in the liquidation of Santiago as unsecured creditors for the balance of its debt; or surrender the security interest to the liquidator appointed for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole of its debt.

**Commented [CW28]:** No reference to security in the question.

Pursuant to sections 446 of the Insolvency Act, enforcement of creditors rights, whereby Peralta, a foreign creditor, can access to a BVI proceeding and has the same rights regarding the commencement and participation in BVI proceeding.

Pursuant to section 161 of the BVI Business Companies Act, subject to the memorandum and articles of Santiago, it can, by an instrument in writing, create a charge over the property in the BVI or any other property it may have. In the scenario presented in the question Peralta may already have a security over the specific property in Moskito Island pursuant to the loan agreement. Since the charge relates to land in BVI, it should be registered with the Land Registry in the BVI. Since Peralta is a secured creditor its claim is directly against the BVI property which is subject to a security and falls outside any future liquidation. It is up to Peralta to determine when to take control of the security interest and when to sell it for the best return. The interest can be in the form of legal mortgage. If the loan agreement considers a mortgage, there are three primary remedies for Peralta in the event of default, which include: foreclose on the shares; sell the shares; or appoint a receiver over the shares.

**Commented [CW29]:** Not relevant to the question.

In a case where an equitable charge is existed, Peralta has the power to obtain and sell the asset and Santiago is prevented from disposing it. In addition, a security in the form of a pledge whereby Peralta takes possession over the BVI asset. Peralta will have common law power to sale the property.

Another option is the appointment of receiver. In that case the receiver may exercise powers of sale, obtain the best price and sale the property. Peralta will enjoy the proceeds of the sale. Peralta can also consider obtaining a court order over its debt in England and enforce it in the BVI pursuant to the Enforcement of Judgements Act (CAP 65) 1922 (1922 Act).

**Commented [CW30]:** Candidate should have provided more detail in relation to a receiver.

**\* End of Assessment \***

**Commented [CW31]:** Total marks: 44