



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^[la1]

QUESTION 1^[la2](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^[la3]

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^[la4]

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^[1a5]

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^[1a6]

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^[1a7]

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^[1a8]

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^[1a9]

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^[1a10]

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^[1a11]

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^[1a12]

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^[1a13] (direct questions) [10 marks]

Question 2.1 [la14] (1 mark)

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

Set-off ordinarily allows a creditor to net-off debts owed to it from a debtor, by debts it owes to the debtor. [la15]

To avoid a creditor that is otherwise obligated to the estate from acquiring claims to manufacture an offset (ie to gain an unfair preference), [la16] set-off is not allowed in a number of prescribed circumstances. These circumstances include, for example, where the creditor's claim was acquired post-petition or at a time when the debtor was insolvent within 90 days of the petition. The debtor is presumed insolvent during this 90 day period.¹

Question 2.2 [la17] [2 marks]

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

- *Federal Rules of Bankruptcy Procedure* [la18] (Bankruptcy Rules)
- *Federal Rules of Civil Procedure* [la19]
- *Local rules of the bankruptcy court* [la20]
- *Judge's personal practices* [la21]

Question 2.3 [la22] [2 marks]

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

The absolute priority rule requires that each sub-class of priority creditor in Chapter 7² must be paid in full before the next sub-class can be paid. [la23] *For example, all domestic support obligations of individual debtors³ must be paid in full before administrative expenses⁴ can be paid.*

In a Chapter 11 Plan [la24], *the absolute priority rule can be deviated from with the consent of the affected creditors* [la25].⁵

Question 2.4 [la26] [2 marks]

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

¹ Guidance text, pages 61-62.

² 11 USC sections 726(a)(1)-(6).

³ 11 USC section 507(a)(1).

⁴ 11 USC section 507(a)(2).

⁵ Guidance Text, page 51.

Where a debtor in Chapter 11 potentially does not have sufficient means to pay post-petition expenses from ongoing trading activities, it can apply for debtor-in-possession (DIP) financing. Where the debtor does not have sufficient unencumbered property to secure DIP financing^[la27], courts may grant a priming lien that is in priority to, or equal than, pre-petition securities^[la28].⁶ To do this, the debtor must give notice to the affected party and demonstrate that the pre-petition secured creditor is adequately protected.^[la29]

Question 2.5^[la30] [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?

If a transfer from the estate exceeds what the person otherwise would have received in a Chapter 7, then the transfer may be ordered to be returned to the estate (subject to meeting various elements).^[la31]⁷ The purpose of this is to reduce the likelihood of a race to collect a distressed debtor's assets and promote a *pari passu* treatment of creditors (where applicable).

No fault needs to be shown by either the debtor or the creditor^[la32].⁸

The elements are:

- 1) Transfer of a debtor's interest in property^[la33] (like cash, shares, plant and equipment or granting securities/liens in appropriate circumstances);
- 2) The transfer is to, or for the benefit of, a creditor^[la34];
- 3) The creditor's debt must be pre-existing, and cannot be for payment for cash-on-delivery or for contemporaneous exchange^[la35];⁹
- 4) At a time when the debtor was insolvent. Insolvency is presumed in the 90 days preceding the petition,¹⁰ but is rebuttable. Insolvency is assessed on a balance sheet test basis,¹¹ unlike many other countries (like Australia), which adopt a cash flow test;
- 5) The transfer occurred during the 90-day suspect period for third parties, or one year suspect period for related¹² parties; and
- 6) The transfer gives the creditor more than what they would have received in Chapter 7; and
- 7) No valid defence applies (like contemporaneous exchange, payment was in ordinary course, secured debt, liens, 'net result rule' and safe harbours for financial markets).¹³

⁶ See 11 USC section 364.

⁷ 11 USC section 547.

⁸ Guidance text, page 53.

⁹ *In re Hechinger Inv Co of Delaware, Inc* No 01-3170(PBL), 2004 WL 3113718, at 2.

¹⁰ 11 USC section 547(f).

¹¹ 11 USC section 101(32) and *In re American Classic Voyages Co*, 367 BR 500 (Bankr D Del 2007).

¹² 11 USC section 101(31).

¹³ Guidance text, pages 55-58.

QUESTION 3 [1a36] (essay-type questions) [15 marks in total]

Question 3.1 [1a37] [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?

Bankruptcy courts may enter a final order in relation to core matters.¹⁴ Core matters include matters concerning the administration of an estate, proceedings to avoid preferences, determination of claims against the estate, etc [1a38].¹⁵

The District Courts [1a39] have been granted jurisdiction to hear and determine bankruptcy proceedings.¹⁶ However, that depends if there is another basis for the matter in federal jurisdiction.¹⁷

If the matter is non-core, then the bankruptcy court may nonetheless hear (but not decide) the matter if it is sufficiently connected to the bankruptcy proceeding in question.¹⁸ The bankruptcy court instead provides findings of fact and law to the district court for final determination [1a40].¹⁹

The determination of whether a matter is core or non-core initially relies on the motion/pleading of each respective party to the bankruptcy court, so that the bankruptcy court can decide its jurisdiction.

Question 3.2 [1a41] [3 marks]

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?

Provisions that automatically apply upon recognition of a foreign main proceeding include:²⁰

- *Stay of proceedings [1a42] (11 USC section 1520(c));*
- *Operation of the debtor's business in the ordinary course by a foreign representative [1a43];*
- *Sale/transfer/use of the debtor's property, in the ordinary course; and*

¹⁴ 11 USC section 157.

¹⁵ Ibid.

¹⁶ 28 USC sections 157 and 1334.

¹⁷ Guidance text, footnote 31.

¹⁸ Guidance text, page 20.

¹⁹ 28 USC section 157(c).

²⁰ 11 USC section 1524.

- **Avoidance of post-petition transfers/security**^[la44].

Discretionary relief includes:²¹

- **Discovery of a debtor's affairs**^[la45];
- **Entrusting the debtor's assets/business with the foreign representative (or others)**^[la46];
- **Extension of provisional relief**^[la47]; and
- **Any other relief necessary to effectuate Chapter 15 or consistent with the principle of comity.**²²

Question 3.3^[la48] [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?

*In the ordinary course of business, the overriding duty of a director is the fiduciary duty of **loyalty**^[la49] the company's best interest and a duty of **care**^[la50] in educated decision-making.*²³

*Directors may be protected by the **business judgement rule**^[la51] from liability for errors of judgment; in that they are presumed to have acted in good faith in reliance on reasonable information. To rebut that presumption, one needs to show that the majority of the board:*

- *was not reasonably informed;*
- *did not have a reasonably honest belief that their decision/actions were in the best interest of the company;*
- *were not acting in good faith; or*
- *were not disinterested or independent.*

*These duties are to the company and its shareholders, not creditors. This is so even where the company is insolvent (or likely to become insolvent).^[la52]²⁴ This means that there is no obligation on the board to cease trading in insolvency-related circumstances.*²⁵

Question 3.4^[la53] [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.

²¹ 11 USC section 1521.

²² 11 USC section 1507(b).

²³ Guidance text, page 62.

²⁴ *North Am Catholic Educational Programming Foundation, Inc v Gheewalla*, 930 A.2d 92, 103 (Del 2007).

²⁵ *Trenwick Am Litig Trust v Ernest & Young, LLP*, 906 A.2d 168 (Del Ch 2006).

*Involuntary proceedings may be commenced by a petitioning creditor under only Chapter 7 or Chapter 11.²⁶ To apply for involuntary proceedings, at least one petitioning creditor must file proceedings (where there is fewer than 12 prescribed creditors); or at least three petitioning creditors, where there are more than 12 prescribed creditors. Also, the petition must (*inter alia*) allege that the debtor is generally not paying its debts when due.²⁷*

To qualify, the petitioning creditor must have a claim against the debtor that is:

- *a non-contingent debt^[la55] - ie a debt that is not contingent on the happening of a future event^[la56] or one that is unmatured. An example of a non-contingent debt would be a trade creditor owed money from a customer. An example of a contingent debt would be an unliquidated damage claim from say a tort;*
- *not bona fide - ie not subject to dispute^[la57], even if only in part. A bona fide dispute is one in which there is an objective (cannot be subjective), reasonable basis for the dispute on factual/legal grounds^[la58]. A bona fide dispute example may be that the customer can evidence that the delivery of goods from the supplier was never achieved and therefore there is no debt; and*
- *unsecured (or in respect of a shortfall amount of a secured debt)^[la59] in the aggregate amount of at least USD 16,750^[la60] (subject to periodical change).*

QUESTION 4^[la61](fact-based application-type question) [15 marks in total]

Question 4.1^[la62] [5 marks]

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 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?

A worldwide automatic stay^[la63] is extremely broad under the Bankruptcy Code, which is said to include a stay on:²⁸

²⁶ 11 USC section 303.

²⁷ Form B205 at 2 and guidance text, page 14.

²⁸ 11 USC section 362(a).

- **litigation of pre-petition claims - this would likely include the delinquent lease (to the extent damages are claimed [la64]), the margin loan default [la65] or employment discrimination [la66];**
- **enforcement of pre-petition judgment against the estate, including any act to obtain possession or control of property;**
- **perfection or creation of a lien/charge over the estate's assets;**
- **attempts to collect on pre-petition claims; or**
- **set-off.**

However, the stay only prohibits affirmative acts that change the status quo of the estate's property.²⁹

The automatic stay does not apply in the following relevant statutory exceptions:³⁰

- **criminal proceedings or regulatory investigations - which would likely include the DOJ investigation [la67]; or**
- **exercise of rights under commodity, forward or security contract or rights under a swap agreement - it is not clear on the facts whether the margin loan default would fall under this exception.**

²⁹ *City of Chicago v Fulton*, 529 US 140 (2021).

³⁰ 11 USC section 362(b).

Question 4.2^[1a68] [5 marks]

Stella SA (Stella) is 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?

Chapter 15 is a near verbatim copy of the UNCITRAL Model Law on cross-border insolvencies. Chapter 15 requires a petition by the foreign representative of the debtor.³¹ The stay under Chapter 15 requires the court to grant the petition for recognition of the foreign proceeding as a foreign main proceeding and is limited only to the property within the USA.³²

The English practitioner must establish that a foreign court or administrative proceeding is pending and that the English practitioner is empowered to act.³³ The foreign proceeding need not be a recognised USA proceeding, for instance scheme of arrangements from the UK have been recognised in the USA.³⁴

The final key test is whether proceeding is a foreign main, or foreign non-main, proceeding. A foreign main proceedings is one that is commenced in the debtor's COMI. A foreign non-main proceeding is one where Stella has an establishment in the UK (ie a place where it carried out non-transitory economic activity).^[1a69]

A debtor's COMI is presumed to be its place of incorporation, but this is rebuttable.^[1a70]³⁵ On the facts, France is stated to be the place of incorporation for Stella. Accordingly, Stella's COMI is presumed to be France, without more. Other relevant COMI factors that can be taken into account, on an objective basis,³⁶ are:

- *location of headquarters - again the facts say this is France;*
- *location of management - given headquarters is in France, I assume that the management team is also in France;*
- *location of primary assets - the facts suggest that Stella's retail supplies are made in Italy but shipped to retail stores in Europe and in the UK. I would want to see a balance sheet or breakdown of the portion of assets (whether tangible or intangible) that are located in each of these locations;*

³¹ 11 USC section 1501(a).

³² Ibid, section 1520(a)(1).

³³ Ibid, section 101(23).

³⁴ Ibid. See also guidance text page 65.

³⁵ 11 USC, section 1516(c).

³⁶ *Morning Mist*, 714 F.3d at 134.

- *location of a majority of the debtor's creditors - it is not clear what percentage of Stella's debts comes from the funding from the UK Eurobonds/bank loans. I assume that the phrase "Stella's funding comes from" could be read as meaning the majority in value of creditors relates to the Eurobonds; and*
- *jurisdiction of whose law will apply to most disputes - the Eurobonds are said to be governed by UK law. If the requisite majority of creditors are covered by the UK law, then this limb may be met.*

Therefore, assuming the Eurobonds make up a material majority of Stella's creditor pool, it is possible that an American court may recognise the scheme of arrangement as a foreign main proceeding^[la71].

Question 4.3 ^[la72] [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?***

An executory contract is one where there is a material underperformed obligation on both sides.³⁷ I do not believe that the licence is executory, as ToyCo is not underperforming its side of the obligation^[la73].

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

A 363 sale grants the debtor the ability to sell its property clear of any creditor interests with court approval.³⁸ Licensees of patents and copyrights are protected from 363 sales, without the consent of the licensee (ie ToyCo^[la74]).³⁹

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

³⁷ 11 USC, section 365.

³⁸ 11 USC, section 363(f).

³⁹ 11 USC, section 365(n)

A 363 sale grants the debtor the ability to sell its property clear of any creditor interests with court approval.⁴⁰ The factory lease may be transferred as an executory contract, without approval^[1a75] and despite contractual terms to the contrary^[1a76], as long as the transferee gives adequate assurances of future performance to LandCorp.⁴¹

*** End of Assessment ***

⁴⁰ 11 USC, section 363(f).

⁴¹ Ibid, sections 365(c), (e) and (f).