



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: **[studentID.assessment5E]**. An example would be something along the following lines: 202122-336.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 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 **8 pages**.

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 JEP 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 – Incorrect]

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 – Correct]

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.

The ultimate role of the Viscount is to realise the assets of the debtor for the benefit of their creditors. The powers that are available to a Viscount in respect of a *Désastre* include the power to:

- a. Bring, institute and defend action in relation to the property vested in the Viscount;
- b. Compromise debts, claims and liabilities;
- c. Make compromises or alternative arrangements with creditors;
- d. Dispose property;
- e. Carry on business of the debtor as necessary for the beneficial winding-up of the debtor;
- f. Borrow money;
- g. Pay creditors;
- h. Disclaim onerous property and contract leases;
- i. Pursue recovery in respect of antecedent transactions.

The role of the Liquidator is to realise assets in an effort to enable a *pari passu* distribution of assets among creditors according to their status, any surplus of which will then be distributed to shareholders.

The Liquidator's powers depend on the type of winding-up but can have a wide range including all powers of the company required for its beneficial winding up; power to pay creditors; power to disclaim onerous property and contract leases; and power to pursue recovery in respect of antecedent transactions.

ANSWER: The powers of a liquidator in a summary winding up will be to realise assets, discharge liabilities and distribute assets; powers of a liquidator in a creditors; In a just and equitable winding up, the liquidator will have specific powers as granted by the Jersey court (2 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.

There are several reasons why Jersey may not have a statutory or customary corporate rescue and turnaround procedure equivalent to an English administration or US Chapter 11.

The main reason that these procedures are not available is in light of the type of jurisdiction that Jersey represents and the type of Companies that it registers. That is, Jersey is an offshore jurisdiction and known as an international financial center, with approximately 33,000 live companies. With such a large number of companies in comparison to its population, it is easy to see that the companies in Jersey are typically used for financial structuring, holding companies, and other finance-related purposes, as opposed to traditional trading companies.

In light of this, the numbers of managed solvent liquidations is high, whereas the requirement for rescue and turnaround is low.

That being said, the Companies Law includes provisions in relation to Schemes of Arrangement and other processes such as Desastre. Similarly, the just and equitable winding-up process has been used to effect a quasi-pre-packaged sale of assets, which is typically associated with an administration process.

ANSWER: Very good (2 marks)

Question 2.3 [maximum 3 marks]

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

The three varieties of mortgages available in Jersey in respect of immovable property are:

- a. Judicial Hypothec – This type of mortgage occurs by way of a judgement by the Jersey Court, acknowledging the debt of a defined sum, which is registered in the Jersey Public Registry. The registration of this judgement for a debt effectively becomes a mortgage over the immovable property;
- b. Conventional Hypothec – This mortgage is created between two or more parties by way of a contract that is passed before the Jersey Court;
- c. Legal Hypothec – This mortgage is relatively rare and arise by operation of law in certain special cases, however, they are priorities granted in specific circumstances to protect the rights of certain individuals. It comes into being against immovable property of a deceased debtor in favour of their creditors, so long as certain procedural steps are adhered to.

ANSWER: Very good (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.

The restricted circumstances in which a Debt Remission Order (“DRO”) is available for a resident under the Debtor Remission (Individuals) (Jersey) Law 2016 (“DRO Law”) include where the application has:

- a. Assets which are worth less than JEP 5,000;
- b. Less than JEP 100 of disposable income on a monthly basis;
- c. Debts of less than JEP 20,000; and
- d. Acted in good faith whilst incurring the debts.

A moratorium is created for the debtor for 12 months, after which all debts covered by the DRO will be written off.

ANSWER: Good (2 marks)

Question 2: 9 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. In your essay, you should refer to at least the following:

- The parties who can be subject to *Désastre*
- The parties who can apply for *Désastre*
- Requirements for an application for *Désastre*
- The effect of *Désastre* upon the debtor
- The role of the Viscount
- The Viscount's costs
- Conclusion of the *Désastre*

Desastre is a process under the Bankruptcy (Desastre) (Jersey) Law 1990 ("Desastre Law") which provides a procedure for winding-up of the affairs of a company or an individual. The Company may be a dissolved company that was registered under the Companies (Jersey) Law 1991; an incorporated limited partnership or a limited liability partnership. An individual must have been ordinarily resident in Jersey at any time within the period of 12 months preceding the date of the application; or have carried on business in Jersey at any time within the period of three years preceding the date of application; or have immovable property in Jersey at the time of the application. An application cannot be made in relation to a deceased person.

An application for Desastre can be made by the debtor, a creditor with a claim of at least JEP\$3,000, or the Jersey Financial Services Commission.

Upon a successful application, the Viscount carries out the Desastre. The assets of the debtor vest in the Viscount and include worldwide assets which are automatically declared Desastre. It should be noted that the Jersey Court has discretion to grant the Desastre Order, and will consider each application carefully.

The Viscount realizes the assets for the benefit of the debtor's creditors and will conduct its own investigations to identify why insolvency occurred and what, if any, offence were committed. Where the debtor is a Company, the Viscount will file the necessary documents with the Registrar to dissolve the company. The Viscount has a wide range of powers including to bring, institute or defend action in respect of the property vested in the Viscount; compromise debts, claims and liabilities; make compromise or other arrangements with creditors; dispose of property; carry on the business of the debtor as necessary for the beneficial winding-up of the debtor; borrow money; pay creditors; disclaim onerous property and contract leases. The Viscount can also pursue recovery in respect of antecedent transactions.

The applying creditor is usually required to indemnify the Viscount for costs and liabilities, and the Viscount may levy fees as they arise, or take amounts equivalent to 12.5% of the

amounts realised and distributed. The Viscount's costs are paid in priority to other creditors from amounts liquidated.

It should be noted that the debtor must be insolvent but the onus is on the creditor to prove that the debtor has assets.

A moratorium is also available in respect of a Desastre. A debtor will cease to be liable for their debts provable in a Desastre once the Jersey Court has made an order for their discharge. The debtor will however remain liable for debts incurred by them during the Desastre.

In the case of a Company, as noted above, the Viscount concludes the Desastre by filing the necessary documents with the Registrar of Companies to dissolve the Company. A company that is dissolved may be reinstated to the register at any time within 10 years of the date of dissolution or by order of the Court.

Upon payment of the final dividend, the Viscount will notify the registrar along with receipt of the notice that the company is dissolved.

ANSWER: A personal Desastre will last four years. (6 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

Article 166 of the Companies law provides for a creditors' winding-up and notes that the same rules prevail regarding the respective rights of secured and unsecured creditors, to debts provable, in relation to the time and manner of proving debts, to the admission and rejection of proofs of debts and to the order of payment of debts. That is, the Companies Law applies the Desastre rules in relation to proving debts.

Under Jersey Law, there is no statutory time period for notices to be published for any potential claims in a winding up, however, it is a general agreement that 60 days' notice is adequate. There is also no statutory requirement to publish outside of Jersey, however, a Liquidator would typically consider the circumstances of the liquidation to determine whether publication will be prudent, to avoid a challenge from a subsequent claimant who comes forward.

The creditor must bear the cost of proving their debt and must prove their debt at the time and in the manner prescribed by the Jersey Court. Interest is also provable if the debt bears interest and is incurred up to the date of commencement, or to the date of payment in instances where it is a secured debt. Creditors also have the right to examine other creditors' proofs.

Claims can be adjudicated, and further information can be requested. Subsequently, the claim will be either admitted or rejected in whole or in part. Where the claim is rejected, notice of the rejection is served on the creditor. If dissatisfied, the creditor has the opportunity to request an application to the Court to review the decision.

In the claims process, the fees and expenses of the Viscount takes priority over secured creditors. Within the priority of claims, after secured creditors are the amounts payable to depositors if the debtor is a bank; wages and salary for six months before declaration of desastre; health insurance, social security, income tax and goods and services tax; six months' arrears of rent; and two years' arrears of parish rates; followed by unsecured creditors.

ANSWER: All debts and liabilities, present, future or contingent are provable in the CWU (7 marks)

Question 3: 13 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.**

Based on the case above, the facts are that XYZ Limited ("XYZ") is a company registered in England, with a branch in Jersey. Its secured creditor is Big Bank PLC ("Big Bank") who has a fixed and floating charge over XYZ's assets.

Under Jersey law, secured creditors rank ahead of all other creditors in a Desastre or Liquidation situation. Furthermore, the Security Law provides that where the grantor is subject to any insolvency proceedings consequent upon insolvency in Jersey or elsewhere, the ability to enforce the powers of the secured party will not be affected.

Additionally, in relation to cross-border insolvency matters, although Jersey has not signed to UNCITRAL Model law on Cross-Border Insolvency, nor is it a member of the EU, there is a list of 'Relevant' jurisdictions in which Jersey Court recognizes reciprocity. This includes Australia, Finland, Guernsey, Isle of Man and the United Kingdom.

As XYZ is registered in England, and Big Bank will most likely take action in England, there is an expectation of co-operation between Jersey and England. Similarly, where judgements passed in a relevant country, and it is a judgement covered under the 1960 Law, then the judgement will be enforced in Jersey as though the judgement was given in Jersey.

On this basis, Big Bank will have the ability to pursue the assets of XYZ in Jersey.

Big Bank will be required to serve notice on XYZ. Depending on the type of assets, there are a number of options available. If the fixed assets are immovable, Big Bank can apply to the Jersey Court for a Desastre or a Degrevement. For fixed assets that are movable, they may apply to the Jersey Court to enforce their contractual rights.

ANSWER: Very good (3 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”))?

Clarification is needed to confirm whether the ‘store’ in Jersey refers to the physical building – that is, the asset. If the asset is owned by ABC Limited, then this will imply that XYZ was renting the building from ABC Limited. In this instance, XYZ did not own the assets and it is unlikely that Big Bank will want to pursue Jersey proceedings.

As ABC’s COMI is considered to be in England, it will be possible to place ABC under English Administration.

ANSWER: The Recast EIR does not apply in Jersey, but the Jersey Court may still have regard to where ABC’s COMI is in considering applications to commence insolvency proceedings. For example, if it can be shown that management and control is in England then it may be possible to place ABC in to Administration under English law. The Jersey Court may still have regard to ABC’s COMI and may place ABC in Administration under English law; 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 (1 mark)

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?

The alternative to allow for a pre-packaged sale to occur in light of no modern rehabilitation procedure similar to administration under English company law is the provisions available for a just and equitable winding-up.

This has been used where a company is insolvent, or where a company is solvent but directors are reluctant to sign a declaration of solvency.

A Liquidator is appointed to gather in the assets and make a distribution. However, a creditor cannot apply for Just and Equitable winding-up. Only a director, shareholder, or in some instances, the Chief Minister or the JFC may apply for this grounds of winding-up.

This method of winding-up ensures effective control of the company needing to be wound-up.

However, as it is already clear that the company is insolvent and is unable to service its debts, nor pay its rental costs, it is unlikely that the business will be able to be sold as a going concern, thereby reducing the value it can be sold for, and/or limiting the sale to just the assets of the company.

ANSWER: Good (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?

The approach will be different if the Jersey store was a branch of XYZ rather than a separate Jersey Company.

Under Article 49 of the Bankruptcy Law, co-operation provisions are available in cross-border insolvency cases and provides for the Jersey Court to provide assistance to foreign courts.

Article 49 allows for recognition of foreign officeholders, disclosure of assets or information; the examination of witnesses; prevention of disclosure; freezing of assets and restricting how information obtained may be useful.

The foreign office holder will need to request the foreign court, being in a relevant jurisdiction, to submit a Letter of Request from the English court. As the English court falls under a relevant jurisdiction, recognition will be easier.

ANSWER: Good (3 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?

Article 49 of the Bankruptcy Law suggests that the Court in Jersey have regard for UNCITRAL Model Law on Cross Border Insolvency and to consider the rules of private international law.

Poland is not a relevant jurisdiction for recognition, however, a Letter of Request from a court in a non-relevant country does not restrict assistance. It is likely that assistance will be granted under common law principles of private international law and/or comity and co-operation. While the Jersey court does have a long history of providing assistance to overseas insolvency office-holders, the Jersey court will want to ensure that there is sufficient connection between the office-holder appointment in the jurisdiction where the company is incorporated, and the jurisdiction where the court order was made.

The Jersey court will also consider the impact on Jersey creditors. They will want to ensure that all creditors interest will be protected. Similarly, they will want to ensure that the request from a foreign court is also consistent with Jersey Law.

Another alternative is to seek an entirely new appointment in Jersey since there is no requirement to have a local practitioner in Jersey. This, however, will require support of the directors and/or the company for a just and equitable winding-up or a creditors' winding up.

ANSWER: Good (3 marks)

Question 4: 13 out of 15

TOTAL: 44 out of 50

*** End of Assessment ***