



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** (P.31).
- (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 BCA, a company can only be liquidated under Part XII if: (a) it has no liabilities; or (b) if it is able to pay its debts as they fall due and the value of the assets is equal or exceeds its liabilities.

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.

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 the fraudulent conduct provisions as provided under section 289 of the BVI insolvency Act 2003, where a liquidator is appointed by the Court, 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:

- 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
- 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

A person is not guilty of an offence under this section:

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

Commented [JW3]: 2 marks

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?

Part XIX of the Insolvency Act, section 467 provides the primary framework for the powers provided to the BVI Court to make orders in aid of "foreign proceedings". The BVI Court can recognise certain foreign insolvency proceedings and provide assistance to "foreign representatives". The power to make such orders extends to designated countries, which include Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the USA. When making an order in aid of foreign proceedings, the BVI Court is able to apply the applicable BVI laws or the law of the applicable country.

Commented [JW4]: 2 marks

The BVI Court is provided with powers in relation to the orders that can be made in support of foreign insolvency proceedings, which include:

- (a) restraining the commencement or continuation of any proceedings, against a debtor or debtor's property;
- (b) restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;
- (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 a BVI insolvency proceeding.

When considering such application, the BVI court will do what is best to ensure the economic and expeditious administration of the foreign proceedings in line with certain guiding principles. The provision under Part XIX does not extend to permitting the court to assist foreign representatives from non-prescribed foreign jurisdiction.

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.

Corporate insolvency is governed by Part VIII of the Insolvency Act, with procedural requirements provided for under the Insolvency Rules. Below is the definitions of "insolvent" as provided in section 8 of the Insolvency Act:

A company or a foreign company is insolvent if

- it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;
- 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;
- the value of the company's liabilities exceeds its assets; or
- the company is unable to pay its debts as they fall due.

Set out below are the circumstances in which a company will be considered insolvent in BVI. Whilst such statutory tests exist, on a Court appointment the Court retains residual discretion as to whether it should find that a company is insolvent and appoint a liquidator.

- It is proved to the satisfaction of the Court that a company is unable pay its debts as they fall due (a question of fact) The well-known English case of *Cornhill Insurance Plc v Improvement Services Limited* sets out that an inability to pay a debt that is due and not disputed, is sufficient evidence of insolvency
- It is proved to the satisfaction of the Court that the value of the company's liabilities exceeds the value of its assets, or "balance sheet insolvency" Section 10(1) of the Insolvency Act provides a wide definition of liability – under an enactment, in contract, tort or bailment, a breach of trust and arising out of an obligation to make restitution.

Liability for these purposes includes a debt. In addition, section 10(2) of the Insolvency Act states that a liability may be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion. Notably, the BVI Court of Appeal in *Trade and Commerce Bank v Island Point Properties*¹⁰⁹ confirmed that a company may not be considered balance sheet insolvent in circumstances where the value of a company's assets became lower than those of its assets for only a short period.

- A company fails to satisfy (wholly or partly) execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company.
- If a company fails to comply with the terms of a statutory demand and it is not successfully set aside under sections 156 and 157 of the Insolvency Act. A statutory demand is a written demand for payment of a debt that is due and payable, made by a creditor in the format required under section 156 of the Insolvency Act.

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

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

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.

The liquidation of a company can be terminated when the following occurs:

- The court makes an order to terminate the liquidation
- the liquidator filed a certificate of compliance, as he is required to do under section 234(2) of the Insolvency Act; or
- the Court makes an order exempting the liquidator from having to file a certificate of compliance.

As soon as practicable after the liquidator completing his/her duties in relation to the liquidation of a company, pursuant to section 234 of Insolvency Act, the liquidator shall

1. Prepare and send to every creditor of the company whose claim has been admitted and to every member of the company
 - a final report and a statement of realisations and distributions in respect of the liquidation. The final report of the liquidator must contain a statement that all known assets of the company have been disclaimed, realised or distributed without realisation, that all proceeds of realisation have been distributed; and that there is no reason why, in his or her opinion, the company should not be struck from the Register, and dissolved.
 - a summary of the grounds upon which a creditor or member may object to the striking of the company from the Register;
2. File a copy of the final report and the statement of realisations and distributions sent to the creditors and members of the company with the registrar.

On the application of the liquidator the court may exempt the liquidator from compliance with the requirement to send his final report to all known creditors or modify the entire provision with regard to a final report as required under section 234(2a) of Insolvency Act.

Once the liquidator completed his duties the liquidator he also can apply to the court for his release when the liquidation is terminated under section 235 of Insolvency Act. When the court grant the order to release the liquidator, the liquidator will be discharge from all from all liability in respect of any act or default in relation to his administration of the company. Notwithstanding the release obtain under section 235, the court can still make an order under section 254 of the Insolvency Act against the liquidator.

Section 236 of the insolvency Act states that, the Insolvency Rules provide for the dissolution of a company on the termination and completion of the liquidation of the company. Once the liquidator has filed his final report and been released, its consider the liquidation has been completed and terminated. Thereafter the liquidator will write to the Registrar / FSC to request that the company be dissolved. The company will then be struck from the registrar of companies.

Termination of liquidation may not necessary mean that the company should be dissolved. In some instance the liquidation will be stayed/terminated once the company pay all the debts of the company and make an application to the court to the liquidation to be terminated in order for the company to continue its business.

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?

Pursuant to section 483 of the Insolvency Act, an oversea insolvency practitioner can be appointed to act as an insolvency practitioner in BVI. However, the oversea insolvency practitioner must be appointed jointly with a BVI licenced insolvency practitioner or the Official Receiver.

Prior to appointing overseas insolvency practitioner, the court or the person appointing the overseas insolvency practitioner must be satisfied that:

- overseas insolvency practitioner has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;
- overseas insolvency practitioner has given his or her written consent to act in the prescribed form;
- overseas insolvency practitioner is not disqualified from holding a licence under section 477 Insolvency Act;
- overseas insolvency practitioner 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) of Insolvency Act;
- there is in force such security for the proper performance of his or her functions as may be specified in the Regulations; and

Following are the circumstances when a creditor can consider appointment of an oversea insolvency practitioner:

- when the assets of the company are not in BVI. The creditor may appoint an insolvency practitioner from a jurisdiction in which the BVI company's assets are held.

- reduce cost i.e cost of travel, local expertise

In order to be appointed as an overseas insolvency practitioner a prior written notice of such intended appointment must be given to BVI Financial Services Commission. Such notice usually provides required details (such as expertise, qualifications, justification for appointment, details of the BVI licenced insolvency practitioner and the proposed overseas insolvency practitioner). Once the notice is given to BVI Financial Services Commission the overseas insolvency practitioner must wait for FSC approval (subject to Court approval, where relevant). Under section 484 of the Insolvency Act, the BVI Financial Services Commission has the power to appear and be heard at the court hearing to appoint (where applicable) and object to the appointment.

Question 3.3 [maximum 5 marks]

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

The Insolvency Act specifically recognises and protects the rights of secured creditors to enforce their security. Section 175 of the Insolvency Act states that an appointment of liquidator 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

Secured creditors claims are directly against the assets of the company, which are subject to the security, so they fall outside the liquidation. There are, therefore, no timelines for enforcing a secured claim. It is up to the secured creditor to determine when to take control of the security interest and when to sell it for the best return.

Pursuant to section 211 of the Insolvency Act, in a liquidation scenario a secured creditor may

- value the assets subject to the security interest and claim in the liquidation of a company as an unsecured creditor for the balance of his debt; or
- surrender the 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 debt.

However, the Insolvency Act does not impose either option on a secured creditor and they may remain outside the liquidation process.

A secured creditor can enforce his right by the method provided in the security agreement. For instance, the secured creditor can appoint a receiver over the charged assets to exercise its statutory rights (where a mortgage has been granted over property) or contractual rights (debenture). The holder of debenture or other instrument secured over the whole or substantially the whole of the debtor's company's assets can by way of an application to court or pursuant to the power in the security document appoint an administrative receiver.

Under the BVI insolvency framework, there are provision for rescue and reorganisation of distress company which does not compromise the secured creditors position.

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

Question 4.1 [maximum 6 marks]

Commented [JW8]: 3 marks - Not just liquidation -protection also in creditors arrangement section 15/bankruptcy section 311/section 467. Options to relinquish security interest in all insolvency procedures and can appoint receiver/admin receiver under s.115/s142

Commented [JW9]: 5 marks - 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

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?

The recognition of foreign judgements in the BVI is governed by the Reciprocal Enforcement of Judgments Act 1922 and common law. Under the Reciprocal Enforcement Act and the common law, a judgment must be a final and conclusive money judgment to be directly enforceable. Under the 1922 Act, "Judgement" is defined as any judgment or order Made by the court before or after the passing of the act, whereby any sum of money is made payable. As such, based on the section 2(1) of the Reciprocal Enforcement of Judgments Act 1922, only the monetary judgement can be enforced. Other judgments such as declaratory, injunctive or otherwise cannot be enforced. The judgment obtain by Pinforth Holdings of USD4.5 million fall under the category of monetary judgment.

The 1922 Act only covers the judgment given in certain court such as the High Court of England Wales and Northern Ireland, Court of Session in Scotland, Court of Bahamas, Barbados, Belize, Trinidad & Tobago, Guyana, St Lucia, Grenada, Jamaica and New South Wales (Australia). The judgment from other countries which are not included in the Reciprocal Enforcement of Judgments Act 1922 cannot be registered. The judgment obtain by Pinforth Holdings was handed down by High Court of England, a jurisdiction to which the Reciprocal Enforcement of Judgments Act 1922 is extends.

A judgment from a jurisdiction subject to the Reciprocal Enforcement of Judgments Act 1922 (Reciprocal Enforcement Act) can be registered in the BVI for enforcement as if it were a BVI judgment. Once foreign judgments have been recognised as enforceable in the BVI, the same enforcement remedies are available as for domestic judgments (under the Eastern Caribbean Civil Procedure Rules 2000 (CPR) and otherwise). The foreign judgment is registrable within 12 months of the date of judgment, unless the BVI court grants a longer period on the basis that it is just and convenient to do so. Further information is required to determine whether the foreign judgment obtained by Pinforth Holdings is still within the 12 months period for registration.

A judgment creditor must apply to court under CPR Part 72, including an affidavit containing the necessary confirmations and statements about the judgment (brief details of the judgment such as the amount of interest that has become due, the fact and legal ground of the case, details of service and appearance by the judgment debtor, whether the judgment is appealable or subject to an appeal) along with a verified/certified copy of the foreign judgment and a certified/authenticated translation into English if necessary. The application can be made without notice to the judgment debtor. The court can order the judgment creditor to give security for costs in relation to any proceedings that can be brought to set aside the registration. Once a foreign judgment is registered, it can be enforced like any other BVI judgment.

A foreign judgment will not be registered under the Reciprocal Enforcement of Judgments Act 1922/Eastern Caribbean Civil Procedure Rules 2000 Part 72 if the:

- Foreign court acted without jurisdiction.
- Judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the foreign court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court.

- Judgment debtor was not duly served with the process of the foreign court and did not appear in those proceedings, notwithstanding the fact that the judgment debtor was ordinarily resident or carrying on business in the foreign jurisdiction.
- Judgment was in respect of some cause of action that, for reasons of public policy or for some similar reason, could not have been entertained in the BVI court
- the judgment was obtained by fraud
- The judgment debtor satisfied the court that an appeal is pending or that he is entitled to and intends to appeal.

Once the judgment is registered in BVI, the following remedies are available for Pinthforth:

- Garnishee/ attachment order
- Order for the seizure and sale of goods
- Order for possession and sale of land/assets
- Court to Appoint a receiver

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?

The Insolvency Act consist of two parts which address the cross-border insolvency namely Part XVIII and Part XIX. Part XVIII sets out based on the UNCITRAL Model Law on Cross-Border Insolvency. However, this has not been brought into force. Whereas Part XIX

Part XIX of the Insolvency Act, section 467 provides the primary framework for the powers provided to the BVI Court to make orders in aid of “foreign proceedings”. The BVI Court can recognise certain foreign insolvency proceedings and provide assistance to “foreign representatives”. The power to make such orders extends to designated countries, which include Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the USA. When making an order in aid of foreign proceedings, the BVI Court is able to apply the applicable BVI laws or the law of the applicable country.

A foreign proceeding refer as collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy. Foreign representative means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding.

Section 446 of the Insolvency Act provides foreign creditors with a right of direct access and such creditors have the same rights regarding the commencement of, and participation in, a

Commented [JW10]: 3.5 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 [JW11]: Section 446 not in force

BVI insolvency proceeding as creditors from within the jurisdiction. Such right of direct access does not affect the priority of claims in a BVI insolvency proceeding or the exclusion of foreign penal, revenue and social security claims from such a proceeding.

Abbeydale Limited shall review the terms of the loan agreement where the loan was provided to Dendoncker Limited to confirm if there is any security was given by Dendoncker Limited before obtaining the loan. If the loan is secured, Abbeydale Limited can appoint a receiver over the assets of Dendoncker Limited to exercise its rights.

In the event if Abbeydale Limited loan is not secured, Abbeydale Limited can issue a civil claim against Dendoncker Limited for outstanding debt. If the court finds in the creditor's favour, the creditor can obtain judgment for the debt. If the debtor fails to file an acknowledgement of service or defence, the creditor may be able to obtain default judgment. Alternatively, where a debtor files a defence but has no real prospect of successfully defending the claim, the court may give summary judgment in the creditor's favour.

- If the debtor fails to pay the judgment debt, the creditor can (in appropriate circumstances):
 - apply to the court to appoint a liquidator to the debtor;
- obtain a charging order over the debtor's assets;
- apply to the court for the appointment of a receiver by way of enforcement; and/or
- obtain an attachment of debts order.

*** End of Assessment ***