



**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: **[studentID.assessment5B]**. An example would be something along the following lines: 202122-336.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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 [JW1]: 10 marks

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

#### **Question 1.1**

**When** is the appointment of a liquidator **deemed to commence**, when there has been a qualifying resolution passed to appoint a liquidator?

- (a) On the date of the order appointing the liquidator.
- (b) On the date the qualifying resolution is passed.**
- (c) On the filing of the application to appoint a liquidator.
- (d) On the advertisement of the application to appoint a liquidator.

#### **Question 1.2**

In order to comply with section 156 of the Insolvency Act, **what timeframe** for payment of the debt (or to secure or compound for the debt), must a statutory demand require?

- (a) Within 14 days of the service of the statutory demand.
- (b) Within 21 days of the date of the statutory demand.
- (c) Within 21 days of the service of the statutory demand.**
- (d) Within 14 days of the date of the statutory demand.

#### **Question 1.3**

Which of the following **is not able** to make an application for the removal of a liquidator?

- (a) A member of the company.
- (b) A creditor.
- (c) The creditors' committee.
- (d) A receiver.**

#### Question 1.4

Where a receiver exercises a power of sale, the receiver owes a duty to obtain the best price reasonably obtainable at the time of sale. **To which one of the following is the duty owed to?**

- (a) The creditors, the shareholders, persons claiming an interest in the assets and the company.
- (b) The creditors, sureties, the shareholders and the company.
- (c) The creditors, sureties, persons claiming an interest in the assets of the company and the company.
- (d) The creditors, shareholders, sureties and persons claiming an interest in the assets of the company.

#### Question 1.5

A person is an "eligible insolvency practitioner", able to be appointed over an insolvent BVI company, foreign company or an individual's estate as a trustee in bankruptcy if:

- (a) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (b) He or she is a licenced insolvency practitioner; has advertised for his or her role; is not disqualified from holding a licence; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (c) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding an appointment; is not disqualified from acting; and there is in force security for the proper performance of his or her functions.
- (d) He or she is a licenced insolvency practitioner; has given written consent to act; is not disqualified from holding a licence; is not disqualified from acting; and there is in force an undertaking for the proper performance of his or her functions.

#### Question 1.6

Under the Reciprocal Enforcement of Judgments Act 1922, what is the **time period** during which a foreign judgment is registrable in the BVI?

- (a) Within 12 months of the date of judgment.
- (b) Within 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.

**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]**

Set out the circumstances in which a voluntary liquidator can be appointed over a company, pursuant to Part XII of the Business Companies Act 2004.

Pursuant to section 197(1) of the Business Companies Act 2004 ("the BCA 2004"), a company can only be liquidated under Part XII of the BCA 2004 under the following circumstances:-

- (a) The company has no liabilities; or
- (b) The company is unable to pay its debts as they fall due and its asset's value is equal or exceeds its liability.

Together with section 198 of the Business Companies Act 2004, the directors shall also set out the followings to appoint a voluntary liquidator for a company:-

- (a) To make a declaration of solvency of the company stating that the company is and will be able to discharge, pay or provide for its debts; and
- (b) To approve a liquidation plan specifying the following issues:-
  - (i) reasons for liquidation;
  - (ii) estimated time to liquidate;
  - (iii) whether the liquidator is authorised to carrying on the business if he determines that would be necessary or in the best interests of the creditors or members of the company;
  - (iv) the name and address of each liquidators whom to be appointed and the proposed remuneration to each liquidator; and
  - (v) whether the liquidator is required to prepare and/or send statement of account to the members of the company in relation to liquidator's action(s) or transaction(s).

**Question 2.2 [maximum 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 Insolvency Act 2003 ("the Insolvency Act"), when a liquidator is appointed to a BVI incorporated company by the Court under section 159 of the same Act, an officer, who is or has been an officer, of the company is deemed to have committed an offence if, at any time whilst an officer or during the period of 1 months preceding the commencement of the liquidation, he or she 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 assets of the company; or
- (b) concealed or removed any of the company's assets since, or within, sixty (60) days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.

**Commented [JW2]:** 1/2 mark - Section 199 (1) & (2) (subject to section 200) of the BCA 2004 sets out all the circumstances in which a voluntary liquidator can be appointed.

**Commented [JW3]:** This is how not why

**Commented [JW4]:** 2 marks

But this section is subject to exceptions as stipulated under subsection (2) that an officer is not guilty of the offence under the following circumstances:-

- (a) by reason of conduct constituting an offence under this section 289(1) of the Insolvency Act which occurred more than five (5) years before the commencement of the liquidation; or
- (b) if an officer proves that, at the time of conduct constituting the offence, he or she had no intent to defraud the creditors of the company.

**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?

Pursuant to section 467(3) of the Insolvency Act 2003 ("the Insolvency Act"), the Court is empowered widely to order:-

- (a) restraining the commencement or continuation of any proceedings, 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 any property of the debtor or the proceeds of such property;
- (d) ordering or granting relief to facilitate, approve or implement arrangements that will result in a co-ordination of 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 it considers appropriate;
- (f) authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding; or
- (g) staying or terminating or making any other order it considers appropriate in relation to a BVI insolvency proceeding.

**Question 2.4 [maximum 4 marks]**

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

As defined under section 8 of the Insolvency Act 2003 ("the Insolvency Act"), subject to the residual discretion of the Court, a company will be considered insolvent in the BVI in the following circumstances:-

- (a) it is to the satisfaction of Court that the company is unable to pay its debts as they fall due as a question of fact. This test was also set out in *Cornhill Insurance Plc v Improvement Services Limited* that an inability to pay a non-disputed debt when it is due is sufficient to prove insolvent;

**Commented [JW5]:** 2 marks - 8th power - such order or grant Court considers appropriate

**Commented [JW6]:** 4 marks

- (b) it is to the satisfaction of Court that the value of the liabilities of the company exceeds the value of its assets under the balance sheet test. Under this balance sheet insolvency, liability is with wide definition, that includes liabilities under an enactment, in contract tort or bailment, a breach of trust and arising out of an obligation to make restitution as stipulated under section 10(1) of the Insolvency Act. Further in section 10(2) of the Insolvency Act, the liability may be in 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, this balance sheet insolvency may not be considered if the value of the assets of the company become lower than those of its assets for only a short period under the BVI Court of Appeal case, Trade and Commerce Bank v Island Point Properties;
- (c) Failure of a company to satisfy execution or other process in whole or partly issued on a judgment decree or order of the BVI Court of a creditor of the company;
- (d) Failure to comply with the terms of a statutory demand for payment of debt that is due and payable as required under section 156 of the Insolvency Act. And such statutory demand is not successfully set aside under sections 156 and 157 of the Insolvency Act.

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

**Question 3.1 [maximum 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 Insolvency Act 2003 ("the Insolvency Act"), liquidation of a company will be terminated on the date when the Court makes an order of termination of the liquidation, the filing date of the certificate of compliance by the liquidator under section 234(2) of the Insolvency Act, or the Court makes an order of exempting the liquidator to file the certificate of compliance.

To prepare termination of the liquidation, the liquidator has to comply with sections 234 and section 235 of the Insolvency Act:-

Under section 234(2) of the Insolvency Act, upon the completion of duties of the liquidator, the liquidator is required to prepare his final report as soon as practicable. In the report, the liquidator has to state that all known assets of the company have been disclaimed, realised or distributed without realisation, all proceeds of realisation have been distributed and in his opinion, there is no reason that the company not to be struck from the Register as required under section 234(3). Such report must be sent to every admitted creditor and every member of the company with a summary of grounds that a creditor or member may object to the striking of the company from the Register under section 234(2)(a) of the Insolvency Act. And a copy of the same has to be filed with the Registrar. But the liquidator may also apply for exemption from the Court to his compliance with section 234(2)(a) or to modify the application of the provision of section 234(2) under section 234(4).

Furthermore, section 235 of the Insolvency Act provides that the liquidator or provisional liquidator can apply for their release when the appointment ceases. As stipulated under section 235(3) of the Insolvency Act, the effect of the release is that the liquidator will then be discharged from all liability in respect of any act of default in relation to the administration of the company, except to the Court order made against the liquidator under section 254 of the Insolvency Act as stipulated under section 235(5). Upon obtaining his release, the

**Commented [JW7]:** 3 marks - no mention of BCA 2004 sections 207A-208 - termination does not always mean company is struck off or dissolved



liquidator shall file a notice in the prescribed form with the Registrar as under section 235(7) of the Insolvency Act.

**Question 3.2 [maximum 5 marks]**

Commented [JW8]: 5 marks

Is it possible to make an application to the BVI Court for the appointment of an overseas insolvency practitioner in relation to a BVI company and, if so: (i) in what circumstances might a creditor consider the appointment of an overseas insolvency practitioner; and (ii) what is the process for such proposed appointment?

Under section 483 of the Insolvency Act 2003 ("the Insolvency Act"), an individual resident outside the Virgin Islands may be appointed to act as an insolvency practitioner jointly with a licensee or the Official Receiver.

**Circumstances for creditor to appoint an overseas insolvency practitioner**

This is especially the case for the creditor to consider if there are assets of the company held in that foreign jurisdiction. In practice, this appointment of an overseas insolvency practitioner for company involving multiple disputes in different jurisdictions may reduce costs of travel and further costs in relation to local expertise.

To appoint, the potential overseas insolvency practitioner shall be satisfied with the following conditions under section 483(a) of the Insolvency Act:-

- (a) That individual has sufficient qualifications and experience to act in the insolvency proceedings in relation to which the appointment is made;
- (b) That individual has given his or her written consent to act in the prescribed form;
- (c) That individual is not disqualified from holding a licence under section 477 of the Insolvency Act;
- (d) That individual is not disqualified from acting in the case of a company or a foreign company if he or she. At any time in the previous 3 years has been the auditor of the company, an employee of such auditor, or a director of the company under section 482(2) or ,under section 482(3) of the Insolvency Act, has connection to the individual within the meaning of connected person as defined under section 5(3) of the Insolvency Act section 482(3) of the Insolvency Act;
- (e) There is in force such security for the proper performance of that individual functions as may be specified in the Regulations.

**Process to appoint an overseas insolvency practitioner**

The process of the proposed appointment is that:-

- (a) prior written notice of such intended appointment must be provided to the BVI Financial Services Commission ("the Commission") as stipulated under section 483(b) of the Insolvency Act;
- (b) The Commission may then give the appointer notice that its intention to apply for a Court order that the overseas insolvency practitioner should not be appointed;

- (c) When such notice is received from the Commission, the overseas insolvency practitioner should not be appointed unless the Court approves at the hearing of the Commission's application of the appointment or the Commission approves the appointment. Otherwise, that person who contravenes may commit an offence;
- (d) At the hearing of the appointment application, the Commission may appear and be heard and the Commission may also object to the appointment under section 484 of the Insolvency Act.

**Question 3.3 [maximum 5 marks]**

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

Under the BVI insolvency framework, secured creditors are protected by having higher ranking than those unsecured creditors and have several options in settling his/her debts.

**Protection to secured creditors**

As stipulated under section 175(2) of the Insolvency Act 2003 ("the Insolvency Act"), the right of the secured creditors to take possession of and realise or deal with the assets of the company which he or she has a security interest over are not affected in the insolvency process.

In other words, upon the sale of the assets subject to a security interest, the secured creditor would be paid first. If there is insufficient funds from the realization, the secured creditors will ranked as a unsecured creditor for the shortfall.

However, the secured creditor's high ranking is not an absolute priority. Pursuant to section 208 of the Insolvency Act, when there is insufficient amount of assets to pay for the costs and expenses in liquidation, the claims, costs and expenses of the preferential creditors have priority over those claims of chargees with floating charges.

**Options to secured creditors**

Sections 211-213 of the Insolvency Act are those provisions dealing with the claims, redemption and realisation of the secured creditors. Generally, a secured creditor may enforce its rights on the security and take control of the assets which are subject to the creditor's security interest. On the other hand, the secured creditor may negotiate with the liquidator on how to deal with the disposal of the assets which are subject to security. Pursuant to section 211 of the Insolvency Act, a secured creditor has the following options under the BVI insolvency framework:-

- (a) Under section 211(1) of the Insolvency Act, a secured creditor may value the assets subject to the security interest. Upon the sale of the assets in concerned, the debts of the secured creditor, are entitled to be settled in before those unsecured creditors. The secured creditor can also claim in the liquidation of the company as an unsecured creditor for the balance of his or her debt;
- (b) A secured creditor may also surrender his or her security interest to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole of his or her debt, without imposed obligation as under section 211(2) of the Insolvency Act;

**Commented [JW9]:** 3 marks - Not just liquidation - protection also in creditors arrangement/bankruptcy. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/s142

- (c) Another option for a secured creditor as under section 211(3) of the Insolvency Act is that he/she may, at any time, apply to the liquidator to amend the value that he or she placed on the security interest in his or her claim to the satisfaction of the liquidator that the value placed on the security interest was mistakenly estimated in good faith or such value has subsequently changed;
- (d) If the value on the security interest placed by the secured creditor is not satisfied by the liquidator, the liquidator may require the assets in concerned to be offered for sale. The secured creditors may have an agreement with the liquidators on the terms and conditions of the offer for sale. These are stipulated under section 211(4) and (5) of the Insolvency Act;
- (e) Last but not least, the secured creditors are entitled to bid for and purchase the assets which are offered for sale by public auction under section 211(6) the Insolvency Act.

A secured creditors may choose to act as the power conferred to him/her as mentioned above under the Insolvency Act to enforcing its security interest.

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

**Question 4.1 [maximum 6 marks]**

In September 2020 Pinforth Holdings Limited, a company incorporated in England, brought a claim against Expat Properties Limited, a company incorporated in the BVI, in the English High Court. Expat Properties did not attend the hearing and Pinforth Holdings was awarded judgment in the sum of USD 4,500,000.

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

When a creditor with foreign judgment considers to enforce such judgment in BVI, the creditor with judgments from certain jurisdictions, including the High Court of England and Wales, may reply on a statutory process of registration as provided under the Reciprocal Enforcement of Judgments Act 1922 ("the 1922 Act"); for judgments from other jurisdictions, the creditors may bring common law claim, as reference to Flat Point Development Limited v Canisby Limited (Appeal No. ANUHCVP2016/0006, 7 December 2017), to enforce their judgement.

Here for the case of Pinforth Holdings, he has a judgment from the English High Court. Therefore, Pinforth Holdings may consider to enforce its judgment in BVI by using the statutory process of registration under the 1922 Act. To make such registration of its foreign judgment, Pinforth Holdings has to consider the following issues:-

- (a) There should be assets of the judgment debtor in the BVI. From the fact, Expat Properties has significant assets in the BVI. It appears no problem in this issue.
- (b) Under the 1922 Act, the judgment should be for final and conclusive monetary sums . Pursuant to section 2(1) of the 1922 Act, the enforcement of a foreign judgment is only effective when the judgment is made in any civil proceedings that any sum of money is made payable. In this case, the claim of Pinforth Holdings was of USD4,500,000. It was a monetary judgment under a civil proceedings made in the English High Court. Therefore, this judgment is applicable under the section.

**Commented [JW10]:** 3 - not all conditions listed under REJ1922. Claim was more than 12 months but question does not state when judgment awarded and Expat did not attend hearing so not registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA2003

- (c) Further to section 3(1) of the 1922 Act, foreign judgments which are applicable to be registered and to enforce in BVI including those were given in the High Court of England Wales and Northern Ireland and the Court of Session in Scotland. This is the case of Pinforth Holdings that their judgment was obtained from English High Court.
- (d) Pinforth Holdings also has to satisfy the requirement of registration within the specified timeframe. Pursuant to section 3(3)(a) of the Act, the foreign judgments has to be registered within 12 months of the of judgment, unless with leave of extension from the BVI Court on the basis that it is just and convenient of the extension. In this circumstances, the date of the judgments obtained from Pinforth Holdings in the English High Court is of the essence to consider if the said foreign judgment is eligible to be registered under the BVI Court. Thus, more facts will be required to confirm of the availability of registration.

With the satisfaction of the above issues, Pinforth should also follow the rules setting out under the ECSC Civil Procedure Rules 2000 Part 72 for their registration application of the foreign judgment. In their application, there must be certain prescribed information and must exhibit a duly authenticated copy of that foreign judgment with a certified or authenticated English translation. Notice to judgment debtor, Expat Properties Limited, may not be required on this application, but Pinforth may be ordered by the Court to give security for costs in relation to any registration set aside proceedings.

#### Question 4.2 [maximum 9 marks]

Abbeydale Limited, a company incorporated in England, and Dendoncker Limited, a company incorporated in the BVI, entered into a loan agreement for the purchase of a property on Necker Island in the BVI. Under the terms of the loan agreement, Abbeydale transferred USD 12,000,000 to Dendoncker and Dendoncker successfully purchased the property. Subsequently, Dendoncker failed to make any of the loan repayments pursuant to the repayment clauses. As a result of this failure, Abbeydale made a demand for immediate repayment in full, as it was entitled to do under the agreement. Dendoncker failed to make any repayments in full or in part.

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

Pursuant to section 446 of the Insolvency Act, foreign creditors have the same rights of direct access in relation to the commencement of and participation in the BVI insolvency proceedings as the domestic creditors. In other words, Abbeydale Limited would have the same position as those BVI creditors that it would commence insolvency proceedings against Dendoncker.

But firstly, we have to ascertain the type of creditor of Abbeydale, in particular, whether Abbeydale is a creditor with security interest or just an unsecured creditor. As stipulated under section 175(2) of the Insolvency Act, the right of the secured creditors to take possession of and realise or deal with the assets of the company which he or she has a security interest over are not affected in the insolvency process. From the fact, we only know that Abbeydale lent USD12,000,000 to Dendoncker for its purchase of a property on Necker Island in BVI. It does not mentioned whether any legal charge or mortgage had been created under the loan agreement between Abbeydale and Dendoncker. But with reference to the Insolvency Act 2003 ("the Insolvency Act"), the following available options for Abbeydale will assume Abbeydale is an unsecured creditor against the debt owed by Dendoncker.

**Commented [JW11]:** 5.5 marks First issue to determine: Is A secured or unsecured creditor? If secured - does it have registered charge/ debenture/ legal charge/equitable charge - have to see the loan document. Options under IA2003: Receiver /Administrative Receiver / Out of Court Receiver. If unsecured creditor then: Breach of contract – damages and obtain judgment from English Court in its favour – may be delay and costly; or obtain judgment in English court – recognised in BVI Court under IA 2003; or serve statutory demand under s155 IA2003 and then if unpaid application to the Court for liquidation under Section 162 for appointment of liquidator by the Court - winding up will only be made if insolvent. Provisional Liquidation can be appointed under section 170 if assets at risk of dissipation.

**Commented [JW12]:** Section 446 is not in force

### Court Liquidation Application

The first option for Abbeydale is the Court Liquidation Application. Under the Insolvency Act, the major action that creditor may consider to enforce the debt owed to it is to bring formal insolvency proceedings against the debtor, that is the Court liquidation process. To make such application, Abbeydale has to file an application to Court stating the grounds and to satisfy the Court that the debtor, Dendoncker, is insolvent. In this case, Abbeydale has to show that Dendoncker failed to comply with the terms of the statutory demand for payment of the due and payable debt. The statutory demand should be complied with the requirement under section 155 of the Insolvency Act and the said demand has not been set aside under section 156 of the Insolvency Act.

Subsequently, Abbeydale may file another application of appointment of liquidator to Court pursuant to section 162 of the Act. The said application should state the ground for the appointment, the name of the proposed liquidator and a supporting affidavit attached with a notice of eligibility and consent to act signed by the proposed liquidator. To the satisfaction of the Court that such application is just and equitable or it is for the public interest, a liquidator will be appointed within 6 months after the application is filed under section 168(1) of the Act, unless with the extension from Court.

Such then, the liquidator has custody and control over the assets of Dendoncker under section 175(1) of the Act. If creditors' committee would be passed by resolution in a meeting under section 421 of the Act, and Abbeydale is resolved to be a member of the committee, it may have more active role in the liquidation process. A creditors' committee is granting the powers to call creditors' meeting, to reasonably require the liquidator to provide the committee with reports and information, or explanation concerning the liquidation, and to approve the remuneration of the liquidator under section 422 of the Insolvency Act.

Despite of the identity of foreign creditor, Abbeydale is not require to comply with additional special procedures when filing their claims under BVI proceedings. Yet, this option will not give preferential priority to Abbeydale Limited among other unsecured creditors when distributing dividend from the realised assets. If there is other creditor with security interest against Dendoncker, the appointment of liquidator does not affect their right to take possession or realise or deal with the asset which is subject to that security interest as stated under section 175(2) of the Insolvency Act.

### Creditors' arrangement

Another option Abbeydale might consider is the Creditors' arrangement (CCA). CCA is governed by Part II of the Insolvency Act. Pursuant to section 15 of the Insolvency Act, CCA is a compromise between a company and its creditors which allows them to vary the rights of the creditors and cancel the liability of the debtor wholly or partially. Under CCA, there should be the presence of a supervisor to ensure the terms of the CCA are implemented.

Nevertheless, the process of CCA has to be initiated by the boards of the company by proposing the arrangement and nominating the supervisor as under section 20(1) of the Insolvency Act. In other words, Abbeydale is in passive role under this option. If the directors of Dendoncker do not propose or resolve such arrangement, this option is not able to be taken out.

Commented [JW13]: Not an option recommended in practice

### Scheme of Arrangement

Apart from the above, Abbeydale may consider the option of Scheme of Arrangement ("the Arrangement") by applying to the BVI Court for a meeting of creditors or shareholders pursuant to section 179A(1) and (2) of the Business Companies Act.

Under the Arrangement, a compromise or arrangement is made between the company and the creditors, or between the company and its shareholders. The Arrangement allows the company to restructure and avoid entering of a formal liquidation process.

Although there is no requirement of insolvent of the company, a meeting of creditors has to be called and the scheme should then be approved by 75% in value of the creditors or class of creditors or shareholders or class of shareholders present and voting at the meeting as stipulated under section 179A(3) of the Business Companies Act. The approved scheme by in the said meeting has to be sanctioned by Court. Upon the filing of the order from Court on the scheme with the Registrar, the scheme will be binding only on all creditors, shareholders and the company as under section 179A(5) of the Business Act.

**Commented [JW14]:** Scheme of Arrangement is not a Insolvency Act 2003 procedure - BCA 2004 s.179A

More facts may be required to consider if Abbeydale is in good position to adopt this option. The stands of other creditors of Dendoncker and the shareholders of Dendoncker are crucial for the success of Abbeydale to enforce the debt owed to it by Scheme of Arrangement. Furthermore, if there are other secured creditors or preferential creditors against Dendoncker, the Abbeydale may be more beneficial when adopting this option as there is no express protection for the rights of secured or preferential creditors under Scheme of Arrangement in the BVI.

### Receivership

Under this option, receiver will be appointed by Court on an application or under a debenture under section 115(2) of the Insolvency Act. Pursuant to section 126(1) of the Insolvency Act, a receiver appointed under debenture is deemed to be an agent of the company unless the instrument expressly states in the contrary.

**Commented [JW15]:** Have to ascertain if secured creditor first - look at loan documentation

From the fact, it appears that the dealing between Abbeydale and Dendoncker was just in the matter of the relevant loan agreement and there was no issue in relation to debenture. Therefore, Receivership may not be an option for Abbeydale.

In view of the above, Abbeydale may put more consideration on Court Liquidation application or Scheme of Arrangement to enforce the debt owed to it by Dendoncker.

**\* End of Assessment \***