



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5E

JERSEY

This is the **summative (formal) assessment** for **Module 5E** on 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: **[studentnumber.assessment5E]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. 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 **9 pages**.

Commented [DB1]: Please read and comply with the instructions!

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 would be most appropriate in pursuing enforcement for a claim of £5,000 in Jersey?

- (a) Royal Court.
- (b) Court of Appeal and Privy Council.
- (c) Petty Debts Court.**
- (d) None of the above.

ANSWER: c - correct

Question 1.2

Debtors that can become subject to *Désastre* in Jersey under the Bankruptcy (*Désastre*) (Jersey) Law 1990, include the following:

- (i) A dissolved company that was registered in Jersey under the Companies (Jersey) Law 1991.
- (ii) An individual who was ordinarily resident in Jersey until 18 months before, but has had no connection to Jersey since that time.
- (iii) An incorporated Limited Partnership.
- (iv) An individual who has never been ordinarily resident in Jersey or carried on business in Jersey, but owns movable property in Jersey.

The answer is:

- (a) (i), (ii), (iii) and (iv).
- (b) (i), (iii) and (iv).
- (c) (ii) and (iv).

(d) (i) and (iii).

ANSWER: d - correct

Question 1.3

Which party **cannot** make an application for *Désastre* under the Bankruptcy (*Désastre*) (Jersey) Law 1990?

(a) The Viscount.

(b) The Jersey Financial Services Commission.

(c) A creditor with a claim of at least £3,000.

(d) The Debtor.

ANSWER: a - correct

Question 1.4

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

(i) Summary Winding Up.

(ii) Creditors' Winding Up.

(iii) Just and Equitable Winding Up.

(iv) *Désastre*.

(v) *Dégrévement* or Realisation.

(vi) Debt Remission Order.

(vii) *Remise de Biens*.

(viii) Compromises or Arrangements.

The answer is:

(a) (i), (ii), (iii), (iv), (vi), (vii) and (viii).

(b) (i), (ii), (iii) and (iv).

(c) (i), (ii), (iii), (vii) and (viii).

(d) All of the above.

ANSWER: a - correct

Question 1.5

Which liquidation processes under Part 21 of the Companies (Jersey) Law 1991, as amended, are available in respect of solvent companies?

- (i) Summary Winding Up.
- (ii) Creditors' Winding Up.
- (iii) Just and Equitable Winding Up.

The answer is:

- (a) (i) only.
- (b) (i) and (ii).
- (c) (i) and (iii).

(d) All of the above.

ANSWER: d - correct

Question 1.6

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

- (a) Jersey is part of Britain, the UK and the EU.
- (b) Jersey is part of Britain and the EU but not the UK.

(c) Jersey is part of Britain but not the UK and not the EU.

- (d) Jersey is not part of Britain, or the UK or the EU.

ANSWER: c - correct

Question 1.7

Which of the following statements **are correct**?

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

- (i) Low tax regime.
- (ii) Political independence.
- (iii) Rapidly expanding economy.
- (iv) Legal and regulatory infrastructure.

The answer is:

- (a) (i), (ii), (iii) and (iv).
- (b) (i), (iii) and (iv).
- (c) (i), (ii) and (iii).

(d) (i), (ii) and (iv).

ANSWER: d - correct

Question 1.8

What type of mortgage can be granted in Jersey, following judgment of the Jersey Court, to allow an unsecured creditor to obtain security over immovable property owned by a debtor?

(a) A conventional hypothec.

(b) A judicial hypothec.

(c) A pledge.

(d) A legal hypothec.

ANSWER: b - incorrect

Question 1.9

In which statutory processes is it typical for an independent professional Insolvency Practitioner to be appointed?

(i) Summary Winding Up.

(ii) Creditors' Winding Up.

(iii) Just and Equitable Winding Up.

(iv) *Désastre*.

(v) *Dégrévement* or Realisation.

(vi) Debt Remission Order.

(vii) *Remise de Biens*.

(viii) Compromises or Arrangements.

The answer is:

(a) (i), (ii) and (iii).

(b) (ii) and (iii).

(c) (i), (ii), (iii), and (viii).

(d) All of the above.

ANSWER: b - correct

Question 1.10

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

- (a) Coroner.
- (b) Data Protection.
- (c) Farming and fishing.
- (d) Prison services.

ANSWER: a - correct

Question 1: 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Describe the powers that are available to a Viscount in respect of a *Désastre* and a Liquidator in respect of a Winding Up.

En Desastre, the debtors worldwide assets will vest in the Viscount. The Viscount has the power to realise the assets for the benefit of the debtor's creditors and has the power to conduct investigations to identify why insolvency occurred and whether any offences were committed. The Viscount's wide ranging powers include the following:

- The power to bring, institute or defend action in respect of property vested in the Viscount;
- The power to compromise debts, claims and liabilities;
- The power to make compromises or other arrangements with creditors;
- The power to dispose of property;
- The power to carry on the business of the debtor as far as is necessary for the beneficial winding up of a company debtor;
- The power to borrow money;
- The power to pay creditors;
- The power to disclaim onerous property and contract leases;
- The power to pursue recovery in respect of antecedent transactions

If the debtor is a company, once the desastre process has been completed, the Viscount will file the necessary forms with the Registrar of Companies in order to dissolve the company.

ANSWER: The Liquidators powers in a (1) Summary Winding Up will be to realise assets, discharge liabilities and distribute assets; in a (2) Creditors' Winding Up will be all powers of the company required for the beneficial winding up, power to pay creditors, power to disclaim onerous property and contract leases and powers to pursue recovery of antecedent transactions; in a (3) Just and Equitable Winding Up will be specific powers as granted by the Jersey Court, which are likely to mirror the powers of a SWU or CWU dependent upon whether the company is solvent or insolvent

Good answer in respect of the powers of a Viscount. The question also required an explanation of the powers of a liquidator in respect of a Winding Up (1.5 marks)

Question 2.2 [maximum 2 marks]

Briefly describe 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.

Jersey has a different business and landscape to the UK and US. Many of the companies in Jersey are special purpose vehicles holding companies or other group companies as opposed to more traditional 'trading businesses' found in the UK and US. As such, the number of managed solvent liquidations is very high rather than the processes of administration or Chapter 11 type procedures which are just not required for the type of business that is set up in Jersey as insolvency remains typically low.

In addition, Liquidators appointed over Jersey companies have the ability to continue to trade the company if the power is specifically granted by the Jersey Court on a creditors' winding up or a just and equitable winding up.

ANSWER: Excellent answer (2 marks)

Question 2.3 [maximum 3 marks]

Describe the three varieties of mortgage available in Jersey in respect of **immovable property**.

There are three types of mortgage or hypothec:

- Judicial hypothec: this occurs by judgment of the Jersey Court acknowledging (by consent or otherwise) the debt of a defined sum which is registered in the Jersey Public Registry.
- Conventional hypothec: this is 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.
- Legal hypothec: this is a rare mortgage and arises by operation of law in certain special cases

ANSWER: Excellent answer (3 marks)

Question 2.4 [maximum 2 marks]

Describe the restricted circumstances in which a Debt Remission Order is available for a Jersey resident under the Debtor Remission (Individuals) (Jersey) Law 2016.

A DRO is available in circumstances whereby the applicant has:

- Assets worth less than JEP 5,000
- Less than JEP 100 of disposable income on a monthly basis
- Debts of less than JEP 20,000
- Acted in good faith whilst incurring the debts

ANSWER: Excellent answer (2 marks)

Question 2: 8.5 out of 10

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

Question 3.1 [maximum 7 marks]

Write a short essay on the *Désastre* process under the Bankruptcy (*Désastre*) (Jersey) Law 1990.

Desastre is a procedure for the winding up of the affairs of a company or an individual including an incorporated Limited Partnership or Limited Liability Partnership. The Desastre process can be instigated by a creditor and debtors are also able to apply for their own Desastre.

The debtor can be a company or an individual. In order to bring an application, the creditor must have a valid claim of at least JEP 3,000. The debtor must be insolvent but have realisable assets and in order to bring an application the creditor must confirm in the application that they believe this to be the case.

In order for a desastre order to be made against an individual, they must have been ordinarily resident in Jersey at any time within the period of 12 months immediately preceding the date of the application or have carried on business in Jersey at any time within three years before the date of the application or have immovable property in Jersey at the time of the application.

The debtor's estate vests in the Viscount once the order for desastre is made. A moratorium is also available. It is usual for a personal desastre to last for four years but it is possible to shorten or lengthen the period.

The Viscount has the power to realise the assets for the benefit of the debtor's creditors and has the power to conduct investigations to identify why insolvency occurred and whether any offences were committed. The Viscount's wide ranging powers include the following:

- The power to bring, institute or defend action in respect of property vested in the Viscount;
- The power to compromise debts, claims and liabilities;
- The power to make compromises or other arrangements with creditors;
- The power to dispose of property;
- The power to carry on the business of the debtor as far as is necessary for the beneficial winding up of a company debtor;
- The power to borrow money;
- The power to pay creditors;
- The power to disclaim onerous property and contract leases;
- The power to pursue recovery in respect of antecedent transactions

The applicant creditor is usually required to indemnify the Viscount for costs and liabilities incurred in the Desastre. The Viscount may levy fees as they arise or take amounts equivalent to 12.5% of the sums realised and distributed to creditors. The Viscount's costs are paid in priority to other creditors from amounts liquidated, as the secured creditors rights are preserved in the process.

If the debtor is a company, once the desastre process has been completed, the Viscount will file the necessary forms with the Registrar of Companies in order to dissolve the company.

ANSWER: Debtor may apply or JFSC may apply in respect of regulated businesses; a personal Desastre will last four years, but it is possible to shorten or lengthen this.
Good answer (5.5 marks)

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:

- The relevant Jersey law that applies
- Which areas are covered under the relevant Jersey law
- Advertising for claims and notice periods
- Which debts are provable
- Interest on debts
- Proof of debts and the cost of proving
- Examination of proofs of debts
- Adjudication and the process of admitting or rejecting claims

Part 21 of the Companies Law describes four types of winding up including Creditors' Winding Up ("CWU"). Article 166 of the Companies Law applies to the creditor claims process in relation to a CWU. Article 166 explains that the same rules apply to the process of creditor claims in a CWU as are in force under Part 7 of the Bankruptcy Law.

All debts and liabilities in a CWU are provable, whether they are present, future or contingent. Interest is provable to the date of CWU, if the debt bears interest, or to the date of payment if it is a secured debt.

All creditors in a CWU must prove their debt at the time and in the manner prescribed by the Jersey Court and must bear the cost of proving their debt. Creditors are also entitled to examine other creditors' proofs in a fixed time provided by the Viscount.

No statutory time period exists for notices to be published for potential claims in a CWU. It is usually agreed that a period of 60 days' notice is appropriate for a CWU. Comparatively, 21 days' notice is usually given for a summary winding up, if notice is given at all. For potential claims outside the jurisdiction of Jersey, there is no statutory provision for publishing notices, however, the appointed liquidator should consider the circumstances of the liquidation in order to avoid a challenge from a claimant coming forward further down the line.

The Viscount is the adjudicator of creditors' claims and may request further information relating to any claim if it is required. Following the adjudication, the Viscount will then admit or reject each creditor claim, either in whole or in part. If a claim is to be rejected (in whole or in part) then the Viscount must serve a notice of rejection on the relevant creditor. If the creditor is unhappy with the rejection, they are apply to request that the Viscount apply to the Jersey Court for a review of the decision.

ANSWER: Relevant law is the Bankruptcy (Desastre) (Jersey) Law 1990, as specified in Article 166 of the Companies (Jersey) Law 1991; this law covers rights of secured and

unsecured creditors, debts provable, time and manner of proving debts, admission and rejection of proof of debts and order of payment; interest is provable to the date of CWU if the debt bears interest, or to the date of payment if it is a secured debt (5 marks)

Question 3: 10.5 out of 15

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

XYZ Limited is a major high-street retailer registered in England with stores throughout England and 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, 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.

Using the facts above and the additional facts below, answer the questions that follow.

Question 4.1 [maximum 3 marks]

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 which you set out your comments.**

If Big Bank has security over immovable property, it will be taken by one of three varieties of mortgage (hypothec). The bank will have the power of enforcement once an event of default has occurred and written notice of the default has been served on XYZ. If the bank wants to sell the assets charged, they must give XYZ 14 days written notice, but XYZ may agree to waive its rights to notice.

If Big Bank has security over moveable property in Jersey by way of pledge, the bank will have the right of retention provided there has been physical delivery of the tangible moveable property pledged into the bank's possession. As a matter of Jersey customary law, the bank should also have an implied right of sale when XYZ is in default and there is likely to be an express power of sale in the pledge document. The bank may enforce their rights over immovable property by applying to the court for a desastre or degrevement to enforce their contractual rights.

As an unsecured creditor, Big Bank is able to pursue a judgment debt against XYZ in the same way as a secured creditor can.

ANSWER: the enforcement powers of a secured creditor are not affected by insolvency proceedings over the debtor; if security is over Jersey immovable property then Big Bank can apply to Court in Jersey for a Desastre or Degrevement; if security is over movable property then Big Bank may apply to Court in Jersey to enforce its contractual rights; secured creditors will have priority over all other creditors in a Desastre and Liquidation scenario (1.5 marks)

Additional facts:

The directors of XYZ identify a party who is interested in acquiring the business of XYZ. Following a brief period of negotiation conducted with the oversight of a proposed Administrator (and with the approval of Big Bank), the directors of XYZ begin the process of placing XYZ into Administration in England, in order to allow a "pre-packaged" sale of the business to occur.

Question 4.2 [maximum 3 marks]

The Jersey store is owned by a separate Jersey company, ABC Limited, but ABC's centre of main interest (COMI) is considered to be in England. Will it be possible to place ABC under 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"))?

The Recast EIR is not applicable as Jersey is not a signatory to the Model Law nor a member of the EU. However, the Jersey Court is able to provide assistance to overseas insolvency officeholders in certain circumstances under Article 49 of the Bankruptcy Law and on the basis of common law principles and on the grounds of comity.

ANSWER: it would be necessary to demonstrate that an English Administration would achieve a better outcome for the debtor and creditors than a local process, with emphasis on the proposed pre-packaged sale; the Jersey Court has demonstrated flexibility and has recognised the office of Administration before, despite not having such a process locally (1.5 marks)

Question 4.3 [maximum 3 marks]

If it is not possible to place ABC under English Administration, are there alternative Jersey insolvency processes that will allow a pre-packaged sale to occur? Are there any potential problems in achieving a sale as a going concern?

In Jersey, the just and equitable winding up process can be used to effect a 'quasi' pre-packaged sale of assets which would be typically associated with an English Administration process. On the sale of immovable property during the liquidation, all hypothecs secured against ABC will be extinguished but the holders of the hypothecs have preferential rights in relation to the sale proceeds. This might make a sale as a going concern difficult to achieve depending on the rights of any secured creditors. In addition, the Jersey Court is unlikely to assist an English administrator who ring-fences the sale proceeds for creditors outside of the Jersey jurisdiction. A transfer of assets to a foreign office holder will typically require interests of Jersey creditors to be protected by an undertaking or court order.

ANSWER: Excellent (3 marks)

Question 4.4 [maximum 3 marks]

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?

If XYZ was not a separate Jersey company, Article 49 could be used as a co-operation provision in the matter. The office holder would have to apply for a letter of request from the court of England – if granted, the officeholders would be recognised in Jersey over the branch of XYZ. If the requirements of Article 49 are met, the Jersey Court may recognise the English office holder and register such appointment in the rolls of the Royal Court. Article 49 refers to relevant countries or territories where assistance can be expected to be given – the UK is included on the list.

The jurisdiction of the Jersey Court is broad and it may make orders recognising the rights and powers of the English office holder in respect of Jersey property or make orders for disclosure of documents and/or examination of witnesses and otherwise make orders in aid of the foreign insolvency.

ANSWER: Article 49 authorises the Jersey Court to extend cooperation to foreign courts of a "relevant" country upon receipt of a letter of request to that effect; the UK is a "relevant" country within the meaning of Article 49 (2 marks)

Question 4.5 [maximum 3 marks]

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 the same as in England)? Would the UNCITRAL Model Law on Cross-Border Insolvency or the Recast EIR assist with recognition in Jersey?

The Recast EIR and Model law would not assist with recognition in Jersey as Jersey is not a signatory to the Model Law nor a member of the EU. Poland is not on the list of relevant territories included in Article 49 of the Bankruptcy Law. Despite this, the office holder could still apply for recognition based on common law principles of private international law and/or comity and cooperation. The Jersey Court has a long history of providing assistance in such cases, e.g. in the case of Re R & O Finance AG.

ANSWER: Poland follows the UNCITRAL Model Law and the Recast EIR; the Jersey Court retains discretion and will consider amongst other things treatment of creditors and protection of interests of Jersey creditors and will want to ensure consistency with Jersey law (1.5 marks)

Question 4: 9.5 out of 15

TOTAL: 37.5 out of 50

*** End of Assessment ***