



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5E

JERSEY

1 = 7/10
2 = 7/10
3 = 14/15
4 = 14/15
42/50

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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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 10 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 can hear an appeal in respect of a Jersey legal matter?

- (i) Royal Court.**
- (ii) Court of Appeal.**
- (iii) Petty Debts Court.**
- (iv) Privy Council.**

Choose the correct answer:

- (a) Option (ii).**
- (b) Options (ii) and (iv). - CORRECT (B)**
- (c) Option (i).**
- (d) All of the above are correct.**

Question 1.2

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

- (a) A dissolved company that was registered in Jersey under the Companies (Jersey) Law 1991.**
- (b) An individual who was ordinarily resident in Jersey until 18 months ago, but has had no connection to Jersey since that time.**

(c) *An incorporated Limited Partnership.*

(d) *An individual who has never been ordinarily resident in Jersey or carried on business in Jersey, but owns movable property in Jersey.*

Choose the correct answer:

(a) *All of the above.*

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

(c) *Option (ii) and (iv).*

(d) *Options (i) and (iii). - INCORRECT (D)*

Question 1.3

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

(i) *The Viscount.*

(ii) *The Jersey Financial Services Commission.*

(iii) *A creditor with a claim of GBP 2,000.*

(iv) *The debtor.*

Choose the correct answer:

(a) *Options (ii), (iii) and (iv).*

(b) *All of the above.*

(c) Options (ii) and (iv). - CORRECT (C)

(d) *Option (i).*

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) Dégrèvement or Realisation.

(vi) Debt Remission Order.

(vii) Remise de Biens.

(viii) Compromises or arrangements.

Choose the correct answer:

(a) Options (i), (ii), (iii), (iv), (vi), (vii) and (viii). - CORRECT (A)

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

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

(d) All of the above.

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 through court.

(iii) Creditors' winding-up not through court.

(iv) Just and equitable winding-up.

Choose the correct answer:

(a) Option (i).

(b) Options (i) and (ii).

(c) Options (i), (iii) and (iv).

(d) All of the above. - INCORRECT (C)

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. - CORRECT (C)**
- (d) 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:

- (i) Tax neutrality.**
- (ii) Political independence.**
- (iii) Economic stability.**
- (iv) Legal and regulatory infrastructure.**

Choose the correct answer:

- (a) All of the above.**
- (b) Options (i), (iii) and (iv) - INCORRECT (A)**
- (c) Options (i), (ii) and (iii)**
- (d) 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?

- (a) A conventional hypothec. - CORRECT (A)**
- (b) A judicial hypothec.**
- (c) A pledge.**

(d) A legal hypothec.

Question 1.9

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

(i) Summary winding-up.

(ii) Creditors' winding-up through court.

(iii) Just and equitable winding-up.

(iv) Creditors' winding-up not through court.

Choose the correct answer:

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

(b) Options (ii) and (iii). - CORRECT (B)

(c) Options (ii) and (iv).

(d) All of the above.

Question 1.10

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

(a) Coroner. - CORRECT (A)

(b) Data Protection.

(c) Farming and fishing.

(d) Prison services.

7/10

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

Question 2.1 [maximum 3 marks]

Describe the powers that are available to a Viscount in respect of a *Désastre* and to a liquidator in respect of a winding-up.

*In Jersey the Viscount is a Chief Executive Officer of the Islands' courts and the States of Jersey. In a *désastre* the Viscount's role is to administer the *désastre* process. All of the debtor's assets are vested in the Viscount in a *désastre* proceeding following written notice served on the debtor. Duties of the Viscount in a *désastre* include to protect and realise the debtor's assets for the benefit of the creditors.*

The Viscount's general powers are set out in Part 6 of the Bankruptcy (Désastre) (Jersey) Law 1990. Viscount powers include to defend the proceedings in relation to the debtor's property (debts, claims, shares, business). Viscount has powers to carry on business of the debtor, summons any person in possession of information relating to the debtor's activities, powers to require documentation. Viscount also adjudicates on creditor claims and investigate the circumstances surrounding the insolvency including whether there are offences that were committed. Viscount also has the power to dissolve the company by filing the necessary forms with the Registrar of Companies.

Compromise debts; pay creditors; borrow money; institute action and pursue recovery of antecedent transaction; power to disclaim

*The Viscount may report the progress of the *désastre* to the creditors and may apply to the Court for directions on any issues.*

*A Jersey liquidator's powers and duties are set out in Articles 170 and 171 of Companies (Jersey) Law 1991 and includes collecting and realising the debtor's assets and thereafter distribution it in satisfaction of the debts *pari passu* following payment of all priority creditors. The liquidator is obliged to report any possible criminal offences to the Attorney General. Many of the procedural rules which apply to *désastre*, applies to certain actions and powers of the liquidator including adjudicating on and proving debts. Certain actions however such as compromising claims or paying creditors in full require sanction of the creditor's committee or the Court.*

Distinguish between liquidator in SWU, CWU and J&E

1/3

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:

Jersey is an offshore jurisdiction and international finance centre, which is a different business landscape to a typical onshore jurisdiction. Jersey has 33,000 live companies. A reason for the number of companies in Jersey is that they are often used for financial structuring and another finance-related purpose as opposed to more traditional trading business found onshore. With that many companies the number of managed solvent liquidations is high, whereas the requirement for corporate rescue and turnaround processes, which are more typically associated with traditional trading business, is low.

2/2

Question 2.3 [maximum 2 marks]

Describe the ways in which a creditor might take enforcement action in Jersey.

A secured creditor's power of enforcement is exercisable on occurrence of the default event. The secured creditor must give 14 days-written notice to the grantor of the security if the secured creditor wants to appropriate or sell the collateral. The obligation to give 14 days-notice only applies where the secured creditor intends to appropriate or sell the collateral.

*Where the security is over immovable property, the secured creditor will need to apply to the court for a *désastre* or a *dégrévement*. Where the security is over moveable property the secured creditor may apply to the court to enforce their contractual rights.*

A creditor might take enforcement action in Jersey in the following ways:

- 1. By making a *désastre* application - this is where the debtor is insolvent and the creditor must confirm that that is the case. The Viscount is appointed to wind-up the debtor and distribute its assets.*

The creditor must be owed not less than £3,000 and apply to the Jersey Court for the court to declare that the debtor's property be vested in the Viscount. If successful, the Viscount will realise the debtor's assets and distribute the proceeds to the debtor's creditors.

*A *désastre* is applicable to enforce debt against companies or individual.*

- 2. By a creditors winding-up application - Since March 2022, following amendments to the Companies (Jersey) Law 1991 creditors are now also able to apply to the Jersey Court for the debtor company to be placed into creditor's wind-up and for liquidators to be appointed.*

A creditor may apply to the Jersey Court to commence a creditor's wind-up if they have:-

- *a claim against the company for at least £3,000; and*
- *the company is unable to pay its debts;*
- *The creditor can prove the company's insolvency; or*
- *The company consented to the creditor making the application.*

A creditor winding-up is only applicable to Jersey companies.

2/2

Question 2.4 [maximum 3 marks]

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

Pursuant to Article 32 of the Bankruptcy (Désastre) (Jersey) Law 1990, in a désastre the following claims potentially rank as priority claims:

- *Payment of Viscount's fees;*
- *Debtor's employees up to six months of arrears per employee; includes vacation pay and bonuses;*
- *Health Insurance Fund payments under the Health Insurance (Jersey) Law 1967 and the social Security Fund under the Social Security (Jersey) Law 1974;*
- *Taxes due under Income Tax (Jersey) Law 1961 and Good and Services Tax (Jersey) Law 2007;*
- *Up to 2 months' rent arrears; and*
- *parochial rates due to any parish in Jersey for a period not exceeding 2 years*

Note however that secured creditors are not prevented from exercising their rights they may have in collateral.

Depositors where the debtor is a bank

2/3

7/10

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*, *Dégrevement* and *Realisation*, *Debt Remission Order* and *Remise de Biens*.

Désastre

An application is made to the Jersey Court by the creditor or the debtor themselves to have the debtor's worldwide property vested in the Viscount. If successful, the Viscount will realise the debtor's property and distribute the proceeds to the debtor's creditors. Note that the individual must:

- *Have been ordinarily resident in Jersey at any time within the 12 months immediately preceding the date of the application; or*
- *Have carried on business in Jersey at any time within the three years immediately preceding the date of the application; or*
- *Must have immovable property in Jersey at the time of the application.*

A désastre order is made at the discretion of the court who will carefully consider the application as to whether the order should be made or not. A typical personal désastre can last for four years but the term can be shortened or lengthened.

The Viscount has wide ranging powers which includes:

- *Carrying on the business of the debtor to the extent necessary for the beneficial winding up of the debtor's assets;*
- *Bringing, instituting, or defending actions in respect of the debtor's property;*
- *Compromising debts, claims and liabilities;*
- *Compromising or making other arrangements with creditors; and*
- *Disposing of the debtor's property.*

At the end of the process the debtor is discharged from any outstanding debts, except for any fraudulent or maintenance debts to which they are still liable.

The désastre is a more modern procedure and one which is preferred by the court. Some key advantage includes:

- *Controlled by the Viscount;*
- *Can be commenced by the creditor or the debtor;*
- *All debts are written off at the end of the process.*

Some disadvantage of the désastre are

- *it is an expensive and long process which can take one to four years; this time can be reduced or extended on application to Court.*

- *There is risk to the creditor who initiated the process in that the creditor must confirm that the debtor has realisable assets. Which may be difficult to ascertain.*

Creditor must be owed at least £3,000

Dégrèvement and Realisation

Dégrèvement

The dégrèvement is a legal process whereby immovable property such as land and buildings, which is owned by an insolvent debtor is transferred to one of the debtor's secured creditors who is willing to become the new owner of the property.

The transferee creditor becomes known as the "tenant après dégrèvement" and is legally obliged to pay off all earlier secured charges on the property and to pay off all priority and privileged claims. All charges and debts are removed so that the new owner owns the property free and clear.

Secured creditors are called in reverse order by reference to the date of their respective secured charges, (i.e. latest secured creditor is called first). Each creditor must accept or renounce their ownership in the property. The secured creditors who renounce their ownership in the property loses the benefit of their secured charge and becomes an unsecured creditor.

Réalisation

Realisation involves selling the insolvent debtor's movable property in order to clear the debts. Such moveable property includes stocks, shares, antiques, vehicles, clothing, jewellery etc. The proceeds are then shared among the unsecured creditors.

Dégrèvement and réalisation are often utilised together, however it is possible for a dégrèvement to take place without a réalisation (e.g. in cases where the debtor does not have any moveable assets to sell).

At the end of the process the debtor is no longer the owner of any moveable or immovable property but remains liable to pay all the outstanding debts which were not repaid during the dégrèvement and realization process.

The dégrèvement can be an appealing route for creditor for the following reasons:

- *it is a procedure that is controlled by the creditor;*
- *it is quicker especially compared to the *désastre* (i.e takes about five months to conclude from the date of the judgement).*
- *The first secured creditor will receive payment in full by the later secured creditor or will become the new legal owner of the property;*
- *There is no obligation to account for the balance after sale of assets*

Disadvantage of the *dégrévement* are:

- *it can be cumbersome being a 5-stage process (i.e. 1) judgement, 2) *Acte Vicomte chargé d'écrire* application, 3) Renunciation application, 4) *Dégrévement* hearing and 5) Confirmation of tenure; and*
- *it can be expensive.*

The *dégrévement* can be appealing for the debtor for the following reasons:

- *Debtors are not subjected to the four-year restrictions like in the *désastre* (i.e. being restricted from acting as a director, executor or juror and restricted from holding public office)*

A disadvantage to debtors is that they remain liable for any outstanding debt at the end of the *dégrévement*.

Debt Remission Order

A DRO, which is governed by the Debtor Remission (Individuals) (Jersey) Law 2016, is a personal insolvency process which affords the debtor a moratorium in respect of the debts listed in the DRO. This effectively means that the debtor's creditors cannot take action to recover the debt from the date of the order until its expiration which is usually 12 months from the date of the order.

The DRO is a small debt proceeding which is run by the Viscount and administered by the citizens Advice Bureau and is restricted to the following circumstances where the debtor:

- ***Where the debtor has assets worth less than £5000***
- ***Where the debtor has less than £100 disposable income monthly***
- ***Has debts of less than £20,000; and***
- ***Has acted in good faith whilst incurring the relevant debts.***

At the expiration of the moratorium, the debts will be written off and cannot again be pursued. However, any joint borrower or guarantor is not released from repaying the debt.

Remise de Biens

Remise de Biens is a personal insolvency procedure wherein a debtor in financial difficulties asks the Court for protection. Before granting the Remise de Biens some pre-conditions will need to be satisfied:

- *The debtor must hold immovable property; and*
- *There must be prospects of full payment of the secured debts and payments of dividends (no matter how small) to the unsecured creditors.*

If successful, the Remise de Biens results in the debtor's affairs being placed in the hands of the Court for the usual period of six months. During this period two Court appointed Jurats will attempt to discharge the debtor's debts by realizing the property. The view is to obtain a better sale during the six-months period than would be possible if the sale was conducted hastily. Once the secured creditors are fully paid and unsecured creditors receive some payment, any unsold property is returned to the debtor and the debtor is then discharged from any outstanding amounts.

*A Remise de Biens procedure is useful to protect the debtor from losing surplus value in their immovable property due to foreclosure. Advantage to debtor is that all debts are written off at the end of process. The debtor also retains ownership of their property although they must cooperate with the Jurat who has a power of management over the property. The Remise de Biens can be invoked at any stage of a *dégrévement* process even up to the moment the property is transferred to the creditor. Charges of *Remise de Biens* are less than that of the *dégrévement* or *désastre* process because of the experienced professionals used to conduct the process and because of the time scale.*

6/7

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:

- (i) The relevant Jersey law that applies.**

- (ii) Which areas are covered under the relevant Jersey law.**
- (iii) Advertising for claims and notice periods.**
- (iv) Which debts are provable.**
- (v) Interest on debts.**
- (vi) Proving of debts and the cost of proving.**
- (vii) Examination of proofs of debts.**
- (viii) Adjudication and the process of admitting or rejecting claims.**

As of March 2022, following amendments to the Companies (Jersey) Law 1991 creditors are able to apply to the Jersey Court for the debtor company to be placed into creditor's wind-up and for liquidators to be appointed. The provisions for a creditor winding-up only applies to companies registered under the Companies Law.

A creditor may apply to the Jersey Court to commence a creditor's wind-up if:-

- they have a claim against the company for at least £3,000; and*
- the company is unable to pay its debts;*
- The creditor can prove the company's insolvency; or*
- The company consented to the creditor making the application.*

The step-by-step process for a creditor's (court commenced) winding-up is as follows:

- creditor serves a statutory demand on the debtor company requiring payment within 21 days.*
- creditor needs to give company 48 hours' notice of the winding up application;*
- Articles 157A to C of the Companies Law - subject to any contrary agreement, the creditor may notify the debtor company and file the application together with supporting affidavit with the Court to wind up the company and/or appoint a provisional liquidator.*
- Applications is filed on Friday mornings following at least two clear days-notice and advertisement placed in the Gazette at least 24 hours prior to the hearing of the application.*

- **Granting the order is at the court's discretion. If the court does grant the order the winding up takes effect from the date the application was made or such other date as the Court determines.**
- **The liquidator (who must satisfy certain registration requirements) is appointed by the Court order.**
- **The liquidator shall notify various persons and must publicise the appointment;**
- **The liquidator must call a meeting of all the creditors.**
- **once the wind up has commenced no action shall be taken by the liquidator action must be taken or proceeded with against the company unless leave of court is obtained. Secured creditors however are entitled to pursue their security outside of the wind up.**

Article 166 Companies (Jersey) Law 1991 explains that the creditor claim process in a creditors' winding-up is the same as the claims process for a *désastre* as set out in Part 7 of the Bankruptcy (Désastre) (Jersey) Law 1990. Thus, the claims process in a creditor's winding up is as follows:

Provable debts

- (1) **Except as provided in paragraph (4), all debts and liabilities, present or future, or contingent, to which the debtor is subject at the time of the declaration, or to which the debtor becomes subject before payment of the final dividend by reason of any obligation incurred before the time of the declaration, shall be debts provable in the wind up.**
- (2) **Where a debt bears interest, interest to the date of the declaration is provable as part of the debt, except in the case of a debt secured by a hypothec, security interest, or pledge, when interest is provable to the date of payment of the claim and payable out of the proceeds of sale of the secured property to the extent that it is required and able to meet it and is secured thereby.**
- (3) **In the case of a debt which, by reason of its being subject to any contingency or contingencies or for any other reason does not bear a certain value, and a debt provable by virtue of Article 15(4) the creditor shall make an estimate of its value.**
- (4) **Where a declaration has been made in respect of the property of a person before the commencement of this Law, no debt or liability which would not have been provable in the wind up if this Law had not been passed shall be provable in the wind up.**

Creditors to prove

- (1) *Unless exempted by Rules made under Article 2, every creditor shall prove the creditor's debt at the time and in the manner prescribed by the court.*
- (2) *A creditor shall bear the cost of proving the debt unless the court decides otherwise.*
- (3) *Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors at a time fixed by the Viscount in accordance with Rules made under Article 2.*
- (4) *A creditor may from time to time amend or withdraw the creditor's proof and every such amendment shall be subject to the same formalities as the original proof.*

Proofs of debts to be examined and admitted or rejected

- (1) *The Liquidator may admit or reject proof of a debt in whole or in part.*
- (2) *Before admitting or rejecting proof of a debt the Liquidator shall examine the proof and any statement opposing the admission of the debt.*
- (3) *Before admitting or rejecting proof of a debt the Liquidator may require further evidence in support of, or in opposition to, its admission.*
- (4) *The Liquidator may reject in whole or part any claim for interest on a debt if the Liquidator considers the rate of interest to be extortionate.*
- (5) *If the Liquidator rejects proof of a debt in whole or in part the Liquidator shall serve notice of rejection in the manner prescribed by the court on the person who provided the proof.*
- (6) *If the Liquidator rejects a statement opposing admission of a debt in whole or in part the Liquidator shall serve notice of rejection in the manner prescribed by the court on the person who provided that statement.*
- (7) *If a person upon whom notice has been served in accordance with paragraph (5) or paragraph (6) is dissatisfied with the decision of the Liquidator and wants the decision reviewed by the court he or she must, within the time prescribed by the court, request the Liquidator to apply to the court for a date to be fixed for the court to review the decision.*
- (8) *The Liquidator shall comply with a request made in accordance with paragraph (7).*

Any surplus remaining after payment of the debts proved in the winding up, before being applied for any other purpose, shall be applied in paying interest on those debts

*which bore interest prior to the commencement of the winding up in respect of the period during which they have been outstanding since the commencement of the winding up and at the rate of interest applicable apart from the winding up.*¹

*There is no statutory time period for notices to be published for potential claims in a winding-up. It is generally agreed that a period of 21 days' notice is adequate for a summary winding-up (if a notice is published at all), and 60 days for a creditor's winding-up. There is no statutory provision for publishing a notice for potential claims outside of Jersey. However, a liquidator should consider the circumstances of the liquidation in determining whether this would be prudent in order to avoid challenges from a claimant subsequently coming forward.*²

8/8

14/15

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 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. XYZs secured lender, Big Bank PLC, has become increasingly concerned at the situation. Big Bank has the benefit of fixed and floating charges over XYZs 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.

(a) 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)

Big Bank can make an application pursuant to Article 3 Bankruptcy (Désastre) (Jersey) Law 1990 if XYZ has carried on business in Jersey, at any time within the period of 3 years immediately preceding the date of the application and if XYZ has immovable property in Jersey capable of realization at the time of the application, Article 4;

In the case of an unsecured debt for at least £3,000 Big Bank will need to issue a statutory demand requesting payment within 21 days. If XYZ does not pay

¹ Article 166(2) Companies (Jersey) Law 1991

² INSOL International Foundation Certificate: Module 5E page 21

*within the 21 days it will be open to Big Bank to commence either a **désastre** or a **dégrévement**.*

*Where the security is over immovable property, Big Bank can apply to the Court for a **désastre** or a **dégrévement**. Where the security is over moveable property the Big Bank would need to apply to the Court to enforce their contractual rights.*

*If a **désastre** is pursued Big Bank will have to confirm that XYZ is insolvent. The fact that XYZ is struggling to pay its debts is indicative that it is insolvent or in the zone of insolvency. XYZ needs to be insolvent per the cash-flow test thus Big Bank will need evidence of XYZ's financial position. XYZ must also have realisable assets which Big Bank will need to ascertain. If application is successful XYZ's worldwide assets would be vested in the Viscount who will realise the assets and distribute the proceeds to creditors.*

*If **dégrévement** is pursued it is possible XYZ's Jersey assets to be transferred to Big Bank or Big Bank be paid off by another creditor who has become the new owner of the property.*

3/3

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.

(b) The Jersey store is owned by a separate Jersey company, ABC Limited, 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 is not a member of the EU and accordingly the Recast EIR is not applicable to Jersey matters. Furthermore, as 11 pm 31 Dec 2020 the Recast EIR no longer applies to UK insolvency proceedings and consequently it is not possible to place ABC into English administration under that authority.

There is no statutory or customary corporate rescue procedure equivalent to an English administration in Jersey. However, an application to place ABC into an English administration can be made pursuant UK Insolvency Act 1986 ("UK IA"). Note that if a company's COMI is in a member state of the European community (excluding Denmark), then such company is a "company" for the purposes of Schedule B1 UK IA. As such, the English Court would have jurisdiction to place such company into administration under the UK IA. Therefore, since ABC's COMI

is considered to be England it can be placed into administration by the English Court. ABC would need to make an application for recognition and assistance in the English Court in order for them to apply to put ABC into administration.

If ABC's COMI is in doubt, then the ABC could obtain a letter of request from the Jersey Court to the English Court. The letter of request would be accepted by the English court under section 426 UK IA and would endow the English Court with jurisdiction over ABC Limited to make an administration order against ABC Limited in accordance with English Law. Note that granting the letter of request is discretionary. Before the Jersey Court issues such letter they will need to be satisfied that ABC has sufficient connection to England and that it is interest of ABC's creditors.

3/3

- (c) 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)**

If it is not possible to put ABC into English administration then, in the alternative, ABC or its directors or its members can apply under Article 155 of the Companies (Jersey) Law 1991 for the court to wind-up ABC on just and equitable grounds.

Article 155 provides wide jurisdiction to the Jersey Court who has shown a willingness to use the provision to facilitate attempts to realise the best outcomes for creditors in difficult situations.

The Jersey court has used the just and equitable winding-up process to effect a quasi-packaged sale of assets, which is typically associated with an administration.

If the Court orders ABC to be wound up under Article 155 it may:

- (a) appoint a liquidator;*
- (b) direct the manner in which the winding-up is to be conducted; and*
- (c) make such orders as it sees fit to ensure that the winding-up is conducted in an orderly manner.*

Thus a just and equitable winding-up is an alternative Jersey insolvency process which can be used if ABC is insolvent but wants to its assets.

The Liquidators ability to continue to trade the company is restricted to winding up its affairs, which may limit the ability to sell as a going concern. However the power can be specifically granted by the court.

2/3

(d) 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)

The approach would be different because XYZ as an English foreign company with Jersey connections would make applications. If insolvency proceedings are commenced in England the English office holders will need the assistance of the Jersey court in order to include and deal with XYZ's Jersey assets including the Jersey branch. The English office holder can apply for a 'letter of request' from the English court requesting assistance from the Jersey court.

Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 provides that the Jersey Court can provide assistance to foreign courts in insolvency matters in relevant countries or territories. One of such relevant territories to which the Jersey court can provide assistance is the UK. Note however, that the Jersey Court has discretion as to what assistance it will provide to the English court.

The Jersey court can refuse assistance in the following circumstances:

- If there is insufficient connection between the English insolvency office-holder and XYZ*
- If XYZ has not submitted to the jurisdiction of the English court.*
- If a transfer of the assets to the English office holder will prejudice Jersey creditors. An undertaking to or court order to protect Jersey creditors would be necessary.*
- If the request for assistance is inconsistent with Jersey law;*

On the facts it is likely that the English office holder's request for assistance will be granted. The request would be coming from a relevant jurisdiction and does not seem to fall into any of the exceptions which would cause the Jersey Court to refuse assistance.

3/3

(e) 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)

Jersey is not a signatory to the Model Law nor is it a member of the EU. Accordingly, neither the Model Law nor the Recast EIR is applicable in Jersey.

The Jersey Court will typically co-operate in foreign insolvency proceedings and grant the relief sought once there is sufficient connection between the debtor and the foreign law under which the foreign office holder was appointed.

Article 49 of the Jersey Bankruptcy Law does require the Jersey Court to have regard to the Model Law and also to consider private international law rules. This means that the Jersey court should assist if it receives request for recognition from non-relevant countries like Poland or on the basis of common law principles on grounds of comity.

3/3

14/15

*** End of Assessment ***