



**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**.

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ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [JW2]: 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.

Insol page 27
BVI Business Companies Act, 2004 (BCA)

Voluntary liquidation

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.

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.

Insol pg 48
Section 289 of the BVI insolvency Act
https://www.iiiglobal.org/sites/default/files/2-BVI_Insolvency_Act_No5_2003.pdf

Fraudulent conduct -
Where a liquidator is appointed by the Court, under the provisions of fraudulent conduct under section 289 of the BVI insolvency Act, 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 company.

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

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?

Insol Page 59
Section 467 of BVI Insolvency Act

Commented [JW3]: ½ 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 [JW4]: 2 marks

Commented [JW5]: Why is here link here?

Commented [JW6]: 2 marks

<https://www.iiiglobal.org/sites/default/files/2- BVI Insolvency Act No5 2003.pdf>

Part XIX of the Insolvency Act, section 467 gives the 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 issue such orders extends only 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 representative may apply to the Court for an order under subsection (3) in aid of the foreign proceeding in respect of which he is authorized.

The BVI Court is provided with wide powers in relation to the orders that can be made, which include:

- restraining the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or debtor’s property;
- restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor’s property;
- requiring any person to deliver up any property of the debtor or the proceeds of such property to the foreign representative;
- 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;
- appointing an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;
- authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding; or
- staying or terminating or making any other order it considers appropriate in relation a BVI insolvency proceeding.

Section 468 of the Insolvency Act puts forward the issues the Court is required to consider when making an order. In particular, the Court must be guided by what will best ensure the economic and expeditious administration of the foreign proceeding, to the extent that this is consistent with:

- (a) the just treatment of all persons claiming in the foreign proceeding;
- (b) the protection of persons in the BVI who have claims, from prejudice and inconvenience in the processing of claims in the foreign proceeding;
- (c) the prevention of preferential or fraudulent dispositions of property;
- (d) the need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a BVI insolvency; and
- (e) comity.

Question 2.4 [maximum 4 marks]

Commented [JW7]: 4 marks

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

Insol page 30

Section 156,157 of BVI Insolvency Act

<https://www.iiiglobal.org/sites/default/files/2- BVI Insolvency Act No5 2003.pdf>

Commented [JW8]: ?

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

A company or a foreign company is insolvent if:

- it fails to comply with the requirements of a statutory demand which 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.

The circumstances in which a company will be considered insolvent in the BVI are considered below. Despite of statutory tests for insolvency, in the case of a Court appointment, the Court retains a residual discretion to find out that a company is insolvent and appoint a liquidator.

- The Court is satisfied that a company is unable pay its debt as they fall due (a question of fact).
The well-known English case of *Cornhill Insurance Plc v Improvement Services Limited*¹⁰⁷ sets out that an inability to pay a debt that is due and not disputed, is sufficient evidence of insolvency.
- The Court is satisfied that the company's liabilities value 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*, 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]

Question 3.1 [maximum 5 marks]

Commented [JW9]: 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.

Insol Page 49

Section 232,233,234 of BVI Insolvency Act 2003

https://www.iiiglobal.org/sites/default/files/2-_BVI_Insolvency_Act_No5_2003.pdf

Termination, completion and dissolution of Liquidation:

Under section 232 the liquidation of a company terminates on the date of the first occurring of one of the following:

- (a) the Court makes an order terminating the liquidation under section 233 or such later date as specified;
- (b) the liquidator has filed a certificate of compliance, with the provisions of section 234(2) of the Insolvency Act; or
- (c) the Court makes an order under section 234(4) exempting the liquidator from having to file a certificate of compliance.

Section 233 provides that, at any time after the appointment of the liquidator and on the application of a liquidator creditor, director, member of the Official Receiver, the Court may make an order for the termination of the liquidation at any time, if it is just and equitable to do so.

Where the Court makes an order under 233 (1), the company ceases to be in liquidation and the liquidator ceases to hold office with effect from the date of the order or such later date as may be specified in the order. The applicant must file a sealed copy of the order with the registrar in 10 days from the date of the order.

Pursuant to section 234(2) the liquidator is required to prepare his final report as soon as practicable after completing his duties. This report must be:

- Sent to every admitted creditor and every member of the company.
 - i. The report must include a statement of realisation and distribution 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.
- Filed with the Registrar along with the statement of realisations and distributions sent to the creditors and members of the company.
- The final report of a liquidator shall 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 opinion, the company should not be struck from the Register, and dissolved.

The liquidator is also empowered to make an application to the Court to 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.

In addition, as per section 235 of the Insolvency Act, the liquidator or provisional liquidator can apply for their release when their appointment ends. The effect of such a release is that the liquidator is discharged from all liability in respect of any act or default in relation to his administration of the company. However, the Court can still make an order under section 254 of the Insolvency Act against a liquidator, notwithstanding his release under section 235.

On the liquidator filing his final report and having been released, it is considered that the liquidation has been completed and terminated. The liquidator will then write to the registrar/ FSC to dissolve the company. On termination and completion of liquidation, section 236 of the Insolvency Act states that the Insolvency Rules will provide for the dissolution of a company.

The termination of a liquidation may not necessarily mean that the company should be dissolved. For example, there may be (rarely) a situation where a company liquidation is terminated because the debt has been paid to the appointing creditor (for example, through an injection of capital by a person interested in the company) and then an application is made to the court that the liquidation be terminated so that it can continue in business. In practice, where a liquidation is completed and terminated once the liquidator has filed his final report and been released, the liquidator will write to the Registrar / FSC to request that the company be dissolved.

Commented [JW10]: Because the company wants to continue to be live/trade

Question 3.2 [maximum 5 marks]

Commented [JW11]: 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?

Insol Pg 13
Section 483 BVI insolvency Act 2003
<https://www.iiiglobal.org/sites/default/files/2- BVI Insolvency Act No5 2003.pdf>

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

- (a) The appointment will be granted by the court if it is 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; and
- (b) prior written notice of his appointment has been given to the Financial Services Commission

The foreign insolvency practitioner usually writes the notice to the FSC, providing required details, such as, expertise and qualifications, justification for appointment, details of the BVI licenced insolvency practitioner and the proposed overseas insolvency practitioner and must wait for confirmation that the Financial Services Commission has approved the appointment of the overseas insolvency practitioner (subject to Court approval, where relevant).

In such circumstances where it is proposed that an overseas insolvency practitioner be appointed, under section 484, the Financial Services Commission has the power to appear and be heard at the court hearing to appoint (where applicable) and object to the appointment.

As it is common for BVI companies' assets to be situated outside of the BVI, a common use case is for creditors to appoint an Overseas Insolvency Practitioner or to appoint an insolvency practitioner from a jurisdiction in which such assets are held. From a practical stand point, whilst there is another insolvency practitioner appointed (which has associated costs), it significantly reduces costs of travel and further costs relating to local expertise. This is particularly important in case of long-running liquidations involving multiple disputes in different jurisdictions.

Question 3.3 [maximum 5 marks]

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

Insol page 5,10,35,53-55, 20

Section 175,211,338 BVI insolvency Act 2003

[https://www.iiiglobal.org/sites/default/files/2- BVI Insolvency Act No5 2003.pdf](https://www.iiiglobal.org/sites/default/files/2-BVI%20Insolvency%20Act%20No5%202003.pdf)

Claims by secured creditors

Whilst secured creditors are not obliged to make a claim in the bankruptcy, they are able to do so under section 338 of the Insolvency Act. In order to make a claim the creditor must value the assets subject to the security and claim as an unsecured creditor for the remainder of the debt as an unsecured creditor. In the alternative the creditor can surrender their security interest to the trustee for the benefit of all creditors and claim as an unsecured creditor for the whole debt.

The Insolvency Act 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.

The secured creditors' claims are directly against the assets of the company, which are subject to the security, so they will fall outside the liquidation. Hence there are 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:

- a) 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
- b) 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 also enforce his right by any such provision in the security agreement. The secured creditor can appoint a receiver over the charged assets to exercise its statutory rights:

Commented [JW12]: 4 marks - protection also in creditors arrangement (section 15)/bankruptcy section 311). Options to relinquish security interest in all insolvency procedures and can appoint receiver/administrative receiver/ out of receiver under s.115.

Commented [JW13]: Why is this link here?

- a) by the Court on an application; or
- b) under a debenture.

The holder of a debenture or any other instrument secured over the whole or substantially the whole of the debtor's company's assets can apply to court or if allowed 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.

Plan of arrangement

The Court will determine to whom notice of the proposed plan should be given and whether the approval of any individual is required.

The BVI Court will also determine whether any holder of shares, debt obligations or securities in the company can dissent to the proposed Plan of Arrangement. In that case, any dissenting party may receive payment of fair value in respect of its shares, debt obligations or other securities.

Commented [JW14]: Not under the BVI insolvency framework but section 177 BCA 2004

Company creditors' arrangements (CCA)

It is worth noting that, unless the secured creditors agree in writing to the contrary, a CCA does not affect the right of a secured creditor to enforce its security interest or vary the liability secured by the security interest.

Schemes of arrangement

In relation to schemes of arrangement in the BVI, it is important to note that there is no express protection for the rights of secured or preferential creditors.

In the case of bankruptcy of individuals:

Secured creditors are not obliged to make a claim in the bankruptcy, they are able to do so under section 338 of the Insolvency Act. To put forward a claim the creditor must value the assets subject to the security and claim as an unsecured creditor for the remainder of the debt as an unsecured creditor. In the alternative the creditor can surrender their security interest to the trustee for the benefit of all creditors and claim as an unsecured creditor for the whole debt.

Commented [JW15]: Not under the BVI insolvency framework but section 179A BCA 2004

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.

Commented [JW16]: 4 marks P's claim was 12 months but question does not state when judgment awarded and Expat did not attend hearing so not registrable but in common law remedy under doctrine of obligation action as specified sum or summary judgment then liquidation under section 162 IA 2003

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?

Insol Pages 63,64

In the BVI, the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 and common law govern the recognition of foreign judgements. Pinforth Holdings needs to use these provisions for registering its judgement and establishing its claims in BVI against Expat properties.

For a judgement to be directly enforceable under the Reciprocal Enforcement Act and the common law, the judgment must be a final and conclusive money judgment.

As per 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.

Under section 2(1) of the Reciprocal Enforcement of Judgments Act 1922, only the final conclusive judgements for monetary sums can be enforced. Other judgements such as declaratory, injunctive or otherwise cannot be enforced. (This criterion is fulfilled by the award of the judgment sum in the English court in Pinforth Holdings' case.)

The 1922 act is only applicable to those judgments which are given by 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).

In the case where the judgment is from other countries which are not included in the Reciprocal Enforcement of Judgments Act 1922, they cannot be registered. (In the case of Pinforth Holdings, the jurisdiction of the English Court is covered under the Reciprocal Enforcement of Judgments Act 1922.)

On the registration of a foreign judgement by the BVI court under the Reciprocal Enforcement of Judgments Act 1922 (Reciprocal Enforcement Act) for enforcement, it is treated as if it were a BVI judgment and has the same effect and force of a BVI judgement.

A foreign judgment is registrable within 12 months of the date of judgment. However, the BVI court can grant a longer period on the basis, that it is just and convenient to do so. (Pinforth Holdings should register the judgement obtained, in the applicable 12 months period.)

To register a judgment, the judgement creditor must apply to court under CPR Part 72. The application must include certain prescribed information such as the confirmations and statements of the judgement including:

- i. details of any interest that has become due under the law of the country in which judgment has been entered;
- ii. the facts and legal grounds of the case;
- iii. details of service and appearance by the judgment debtor;
- iv. If judgment is appealable or is under appeal;
- v. a verified/certified copy of the foreign judgment and a certified/authenticated translation into English if necessary.

The application to register can be made without notice to the judgment debtor. The court can order security for costs from the judgment creditor, in relation to any proceedings that can be brought to set aside the registration. The Court will not order a foreign judgment to be registered in the event of the following (section 3(2) of the 1922 Act):

- the original court did not have jurisdiction to act;
- 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;

- 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;
- if the judgment was obtained by fraud;
- if the judgment debtor can satisfy the court that an appeal is pending or that he is entitled to and intends to appeal
- the judgment related to a cause of action which for reasons of public policy or such similar reason could not have been entertained by the Court.

On such registration, all remedies available for domestic judgements under the Eastern Caribbean Civil Procedure Rules 2000 (CPR) will be available. These include:

- (a) A charging order
- (b) A garnishee order
- (c) A judgement summons
- (d) An order for seizure and sale of goods
- (e) Appointment of a Receiver

(Pinforth can exercise these remedies for its claim)

Commented [JW17]: Claim not registrable as Expat did not hearing

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.

Commented [JW18]: 5 marks - 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.

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?

Insol Page 8,58-60

Section 156,157,211,338,446,467 BVI insolvency Act 2003

Commented [JW19]: Section 446 is not in force.

<https://www.iiiglobal.org/sites/default/files/2- BVI Insolvency Act No5 2003.pdf>

Commented [JW20]: ?

Section 467 (Part XIX) of the Insolvency Act, 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.

The definition of a foreign proceeding is a collective judicial or administrative proceeding, which includes an interim proceeding, pursuant to an insolvency law in which 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. A foreign representative is defined as 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. This will include liquidators or equivalent representatives in the relevant jurisdictions.

Options for Abbeydale Limited:

Security provided:

If the terms of the loan agreement confirm that any security was given by Dendoncker Limited on the assets or the property purchased, at the time the loan was obtained by it, Abbeydale Limited can appoint a receiver over the assets of Dendoncker Limited to exercise its rights. Under section 338 and 211 of the Insolvency act the secured creditor can file its claim.

Commented [JW21]: Only the unsecured portion if any unless it gives up its security interest

Unsecured Loan:

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 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.

Commented [JW22]: Section 446 is not in force

The Creditor, as a first step must initiate a statutory demand to start the process to declare the company insolvent:

- If the 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.

The statutory demand must be (among other things) in writing, dated and signed by the creditor. It must require the company to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the service of the statutory demand. The most common reason that a company would apply to set aside a statutory demand is that a debt is disputed.

On the expiry of the statutory demand period and if the debt is unsatisfied, the creditor can obtain judgment for the debt amount. If the debtor fails to challenge or has not received service of the demand, a judgement in default can be obtained. However, if the demand is challenged, the court can give summary judgement in the creditor's favour if there is no case for defence. Once the judgement debt is obtained and the debtor fails to pay the debt, the creditor can;

- 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.

Commented [JW23]: Under section 162 IA 2003

Commented [JW24]: If debenture can appoint an Administrative Receiver - either out of court or by Court

If the creditor wishes, it can proceed to launch the proceedings in the English courts and on the receipt of the judgement order for monetary sum enforce the same in BVI under the Reciprocal Enforcements of Judgements Act 1922.

A liquidator can also be appointed by the English court and can seek recognition and then proceed to realise the assets of the debtor for the benefit of the creditors of the company including Abbeydale. If the loan document provides for priority, such priority can be used for distribution of the proceeds.

Commented [JW25]: Unlikely for English Court to make a winding order over a foreign company such an order unless some connection with jurisdiction

Commented [JW26]: Only if A is a secured creditor would it have priority over creditors. An as unsecured creditor it would rank equally with the others - pari passu.

Bibliography:

Insol:

Foundation Certificate in International Insolvency Law – Module 5B- Guidance Text, British Virgin Islands (2021/2022)

BVI insolvency Act

https://www.conyers.com/wp-content/uploads/2018/06/BVI_Insolvency_Act_2003_Conyers.pdf

https://www.iiiglobal.org/sites/default/files/2- BVI_Insolvency_Act_No5_2003.pdf

*** End of Assessment ***