



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5E

JERSEY

1 = 7/10

2 = 7.5/10

3 = 14/15

4 = 13/15

41.5/50

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). - INCORRECT (D)

(d) Options (i) and (iii).

Question 1.3

Which parties can make an application for Désastre under the Bankruptcy (Désastre) 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) **Dégrévement 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). - CORRECT (C)**

- (d) All of the above.

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. - CORRECT (A)**
- (b) Options (i), (iii) and (iv).**
- (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).

(c) Options (ii) and (iv). - INCORRECT (B)

(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.

The powers that are available to the Viscount in respect of a Desastre are as follows:

- *The power to bring or defend action in respect of the property vested in the Viscount;*
- *The power to compromise debts, claims and liabilities;*
- *The power to make compromise arrangements with creditors;*
- *The power to dispose of property;*
- *The power to carry on the business of the debtor in so far as it is required for the orderly winding up;*
- *The power to borrow money;*
- *The power to disclaim onerous property;*
- *The power to pay creditors; and*
- *The power to pursue recoveries in respect of any antecedent transactions.*

The powers that are available to a liquidator in respect of a winding-up are as follows:

- *All powers of the company required for its beneficial winding up;*
- *The power to pay creditors;*
- *The power to disclaim onerous property, contracts or leases; and*
- *The power to pursue recoveries in respect of any antecedent transactions.*

Distinguish between powers of a liquidator in SWU, CWU and J&E

1.5/3

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 does not have a formal rescue and turnaround procedure equivalent to that in the UK or US because, as an offshore financial centre, the need has not arisen in the same way as it has historically in onshore jurisdictions. The vast majority of businesses in Jersey are used for financial structuring as part of larger groups or for asset holding purposes. There are comparatively few 'trading businesses' that would typically use a turnaround or rescue process when in difficulty. Accordingly the procedure has not been needed often enough to warrant drafting. The Jersey Court however has been creative in the past when the need has arisen.

2/2

Question 2.3 [maximum 2 marks]

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

The options open to a creditor prior to March 2022 were relatively limited as Jersey was decidedly 'debtor-friendly'. The amendments to the Companies Law introduced a creditor led 'creditors winding-up process' which allows a creditor to petition the court for the insolvent company to be placed into creditors' winding-up and for a liquidator to be appointed.

The other option open to a creditor is via the Desastre route which is the most common. For this process, the creditor must confirm in its application that the debtor is insolvent but has assets to realise which can be problematic if the information is not available to the creditor.

Finally, secured creditors may enforce their security interests in line with the contractual terms of the security document and only once an event of default has occurred and written notice of this fact has been served on the debtor.

2/2

Question 2.4 [maximum 3 marks]

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

The claims that potentially rank as priority claims in Desastre are as follows:

- *Any salary arrears owed to employees during the 6 months prior to the declaration;*
- *Holiday pay and bonuses for employees up to certain limits;*
- *Sums payable to the Health Insurance fund;*
- *Sums due to the Social Security fund;*
- *Parish rates due for a period not exceeding 2 years prior to the declaration;*
- *Certain Jersey taxes including the Goods and Services Tax; and*
- *Amounts due to a landlord for rent that is given preference under customary law.*

Depositors where the debtor is a bank

2/3

7.5/10

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

Jersey has a number of different personal insolvency options but, given the context of the island as an offshore financial centre, these are not used often and none of the below described processes require the appointment of an insolvency practitioner.

1. Desastre

This is the process under the Bankruptcy Law by which an individual's affairs may be wound up. In order for an application to be successful, the individual must have been ordinarily resident in Jersey at any time within the 12 months immediately preceding the date of the application for Desastre; or have carried on business in Jersey at any time within a period of three years preceding the date of the application; or have immovable property in the jurisdiction at the time of the application. Desastre can be applied for by a creditor or the debtor themselves.

Should the Jersey court determine that Desastre is appropriate it will make such a declaration and the debtor's worldwide property will automatically vest in the Viscount who will realise the assets for the benefit of the creditors. Desastre in personal insolvency cases usually lasts 4 years but, at the Court's discretion, this period can be lengthened or shortened.

Creditor owed £3,000 can also apply

2. Degrevement and Realisation

Degrevement is the process by which a judgment creditor may enforce against immovable property. Attournes are appointed to hold a hearing whereby the following process is undertaken:

- *Firstly, the unsecured creditors are offered the property (subject to any secured charges which they must pay);*
- *If this offer is not taken up by the unsecured creditors the charge holders are offered the same right in reverse priority.*

Whoever takes the property receives it in an unencumbered state and if the value of the property exceeds their debt they do not have to account to the debtor.

Realisation sits alongside Degrevement and applies to movable assets. In this case the Attournes would typically sell the assets at auction.

In both cases the debtor may not necessarily be discharged from their debts if they are not fully repaid.

3. Debt Remission Order (DRO)

This is a recent (2016) addition to Jersey law and allows the Citizens Advice Bureau to administer a small local debt proceeding available in the following limited circumstances:

- Where the applicant has assets worth less than JEP 5k;
- Where they have less than JEP 100 in disposable income on a monthly basis;
- Where they have debts totalling less than JEP 20k; and
- Where they have acted in good faith whilst incurring the debts.

A DRO creates a moratorium for 12 months after which time the debts covered by the DRO will be written off.

4. Remise de Biens (Remise)

A Remise is a court process available to a debtor who owns immovable property. There is no need for formal insolvency but the debtor would usually be having issues satisfying their creditors. Any security must be in an amount that will leave a surplus for unsecured creditors. The debtor surrenders the property to the Court for a period of time, which affords him protection, the Court then realises the property to discharge the debts.

Remise offers a return to the debtor where there is a surplus and rehabilitation.

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.**

In a creditor's winding up, Article 166 of the Companies Law provides that the same rules apply to creditor claims as those that are stated in Part 7 of the Bankruptcy Law.

Part 7 deals with the respective rights of secured and unsecured creditors, to which debts are provable, to the time and manner of proving debts, to the admission and rejection of proofs and the order of payment. Part 7 also deals with the treatment of interest.

There is no statutory time period for notices to be published for potential claims in a winding up - although it is generally standard practice to allow 60 days for a creditor's winding up. Whilst there is also no formal requirement to advertise outside of Jersey, most practitioners will consider doing so if it is likely to be helpful in reaching all potential creditors of the company - for example if the Jersey-based company regularly traded in Guernsey it would be prudent to advertise in the Guernsey Gazette as well - although not mandatory.

All debts, present, future and contingent are provable. Interest is also provable up to the date of the winding up. Secured creditors can claim any interest applicable up to the date of payment.

Creditors must bear the cost (if any) of proving their debt at the time and in the manner prescribed by the Jersey Court. Proofs are then examined and accepted, rejected or rejected in part once further information requests have been issued as required. Creditors are also entitled to examine each others' proofs upon request.

If a proof is rejected (in whole or in part) the creditor must be served with notice of the rejection. Unhappy creditors can request that the Court be asked to review the relevant decision.

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 will be concerned about its rights of enforcement against the assets of XYZ, particularly if formal insolvency is contemplated and there are other creditors in play (such as the landlords). Big Bank can however be reassured that secured creditors rank ahead of all other creditors should XYZ declare Désastre or if they enter liquidation. Big Bank can also enforce prior to any insolvency of XYZ once a default event has occurred and they have served written notice of this fact on XYZ. They can then serve a 14 day written notice should they wish to appropriate or sell any collateral of XYZ.

There is no equivalent to a floating charge in Jersey. If Big Bank has security over Jersey immovable property (for example a mortgage over the building) then they can apply to court in Jersey for a Désastre or Dégrèvement. If they have security over movable property then they may apply to court in Jersey to enforce their contractual rights. Secured creditors will have priority over all other creditors in Désastre and Liquidation scenarios, and the fact that a debtors becomes subject to an insolvency proceeding does not affect the enforcement powers of the secured party

2/3

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)**

It is not possible to place ABC Limited into an English Law Administration because the Recast EIR does not apply in Jersey notwithstanding ABC's centre of main interests rests in the UK and Jersey has not adopted the UNCITRAL Model Law. However, the Jersey Court has historically always been open to providing assistance in cross-border insolvency matters under Article 49 of the Bankruptcy law and under the common law basis of comity.

Would need to demonstrate that English administration would achieve the best possible outcome for the debtor and creditors than local processes.

2/3

- (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)**

The Jersey insolvency regime does not formally cater for restructuring or corporate rescue because it is rarely needed due to the trading nature of the industry on the island. However, the Jersey Court has shown a willingness to find creative and flexible solutions where this need has arisen. The process of a Just and Equitable Winding Up is sometimes used in these scenarios (only where a director, shareholder or the JFSC apply as creditors cannot) to allow for the pre-packaged sale of assets. Ordinarily, this is a terminal process for the company, unless the Jersey Court specifically award the appointed office holder with the power to trade the company in order to sell it. The application to Court will obviously require more in depth work to satisfy the Court of the need for this discretion.

3/3

- (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)**

Yes, if the Jersey store was a branch of a UK company rather than a standalone Jersey entity, the English Administration procedure could be used and the appointed Administrators could apply to the Jersey Court for assistance under Article 49 of the Bankruptcy Law. Article 49 typically deals with the recognition of foreign officeholders, disclosure of assets and restricting how information is obtained and used. Article 49 would apply in this scenario because the UK is a 'relevant' jurisdiction for this purpose. If the English Administrators make a request (via a Letter of Request from the English Court) that is successful they will have standing to act in Jersey. The Jersey Court will typically be cooperative with foreign officeholders if sufficient connection between the Jersey debtor and the jurisdiction of the foreign representatives.

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)**

If XYZ was a Polish company the above scenario may be different. Poland is not a 'relevant' jurisdiction for the purposes of Article 49 of the Bankruptcy Law. Therefore automatic cooperation would not be available. However, Article 49 does indicate that the Jersey Court will have regard to the UNCITRAL Model Law (notwithstanding

it is not formally in agreement with it). The Jersey Court will also have regard to private international law in these matters and will in all likelihood still offer assistance providing it is not contrary to public policy in Jersey.

3/3

13/15

*** End of Assessment ***