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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5E**

**JERSEY**

This is the **summative (formal) assessment for Module 5E** 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 5E**. 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.assessment5E]**. An example would be something along the following lines: 202223-336.assessment5E. **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 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**ANSWER ALL THE QUESTIONS**

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

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**

Which court can **hear an appeal** in respect of a Jersey legal matter?

1. Royal Court.
2. Court of Appeal.
3. Petty Debts Court.
4. Privy Council.

Choose the **correct answer**:

1. Option (ii).
2. Options (ii) and (iv).
3. Option (i).
4. All of the above are correct.

**Question 1.2**

Which statements are correct in relation to the role of liquidators, their powers and duties:

1. Directors’ powers cease upon appointment of a liquidator in a summary winding-up, and a liquidator can exercise those powers if approved by the court.
2. In a just and equitable winding-up, the liquidator’s powers will be determined by the court.
3. In a provisional liquidation, the provisional liquidator will have such powers as specified in the resolutions appointing him.
4. Liquidators are obliged to report possible criminal offences as specified in the Companies Law.

Choose the **correct answer**:

1. All of the above.
2. Options (i), (iii) and (iv).
3. Option (ii) and (iv).
4. Options (i) and (iv).

**Question 1.3**

Which parties can **make an application for** ***Désastre*** under the Bankruptcy (*Désastre*) (Jersey) Law 1990?

1. The Viscount.
2. The Jersey Financial Services Commission.
3. A creditor with a claim of GBP 2,000.
4. The debtor.

Choose the **correct answer**:

1. Options (ii), (iii) and (iv).
2. All of the above.
3. Options (ii) and (iv).
4. Option (i).

**Question 1.4**

Which statutory processes provide a **moratorium** against action being brought by non-secured creditors?

1. Summary winding-up.
2. Creditors’ winding-up.
3. Just and equitable winding-up.
4. *Désastre*.
5. *Dégrèvement* or Realisation.
6. Debt Remission Order.
7. *Remise de Biens*.
8. Compromises or arrangements.

Choose the **correct answer**:

1. Options (i), (ii), (iii), (iv), (vi), (vii) and (viii).
2. Options (i), (ii), (iii) and (iv).
3. Options (i), (ii), (iii), (vii) and (viii).
4. All of the above.

**Question 1.5**

Which antecedent transactions can the liquidator of a summary winding up pursue under the Companies Law?

1. Transactions at an undervalue.
2. Preferences.
3. Wrongful trading.
4. Fraudulent trading.
5. Extortionate credit transactions.

Choose the **correct answer**:

1. All of the above.
2. Options (i) and (ii).
3. Options (i), (iii) and (iv).
4. None of the above.

**Question 1.6**

Which one of the following statements is **correct**?

1. Jersey is part of Britain, the UK and the EU.
2. Jersey is part of Britain and the EU but not the UK.
3. Jersey is part of Britain but not the UK and not the EU.
4. Jersey is not part of Britain, or the UK or the EU.

**Question 1.7**

Jersey is an attractive destination for **international** **finance**, due in part to its:

1. Tax neutrality.
2. Political independence.
3. Economic stability.
4. Legal and regulatory infrastructure.

Choose the **correct answer**:

1. All of the above.
2. Options (i), (iii) and (iv).
3. Options (i), (ii) and (iii).
4. Options (i), (ii) and (iii).

**Question 1.8**

Which **type of mortgage** can be created by agreement between two or more parties as to the granting and taking of security expressed in the form of a contract passed before the Jersey court?

1. A conventional hypothec.
2. A judicial hypothec.
3. A pledge.
4. A legal hypothec.

**Question 1.9**

Which statutory processes require a liquidator to be on the **approved register of liquidators**?

1. Summary winding-up.
2. Creditors’ winding-up through court.
3. Just and equitable winding-up.
4. Creditors’ winding-up not through court.

Choose the **correct answer**:

1. Options (i), (ii) and (iii).
2. Options (ii) and (iii).
3. Options (ii) and (iv).
4. All of the above.

**Question 1.10**

Which **other responsibilities** are overseen by the office of the Viscount, besides insolvency functions?

1. Coroner.
2. Data Protection.
3. Farming and fishing.
4. Prison services.

**QUESTION 2 (direct questions) [10 marks in total]**

**Question 2.1 [maximum 3 marks]**

Describe the points both in favour and against the 2022 introduction of a register of approved liquidators in Jersey. What are the criteria to be eligible for the register?

Jersey does not have an insolvency regulator and until recently did not have a register or any specific licensing for insolvency practitioners. However, in March 2022, The Companies (General Provisions) (Amendment No 6)(Jersey) Order 2022 came into effect which established a register of approved liquidators for creditor winding-up proceedings. This register is maintained by the Viscount.

In order to be eligible to be on the register, you must (1) be an individual person and ordinarily a resident of Jersey; (2) be determined by the Viscount to have sufficient experience and by a UK licensed insolvency practitioner or qualified accountant; and (3) have a sufficient bond. It is also possible to become a joint liquidator (with a resident liquidator) if you do not reside in Jersey but such person must also apply to be on a separate register of non-Jersey approved liquidators also maintained by the Viscount.

Certainly it is good to have experienced liquidators, so the March 2022 Order assumedly accomplished this objective. Also, the laws in Jersey had previously been criticized by insolvency professionals worldwide for not having a regulated liquidator program. However, it is not clear how long it takes to be added to either the Jersey register or the non-Jersey register; thus particularly with cross-border proceedings, timing may be an issue with respect to becoming a liquidator in Jersey. Also, given that the registers are maintained by the Viscount, parties in interest now have less control over the procedures.

Question 2.2 [maximum 2 marks]

Describe briefly the practical reasons why Jersey may not have a statutory or customary corporate rescue and turnaround procedure equivalent to an English administration or US Chapter 11 proceeding.

Practically speaking, Jersey’s lack of a corporate rescue procedure is not overly problematic because the country’s economic landscape is primarily composed of a vibrant offshore and international finance center. There are many companies in Jersey and they are primarily focused in the area of banking, private wealth and fund management. The percentage of solvent companies is thus very high. Simply stated, the rescue procedure is not often needed. Also, the Jersey Court has shown a willingness to provide innovative and flexible solutions for insolvent debtors when they are needed, such as with a just and equitable wind up being used to effectuate a pre-pack sale of assets. Also, the Jersey Courts allow compromises or arrangements when a majority in number of creditors representing 75 per cent of value consents to the arrangement. Furthermore, the Jersey Court is very experienced in cross-border issues and, although not a signatory to the Uncitral Model law, frequently cooperates with foreign courts under article 49 of the Bankruptcy Law and under common law and comity principles.

Question 2.3 [maximum 2 marks]

Describe the appointment process in respect of the liquidation of a limited duration company.

By definition, Limited Duration company wind ups are an automatic wind-up of a company at the end of its limited life. The Company can be solvent or insolvent. The appointment process follows that of a summary wind up or creditors’ winding-up process, depending on whether there is a statement of solvency made. If there is a statement of solvency, a liquidator can be appointed but is not required to be; it can otherwise be conducted by the directors. If there is no statement of solvency made, it is essentially converted to a creditors’ winding-up and the shareholders place the company into the winding-up and appoint a liquidator. The creditors then meet to either confirm the liquidator or to nominate their own liquidator. In the latter case, the disagreement over choice of liquidator is resolved by the Jersey Court.

Question 2.4 [maximum 3 marks]

What claims potentially rank as priority claims in a *Désastre*?

Priority creditors in a Desastre, include depositors, where the debtor is a bank under the Banking Business (See Depositors Compensation (Jersey) Regulations 2009) and also include the following:

1. Employees for salary arrears within six months preceding the declaration of Desastre and also holiday pay and bonuses subject to certain limitations;
2. Amounts owed to the Health Insurance Fund (See Health Insurance (Jersey) Law 1967;
3. Amounts owed to Social Security Fund (See Social Security (Jersey) Law 1974;
4. Certain income tax (See Income Tax (Jersey) Law 1961;
5. Certain goods and services tax (See Goods and Services Tax (Jersey) Law 2007;
6. Rental amounts owed to landlord to the extent it qualifies for preference under customary law; and
7. Parochial sums due in the 2 years prior to the declaration of Desastre for any parish in Jersey.

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

Question 3.1 [maximum 7 marks]

Write a short essay to describe the personal insolvency options available in Jersey, being *Désastre*, *Degrevement* and Realisation, Debt Remission Order and *Remise de Biens*.

The personal insolvency options available in Jersey are Desastre, Degrevement and Realisation, Debt Remission Order and Remise de Biens. They are each summarized below:

1. Desastre if the Jersey law version of traditional bankruptcy. It is a winding-up procedure for a company or individual and can be instigated by a creditor or by the debtor. An application is made to the Court and the Court decides whether the declaration should be made. On the making of a declaration of Desastre, the Viscount is vested with all property of the Debtor, wherever located. The Viscount’s job is to realize the assets for the benefit of the creditors and he has broad powers to do so, including bringing actions including avoidance actions, settling claims and paying creditors, selling property and disclaiming onerous property. Usually a Desastre lasts four years, but can also be for a shorter or longer period.
2. Degrevement and Realisation – these originate under the Loi (1904) (Amendement No 2) sur la Propriete Forciere. Basically Degrevement is a procedure where immovable property can be used to pay creditors and Realisation is the same process for movable property. The property becomes “discumbered”, which means that charges and debts are removed so that the property can be sold “free and clear” to a new owner. To accomplish this, a hearing is held by an Attournes (an appointed professional) and the property is first offered to the unsecured creditors who would have to take the property subject to all the secured charges, which they have to pay in full. If they do not accept the offer, then the most junior secured creditor is made the offer and would have to pay all secured debts having a higher priority than him. The reverse hierarchy continues until someone accepts and that creditor only must pay the amounts senior to his debt. Significantly, even if the value of the property exceeds the value of the winning charge (and those senior to it), the accepting creditor does not have to pay any excess to the debtor. Moreover, the debtor is not necessarily discharged from his debts if they are not fully paid off, although these creditors will, at best, have an unsecured claim.
3. Debt Remission Order (DRO) – this is a recent enactment of Jersey law (Debtor Remission (Individuals)(Jersey) Law 2016 (the “DRO Law”) and addresses local small debt proceedings administered by the Citizens Advice Bureau and managed by the Viscount. It is not currently being used because this procedure is only available when there are (a) assets worth less than JEP 5,000; (b) less than JEP 100 of disposable insomce on a monthly basis; (c) debts are under JEP 20,000; and (d) the debtor acted in good faith when he incurred the debts. In this regime, the Debtor gets a moratorium for 12 months, after which the debts are written off.
4. Remise de Biens – Like Degrevement and Réalisation, Remise is an old procedure (See Loi (1839) sur les Remises de Biens . It is available to a debtor with immovable property. The debtor can be solvent but must be having some difficulty paying his creditors. The debtor surrenders his property to the Jersey Court which the Court will ultimately liquidate the property to discharge the debts. However, any surplus in monies recovered from the liquidation may be returned to the debtor and the Court offers some protections and rehabilitation to the debtor for entering this procedure.

Question 3.2 [maximum 8 marks]

Write a short essay describing in detail the creditor claims process in respect of a creditors’ winding-up. In your essay, you should refer to at least the following:

1. The relevant Jersey law that applies.
2. Which areas are covered under the relevant Jersey law.
3. Advertising for claims and notice periods.
4. Which debts are provable.
5. Interest on debts.
6. Proving of debts and the cost of proving.
7. Examination of proofs of debts.
8. Adjudication and the process of admitting or rejecting claims.

The law that applies to the creditor claims process in a creditors’ winding up is contained in Article 166 of the Companies Law, which provides that the same rules apply as with Desastre with respect to the rights of secured and unsecured creditors, provability of debts, time and method of proving debts and how they are admitted or rejected and to the order of payment.

The rules for proving claims in a Desastre are contained in Part 7 of the Bankruptcy Law.

There is no statutory minimum time period for the notice to creditors in a winding up. Generally, it is considered that 60 days notice is adequate for a creditors’ winding up. There is also no requirement for notice to be made outside of Jersey. However, depending on the facts of the case, a liquidator should decide whether outside notice is prudent so as to avoid challenges from reasonably foreseeable potential claimants.

The debts that are provable by a creditor are all debts and liabilities, whether present, future or contingent. A creditor has the burden of proof for their debt and must bear the cost of proving its debt in the manner prescribed by the Court. Interest is also permitted if the debt bears interest until the date of commencement of the winding up and is payment until the date of payment if it is a secured debt.

The Viscount adjudicates the claims and can request additional information if needed. The Viscount then either admits or rejects the claim (or can partially admit or reject). If the Viscount rejects the claim, he must serve notice of rejection on the creditor and the creditor then has the option to request review of the rejection decision by the Jersey Court.

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

XYZ Limited (XYZ) is a major high-street retailer registered in England with stores throughout England as well as a store in Jersey. Like many retailers, XYZ has struggled in recent times due to the change in shopping habits of the British public. Sales have fallen, as customers increasingly look for cheaper alternatives online, and XYZ is struggling to meet its ongoing rent commitments at its many stores. The majority of XYZ’s stores have been loss-making for some time, including its store in Jersey. XYZ’s secured lender, Big Bank PLC (Big Bank), has become increasingly concerned at the situation. Big Bank has the benefit of fixed and floating charges over XYZ’s assets.

In December 2018, Big Bank confirmed that it would no longer continue to provide financial support and would not allow a further extension of facilities in order to meet the rental payments which were due on 25 December.

1. Big Bank has obtained legal advice in England in relation to its rights as secured creditor. You have been approached in Jersey to comment on Big Bank’s rights. Please draft a note in this regard. (3 marks)

According to the hypothetical, Big Bank has a fixed and floating charge over all of XYZ’s assets. However, based on the hypothetical it appears that the only assets that XYZ would have in Jersey are movable assets (eg inventory). A security interest in tangible movable property in Jersey can only be created by way of pledge. And to perfect an interest in pledged property, there must be actual physical possession by the creditor of the movable property. So, although secured creditors rank ahead of all other creditors in a Desastre or Liquidation scenario, there would be no valid security interest enforced with respect to the store assets in Jersey.

Conversely, Big Bank would likely have a valid floating lien with respect to the assets in England. England does recognize floating liens in inventory, without the requirement of possession. Also, even if the insolvency proceeding is in Jersey, the Jersey Court would likely recognize any security granted under the law where the assets are located under the principle of universality. A secured creditor’s status in another jurisdiction will likely be recognized in Jersey, absent a compelling reason to rule otherwise. So likely the lien of Big Bank would be recognized for the inventory assets in England.

It also appears under the ruling of Hamel v Hawkes and Gardner Limited (1900) 220 Ex 122. that, if an insolvency proceeding is opened in England, the Jersey court may extend the lien to movable property in Jersey.

The directors of XYZ identify a party that is interested in acquiring the business of XYZ. Following a brief period of negotiation conducted with the oversight of a proposed administrator, and with approval of Big Bank, the directors of XYZ began the process to place XYZ into administration in England, in order to allow a “pre-packaged” sale of the business to occur.

1. The Jersey store is owned by a separate Jersey company, ABC Limited (ABC), but ABC’s centre of main interest is considered to be in England. Is it possible to place ABC into English administration (following the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (the Recast EIR)? (3 marks)

Jersey has not adopted the Uncitral Model Law on Cross-Border Insolvency and it is not a member of the EU, so Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (the Recast EIR) does not apply. However, the Jersey Court generally cooperates with foreign proceedings under article 49 of the Bankruptcy Law by incorporating common law and comity principles. In particular, the Jersey Court will provide assistance to foreign courts if the court in question has offered reciprocal treatment, known as a “relevant” country or territory. The UK is considered a relevant country. Thus, the Jersey Court may exercise jurisdiction to recognize an insolvency proceeding commenced in the UK. Article 49 also suggests that the Jersey Court consider the effect of the Model Law and/or rules of private international law to give force to an action in that jurisdiction. Notwithstanding, the Jersey Court will continue to exercise its discretion and power to ensure that any request from the foreign court is not inconsistent with Jersey law and public policy.

The hypothetical states that the Jersey store is a separate Jersey company (ABC), and that its centre of main interest is considered to be England. However, this should not be sufficient to commence an administration in England because neither Jersey nor the UK are members of the EU and thus are not bound by the Recast EIR. As a result, the centre of main interest would likely not be the decisive factor in determining where the insolvency proceeding of ABC should commence. Also, the Jersey Court is likely to consider that the effect of Big Bank’s lien under English law will likely extend to the assets in Jersey if the Jersey Court allows a proceeding to commence in England.

1. If it is not possible to place ABC into English administration, then are there alternative Jersey insolvency processes that will allow a pre-packaged sale to occur? Are there any potential problems with achieving a sale as a going concern? (3 marks)

Unlike the US and the UK, there is no rehabilitation procedure in Jersey. However, the Jersey Court often allows creative flexibility in proceedings. So, for instance, a Just and Equitable Winding Up is sometimes used as a quasi-pre-packaged sale of assets. Also, compromises or arrangements are often done between the company and any class of its creditors or shareholders in order to effect a voluntary reorganization. A compromise or arrangement can be effected if a majority in number representing 75 per cent in value of the present and voting creditors agree to the compromise or arrangement.

One problem that may arise in attempting a sale of the business as a going concern is that a foreign proceeding in the UK for XYZ could result in a finding that Big Bank’s lien extends to ABC’s assets, and/or a request for something similar to substantive consolidation of XYZ and ABC in the UK proceeding. This would possibly necessitate a request by the Viscount or liquidator in Jersey to intervene in the UK proceeding> Section 426 of the Insolvency Act 1986 allows the liquidator to be recognized in England.

Another potential issue is based on the fact that the directors in ABC and XYZ apparently allowed the companies to continue to operate despite being insolvent for quite some period of time. In Jersey, there is no obligation to liquidate, but a director can face personal liability for permitting a company to continue to trade while insolvent. Assumedly, if a compromise or arrangement was made with the requisite majority in favor, the creditors would likely be barred from taking action against the directors provided there was adequate disclosure of the indiscretion.

1. Would the approach be different if the Jersey store was a branch of XYZ as opposed to a separate Jersey company? How might article 49 of the Bankruptcy Law be used? (3 marks)

I would expect the response of the Jersey Court to be different if the Jersey store was a branch of XYZ rather than a separate entity. Again, although neither the UK or Jersey are members of the EU and thus not bound by the EIR Recast, Article 49 of the Bankruptcy Law acts as a cooperation mechanism in cross-border insolvency proceedings. It suggests that the Jersey Court should be mindful of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency 1997 (the Model Law), as well as private international law (which governs choice of law), comity and cooperation.

Given the hypothetical’s statement that the centre of main interests is in England, it is likely that an insolvency professional appointed in a proceeding commenced in England would receive recognition by the Jersey Court. In practice, the foreign insolvency representative would likely meet with the Viscount prior to submission of an application for recognition to discuss proposed strategies. However, the Jersey Court will for the most part cooperate in a foreign proceeding if there is a sufficient connection between the debtor and the country from which the foreign representative is appointed. The Jersey Court retains discretion, but likely under the facts presented and given the ruling in the Hamel v Hawkes and Gardner Limited case, there is no inherent conflict between the laws such that recognition would not be granted. (See also Re Walkers Advertising Associates Limited (Jersey Desastre followed by English proceedings permitted to continue on terms agreed between the Viscount and the English liquidator, primarily being the Viscount would realise the Jersey assets and pay priority creditors and then remit the balance to England and unsecured creditors would be fairly treated).

1. What if XYZ Limited was a Polish company with Polish stores and a store in Jersey, but all other details remain the same (and assume that Poland has an administration process that is the same as that in England)? Would the UNCITRAL Model Law on Cross-Border Insolvency 1997 (the Model Law) or the Recast EIR assist with recognition in Jersey? (3 marks)

If XYZ was a Polish company with Polish stores and a store in Jersey, the Recast EIR would certainly assist with recognition in Jersey. Although Poland is not a “relevant” country with respect to recognition, it is a member of the EU and thus bound by EIR Recast. And, although Jersey is not bound by EIR Recast, article 49 instructs the Court to be mindful of what would occur in EIR Recast and clearly under these revised facts, Poland would be the centre of main interests which means that under EIR Recast it would host the main insolvency proceeding (See also Re F&O Finance AG (2000) JLR Note 5a – Swiss court able to receive assistance from Jersey Court even though not a relevant country under article 49 of Bankruptcy Law).

Again, the Jersey Court would maintain discretion and likely the Viscount and the foreign insolvency representative would meet and discuss prior to submission of recognition proceeding. On the same basis, the Jersey Court could also abide by the Model Law (which also uses centre of main interest) as a consideration. The Jersey Court, however, retains discretion to apply either Jersey law or the foreign law of the requesting country when granting recognition. It likely will be guided by whether there is equality of treatment of creditors between the two countries and/or will require interests of Jersey creditors to be otherwise protected and that no request of the foreign representative is inconsistent with Jersey law or public policy.

**\* End of Assessment \***