



**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]**

Commented [JW2]: 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.

A voluntary liquidation under the BCA 2004 is only available to companies which have no liabilities or are able to pay their debts as they fall due and the value of their assets equals or exceeds their liabilities pursuant to section 197(1) BCA 2004.

Pursuant to section 199(1) BCA 2004 and subject to section 200 BCA 2004, a voluntary liquidator may be appointed in respect of a company

- (a) by a resolution of the directors passed under subsection (2); or
- (b) by a resolution of the members passed under subsection (3).

According to subsection (2), the directors of a company may, by resolution, appoint an eligible individual as the voluntary liquidator of the company

- (a) upon the expiration of such time as may be specified in its memorandum or articles for the company's existence;
- (b) upon the happening of such event as may be specified in its memorandum or articles as an event that shall terminate the existence of the company;
- (c) in the case of a company limited by shares, if it has never issued any shares; or (d) in any other case
  - (i) if the memorandum or articles permit them to pass a resolution for the appointment of a voluntary liquidator, and
  - (ii) the members have, by resolution, approved the liquidation plan.

Pursuant to subsection (3), the members of a company may, by resolution

- (a) approve the liquidation plan; and
- (b) appoint an eligible individual as the voluntary liquidator of the company.

**Question 2.2 [maximum 2 marks]**

Commented [JW3]: 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, where a liquidator of a company is appointed under section 159, a person 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 12 months preceding 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) has 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.

According to section 289(2) of the Insolvency Act 2003, a person is not guilty of an offence under this section

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

**Question 2.3 [maximum 2 marks]**

Commented [JW4]: 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?

Part XVIII of the Insolvency Act 2003, which sets out the provisions based on the UNCITRAL Model Law on Cross-Border Insolvency, has not brought into force yet.

The orders the Court can make in support of foreign insolvency proceedings are listed under section 467(3) of the Insolvency Act 2003: Subject to section 468, upon an application under subsection (1), the Court may

- (a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;
- (b) subject to subsection (4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
- (c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
- (d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;
- (e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;
- (f) authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;
- (g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or
- (h) make such other or grant such other relief as it considers appropriate.

According to section 467(5) of the Insolvency Act 2003, the Court may apply the law of the Virgin Islands or the law applicable in respect of the foreign proceeding in making an order under subsection (3).

The power of the Court to make such orders extends only to the following countries: Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the USA (section 467(2) in connection with section 466(1) of the Insolvency Act 2003 and the FSC's list of relevant foreign countries for the purposes of part XIX of the Insolvency Act 2003).

**Question 2.4 [maximum 4 marks]**

Commented [JW5]: 4 marks

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

Pursuant to section 8(1) of the Insolvency Act 2003, a company or a foreign company is insolvent if

- (a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;
- (b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
- (c) either-
  - (i) the value of the company's liabilities exceeds its assets; or
  - (ii) the company is unable to pay its debts as they fall due.

Regarding section 8(1)(c)(ii) of the Insolvency Act 2003, the case *Cornhill Insurance Plc v Improvement Services Limited* clarified that an inability to pay a debt that is due and not disputed is sufficient evidence of insolvency.

Regarding section 8(1)(c)(i) of the Insolvency Act 2003, the definition of liability under section 10 of the Insolvency Act 2003 is to be taken into consideration. If the company's assets are lower than its liabilities for only a short period it may not be considered insolvent pursuant to the case *Trade and Commerce Bank v Island Point Properties*.

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

#### Question 3.1 [maximum 5 marks]

Commented [JW6]: 3 marks - no mention of section 207A -208 BCA 2004 for voluntary liquidation

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

According to section 232 of the Insolvency Act 2003, the liquidation of a company terminates on the first occurring of

- (a) the making by the Court of an order terminating the liquidation under section 233, or such later date as may be specified in the order;
- (b) the filing by the liquidator of a certificate of compliance with the provisions of section 234(2), as modified by the Court under section 234(4), if appropriate; or
- (c) the making by the Court of an order under section 234(4) exempting the liquidator from compliance with 234(2), or such later date as may be specified in the order.

Pursuant to section 233(1) of the Insolvency Act 2003, the Court may, at any time after the appointment of the liquidator of a company, make an order terminating the liquidation if it is satisfied that it is just and equitable to do so.

If the liquidator intends to get the liquidation terminated under section 233(1) of the Insolvency Act, he or she must prepare an application explaining why it should be just and equitable to terminate the liquidation. According to section 233(3) of the Insolvency Act 2003, the Court may ask the liquidator to file a report with respect to any matter relevant to the application for termination. Therefore, the liquidator may also has to file such a report.

Pursuant to section 234(2) of the Insolvency Act 2003, the liquidator shall, as soon as practicable after completing his duties in relation to the liquidation of a company

- (a) prepare and send to every creditor of the company whose claim has been admitted and to every member of the company
  - (i) his final report, complying with subsection (3), and a statement of realisations and distributions in respect of the liquidation, and
  - (ii) a summary of the grounds upon which a creditor or member may object to the striking of the company from the Register; and
- (b) file with the Registrar a copy the final report and the statement of realisations and distributions sent to the creditors and members of the company.

If the liquidator intends to terminate the liquidation by filing a certificate of compliance he or she has to prepare and send the final report, summaries and statements as stipulated under section 234(2) of the Insolvency Act 2003.

According to section 234(3) of the Insolvency Act 2003, the final report of a liquidator shall contain a statement



- (a) that all known assets of the company have been disclaimed, realized or distributed without realisation;
- (b) that all proceeds of realisation have been distributed; and
- (c) that there is no reason why, in his opinion, the company should not be struck from the Register, and dissolved.

According to section 234(4) of the Insolvency Act 2003, the Court, on the application of the liquidator, may on such terms and conditions as it considers just,

- (a) exempt the liquidator from compliance with subsection (2)(a); or
- (b) modify the application of the provisions of subsection (2) to the liquidator.

If the liquidator intends to terminate the liquidation without fulfilling all the requirements of subsection (2) he or she needs to prepare an application to the Court explaining why the requested modifications should be granted.

### Question 3.2 [maximum 5 marks]

Commented [JW7]: 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?

Yes, the appointment of an overseas insolvency practitioner in relation to a BVI company is possible but only as joint liquidator with a BVI licenced insolvency practitioner or the Official Receiver according to section 483 of the Insolvency Act 2003.

A creditor might consider the appointment of an overseas insolvency practitioner if the BVI company has substantial assets situated overseas. In such a case, the appointment of an overseas insolvency practitioner may be considered in order to secure and realise the company's assets overseas which may require special expertise or are more cost efficient when dealt with a local insolvency practitioner.

Pursuant to section 483(a) of the Insolvency Act 2003, an overseas insolvency practitioner may only be appointed when the Court, or in any other case the person or persons appointing him, is or are satisfied that

- (i) he has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made,
- (ii) he has given his written consent to act in the prescribed form,
- (iii) he is not disqualified from holding a licence under section 477,
- (iv) he is not disqualified from acting in the case of a company or a foreign company, under subsection 482(2) or in the case of an individual, under subsection 482(3),
- (v) there is in force such security for the proper performance of his functions as may be specified in the Regulations;

According to section 483(b) of the Insolvency Act 2003, prior written notice of the intended appointment of an overseas insolvency practitioner has to be given to the FSC.

In this written notice, the required details for the intended appointment of the overseas insolvency practitioner are usually provided to the FSC (see section 483(a) of the Insolvency Act 2003). The FSC then may approve or disapprove the intended appointment before the court hearing for the appointment of an overseas insolvency practitioner. The FSC has also the power to appear and be heard at the court hearing to appoint the overseas practitioner.

If all requirements are fulfilled the Court will appoint the overseas insolvency practitioner jointly with an BVI insolvency practitioner.

**Question 3.3 [maximum 5 marks]**

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

Insolvency proceedings do not affect the right of a secured creditor to take possession or realise or otherwise deal with the assets over which the creditor has security according to section 175(2) of the Insolvency Act 2003.

Therefore, secured creditors have a strong protection against the effects of liquidation.

Pursuant to section 338(1) of the Insolvency Act 2003, a secured creditor has the options to

- (a) value the assets subject to the security interest and claim in the bankruptcy as an unsecured creditor for the balance of his debt; or
- (b) surrender his security interest to the trustee for the general benefit of creditors and claim in the bankruptcy as an unsecured creditor for the whole of his debt; but he is not obliged to do either.

Hence, a secured creditor can file a claim for the part of his claim which is not covered by the security or he can surrender his security and file a claim for his whole claim if he deems it opportune.

**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?

Pinforth Holdings should be advised that foreign judgments may be recognised in the BVI under the Reciprocal Enforcement of Judgments Act 1922 ("1922 Act") or based on common law.

Under the 1922 Act, judgments or orders given or made by a court in civil proceedings, whether before or after the passing of the Act, for any sum of money from courts in specific territories, may be recognised (see section 2(1) of the 1922 Act). The High Court of England and Wales is a court from within these specific territories of which judgments may be recognised (see section 3(1) of the 1922 Act).

Judgments of the High Court of England and Wales recognised or registered under the 1922 Act are treated as being of the same force and effect as judgments of BVI courts (see section 3(3)(a) of the 1922 Act). Therefore, registered judgments may be enforced against assets situated in the BVI with, *inter alia*, a charging order, a garnishee order, a judgment summons, an order for seizure and sale of goods and the appointment of a receiver (see CPR 45.2). However, foreign judgments have to be registered within 12 months of the date of judgment in general. A longer period for the registration of a foreign judgment may only be granted by the BVI court on the basis that it is just and convenient to do so (see section 3(1) of the 1922 Act).

**Commented [JW8]:** 2 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

**Commented [JW9]:** 5 marks - so if not registrable then common law remedy under doctrine of obligation action as specified sum or summary judgment and application for liquidation under section 162 IA2003.

According to section 3(2) of the 1922 Act, the BVI court will not allow a foreign judgment to be registered if:

- a) the original court acted without jurisdiction;
- b) the judgment debtor, being a person who was neither carrying on business nor ordinarily 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;
- c) 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 the court;
- d) the judgment was obtained by fraud;
- e) the judgment debtor satisfies the court that an appeal is pending or that he is entitled to and intends to appeal; or
- f) the judgment related to a cause of action which for reasons of public policy (or similar) could not have been entertained by the Court.

It does not state in the facts, when the judgment of the High Court of England and Wales was made. Given that the claim was brought against Expat Properties Limited in September 2020 and that Expat Properties Limited did not attend the court hearing, it is likely that the judgment was made soon after September 2020. Therefore, the ordinary time limit of 12 months to register the judgment in the BVI probably has already expired. A registration of the judgment would then only be possible if the BVI court grants a longer period for the registration on the basis that it is just and convenient to do so.

Furthermore, a registration of the judgment of the High Court of England and Wales in the BVI may be rejected if the BVI court comes to the conclusion that the High Court of England and Wales had no jurisdiction to make a judgment against Expat Properties Limited, a company incorporated in the BVI. Given that Expat Properties Limited did not appear to the hearing before the High Court of England and Wales, registration of the judgment may also be rejected if Expat Properties Limited was not duly served with the process of the High Court of England and Wales. The facts of the case do not state if the High Court of England and Wales had jurisdiction to pass the judgment against Expat Properties Limited and if Expat Properties Limited was duly served the process.

If a registration of the judgment of the High Court of England and Wales in the BVI is not possible or rejected Pinforth Holdings may try to use the judgment of the High Court of England and Wales in order to obtain a summary judgment of a BVI court against Expat Properties Limited based on common law.

#### **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?

**Commented [JW10]:** 5 marks - first issue is A secured or unsecured creditor? If secured - registered charge/ debenture/ legal charge/equitable charge - have to see the loan document. Options under IA2003: Receiver /Administrative Receiver / Out of Court Receiver.

According to section 8(1) of the Insolvency Act 2003, a company is insolvent if

- (a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;
- (b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
- (c) either-
  - i. the value of the company's liabilities exceeds its assets; or
  - ii. the company is unable to pay its debts as they fall due.

Abbeydale Limited could of course file a court action against Dendoncker Limited and trying to obtain a judgment against Dendoncker for the repayment of the loan which it then could try to enforce against Dendoncker. If the execution of this judgment would returned wholly or partly unsatisfied Dendoncker would be insolvent according to section 8(1)(b) of the Insolvency Act 2003 and Abbeydale Limited could apply for the appointment of a liquidator by the Court under section 162(1)(a) of the Insolvency Act 2003. This whole process would, however, be time and probably cost consuming and is, therefore, not advised.

Given that the whole is due for repayment and Dendoncker fails to do so, Abbeydale Limited could also apply to the Court for the appointment of a liquidator based on section 162(1)(a) of the Insolvency Act 2003 by arguing that Dendoncker is insolvent because it is unable to pay its debts as they fall due pursuant to section 8(1)(c)(ii) of the Insolvency Act 2003.

If it is unclear if the Court can be convinced that Dendoncker is unable to pay its debts as they fall due Abbeydale could make a statutory demand. Pursuant to section 155(1) of the Insolvency Act 2003, a creditor may make demand on a person for payment of a debt owed by that person to him. According to section 155(2) of the Insolvency Act 2003, such a demand shall

- (a) be in respect of a debt that is due and payable at the time of the demand and that is not less than the prescribed minimum;
- (b) be in writing and shall specify the nature of the debt and its amount;
- (c) be dated and shall be signed by the creditor or by a person authorized to make demand on the creditor's behalf;
- (d) require the person to pay the debtor to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the date of service of the demand on him or her or such longer period as may be prescribed;
- (e) state that if the demand is not complied with, application may be made to the Court for the appointment of a liquidator or a bankruptcy trustee, as the case may be;
- (f) set out the rights of the person to make application to set the demand aside under section 156; and
- (g) comply with and be served in accordance with the Rule.

According to section 149(1) of the Insolvency Rules 2005, the minimum sum for which a statutory demand may be issued is USD 2,000.00.

Pursuant to section 149(4) of the Insolvency Rules 2005, a statutory demand shall include the name, address and the contact details, if any, of an individual or individuals with whom the debtor may communicate with a view to securing or compounding for the debt to the satisfaction of the creditor.

Even though the list of the above mentioned formalities for a statutory demand is long it is a relatively simple way to enforce a claim against a debtor. If the formalities are complied with the debtor has to pay the debt or to apply to the Court to set aside the statutory demand if it wants to avoid the appointment of a liquidator based on section 8(1)(a) in connection with section 162(1)(a) of the Insolvency Act 2003.

Pursuant to section 157(1) of the Insolvency Act 2003, the Court shall set aside a statutory demand if it is satisfied that

- a) there is a substantial dispute as to whether
  - i. the debt, or
  - ii. a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum,is owing or due;
- b) the person on whom the statutory demand was served has a reasonable prospect of establishing a set-off, counterclaim or cross claim in an amount equal to or greater than the amount specified in the demand less the prescribed minimum; or
- c) the creditor holds a security interest in respect of the debt claimed and the value of the security interest is equal to or greater than the amount specified in the demand less the prescribed minimum.

Furthermore, according to section 157(2) of the Insolvency Act 2003, the Court may set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused

- (a) because of a defect in the demand, including a failure to comply with section 155(3); or
- (b) for some other reason.

In the case at hand, Abbeydale's claim for the repayment of the loan seems undisputed by Dendoncker. Abbeydale does also not hold a security interest in respect of the debt claimed. There is also no other reason visible why a statutory demand of Abbeydale should be set aside if Dendoncker fails to pay Abbeydale's claim. For these reason, Abbeydale should consider making a statutory demand against Dendoncker for the repayment of the loan. If Dendoncker fails to comply with the statutory demand it is considered insolvent according to section 8(1)(a) of the Insolvency Act 2003 and Abbeydale may apply to the Court for the appointment of a liquidator over Dendoncker based section 162(1)(a) of the Insolvency Act 2003.

**Commented [JW11]:** Not stated - is this an assumption? A may be secured creditor.

**\* End of Assessment \***