



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 9/10

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)]: Incorrect, the correct response is (a)

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 8.5/10

Question 2.1 (1 mark)

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

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

Setoff allows a creditor holding a claim against the debtor and simultaneously owing money to the debtor to net out the two (or more) obligations.

Commented [H(15)]: Correct, 1/2 mark

Setoff is not allowed in many circumstances as it can improve the position of the creditors as compared to other unsecured creditors who are not owed money by the debtor as it decreases its obligation to the estate by the full amount owed by the debtor rather than the lesser amount the debtor would pay on the unsecured claim.

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?

I should review the Bankruptcy Rules, the Federal Rules of Civil Procedure, the local rules of the bankruptcy court as well as the judge's personal practices. In the event that I do not practice in a jurisdiction regularly, I should also consider consulting a local practitioner for advice on unwritten local practices.

Commented [H(18)]: Correct, 1/2 mark

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

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

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

Question 2.3 [2 marks]

Commented [H(22)]: Total marks 2/2

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

Under the absolute priority rules, full payment must be made to each category of claims before the next category is able to receive anything. Deviation for the absolute priority is allowed in a chapter 11 plan provided that affected creditors consented to it. However, deviation is not allowed in chapter 7. Under chapter 7, the statutory priorities must be followed strictly.

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 1.5/2

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

Priming lien if granted for post-financing financing, gives the said financing a priority in collateral over the pre-petition secured lenders.

Commented [H(27)]: Correct, 1 mark

The debtor must also show that the interest of the secured creditor being primed is adequately protected.

Commented [H(28)]: Correct, 1/2 mark, also financing must not be available without the priming lien

Question 2.5 [3 marks]

Commented [H(29)]: Total marks 2/3

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 estate in the event it exceeds the amount the recipient would have received under a chapter 7 liquidation had the transfer not been made. It is not a requirement to show any fault of either the debtor or the recipient in connection with the payment having been made.

Commented [H(30)]: Correct, 1/2 mark, also the recipient must be a creditor and the payment must be a repayment of a pre-existing debt

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

Commented [H(32)]: Correct, 1/2 mark

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

Commented [H(33)]: Total marks 14/15

Question 3.1 [3 marks]

Commented [H(34)]: Total marks 2.5/3

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 cases where the litigants had stated in their pleadings that they consent to the entry of final orders or judgment by the bankruptcy court, final order can be entered. Generally, appeals from bankruptcy court are heard by the district court for the district in which they sit. However, in certain circuits, these appeals are heard by a Bankruptcy Appellate Panel ("BAP"). The order of a district court or BAP is in turn reviewed by a circuit court of appeal.

Commented [H(35)]: Correct, 1/2 mark

Commented [H(36)]: Also, the bankruptcy court has authority to enter final orders on certain core matters created by the bankruptcy code, such as a challenge to a petition.

Commented [H(37)]: Correct, 1/2 mark

Commented [H(38)]: Correct, 1/2 mark

In respect of non-final orders, the district court or BAP reviews de novo all findings of fact and conclusions of law to which a party has objected.

Commented [H(39)]: Correct, 1 mark

Question 3.2 [3 marks]

Commented [H(40)]: Total marks 3/3

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?

Upon recognition of a foreign main proceeding, the following provisions of the Bankruptcy Code apply to the debtor's property within the territorial jurisdiction of the United States:

- (a) Automatic stay;
- (b) Operation of the debtor's business in the ordinary course by the foreign representative;
- (c) Sale, transfer or use of property outside the ordinary course;

Commented [H(41)]: Correct, 1/2 mark

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

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

(d) Avoidance of post-petition transfers and post-petition perfection of security interests.

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

The relief listed above may also be granted on a discretionary basis upon the recognition of a foreign non-main proceeding.

Additionally, the following relief may also be granted on a discretionary basis upon the recognition of a foreign proceeding, whether main or non-main:

- (a) Authorization of discovery regarding the debtor's assets and affairs;
- (b) Entrusting administration of the debtor's US assets to the foreign representative or other person;
- (c) Extension of provisional relief;
- (d) Any other relief necessary to effectuate the purposes of Chapter 15 and to protect the assets of the debtor or the interests of creditors.

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

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

Question 3.3 [4 marks]

Commented [H(47)]: Total marks 4/4

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 Delaware corporation's best interest and a duty of care in educated decision-making.

Commented [H(48)]: Correct, 1 mark

Commented [H(49)]: Correct, 1 mark

Directors' duties are owed to the Delaware corporation and the shareholders instead of the creditors even in cases where the corporation is potentially insolvent. Directors are protected from liability for errors of judgment by the business judgment rule.

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

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

Question 3.4 [5 marks]

Commented [H(52)]: Total marks 4.5/5

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

The creditor must have a claim that is non contingent. In this regard, a claim is contingent if it depends on the occurrence of a future event. An example of such claim is a claim under a guarantee which is typically contingent upon the occurrence of a default under the guaranteed obligation. A debt that has yet to become mature is not contingent if all requirements for liability, other than the passage of time, have already occurred.

Commented [H(53)]: Correct, 1 mark

Commented [H(54)]: Correct, 1/2 mark

The claim must not be subject to a bona fide dispute as to liability or amount. In this regard, a bona fide dispute is said to exist if there is an objectively reasonable basis for a dispute as a matter of fact or law. The mere fact a debtor subjectively believes that the debt is not owed of the amount claimed is incorrect would not be sufficient. Creditors cannot use disputed portion of the amount claimed to reach the monetary

Commented [H(55)]: Correct, 1 mark

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

threshold required in the next bullet. However, a dispute at to one claim does not disqualify application of other undisputed claims held by the same creditor to meet the petitioning creditor requirements.

The claim must also be unsecured or undersecured, separately or in the aggregate with all other petitioning creditors' claims, in the amount of at least USD16,750.

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

Commented [H(58)]: Correct, 1/2 mark, also the petitioning creditor must allege that the debtor is not paying its debts generally or has had a custodian appointed over its assets

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

Commented [H(59)]: Total marks 9.5/15

Question 4.1 [5 marks]

Commented [H(60)]: Total marks 3.5/5

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?

Upon the filing of a Chapter 11 petition by Speculation Inc, a worldwide automatic stay comes into effect immediately and this provides Speculation Inc with breathing room to formulate a restructuring plan. However, the stay is of no effect vis-à-vis the DOJ investigation. However, the margin loan default, delinquent lease and employment discrimination lawsuit would all be stayed if they relate to pre-petition claims.

Commented [H(61)]: Correct, 1 mark

Commented [H(62)]: Correct, 1 mark

Commented [H(63)]: Incorrect, the margin loan is a securities contract that is exempt from the automatic stay so the broker can liquidate the collateral.

Commented [H(64)]: Correct, 1/2 mark, specifically the landlord could not evict Speculation Inc. or sue for past-due rent

Commented [H(65)]: Correct, 1 mark

Commented [H(66)]: Total marks 1/5

Question 4.2 [5 marks]

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?

Yes, the English scheme of arrangement can be recognised by a US bankruptcy court under Chapter 15 as the English scheme of arrangement would qualify as a collective judicial or administrative proceeding in a foreign country under a law relating to insolvency or adjustment of debt in which proceedings the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose or reorganization or liquidation. However, recognition under Chapter 15 may be refused if it is manifestly contrary to US public policy.

Foreign main proceedings are those that are commenced in the debtor's COMI. A debtor's COMI is presumed to be in its place of incorporation, but this is rebuttable. The factors that are relevant to the determination of a debtor's COMI includes the following:

- (a) Location of headquarters;
- (b) Location of management;
- (c) Location of primary assets;
- (d) Location of a majority of debtor's creditors or a majority of creditors that will be affected by the relief requested by the foreign representative; and
- (e) Jurisdiction whose law will apply to most disputes.

In this case, it can be argued that the scheme of arrangement has been commenced in Stella SA's COMI as the jurisdiction whose law will apply to most disputes will be England given that English law applies to the Eurobond. On that basis, the scheme of arrangement can be regarded as a foreign main proceeding.

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, if as of the petitioning date, both parties still have material underperformed obligations under the license to manufacture that is currently valid for 10 years.

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

Commented [H(67): Correct, 1 mark, here the factors are unlikely to rebut the presumption--Stella probably has trade creditors in many contractors and its headquarters are in France

Commented [H(68): Since England is not the COMI, recognition as foreign main is inappropriate. Recognition as foreign non-main is appropriate and the retail store in England constitutes the necessary establishment.

Commented [H(69): Total marks 5/5

Commented [H(70): Correct, 1 mark

Yes it cannot. Counterparty consent is required in this case as the manufacturing license involves issues of intellectual property licensing law.

Commented [H(71)]: Correct, 1 mark

Commented [H(72)]: Correct, 1 mark

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

Yes, it may do so. It is executory, hence can be transferred/assigned. Leases are contracts that can be assigned/transferred without the need for counterparty approval.

Commented [H(73)]: Correct, 1 mark

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

[Type your answer here]

* End of Assessment *