



**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.

Voluntary liquidation is not available to an insolvent company (see section 197(1) of the Business Companies Act 2004, the "BCA"). The procedure is primarily appropriate for companies which are to be dissolved, for example, due to a discontinuation of business or because a company is no longer required following a merger or the restructuring of a corporate group.

A voluntary liquidator may be appointed pursuant to section 198(1) using the following procedure. The director(s) of the company shall:

1. make a declaration of solvency in the approved form and attaching a statement of the company's assets and liabilities, stating that, in their opinion,
 - a. the company is and will continue to be able to discharge, pay or provide for its debts as they fall due (cash flow solvency); and
 - b. the value of the company's assets equals or exceeds its liabilities (balance sheet solvency); and
2. approve a liquidation plan specifying the matters listed in section 198(1)(b) of the BCA.

The voluntary liquidator must be appointed within four weeks of the declaration of solvency and within six weeks of the directors' approval of the liquidation plan, otherwise the declaration (section 198(2)(a) BCA) and/or liquidation plan (section 198(3) BCA) is of no effect.

Details of how to appoint a voluntary liquidator are set out at section 199 BCA.

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.

Under section 289(1) of the BCA (as amended), a person who is or has been an officer of the company commits the offence of fraudulent conduct if, at any time whilst an officer or during the period of 12 months preceding the commencement of the liquidation, he or she has:

1. 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
2. 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.

Mirroring other insolvency offences, innocent intention is a defence to fraudulent conduct (see section 298(2)(b)). Further, no charges can be brought under section 289(1) in respect of conduct which occurred more than 5 years before the commencement of the liquidation (i.e. the appointment of the liquidator) (see section 298(2)(a)).

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?

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]: 2 marks

Commented [JW4]: 1/2 mark - the question asked what 'powers' did the BVI Court have - the 8 powers under section 467 should have been listed

The statutory regime for seeking assistance from the BVI courts in support of foreign insolvency proceedings is set out in Part XIX of the Insolvency Act 2003 (in particular, sections 467 and 470). Section 467(2) grants the foreign representative standing to apply to the BVI court for any of the orders set out in section 467(3), without conferring broader recognition on the foreign representative. This reflects the position which the BVI has adopted in not bringing into force part XVIII which is based on the UNCITRAL Model Law on Cross-Border Insolvency.

The remedies available to the foreign representative under section 467 are wide-ranging and are essentially intended to enable the foreign representative to gain control of assets within the BVI, prevent them being subject to other proceedings there, and to take other steps to secure property and information in support of the foreign insolvency proceedings.

One important caveat to the foregoing is that Part XIX only applies in respect of proceedings in certain foreign jurisdictions (see the definition in section 466 of “foreign proceeding”, which refers to a proceeding in a *relevant* foreign country only). The jurisdictions in support of which orders may be made under Part XIX currently include: Australia, Canada, Finland, Hong Kong SAR (not China as a whole), Japan, Jersey, New Zealand, the UK and the USA.

The court has an apparently wide discretion to determine an application under section 467, being guided by “what will be best to ensure the economic and expeditious administration of the foreign proceeding”, but that discretion must be exercised consistently with the five factors listed in section 468(1). The court also has a discretion to apply either BVI law or the law of the jurisdiction of the foreign proceeding (section 467(5)).

In 2021, the BVI also legislated to give the BVI courts the power to grant free-standing interim relief in support of existing *or anticipated* foreign proceedings in any civil or commercial matter. This includes relief appropriate to insolvencies, such as the appointment of receivers and third party disclosure orders.

In the recent case of *Net International Property Limited v Erez* (BVIHCMA 2020/0010), the Eastern Caribbean Court of Appeal considered whether the BVI courts have a residual jurisdiction at common law to order measures in support of foreign proceedings. The question arose because the foreign proceedings in that case were not proceeding in a relevant jurisdiction, but in Israel. The Court found that the common law jurisdiction had been superseded by Part XIX of the Act (see paragraphs [40] and [41]: “a complete code”). The result of the ruling is to limit the assistance available from the BVI courts in support of foreign insolvency proceedings to the nine designated countries mentioned above.

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.

The meaning of insolvent is defined in section 8(1) of the Insolvency Act 2003, and applies equally to companies incorporated in the BVI and to foreign companies.

Section 8(1) provides four tests for insolvency, which are as follows:

1. the company fails to comply with the requirements of a statutory demand that has not been set aside under sections 156 and 157 (this is based on the English case of *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 W.L.R. 114);
2. the company has failed to satisfy, in whole or in part, a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company;
3. the value of the company’s liabilities exceeds its assets (balance sheet insolvency). Section 10 in turn defines liability widely; or

Commented [JW5]: 4 marks

4. the company is unable to pay its debts as they fall due (cash flow insolvency).

It should be noted that, under section 167 of the Insolvency Act 2003 and under the court's inherent jurisdiction, the court retains a discretion whether to declare a company insolvent (paragraph 23 of *Trade and Commerce Bank v Island Point Properties SA* BVICA 2009/0012). Under section 167(1)(b), the court may dismiss an application to appoint a liquidator, even if one or more of the tests above is met (e.g. if a statutory demand which has not been set aside is unsatisfied, as was the case in the *Trade and Commerce Bank* case).

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.

Termination of a liquidation is dealt with at sections 232 and following of the Insolvency Act 2003. A liquidation may be terminated in the three circumstances set out in section 232, i.e. by a court order (section 233), by the completion of the liquidation (section 234) or by the release of the liquidator (section 235).

When preparing to terminate a liquidation, the steps a liquidator must take would depend on which mode of termination applies.

Under section 233, the liquidator may apply for an order terminating the liquidation (section 233(2)). The court may require the liquidator to file a report before it makes such an order (section 233(3)) or to comply with directions (section 233(4)) if the liquidation is to terminate on a subsequent date under section 233(5). If the liquidator's application is granted, the liquidator will finally need to file a sealed copy of the order terminating the liquidation with the Registrar (section 233(6)), otherwise he or she commits an offence.

Under section 234, as soon as practicable after completing his or her duties in relation to the liquidation, the liquidator must prepare and send to every creditor whose claim has been admitted and every shareholder of the company: (1) a final report containing the information set out in section 234(3); (2) a statement of realisations and distributions in respect of the liquidation; and (3) a summary of the grounds upon which a creditor or shareholder may object to the striking of the company from the applicable register of companies. The liquidator must then file a copy of the final report and statement of realisations and distributions circulated under section 234(2) with the Registrar. However the liquidator may apply to the court under section 234(4) to be exempted from the need to send the report and statement to creditors and shareholders, or for an order modifying his or her obligations under section 234(2).

Under section 235, the liquidator may apply to court to be released from all liability in respect of any act or default by the liquidator in relation to the administration of the company, either unconditionally or on such conditions as the court sees fit. Under section 235(7), a liquidator who obtains release must file a notice in the prescribed form with the Registrar.

Question 3.2 [maximum 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?

Commented [JW6]: 3 marks - no mention of BCA 2004 sections 207A-208 for voluntary liquidation. Termination does not always mean company is struck off or dissolved.

Commented [JW7]: 5 marks

The appointment of an insolvency practitioner (IP) who is based in another jurisdiction may be advisable if significant assets forming part of the insolvent estate are located in that jurisdiction. Although two sets of professional fees may at first appear to be an imprudent expense, it could in fact result in cost savings by reducing the need for a BVI liquidator to travel to the jurisdiction where those foreign assets are located and to seek advice from a local IP in that jurisdiction.

Under section 483 of the Insolvency Act 2003, an individual resident outside the Virgin Islands (an overseas IP) may be appointed in insolvency proceedings relating to a BVI company, however the appointment must be held jointly with a BVI licensed IP or jointly with the Official Receiver under section 488. The circumstances in which the court may appoint an overseas IP are set out in the subsections to section 483. There are five conditions relating to the overseas IP which must be satisfied (see subsection (a)). These might be regarded as eligibility conditions. They include safeguards such as sufficient qualification and experience, and that the person has not been disqualified from holding a licence under section 477. There is also a notice provision at section 483(b), pursuant to which advance written notice of the proposed appointment must be given to the Financial Services Commission (the relevant regulator).

An application should be made to the court to appoint an overseas IP, and the Financial Services Commission may appear at the hearing of any such application if it wishes to raise objections (section 484(1)). In practice, however, the overseas IP will usually write to the FSC, setting out the required details such as expertise and qualifications, and will await the FSC's approval. Otherwise the costs of the court application and hearing could be wasted if the FSC objects and the court refuses the application as a result.

Commented [JW8]: Normally at the same time as the application to Court for the liquidation

Question 3.3 [maximum 5 marks]

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

Commented [JW9]: 4 marks

Commented [JW10R9]: Options to relinquish security interest in all insolvency procedures and can appoint receiver/administrative receiver under s.115/s142

If a secured creditor participates in an insolvency, they will rank behind the costs and expenses properly incurred in liquidation and preferential claims admitted by the liquidator. I say "if", because where a secured creditor chooses to enforce against the secured asset, that "claim" falls outside the liquidation. See section 175(2) of the Insolvency Act 2003, which clarifies that the commencement of a liquidation does not affect the right of a secured creditor to take possession of and realise or otherwise deal with assets of the company over which that creditor has a security interest. See also to similar effect, section 197(2) of the BCA dealing with voluntary liquidation. The following protections and options are available to secured creditors of an insolvent company who do participate in the liquidation.

Commented [JW11]: Not quite correct. Secured creditors with fixed charges have priority over their assets and the liquidator would not realise them without permission and agreement as to the costs involved. Where it is a floating charge only then liquidation costs and preferential creditors have priority.

1. Section 211(1) of the Insolvency Act 2003 gives the secured creditor the right, if he or she wishes, to value the assets subject to the security interest and claim the balance of his/her debt as an unsecured creditor (e.g. where the value of the secured property has fallen and is insufficient to cover the balance of the loan). This is mirrored in section 213(2) (an unsecured claim for the balance of a debt after realising the security).
2. Section 211(1) of the Insolvency Act 2003 also gives a secured creditor the right, if he or she wishes, to surrender his or her security and claim as an unsecured creditor. Neither option under section 211 is obligatory, however, and a secured creditor is entitled to remain outside the insolvency process if he or she wishes.

3. Section 211(6) of the Insolvency Act 2003 gives the secured creditor a right to bid for assets offered for sale at public auction. This presumably includes an asset in which the secured debtor has surrendered his or her security interest under section 211(1)(b).
4. (Similar provisions are provided in relation to creditors of bankrupt individuals, see sections 298 and following of the Insolvency Act 2003.)
5. By way of safeguard, section 15 of the Insolvency Act 2003 (Arrangements) provides, under subsection 4, that an arrangement will not affect the right of a secured creditor to enforce his or her security interest or vary the liability secured, except with the written agreement of the secured creditor.
6. An order in support of foreign insolvency proceedings will similarly not affect the right of a secured creditor to realise or otherwise deal with the secured property (section 467(4) of the Insolvency Act 2003).
7. There is also a protection for foreign secured creditors in section 446(1) of the Insolvency Act 2003, which grants foreign creditors the same rights regarding the commencement of, and participation in, a BVI insolvency proceeding as domestic creditors; and in section 447(1), which requires foreign known creditors to be notified in the same manner as domestic known creditors.

Commented [JW12]: Section not in force

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?

Option 1: Enforcement under statute as if it were a BVI judgment

The English High Court judgment appears to be in scope of the Reciprocal Enforcement of Judgments Act 1922. Section 2(1) of that act defines a judgment as any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of the Act, whereby any sum of money is made payable. Section 3(1) provides that English High Court judgments are within scope of the Act.

If Pinforth chooses to enforce against assets in the BVI, it will need to register the English judgment within 12 months of the date of the judgment, or seek dispensation from the BVI court to extend the time limit on the just and convenient ground (section 3(1)).

Pinforth would need to make its application under Part 72.

A risk of pursuing this route to enforcement is that the BVI court might decline to register the judgment. The risk is two-fold, firstly a costs risk (the costs which Pinforth would waste in pursuing the registration application and any adverse costs of another party), and secondly, the risk of tipping off Expat that Pinforth intends to target assets in the BVI. If the application fails, this could give Expat an opportunity to move assets to a jurisdiction where enforcement will be more problematic for Pinforth. The reason why the BVI court might decline registration is that, under section 3(2) of the 1922 Act, the court will not order a judgment to be registered if the judgment debtor (Expat), being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court (England and Wales), did not

Commented [JW13]: 3.5 marks - not all the conditions under the REJ1922 referred to. Claim was more than 12 months but question does not state when judgment awarded and Expat did not attend hearing so not likely registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment, issue of statutory demand then liquidation under section 162 IA2003

voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court. This raises factual questions in relation to which I have no instructions. It may be the case, for example, that Pinforth's claim was based on a contract which contained an exclusive jurisdiction clause in favour of the High Court of England and Wales. In that event, section 3(2) may not be an obstacle to enforcement, but this is speculation.

Option 2: Enforcement at common law by an action on the original judgment

The second option for Pinforth would be to sue on the English judgment in the BVI, to obtain a BVI judgment which would be enforceable in the usual way under the CPR. Pinforth would need to prove the English judgment and show that it is a final and conclusive monetary judgment for a specified sum.

Option 3: Statutory demand and insolvency proceedings

A third option may be to serve a statutory demand on Expat for the judgment debt under section 155 of the Insolvency Act 2003. Section 15(2)(a) requires a statutory demand to be in respect of a debt which is due and payable, but there does not appear to be any limitation excluding foreign debts or foreign judgment debts from being the subject of a statutory demand. This option has the attraction of being likely to produce a more immediate result than the enforcement options outlined above, but if Expat can show that it is not insolvent despite its refusal to satisfy the English judgment, the BVI court may decline to appoint a liquidator and Pinforth would then be no further forward.

Overall it seems to me that option 2 provides the best combination of low risk and probable efficacy, but there is nothing to prevent Pinforth issuing a stat demand while pursuing option 2 in order to increase the pressure on Expat.

Question 4.2 [maximum 9 marks]

Abbeyle 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, Abbeyle 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, Abbeyle 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 Abbeyle Limited be advised to consider in order to enforce the debt owed to it by Dendoncker Limited?

Option 1: Realise the security

The question does not tell us whether the loan was secured or unsecured. If the former, then the most straightforward option would appear to be realisation of the security in accordance with the terms of the loan.

Option 2: Apply to commence insolvency proceedings

If Abbeyle believes that Dendoncker's failure to repay any part of the loan is due to insolvency, Abbeyle could consider commencing insolvency proceedings in order to recover

Commented [JW14]: 5 marks -First issue to determine: 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 [JW15]: Needed to be expanded with reference options under IA2003

the balance of the loan and any contractual interest owing. This option may be attractive if the loan is unsecured, or if there is an unsecured balance following the realisation of Abbeydale's security (option A above).

Commented [JW16]: And if unsecured creditor.

Abbeydale has standing under section 162(2)(b) of the 2003 Act, to apply to the BVI court for the appointment of a liquidator under section 162(1). The ground of the application would be insolvency: section 162(1)(a). That would require Abbeydale to prove Dendoncker's insolvency within the meaning of section 8(1). The easiest way to satisfy section 8(1) may be to serve a statutory demand on Dendoncker under section 155 of the 2003 Act. If that demand goes unchallenged within 14 days (section 156(2)) and unsatisfied for 21 days following service (section 155(2)(d)), the court may declare Dendoncker insolvent and appoint a liquidator under section 159. If that happens, Abbeydale would need to make a claim in the liquidation under section 209 of the 2003 Act, and Abbeydale would stand to be paid *pari passu* with the other unsecured creditors after the costs and expenses of the liquidation and any preferential claims have been met.

Option 3: Corporate rescue of Dendoncker

Abbeydale could also consider allowing Dondencker's directors to explore corporate rescue options, e.g. a company creditors' arrangement (CCA) under section 15(1), although on the facts provided, it is difficult to see what prospect of repayment there would be for Abbeydale, even if it agreed (with other creditors) to take a haircut on its USD 12 million loan.

Commented [JW17]: Unlikely as CCA required directors resolution

Option 4: Interim relief

If Abbeydale believes that Dendoncker has no solvency issues and is refusing to repay the loan for another reason, or if Abbeydale needs more time to decide how to proceed, one remedy which could assist while Abbeydale, for example, issues proceedings for the repayment of the loan (which would probably be subject to a jurisdiction clause in the loan agreement), is a freezing injunction over assets in the BVI, which could be obtained either from the BVI court or from the English High Court if there is a real risk of dissipation of Dendoncker's assets.

Commented [JW18]: Generally only if assets can be dissipated - if A is secured creditor over the property/ company assets then any attempt to sell it would require satisfaction of the chargeholder. If unsecured creditor best to go for application to wind up under section 162 IA2003 and then whilst waiting for judgment ask for the proposed liquidators to be appointed as provisional liquidators.

*** End of Assessment ***