



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3A

THE INSOLVENCY SYSTEM OF THE UNITED STATES

***This is the*** summative (formal) assessment ***for*** Module 3A ***of this course and is compulsory for all candidates who*** selected this module as one of their compulsory modules from Module 3. ***Please read instruction 6.1 on the next page very carefully.***

***If you selected this module as*** one of your elective modules, ***please read instruction 6.2 on the next page very carefully.***

The mark awarded for this assessment will determine your final mark for Module 3A. ***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 MS Word format, using a standard A4 size page and a 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.assessment3A]. An example would be something along the following lines: 202223-336.assessment3A. 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 "student number" 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.**
- 6.1 **If you selected Module 3A as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 3A as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of 9 pages.

**ANSWER ALL THE QUESTIONS**

Commented [H(1)]: Total marks 41/50

**QUESTION 1** (multiple-choice questions) [10 marks in total]

Commented [H(2)]: Total marks 10/10

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**

Commented [H(3)]: Correct, 1 mark

Which of the following entities does not satisfy the minimum presence requirement to be a debtor under any chapter of the Bankruptcy Code?

- (a) A foreign domiciled company that pays a US attorney a retainer.
- (b) A company with several US bank accounts, but no physical presence in the United States.
- (c) A company with US patents, but no physical presence in the United States.
- (d) All of the above satisfy the minimum requirement for presence in the United States.**
- (e) None of the above satisfy the minimum requirement for presence in the United States.

**Question 1.2**

Commented [H(4)]: Correct, 1 mark

ABC Corp is an industrial manufacturing company that is filing for bankruptcy. Which of the following could not be considered a party in interest?

- (a) A neighboring landowner to ABC Corp's manufacturing plant.
- (b) An environmental advocacy group that opposes ABC Corp's operations.**
- (c) The landlord of ABC Corp's corporate office.

- (d) *People who live several miles downstream from ABC Corp's manufacturing plant and have been exposed to the plant's toxic waste.*
- (e) *The US Internal Revenue Service.*

Question 1.3

Commented [H(5)]: Correct, 1 mark

*Which of the following contracts to which ABC Corp is a party is executory and may be assigned without counterparty consent?*

- (a) A lease on a manufacturing plant that contains a provision that requires landlord approval of any assignment.**
- (b) *An employment contract between ABC Corp and a former employee, requiring the company to provide health insurance through the end of the current year.*
- (c) *A 10-year software licensing agreement with XYZ Corp that is three years into performance.*
- (d) *A lease on office space that ended the prior year, but for which ABC Corp still owes past rent.*
- (e) *None of the above are executory and may be assigned without counterparty consent.*

Question 1.4

Commented [H(6)]: Correct, 1 mark

*Which of the following conditions must be true about a reorganization plan for a court to confirm it under Chapter 11 proceedings?*

- (a) *Have a possibility of success, even if it relies on speculative or improbable events to be capable of execution.*
- (b) The plan is not likely to be followed by liquidation.**
- (c) *All impaired classes must accept the plan.*
- (d) *All of the above.*
- (e) *None of the above.*

Question 1.5

Commented [H(7)]: Correct, 1 mark

*Which of the following about cramdowns, is false?*

- (a) *The plan of reorganization must be fair and equitable to all impaired classes.*
- (b) *Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.*
- (c) *Class definition is often a battleground when a debtor tries to cramdown classes.*
- (d) *Dissenting creditors are permitted to challenge the classification of a creditor supporting the cramdown.*
- (e) *If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.*

Question 1.6

Commented [H(8): Correct, 1 mark

Which of the following about 363 sales is false?

- (a) *A good faith purchaser at a 363 sale may retain the property notwithstanding a subsequent reversal of court approval for the sale on appeal.*
- (b) *The debtor in possession must establish that the transaction is in the best interests of the estate as a whole.*
- (c) *In chapter 15 proceedings, a foreign court's approval alone suffices for a 363 sale.*
- (d) *Debtors must carry out a robust marketing process for the sale.*
- (e) *A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.*

Question 1.7

Commented [H(9): Correct, 1 mark

Which of the following is true of both an actual fraudulent conveyance and a constructive fraudulent conveyance?

- (a) *The debtor must have had an actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted.*
- (b) *Both require at least circumstantial evidence of the fraudulent intent.*
- (c) *The debtor must have been insolvent at the time of transaction.*
- (d) *In addition to provisions in the Bankruptcy Code, the debtor or the trustee may invoke applicable state or foreign fraudulent conveyance laws.*
- (e) *All of the above are true.*

Question 1.8

Commented [H(10)]: Correct, 1 mark

*When does an automatic stay come into effect?*

- (a) Immediately on the filing of any plenary petition.**
- (b) *On the filing of a voluntary petition but not on the filing of an involuntary petition.*
- (c) *Once the court reviews the petition and grants the stay.*
- (d) *Once the petitioner announces their intention to file for bankruptcy publicly.*
- (e) *Once a plan of reorganization is confirmed.*

Question 1.9

Commented [H(11)]: Correct, 1 mark

*Which of the following regarding substantive consolidation is true?*

- (a) *It respects the boundaries of corporate separateness.*
- (b) *It is the treatment of two or more creditors as a single creditor to simplify the claims process.*
- (c) If a creditor can show it extended credit on the basis of corporate separateness, it has a valid objection to substantive consolidation.**
- (d) *Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.*
- (e) *Authority for substantive consolidation comes from the Bankruptcy Code.*

Question 1.10

Commented [H(12)]: Correct, 1 mark

*Which of the following are relevant factors in determining a debtor's center of main interests (COMI) in the recognition stage of a Chapter 15 bankruptcy case?*

- (a) *The location of the headquarters.*
- (b) *The location of primary assets.*
- (c) *The location of the majority of the affected creditors in the request for relief.*
- (d) *The jurisdiction whose law will apply to most disputes.*
- (e) All of the above.**

**QUESTION 2** (direct questions) [10 marks]

Commented [H(13)]: Total marks 10/10

**Question 2.1** (1 mark)

Commented [H(14)]: Total marks 1/1

**What is setoff and why is it not permitted in many circumstances?**

*In short, setoff is the right the creditor has to net the debt he has with the debtor who owns him a claim. In other words, the setoff permits a creditor holding a claim against the debtor and simultaneously owning money to this debtor to net out these obligations. It is not permitted on many circumstances because it might harm the principle of equal treatment of creditors (i.e., par conditio creditorum principle), giving this creditor an improved position as compared to other unsecured creditors who are not owed money by the debtor. As explained in the guide text, "it decreases the obligation to the state by the full amount owned by debtor rather than the lesser amount the debtor would pay on the unsecured claim".*

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Commented [H(16)]: Correct, 1/2 mark

**Question 2.2** [2 marks]

Commented [H(17)]: Total marks 2/2

**What rules should you review when preparing a filing for a bankruptcy court?**

*When preparing a filing for a bankruptcy court, you should review the Bankruptcy Rules, the Federal Rules of Civil Procedure, the local rules of the bankruptcy court and the judge's personal practices.*

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Commented [H(19)]: Correct, 1/2 mark

Commented [H(20)]: Correct, 1/2 mark

Commented [H(21)]: Correct, 1/2 mark

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**Question 2.3** [2 marks]

**What does the absolute priority rule require and when can it be deviated from?**

*In short, the absolute priority rules requires that payment in full must be made to each category of claims before the next category receives anything. It might be deviated in a chapter 11 plan with the consent of affected creditors. This deviation, however, is not permitted in chapter 7, where the statutory priorities must be strictly observed and respected.*

Commented [H(23)]: Correct, 1 mark

Commented [H(24)]: Correct, 1/2 mark

Commented [H(25)]: Correct, 1/2 mark

**Question 2.4** [2 marks]

Commented [H(26)]: Total marks 2/2

**What is a "priming lien" and what requirements must be met for such a lien to be granted to secure DIP financing?**

*It is reasonable to state that priming a lien is the last resort when the debtor is unable to obtain any type of financing. The "priming lien" may be granted by the court and it is senior to or equal to pre-petition liens on the same property. In order to be granted, the debtor must demonstrate that the interest of the secured creditor being primed is adequately protected.*

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Commented [H(28)]: Correct, 1 mark

Commented [H(29)]: Correct, 1/2 mark

Question 2.5 [3 marks]

**What is a preference? What are the elements of a preference claim that need to be proved? Is a showing of fault, by either the debtor or creditor, required?**

A preference is a transfer of the debtor's property made in a suspect period before the petition date that must be returned to the state if it exceeds the amount the recipient would have received in a chapter 7 liquidation had the transfer not being made.

The elements of a preference claim that need to be proved are: (1) a transfer of an interest of the debtor in property (i.e., the transfer may be of funds, property or an interest in property); (2) it was made to or for the benefit of a creditor; (3) for or on account of an antecedent debt owed by the debtor before such transfer was made; (4) made while the debtor was insolvent; (5) made during the suspect period; (6) it enables the creditor to receive more than it would have in a chapter 7 liquidation.

There is no need to show any fault of either the debtor or the recipient in connection with the payment having been made

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Commented [H(31)]: Correct, 1 mark

Commented [H(32)]: Correct, 1/3 mark

Commented [H(33)]: Correct, 1/2 mark

Commented [H(34)]: Correct, 1/2 mark

Commented [H(35)]: Correct, 1 mark

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

Question 3.1 [3 marks]

**Describe the circumstances in which a bankruptcy court may enter a final order, who reviews appeals from bankruptcy court orders and how are non-final orders reviewed?**

In short, there are 2 (two) types of orders: final orders and interlocutory orders. Final orders "are those that dispose of all issues leaving nothing further to be decided". Interlocutory orders, on the other hand, resolve only some issues or claims.

Final orders might be appealed as of right, whereas interlocutory appeals may be appealed only with leave of the appellate court.

In terms of a bankruptcy proceeding, a bankruptcy judge may enter a final order or judgment in a core proceeding. In a non-core proceeding, absent consent of the parties, the bankruptcy judge may not enter a final order<sup>1</sup>.

In general, appeals from bankruptcy court decisions are heard by the district court for the district in which they sit. However, there are some circumstances that bankruptcy appeals are heard by a Bankruptcy Appellate Panel ("BAP"), convened from the judges of the bankruptcy courts within the circuit. From the district court or BAP, there is a further appeal of right to the circuit court of appeals (in this case assuming that the initial order was one from which an appeal of right was available).

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Commented [H(37)]: Total marks 1.5/3

Commented [H(38)]: Partially correct, 1/2 mark, the bankruptcy judge can adjudicate a challenge to a petition or a core proceeding with the consent of the parties. An order as to which the bankruptcy judge cannot enter a final order is treated like a report and recommendation / proposed findings of fact and conclusions of law

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Commented [H(40)]: Correct, 1/2 mark

Question 3.2 [3 marks]

Commented [H(41)]: Total marks 3/3

<sup>1</sup> [https://www.law.cornell.edu/rules/frbp/rule\\_7008](https://www.law.cornell.edu/rules/frbp/rule_7008)



**What provisions of the Bankruptcy Code automatically apply to the debtor's property within the territorial jurisdiction of the United States upon recognition of a foreign main proceeding? What relief may be granted on a discretionary basis for either foreign main or non-main proceedings?**

The provisions that automatically apply are: (1) the automatic stay; (2) operation of the debtor's business in the ordinary course by the foreign representative; (3) sale, transfer or use of property outside the ordinary course; and (4) avoidance of post-petition transfers and post-petition perfection of security interests.

The reliefs that might be granted on discretionary basis are: (1) authorization of discovery regarding the debtor's assets and affairs; (2) entrusting administration of the debtor's US assets to the foreign representative or other person; (3) extension of provisional relief; and (4) any other relief "necessary to effectuate the purposes of [Chapter 15] and to protect the assets of the debtor or the interests of creditors."

Question 3.3 [4 marks]

**What duties do directors owe to a Delaware corporation in the ordinary course of business? To whom are these duties owed when the corporation is potentially or actually insolvent? What rule protects directors from liability for errors of judgment?**

Directors owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision making.

Even when the corporation is potentially or actually insolvent, Director's duties are owed to the corporation and its shareholders. Therefore, it is not owed to creditors.

The rule that protects directors from liabilities for errors of judgment is called "business judgment rule". Under this rule, is presumed to have acted in good faith on the basis of reasonable information. In addition, directors may be exculpated by a corporation's certificate of incorporation from liability for breach of the duty of care (but not for the breach of the duty of loyalty).

Question 3.4 [5 marks]

**List and describe the requirements that a creditor's claim must fulfill in order to qualify as a petitioning creditor in an involuntary proceeding.**

To qualify as a petition creditor, the creditor must have a claim against the debtor that is: (1) non contingent (i.e., it does not depend on the occurrence of a future event); (2) not the subject of bona fide dispute as to liability or amount (i.e., there isn't any objectively reasonable basis for a dispute as a matter of fact or law and, therefore, the debtor does not subjectively believe that the debt is now owed or the amount claim is incorrect or not sufficient); and (3) unsecured or undersecured, separately or in the aggregate with all other petitioning creditor's claim, in the amount of at least USD 16,750 (this amount is periodically increased due to inflation).

Commented [H(42)]: Correct, 1/2 mark

Commented [H(43)]: Correct, 1/2 mark

Commented [H(44)]: Correct, 1/2 mark

Commented [H(45)]: Correct, 1/2 mark

Commented [H(46)]: Correct, 1/2 mark

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Commented [H(48)]: Also correct

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Commented [H(50)]: Correct, 1 mark

Commented [H(51)]: Correct, 1 mark

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Commented [H(56)]: Correct, 1/2 mark

Commented [H(57)]: Correct, 1 mark

Commented [H(58)]: Correct, 1/2 mark

Commented [H(59)]: Correct, 1 mark

Commented [H(60)]: Correct, 1/2 mark, also the creditor must allege that the debtor is generally not paying its debts or that "within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or an agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession."

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

Commented [H(61): Total marks 8/15

**Question 4.1** [5 marks]

Commented [H(62): Total marks 1/5

**Speculation Inc is engaged in day-trading stocks from leased office space with two employees. It funds its trading through a margin loan from its broker, where the shares it purchases are held as collateral. For a while, Speculation Inc was very successful in trading, and the US Department of Justice (DOJ) has announced an investigation into whether its success was due to illegally trading on insider information. More recently, Speculation Inc has had serious trading losses, causing its broker to declare a default on the margin loan. It also has fallen behind on its rent, and been sued by a former employee alleging she was fired due to due to gender bias.**

**What would be the effect of a Chapter 11 petition being filed by Speculation Inc on each of the (i) DOJ investigation, (ii) margin loan default; (iii) delinquent lease and (iv) employment discrimination lawsuit?**

**In short: (1) DOJ investigation will not be stayed; (2) the loan will be restructured, being listed as a secured claim up to the value of its collateral (i.e., the shares); (3) the lease will be subject to the debtor analysis (i.e., the debtor will analyse whether to assume, reject, assume or assign this contract), since it is an executory contract; and (4) any debt with the employee may be discharged by operation of the Chapter 11 Plan.**

Commented [H(63): The filing of the petition brings the automatic stay into effect.

Commented [H(64): Correct, 1 mark

Commented [H(65): Incorrect, a margin loan is a securities contract that benefits from an exception to the automatic stay

Commented [H(66): The automatic stay bars any eviction.

Commented [H(67): The automatic stay would cause the employment litigation to be stayed.

**Question 4.2** [5 marks]

Commented [H(68): Total marks 3/5

**Stella SA (Stella) is a an international cosmetics company incorporated in France, with its headquarters in Paris. Stella's products are made in Italy and shipped to its retail stores in Europe (including England), Asia, and North America. Stella's funding comes from a bank loan and Eurobonds, both of which are governed by English law. Stella's retail sales have suffered due to pandemic-related closures and it is considering options to restructure its debt. One option is to use an English scheme of arrangement with respect to the Eurobonds. Could the English scheme of arrangement be recognized by a US bankruptcy court under Chapter 15, and would such recognition be as a foreign main or non-main proceeding?**

**According to the Bankruptcy Code, a foreign proceeding is defined as "a collective judicial or administrative proceeding in a foreign country (...) under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation". Due to this definition, have been granted recognition by US bankruptcy court under Chapter 15.**

**In order to be recognized as a foreign main proceeding, the proceeding shall be commenced in the debtor's center of main interests ("COMI"). In this case, since Stella**

Commented [H(69): Correct, 1 mark

**S.A. COMI is in France (and not in England), the English scheme must be recognized as a foreign non-main proceeding.**

**Commented [H(70):** Correct, 1 mark, the connections to other jurisdictions aren't sufficient to overcome the presumption of COMI in France

**Commented [H(71):** Correct, 1 mark, also the retail store in England qualifies as the necessary establishment for non-main recognition

**Commented [H(72):** Total marks 4/5

**Question 4.3 [5 marks]**

**ToyCo is an American toy company that has created a popular line of folding robot toys called Xblox. The toys are covered by several US patents. Currently, GameMart Inc (GameMart) has a 10-year exclusive license to manufacture Xblox and pays ToyCo monthly royalties. GameMart operates a factory in California that it leases from Land Corp on a longer term lease with seven years to go; the lease prohibits assignment without Land Corp's consent. The Xblox toys are selling well, but GameMart's other toy lines are doing poorly, so it is considering a Chapter 11 bankruptcy. Answer the following questions:**

**(i) Is the license to manufacture Xblox an executory contract?**

**Yes, it is an executory contract.**

**Commented [H(73):** Correct, 1 mark, one party is obligated to pay royalties and the other is obligated not to license the IP to anyone else

**(ii) Can GameMart transfer the Xblox license as part of 363 sale without ToyCo's consent? Why or why not?**

**ToyCo's consent is necessary in this case. As a rule, counterparty consent is required where the contract is one to make a loan or other financial accommodation, or where substantive non-bankruptcy law (such as intellectual property licensing law) provides that the counterparty cannot be compelled to accept performance from a transferee.**

**Commented [H(74):** Correct, 1 mark

**Commented [H(75):** Correct, 1 mark

**(iii) Can GameMart transfer the factory lease as part of 363 sale without Land Corp's consent? Why or why not?**

**Land Corp's consent is not necessary in this case. As a rule, counterparty consent is required where the contract is one to make a loan or other financial accommodation, or where substantive non-bankruptcy law (such as intellectual property licensing law) provides that the counterparty cannot be compelled to accept performance from a transferee. The lease, however, is not contemplated by this rule.**

**Commented [H(76):** Correct, 1 mark, the anti-assignment clause in the lease is ineffective in bankruptcy

\* End of Assessment \*