



TOTAL: 30/50 = 60%
Good attempt!

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

QUESTION 1 (multiple-choice questions) [10 marks in total] **7 marks**

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 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

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

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

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

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

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

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

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

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

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]

Question 2.1 (1 mark) **1 mark**

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

Setoff allows a creditor who holds a claim against a debtor and simultaneously owes money to the debtor to net out the two obligations. However, this is not allowed in many circumstances as it can improve the position of the creditor compared to the other unsecured creditors as the creditor may get more return by netting the obligations than by the unsecured claim.

Question 2.2 [2 marks] **2 marks**

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.

Question 2.3 [2 marks] **1.5 marks**

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

The absolute priority rule requires that the full payment has to be made to each category of claims before paying the next category of claims. However, this can be deviated from with the consent of the affected creditors. **Permitted to a chap 11 plan**

Question 2.4 [2 marks] **1 mark**

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

A priming lien is senior or equal to a pre-petition lien on estate property to secure post-petition financing. The requirements to meet a priming lien is that the financing cannot be obtained on any other terms. **A priming lien may be granted only if DIP financing is not available without such a lien (1/2 mark) and if the interests of secured creditors are adequately protected (1/2 mark).**

Question 2.5 [3 marks] **1 mark**

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 payment or a transfer of some of the debtor's property to a recipient which was made before the petition date, during the suspect period. This payment would have to be returned to the debtor's assets if it is more than what the recipient would get through chapter 7. There is no requirement to show fault by either the debtor or creditor. The only element which would need to be proved would be that the payment was made while the debtor was insolvent. Elements not discussed

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

Question 3.1 [3 marks] **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?

A bankruptcy court may enter a final order if the parties decide the matter is a core matter. Bankruptcy court orders can be appealed to by the litigants involved as well as other people who are adversely affected by the ruling. If it is concluded that the order is non-final, then the district court or BAP reviews de novo all findings of fact and conclusions of law to which a party has objected.

Question 3.2 [3 marks] **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?

For a foreign main proceeding the following is automatically granted upon recognition:

- ***Automatic stay***
- ***Operation of the debtor's business in the ordinary course by the foreign representative***
- ***Sale, transfer, or use of property outside the ordinary course***
- ***Avoidance of pot-petition transfers and post-petition perfection of security interests.***

The following can be granted to either foreign main or non-main proceedings on a discretionary basis:

- ***Authorization of discovery regarding the debtor's assets and affairs***
- ***Entrusting administration of the debtor's US assets to the foreign representative or other person***
- ***Extension of provisional relief***
- ***Any other relief 'necessary to effectuate the purposes of [chapter 15] and to protect the debtor's assets or the creditor's interests.***

Question 3.3 [4 marks] **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?

During the ordinary course of business, a director have a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision making. When the corporation is potentially or actually insolvent, directors are still owed a duty to the corporation's best interest. The rule that protects the directors would be the business judgement rule.

Question 3.4 [5 marks] **3.5 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.

In order for a creditor's claim to qualify as a petitioning creditor, it must be a non-contingent claim. It must also not be the subject of bona fide dispute as to the liability or the amount. Finally, it must also be in the amount of at least \$16,750 USD, whether unsecured or under secured, separately or in aggregate with other creditors' claims. **Description required of non-contingent and bona fide dispute; allegation that 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]

Question 4.1 [5 marks] **2 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 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?

- i.) ***As the DOJ investigation is on whether Speculation Inc is committing fraud and is a civil proceeding arising in a Chapter 11 case, the court's jurisdiction would be non-exclusive.***
- ii.) ***This proceeding would be related to the case as it would affect the estate. As such the court should abstain from hearing the proceeding and adjudicate it later as there is a parallel proceeding.***
- iii.) ***This would be a case arising under title 11 as it adjudicates the rights and duties established by the statutory provisions under section 542. As such, the jurisdiction of the court is non-exclusive except for the exclusive jurisdiction it has over all claims relating to the retention of professionals.***
- iv.) ***This would, just like the first instance, be a proceeding arising in a Chapter 11 case, and therefore the court's jurisdiction is non-exclusive.***

The filing of the chapter 11 would result in immediate application of the automatic stay.

Any action by the landlord to recover unpaid rent or evict Speculation Inc. would be subject to the automatic stay because the lease had not expired at the end of the term, but rather were simply in payment default.

The filing of the petition would stay the employment discrimination action.

Question 4.2 [5 marks] **0 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?

Under Chapter 15, foreign money judgements may be accepted if they are:

- Final and enforceable in the rendering jurisdiction;***
- For a sum of money;***
- Issued by a court with personal jurisdiction over the defendant; and***
- Issued by a court in a legal system that provides reasonable due process safeguards.***

As the English scheme would meet these requirements, it could be recognized under chapter 15.

A foreign main or non-main proceeding would be identified by Stella's COMI. COMI can be identified by:

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

Stella has its; head quarters, management and primary assets all in different places, however, both of its source of fund is governed by English law and it also has retail stores in England along with other countries. The financing which with wants to switch to would also be governed by English law. As such, the COMI could be in England as its Jurisdiction will apply most to it as well as where the majority creditors are located. As such this would be seen as a foreign main proceeding.

Stella's COMI is France because that's where it is incorporated and has headquartered (1 mark); the connections with other jurisdictions are not sufficient to overcome the presumption that its jurisdiction of incorporation is its COMI (1 mark). Because the English proceedings are not in Stella's COMI jurisdiction, there cannot be foreign main recognition (1 mark). The English proceedings can be recognized as foreign non-main (1 mark), assuming that one of the retail stores is in England and constitutes an establishment (1 mark).

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?

A contract would be executory if there are material unperformed obligations on both sides. As ToyCo has an exclusive license to manufacture Xblox and also pays monthly royalties it has a material obligation. As ToyCo has given an exclusive license, it cannot give the license to another company which also makes it an executory contract. 1

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

As ToyCo's contract with Game mart does not prohibit GameMart from selling the contact, it can sell the contract as a 363 sale without consent, as long as ToyCo's

interest is not disputed or the value of the license does not exceed the value of interest. If this is the case, then ToyCo's interest will attach to the proceeds of the sale and will receive priority distribution of the proceeds. 0 marks

No (1 mark). Because the right to manufacture is an IP license, the consent of the counterparty is required by applicable non-bankruptcy law (1 mark)

(iii) Can GameMart transfer the factory lease as part of 363 sale without Land Corp's consent? Why or why not? 0 marks

As the contract prohibits assignment of the factory without Land Corp's consent, GameMart cannot include the factory lease in its 363 sale without consent.

Yes (1 mark) because anti-assignment contract provisions are not enforceable in bankruptcy (1 mark).

* End of Assessment *