



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5E

JERSEY

1 = 8/10
2 = 9/10
3 = 15/15
4 = 12/15
44/50

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). Note: (a) and (c) - CORRECT (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) **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).**

- (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. - 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.

8/10

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 respect of a *Désastre*, the Viscount has wide ranging powers, including to bring, defend or institute proceedings, to compromise debts, claims and liabilities of the debtor, to dispose of property and to continue the debtor's business for the benefit of the debtor's winding up. The Viscount may also borrow money, pay the debtor's creditors, disclaim onerous property, enter into leases and pursue recovery in respect of antecedent transactions.*

*The liquidator's role is generally to facilitate the *pari passu* distribution of assets amongst the body of creditors. In a summary winding up those powers are limited to the realisation of assets, discharge of liabilities and distribution of assets. In a just and equitable winding up, the liquidator's powers will be determined by court order. In a creditors winding up, the powers are more wide ranging and more similar to those of the Viscount in a *Désastre*. Those powers include all the powers of the company for the benefit of its winding up, including paying creditors, disclaiming onerous property, entering into leases and pursuing recovery in respect of antecedent transactions.*

3/3

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 has a much higher ratio of corporate bodies to natural persons than the UK. Companies are often incorporated for the sole purpose of financial structuring and many are incorporated as special purpose vehicles, holding companies or members of a group of companies. As such, these companies would not benefit from restructuring in the same way as trading businesses would. As a result, Jersey sees high demand for solvent liquidations and far lower demand for rescue and turnaround processes than the UK market.

2/2

Question 2.3 [maximum 2 marks]

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

A secured creditor can enforce upon a default event once written notice of default has been given to the debtor. The secured creditor may appropriate or sell the collateral

upon giving 14 days' written notice unless the debtor has agreed to waive or reduce this notice period.

A creditor with security over immovable property can enforce by way of Désastre or Dégrèvement

A creditor with security over movable property can enforce its contractual right upon an application to the Jersey Courts.

Within the insolvency process, a creditor may opt for any of the winding up processes, including the more recently introduced creditor-led creditors' winding up process.

CWU is the only winding up process available for creditors

1/2

Question 2.4 [maximum 3 marks]

What claims potentially rank as priority claims in a Désastre?

Article 32 Bankruptcy (Désastre) (Jersey) Law 1990 provides that money received by the Viscount upon the realization of the debtor's property shall first be applied in payment of the Viscount's fees and costs, expenses and charges in the désastre and thereafter, in priority to all other debts proved in the désastre:

(1) in payment to any of the debtor's employees of amounts due to them in respect of wages or salary (for the 6 month period preceding the declaration that the debtor's property is en désastre), holiday pay and bonuses

(2) in payment of

(i) all sums payable to the Health Insurance Fund under Article 25 of the [Health Insurance \(Jersey\) Law 1967](#) and to the Social Security Fund under Article 41 of the [Social Security \(Jersey\) Law 1974](#),

(ia) all amounts due as described in Article 45(3) of the [Income Tax \(Jersey\) Law 1961](#) and all amounts due as described in Article 47(8) of the [Goods and Services Tax \(Jersey\) Law 2007](#),

(ii) an amount due by the debtor to his or her landlord for the payment of rent due to the extent, if any, that his or her claim qualifies for preference by virtue of customary law,

(iii) parochial rates due to any parish in Jersey for a period not exceeding 2 years.

(3) A further priority claim is established by Banking Business (Depositors Compensation) (Jersey) Regulations 2009, whereby the depositors' rights under that act are vested in the Jersey Bank Depositors Compensation Board, which becomes a priority creditor of the defaulting bank to the value of the depositors' rights vested in the board (Regulation 34).

3/3

9/10

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

Désastre is similar to the English bankruptcy process, except that it may also apply to corporate bodies. An application may be made by the debtor or a creditor who is owed JEP 3,000 or more. The Court has a discretion whether to grant the application. Once granted, the process will normally last for four years, although this period may be shortened or lengthened. The debtor's assets vest in the Viscount and the process is carried out by the Viscount. The debtor must be insolvent and have realisable assets for the *Désastre* process to apply and the creditor must include in its application that it believes that the debtor has realisable assets.

Dégrévement is the process of removing the charges and debts from the immovable property of the debtor so that it can be transferred unencumbered to the creditor in satisfaction of their claim against the debtor. The process involves a hearing whereby the *Attournes* offer the property to the unsecured creditors first, subject to the charges upon it, thereafter to the secured creditors in reverse order of priority, subject to the obligation to pay off the senior charge holders. Surprisingly, there is no need for the creditor who obtains the property to account to the debtor for any value in excess of the creditor's charge.

Realisation is considered together with *dégrévement*, save that it applies to moveable assets, which are realised at auction by the *Attournes*.

The law governing *Dégrévement* and *Realisation* is the *Loi (1904) (Amendement No 2) sur la Propriete Fonciere*.

A debtor is not discharged from their debts following the *Dégrévement/Realisation* process if those debts are not satisfied by the process in full. However, a secured creditor who rejects the immovable in *Dégrévement* will lose their security and may retain an unsecured claim for its debt after the end of the process.

A *Debt Relief Order* is a process governed by the *Debtor Remission (Individuals) (Jersey) Law 2016 (the DRO Law)* and run by the Viscount. It is available to debtors whose:

- assets are less than JEP 5,000

- *disposable income is less than JEP 1,000 per month*
- *debts are less than JEP 20,000*

and who acted in good faith in incurring the debt. The DRO creates a 12-month moratorium after which the debts are discharged. There has been limited application of the DRO regime and no debtors are currently registered as being subject to DROs, perhaps due to the stringent requirements.

Remise de Biens is a process governed by the Loi (1839) sur les Remises de Biens and is a court-based process available to a debtor who owns immovable property and is struggling to satisfy creditor claims, although the debtor does not need to be insolvent. The security over the debtor's property must exceed the value of the asset so that there is a return to the debtor's unsecured creditors. Unlike Dégrèvement, once the Court has realised the debtor's property, any surplus of assets under the Remise process will be returned to the debtor.

7/7

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.**

Article 166(1) of the Companies (Jersey) Law 1991 (the Companies Law) provides that the same rules apply to creditors winding up as apply to the Desastre process in respect of the rights of secured and unsecured creditors as to provable debts, the time and manner of proving debt, the admission and rejection of proofs of debts, the order

of payments of debts and setting off debts. As such, the provisions in the Bankruptcy (Désastre)(Jersey) Law 1990 (the Bankruptcy Law) applies as if the references to Désastre in respect of those rights were references to winding up and the references to the Viscount were substituted with references to the liquidator.

By Article 29(1) of the Bankruptcy Law (as amended by reference to Article 166(1) of the Companies Law) provides that debts which are provable in the winding up are all debts and liabilities, present or future, or contingent, to which the debtor is subject at the commencement of the winding up, or to which the debtor becomes subject before payment of the final dividend by reason of any obligation incurred before the commencement of the winding up.

*Where a debt bears interest, interest up to the date of commencement of the winding up is provable as part of the debt except in the case of those debt which are secured by a *hypothec*, security interest or pledge, when interest is instead 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 on the same (Article 29(2) of the Bankruptcy Law).*

Where the provable debt is subject to a contingency or does not bear a certain value for any reason (or where the debt is provable by operation of Article 171(4) Companies Law, namely in respect of loss or damage in consequence of the operation of a disclaimer of onerous property) the creditor is required to make an estimate of its value when proving in the liquidation (Article 29(4) of the Bankruptcy Law).

Within 14 days of their appointment within a Court-ordered creditors' winding up, the liquidator must give notice of the appointment to the registrar, the Viscount and the directors and creditors of the company (to the extent known to the liquidator). Similarly, within 14 days of their appointment within a creditors' winding up other than a Court-ordered creditors' winding up, the liquidator must give notice of their appointment to the registrar and to the creditors (Article 161(5) Companies Law). Accordingly, the company's potential creditors ought to be on notice of the winding up and the appointment.

There is no statutory time period for notices to be published for potential claims in a winding up although common practice dictates that 60 days' notice is adequate for creditors' winding up. Nor is there any statutory provision in respect of publishing notice of claims outside of Jersey, however a liquidator should consider whether this might be prudent in any event to avoid subsequent challenge from creditors outside the jurisdiction who have not been put on notice.

By Article 30(1) of the Bankruptcy Law, every creditor, unless exempted, shall prove in the manner prescribed by the Court. The cost is to be borne by the creditor unless the Court orders otherwise (Article 30(2)). Each creditor who has lodged a proof is entitled to see and examine other creditors' proofs (Article 30(3)) and proofs may be amended or withdrawn from time to time as long as the amendments follow the same formalities as the original proof. (Article 30(4)).

The proof may be admitted or rejected in whole or in part by the liquidator (Article 31(1)). The liquidator will take into account any opposition to the proof and may require further evidence in support of its admission or opposition (Article 31(2)). If the liquidator rejects the proof, notice of the rejection shall be served on the creditor. If the creditor is dissatisfied with the rejection, the decision may be reviewed by the Court upon an application made by the liquidator at the creditor's request (Articles 31(5) to (8)).

8/8

15/15

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)

It is necessary to identify the assets over which Big Bank holds collateral and where they are situated.

Where the property is situated outside of Jersey, the Jersey courts will likely recognise the law of the jurisdiction in which the property is situated.

Assuming that property exists in Jersey, if immovable, then Big Bank will have a type of hypothec over the security. It will be necessary to identify whether the security has properly been perfected to ensure that it is recoverable, whether by way of judicial, conventional or legal hypothec.

If Big Bank hold security over intangible movable property, for example shares in XYZ, the interest will have been created pursuant to the Security Interests (Jersey) Law 2012 (Security Law). Article 56 of the Security Law expressly provides that the

creditor's right to appropriate or sell the collateral will not be affected by XYZ's insolvency.

Article 56 of the Security Law provides that a security interest will be void as against the liquidator unless it was perfected before the grantor became insolvent. As such, ascertaining whether the security was properly perfected is key.

Unless XYZ's assets include ships, the only security Big Bank may hold over XYZ's tangible movable assets will be by way of pledge. This seems unlikely, given that a pledge requires actual physical delivery of the pledged asset.

Within an insolvency process, secured creditors rank head of other creditors in a liquidation. The fact that XYZ may be subject to any insolvency order or proceedings, whether in Jersey or foreign proceedings, does not affect Big Bank's right to enforce over its security.

Outside of an insolvency process, Bid Bank's power of enforcement is exercisable upon a default event taking place, in this case the failure to meet the December payment. Big Bank will have to have served notice of the default on XYZ in order to exercise the power of enforcement.

14 days' written notice must be given to XYZ if Big Bank before it appropriates or sells its security, although this period and notice requirement may be waived by XYZ.

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.

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)

English administration would prima facie be available to ABC as its centre of main interests is in the United Kingdom pursuant to paragraph 111(1A)(c) of Schedule B1 of the Insolvency Act 1986.

However this process would be pursuant to the Insolvency Act 1986 and not be pursuant to the Recast EIR as neither Jersey nor the UK are members of the EU. Nor would co-operation between the Jersey courts and the courts of England and Wales in respect of ABC's administration be pursuant to the Recast EIR as neither is a member of the EU. Co-operation between the English Courts and the Jersey Courts would be pursuant to Article 49 Bankruptcy Law, by way of the English Courts presenting the Jersey Courts with a Letter of Request.

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)**

An alternative to a pre-packaged sale of assets in Jersey is the just and equitable winding up process, which has a like-effect to an English "pre-pack" administration. The application cannot be made by creditors and so must be made by the company or its directors or shareholders in this case.

This method is useful where the company is insolvent but nevertheless has assets it would be beneficial to sell under a quasi pre-pack arrangement.

ABC's assets are the Jersey store, however the goodwill in the business is not an asset of ABC but of XYZ. In this case, it is difficult to envisage the winding up of ABC on just and equitable grounds as being an effective means to achieve a sale of XYZ as a going concern.

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)**

Article 49 of the Bankruptcy Law sets out Jersey's approach to co-operation with foreign courts. The UK is a "relevant country" under the Bankruptcy Law and so the courts of England and Wales could submit a Letter of Request to the Jersey Court in respect of a wide range of different powers.

These may include recognition of the English insolvency practitioner, or powers to obtain further information in respect of the assets or assist in the realisation of the Jersey store as an asset in the English administration.

The English administration should impact the worldwide assets including those located in the Jersey store - recognition in Jersey under A49 may be required.

2/3

- (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. Article 49(1) provides that the Jersey Court “may” have regard to the Model law in any event “to the extent it considers appropriate”. Further, in exercising its discretion under Article 49, the Jersey Court is required to have regard in particular to the rules of private international law (Article 49(2)).

Poland is not a “relevant country” under Article 49 but the assistance could still be provided to the Polish administrator under the common law principles of private international law and comity/co-operation.

3/3

12/15

**** End of Assessment ****