



**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]: Good answer, 2 marks

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

Under section 187 of the BVI Insolvency Act 2003, the court may remove a liquidator from his or her office if:

- (I) the liquidator is not eligible to act as an insolvency practitioner in relation to the company;
- (II) the liquidator breaches a duty or obligation imposed on or owed by him or her under the Insolvency Act (or subordinate legislation made therein) or in the capacity as a liquidator under any enactments or laws of BVI;
- (III) the liquidator fails to comply with any direction from the Court made in relation to the liquidation of the company;
- (IV) the court is satisfied that the liquidator's conduct of liquidation is below the standard that may be expected of a reasonable competent liquidator;
- (V) the court is satisfied that the liquidator has a conflict of interest with his or her role as a liquidator; or
- (VI) the court is satisfied that for some other reasons, the liquidator should be removed.

**Question 2.2 [maximum 2 marks]**

Commented [CW14]: Comprehensive answer, 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.

According to section 289(1) of the BVI Insolvency Act 2003, a person who is or has been an officer of a company is deemed to have committed an offence pursuant to the fraudulent conduct provision if, at any time whilst an officer or during the period of 12 months preceding the commencement of the liquidation, the person (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; and (b) has concealed or removed any of the company's assets since or within 60 days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.

However, the person can rely on the statutory defence under section 289(2), which provides that a person is not guilty of section 289(1) if (a) the conduct which constitutes the offence in relation to section 289(1)(a) (ie in respect of gift, transfer or charge etc) occurred more than 5 years before the commencement of the liquidation; or (b) the person proves that at the time of the conduct constituting the offence, the person had no intent to defraud the creditors of the company.

**Question 2.3 [maximum 2 marks]**

Commented [CW15]: 2 marks, good answer

With reference to the Insolvency Act, what powers are provided to the BVI Court in relation to the orders the Court can make in support of foreign insolvency proceedings?

Under section 467(3) of the BVI Insolvency Act 2003, the BVI Court is empowered to make the following orders in support of foreign insolvency proceedings:

- (a) restraining the commencement or continuation of any proceedings, execution or other legal processes or the levying of any distress against the debtor or the property of the debtor;
- (b) restraining the creation, exercise or enforcement of any right or remedy over or against any of the property of the debtor;
- (c) requiring any person to deliver up the property of the debtor or the proceeds of such property to the foreign representative;
- (d) making any order or granting such relief as the Court considers appropriate to facilitate, approve or implement arrangements which will result in a co-ordination of a BVI insolvency proceeding with a foreign proceeding;
- (e) appointing an interim receiver of any property of the debtor for such term and subject to such conditions as the Court considers appropriate;
- (f) authorizing the examination of the debtor or any person who could be examined in a BVI insolvency proceeding by the foreign representative;
- (g) staying, terminating or making any such order as the Court considers appropriate in relation to a BVI insolvency proceeding; and
- (h) making any other relief or order which the Court considers appropriate.

However, according to section 467(4), the Court in exercising its power under section 467(3) must not affect the right of a secured creditor to enforce his security over the property which he has the security interest.

**Question 2.4 [maximum 4 marks]**

**Commented [CW16]:** 4 marks, very comprehensive answer

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

According to section 8(1) of the BVI Insolvency Act 2003, a company is considered insolvent in the BVI under the following circumstances:

- (a) the company fails to comply with the statutory demand that has not been set aside under section 157. Section 155(1) provides that a creditor may make a statutory demand to the debtor for payment of the debt owed to the creditor. Section 155(2) requires the statutory demand to be (I) in respect of a debt which is due or payable at the time of the demand which is not less than USD 2,000 (under rule 149 of the Insolvency Rule 2005); (II) in writing with specification of the nature of the debt and its amount; (III) dated and signed by the creditor or his authorized representative; (IV) requiring the debtor to pay the debt or securing or compounding the debt to the reasonable satisfaction of the creditor within 21 days of the service of the statutory demand; (V) stating that an application may be made to the court for the appointment of the liquidator if the demand is not complied with; and (VI) setting out the right of the debtor to set aside the demand under section 156. Under section 156, the debtor should apply to the court to set aside the demand within 14 days of the date of the service of the demand. A secured creditor can also serve a statutory demand but section 155(3) imposes additional requirement for the secured creditor to (I) state on the demand the nature of the security and the value placed on the security; as well as (II) reduce the value of the security in the full amount owed by the debtor (the claim should not be less than USD\$2,000 after the deduction);
- (b) the 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 partly or wholly unsatisfied;
- (c) the value of the liabilities of the company exceeds the value of the assets of the company (balance sheet insolvent). Liability has a wide meaning under section 10 and means a liability to pay money or money's worth, which includes a debt, 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. A liability 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. However, in *Trade and Commerce Bank v Island Point Properties*, the BVI Court held that a company may not be considered as balance sheet insolvent in circumstances where the value of the asset becomes lower than those of its liabilities for only a short period of time; or

(d) the company is unable to pay its debts as they fall due. This is a question of fact and this limb requires an inability to pay a debt which is due and not disputed.

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

Commented [CW17]: 14 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.

To terminate a liquidation, firstly, under section 234 of BVI Insolvency Act 2003, the liquidator must prepare and send to every creditors of the company whose claims are admitted as well as every members of the company a final report and a statement of realizations and distributions in respect of the liquidation. The final report must contain a statement that (a) all known assets of the company in liquidation have been disclaimed, realized or distributed without realization; (b) all proceeds of realization have been distributed; and (c) in the opinion of the liquidator, there is no reason why the company should not be struck out BVI registers of companies and dissolved. The report should also be filed with the BVI Registrar of Companies. It is possible for the liquidator to apply to the court under section 232(c) to dispense with the requirement to prepare the final report.

Upon completion of the steps above, the liquidator may file a certificate of compliance. The liquidation shall terminate according to section 232(b). The company would then be dissolved in accordance with the procedures in the Insolvency Rule (but no such procedure has been legislated for).

Afterwards, the liquidator may apply under section 235 to the court for release. When the liquidator is released, the liquidator is discharged from all liabilities in respect of any acts or defaults in relation to his administration of the company. The court may grant the release with or without conditions. Even if the release is granted, the court is still able to make a compensation order under section 254 (misfeasance or breach of duty or fiduciary duty in relation to the company).

As an alternative, it is also possible for the liquidator to apply to the court to terminate the liquidation directly under section 233. The court may grant such order if it is considered to be just and equitable to do so. The court may require the liquidator to file a report with respect to any matter related to the liquidation before making the order and the order made by the court can be with or without conditions, as the court considers appropriate. The liquidation shall terminate on the date when the court order is made and the liquidator shall cease to hold office from the date of the order. The order shall be filed to the Registrar of Companies within 10 days of the sealing of the order.

**Question 3.2 [maximum 5 marks]**

Commented [CW19]: 4 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.



Potential red flags which would lead a voluntary liquidator to identify the company as insolvent include the following:

- (a) the directors fail to make a declaration of solvency. It is a criminal offence for a director who makes a declaration of solvency without having reasonable grounds for believing that the company is and will continue to be able to discharge, pay or provide for its debts in full as the fall due. Alternatively, the declaration of solvency may not comply with the statutory requirements under section 198(2) of the Business Companies Act 2004 (such as made more than 4 weeks than the date of resolution to appoint a liquidator). Further, the declaration of solvency must contain an updated statement of the company's assets and liabilities (as at the latest practical date). The liquidator would be able to review the information therein to locate any red flags (say liabilities level exceed the assets level).
- (b) the directors fail to approve a liquidation plan or the liquidation plan contains some inconsistent information. Under section 198 of the Business Companies Act 2004, the liquidation plan must contain the reasons for liquidation of the company. The liquidator may be able to locate information in relation to the solvency status of the company.
- (c) the books and records of the company may suggest that the company is insolvent. Under section 207 of the Business Companies Act 2004, a liquidator under voluntary liquidation has all the powers of the company that are not reserved to members under the Business Companies Act 2004 or the memorandum or the articles. The liquidator hence is entitled to the books and records and review the financial status of the company to determine whether the company is insolvent.
- (d) The company receives statutory demand or is subject to judgment or order against the company unsatisfied. If the company has either of this, it would be potentially within the definition of insolvency in section 8(1) of the Insolvency Act 2003.

In the event that insolvency is identified by the voluntary liquidator, the relevant procedure is governed by section 209 of the Business Companies Act 2004. Section 209 requires the voluntary liquidator to forthwith send a notice to the Office Receiver and the Financial Services Commission (if the company is regulated by the Commission) in the approved form when the voluntary liquidator is of the opinion that the company is insolvent. Section 209(1) defines "insolvency" as (a) the value of liabilities of the company exceeds the value of assets of the company; or (b) the company is unable to pay its debts as they fall due.

Under section 211, from the time when the voluntary liquidator becomes aware that the company is insolvent, the liquidation should be conducted in accordance with the Insolvency Act 2003 and the voluntary liquidator would be deemed to be a liquidator appointed by members pursuant to the members' qualifying resolution of the Insolvency Act 2003. The liquidator powers are restricted to the extent to section 182 of the Insolvency Act 2003. The voluntary liquidator is then required under section 210 of the Business Companies Act 2004 to hold a meeting of the creditors within 21 days of the section 209 notice, which would be deemed to be the first creditors' meeting under section 179 of the Insolvency Act 2003.

Further, there is no requirement for a voluntary liquidator to be a licensed insolvency practitioner but the law requires the liquidator for insolvent liquidation to be a licensed insolvency practitioner. The Official Receiver may apply to the court to appoint himself or a licensed insolvency as a liquidator for the company in case the voluntary liquidator appointed is not a licensed insolvency practitioner when the company is subsequently found to be insolvent.

### Question 3.3 [maximum 5 marks]

**Commented [CW20]:** In these circumstances there would be no voluntary liquidation, as the voluntary liquidator could not be appointed.

**Commented [CW21]:** These are the red flags that would signify that the company is insolvent

**Commented [CW22]:** 5 marks, good answer

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

Under BVI law, a receiver may be appointed either (a) by an application to the court; or (b) under a debenture.

For an appointment of receiver by an application to the court, under section 127(1)(b) of the Insolvency Act 2003, the relevant powers are derived from the court order which appoints the receiver. The powers also include other statutory powers provided under the Insolvency Act 2003 (subject to the appointment court order). Section 127(2) provides a list of statutory powers, which include the power to recover and demand by action or otherwise, income of the assets in respect of which the receiver is appointed; to issue receipts for the income recovered; to manage, insure, repair or maintain the assets in respect of which the receiver is appointed; and to exercise on behalf of the company a right to inspect books and documents in respect of the assets which the receiver is appointed in the possession or under the control of a person other than the company. There are also other statutory powers, such as the power to require co-operation of the company's officer and the power to sell the assets which the receiver is appointed for, under sections 124 and 129 respectively.

For an appointment of receiver under a debenture, under section 127(1)(a) of the Insolvency Act 2003, the powers are those expressly or impliedly set out in the charge or other instrument in terms of which the receiver is appointed. Such receiver can also exercise the powers under sections 124 and 129. The receiver can also exercise the default statutory power under section 127(2), unless the charge or other instrument which appoints the receiver provides otherwise.

For an administrative receiver (which is defined under section 142 as a receiver over all or substantially all of a company's assets and undertaking), the BVI law also empowers such appointment to be made (a) by an application to the court; or (b) under a debenture or other instrument of the company secured by a floating charge in respect of all or substantially all of a company's assets and undertaking.

For an administrative receiver appointed by the court, he would have the power provided in Schedule 1 to the Insolvency Act 2003 and the power to execute documents necessary and incidental to the exercise of his power in the name of and on behalf of the company in receivership and use the company seal under section 144(1), notwithstanding any provisions in the memorandum and articles (subject to the court order).

For an administrative receiver appointed pursuant to a debenture or a floating charge, he would have the power provided in Schedule 1 to the Insolvency Act 2003 and the power to execute documents necessary and incidental to the exercise of his power in the name of and on behalf of the company in receivership and use the company seal under section 144(1), notwithstanding any provisions in the memorandum and articles (Unless and to the extent that the debenture or other instrument by which an administrative receiver is appointed provides otherwise).

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

##### **Question 4.1 [maximum 6 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.

Commented [CW23]: Not relevant here

Commented [CW24]: 13 marks

Commented [CW25]: Good answer, 6 marks

Maximillian 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?

There are three potential routes for Harrison Holdings to enforce its English judgment.

The first route is to enforce the English judgment by way of the Reciprocal Enforcement of Judgments Act 1922. Under the 1922 Act, a "judgment" is defined as any judgment or order given or made by a court in the High Court of England and Wales and other designated court in any civil proceedings whereby any sum of money is made payable. Such judgment can be registered under the 1922 Act by the BVI Court and once registered, the judgment would have the same force and effect as if a judgment had been made in the BVI. The foreign judgment is registerable within 12 months of the date of judgment unless the BVI court grants a longer period on the basis of just and convenience to do so.

In this case, as the judgment is made by the English High Court in respect of a fixed sum of USD 5M in September 2020, it is within the definition of a judgment and is within the 12-month period.

However, even if the basic conditions are complied with, section 3(2) of the 1922 Act provides that the BVI Court would not order a judgment to be registered if the relevant circumstances in section 3(2) apply.

The first circumstance is that the original court acted without jurisdiction. In this case, we are not provided with any information as to why Harrison initiated proceeding in England, other than the fact that Harrison is an England incorporated company. Further, it is noted that the judgment is likely a default judgment in the sense Maximillian did not attend the hearing. We would need to study the relevant facts before considering concluding whether the English court acted without jurisdiction.

The second circumstance is that the judgment debtor being a person who was neither carrying on business nor resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court. In this case, Maximillian is a BVI incorporated company and the Harrison judgment is likely a default judgment. This is the only piece of information which we are provided. It is not entirely clear whether Maximillian carries on business in England. Further, given the default judgment nature, it appears fairly arguable that Maximillian did not appear or agree to submit the jurisdiction to the English court. We need further information, such as the context of the dispute before we can decide.

The third circumstance is that the judgment debtor was not duly served with the process of the original court and did not appear, notwithstanding that he is ordinarily resident or carrying on a business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court. In the present case, as explained above, we have no information as to the nature of the disputes between Harrison and Maximillian as well as the relevant details of the service. Further information is needed.

The remaining circumstances are (a) judgment is obtained by fraud; (b) the judgment debtor satisfies the court that an appeal is pending or that he is entitled and intends to appeal; and (c) the judgment related to a cause of action which could have not entertained by the BVI court for public policy reason. These are all fact specific and in the absence of detailed information about the case, we cannot assess whether they are applicable.

In summary, we are unable to advise whether Harrison could register its English judgment in BVI pursuant to the 1922 Act based on the limited information provided.

The second route is to enforce the English judgment by way of common law. Under common law, the court may treat any final and conclusive monetary judgment as a cause of action itself.

Although this is a judgment for a specified sum of US \$5M, we are not provided with any information as to the circumstances which the judgment is obtained. Further, as the judgment is likely to be a default judgment, it is arguable that the common law route of final and conclusive nature may not be fulfilled, depending on how the judgment is obtained as well as whether Maximillian would like to appeal.

The third route is by way of the procedures under the Insolvency Act 2003 and to apply to the court to appoint a liquidator Maximillian based on insolvency. A company is considered to be insolvent under section 8 of the Insolvency Act 2003 if it is unable to pay its debts as they fall due, if its liabilities exceed its asset or it fails to comply with the statutory demand within 21 days of the service of the demand (and without successfully setting aside). The most straight forward method would be for Harrison to serve a statutory demand in accordance with section 155 of the Insolvency Act 2003 and require Maximillian to respond. The BVI court has jurisdiction to appoint liquidator for Maximillian as it is a BVI incorporated company and BVI does not impose restrictions for a foreign creditor to directly access the BVI court. The statutory demand may be based on the English judgment, which is now due and payable and is more than the prescribed amount. Yet, we are not given with the information on how the judgment is obtained and hence Maximillian may raise that the debt is disputed and hence the statutory demand should be set aside. Nonetheless, in view of the significant assets of BVI for Maximillian, the liquidation application would give pressure to Maximillian to negotiate or settle with Harrison. The third route appears to be the best route for Harrison based on the current information.

#### Question 4.2 [maximum 9 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?

There are various options for Peralta to enforce the debt owed by Santiago and the availability of some of the options would depend on whether Peralta is a secured creditor of Santiago or not.

The first option is to apply to the BVI court for the appointment of liquidator for Santiago based on insolvency pursuant to the Insolvency Act 2003. Santiago is a company incorporated in BVI and BVI court has jurisdiction to appoint liquidator for Santiago and BVI law does not contain any restrictions for foreign creditors on direct access to the BVI court. Under section 8 of the Insolvency Act 2003, a company is considered to be insolvent when it is unable to pay its debts as they fall due. As provided in *Cornhill Insurance Plc v*

**Commented [CW26]:** Good answer, 7 marks.

The candidate should also have considered advising Peralta to first issue a statutory demand, prior to commencing an application for the appointment of a liquidator.

*Improvement Services Limited*, it is sufficient to prove insolvency for an inability to pay a debt that is due and not disputed.

In the present case, Santiago fails to repay the loan in accordance with the repayment clauses in the loan agreement. There is nothing to suggest that the loan agreement is invalid at law or being challenged. Accordingly, Peralta, in its capacity as the creditor of Santiago, can apply to the BVI court to appoint the liquidator for Santiago. Section 168 of the Insolvency Act 2003 requires to determine the appointment within 6 months (with an option to extend for a further 3 months). This appears to be a speedy procedure and with the significant asset of the property on Mosquito Island in the BVI owed by Santiago, the liquidator would be able to collect the assets, realize and distribute to all creditors. The fact pattern does not provide whether any security is provided for the loan. If no security is provided for the loan (ie Peralta is an unsecured creditor), such outcome would not be favourable since the liquidator is required to pay all costs and expenses associated with the liquidation as well as other preferential payments. Further, Peralta would be distributed *pari passu* with other unsecured creditors (and hence would unlikely recover the full sum of US\$10M loan).

Alternatively, Peralta may initiate an action against Santiago for recovery of the loan in BVI court. Once Peralta obtains a judgment and Santiago fails to satisfy the judgment, Peralta would be able to appoint to the court for appointment of a liquidator based on the ground that the company is insolvent for failing to satisfy a judgment made by the BVI court in favour of creditor under section 8. However, this is not a favourable option as Santiago may dissipate the assets prior to the judgment and any judgment would become empty. In addition, the availability of this route would depend on whether the party has agreed the jurisdiction to resolve disputes in the loan agreement. If the loan agreement has stipulated an exclusive jurisdiction in somewhere else, this route would unlikely be workable.

The second option is only available when Peralta is a secured creditor. As Peralta is making a loan to Santiago to purchase a property, it is very likely that Peralta would require Santiago to provide a mortgage or a charge in favour based on the property. As the property concerned is located in BVI, the governing law for the mortgage or the charge would likely be governed by BVI law based on *lex situs* principle. The mortgage or charge of the land however would need to be registered with the Land Registry in the BVI as well as in the company's register of charge under section 162. Although registration of the mortgage or charge with the Registrar of Companies is not mandatory under section 163, section 166 provides that the priority would be determined based on the order in the Registrar's record. If these formalities are complied with, Peralta would be able to enforce its security (say by taking possession of the security and sale for money). Even if there are other creditors who apply to appoint a liquidator for Santiago, a secured creditor is outside the insolvency process and Peralta can decide when to enforce. This appears to be the best option for Peralta.

The third option is for Peralta to appoint a receiver over the Mosquito Island property. An appointment of the receiver may be made by an application to the court or under a debenture. In this case, we are not provided with any information about the loan agreement. However, it is very likely that in a loan agreement to purchase a property, the agreement would entitle the lender to appoint a receiver in the event of default of payment. The agreement would also provide the powers of the receiver appointed. Even if the loan agreement does not contain a receiver appointment power, it is possible to apply to the court for an appointment of a receiver.

Regardless of whether it is a court appointment or an out of court appointment, section 127(2) provides the power to recover and demand by action or otherwise, income of the assets in respect of which the receiver is appointed; to issue receipts for the income

**Commented [CW27]:** Candidate fails to set out reference to the law or under which section the application would be made.

recovered; to manage, insure, repair or maintain the assets in respect of which the receiver is appointed; and to exercise on behalf of the company a right to inspect books and documents in respect of the assets which the receiver is appointed in the possession or under the control of a person other than the company. The exercise of section 127(2) power is subject to the order of the court or the provision in the instrument empowering the appointment. There are also other statutory powers, such as the power to require co-operation of the company's officer and the power to sell the assets which the receiver is appointed for, under sections 124 and 129 respectively. As the receiver has a statutory duty to act for best interests of the person whom he is appointed for under section 128 and is under a duty to obtain the best price reasonably obtained when exercising the power of sale under section 129, it appears that Peralta's interest would also be protected.

The third option however should only be used when the second option is not available since the appointment of receiver would involve extra remunerations and expenditures to be paid to the receiver.

The fourth and final option is for Peralta to take legal action against Santiago in England. After it obtains a judgment against Santiago in the English court, it can register the judgment within 12 months of the date of judgment to the BVI Court pursuant to the Reciprocal Enforcement of Judgment Act 1922. As the judgment is related to loan, it would be a monetary judgment which can be registered. Once it is registered, the judgment has the same force and effect as if it is a judgment made in the BVI.

However, this is not a favourable option. As the court would not register a judgment for various grounds under section 3(2) of the 1922 Act, in particular based on the following two grounds: (a) the judgment debt being a person who was neither carrying on business nor resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court; or (b) the judgment debtor was not duly served with the process of the original court and did not appear, notwithstanding that he is ordinarily resident or carrying on a business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court. In this case, Santiago is incorporated in BVI and it appears that it does not carry on any business in England. Santiago can simply refuse to appear in the English court. At the same time, the English court adopted an in personum jurisdiction and Peralta would need to apply for the service out of jurisdiction. This would be a timely and costly exercise and Santiago may also play tactics by refusing to appear before the English court even a service out order is obtained.

**\* End of Assessment \***

**Commented [CW28]:** Total marks: 47