



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: 202122-514.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 "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

Commented [H(1): Total marks 42/50

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

ABC Corp is filing for bankruptcy under chapter 11. Which of the following **is not** a party in interest in that proceeding?

- (a) A neighboring land owner who has leased equipment to ABC Corp.
- (b) ABC's government regulator.
- (c) A bank that has loaned money to ABC.
- (d) A local advocacy group.**
- (e) All of the above.

Question 1.2

Commented [H(4): Correct, 1 mark

Which of the following statements regarding executory contracts is **false**?

- (a) Executory contracts are clearly defined by the bankruptcy code.**
- (b) Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.
- (c) In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.
- (d) A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.
- (e) Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.

Question 1.3

Commented [H(5): Incorrect, the correct response is (d)

In which of the following scenarios does a bankruptcy court have constitutional authority to issue a final order? Assume in each that the counterparty to the dispute has not consented to the bankruptcy court's exercise of jurisdiction.

- (a) A counterclaim against the estate that introduces a question under state law.
- (b) Since the list of core proceedings is non-exhaustive, a bankruptcy court may issue a final determination on any matter that comes before it.

- (c) A creditor's claim against an affiliate of the debtor that has guaranteed the debtor's obligation to the creditor
- (d) A debtor's motion to dismiss an involuntary bankruptcy petition.
- (e) None of the above.

Question 1.4

Commented [H(6): Correct, 1 mark

Which of the following statements about "pre-packs" is **false**?

- (a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.
- (b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.
- (c) A pre-pack debtor may spend as little as a single day in bankruptcy.
- (d) The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.
- (e) Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.

Question 1.5

Commented [H(7): Correct, 1 mark

Which of the following statements regarding cramdowns is **true**?

- (a) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.
- (b) Because cramdowns do not require the consent of all classes, the plan of reorganization may not be fair and equitable to all impaired classes.
- (c) 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.
- (d) Class definition is rarely a battleground when a debtor tries to cramdown classes.
- (e) Dissenting creditors are not permitted to challenge the classification of a creditor supporting the cramdown.

Question 1.6

Commented [H(8): Correct, 1 mark

Which of the following statements about the plan exclusivity period is **true**?

- (a) The exclusivity period is 1 year.
- (b) The exclusivity period cannot be extended.
- (c) The exclusivity period cannot be shortened.

(d) During the exclusivity period, only a creditor may propose a plan of reorganization.

(e) During the exclusivity period, only the debtor may propose a plan of reorganization.

Question 1.7

Commented [H(9)]: Correct, 1 mark

Which of the following statements about chapter 15 is **false**?

(a) The automatic stay applies upon the filing of a petition for recognition.

(b) A debtor cannot be subject to an involuntary chapter 15 proceeding.

(c) A chapter 15 petition must be filed by a foreign representative.

(d) The automatic stay applies only to property within the territorial jurisdiction of the United States.

(e) Recognition may be granted to a foreign proceeding as either foreign main or foreign non-main.

Question 1.8

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

Which of the following statements about 363 sales is **false**?

(a) A 363 sale permits a debtor to sell an asset free and clear of encumbrances.

(b) A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.

(c) A 363 sale must be conducted as an auction with a stalking horse bidder.

(d) Purchasers may pay a higher price for assets sold in a 363 sale than in an out-of-court transaction.

(e) Sophisticated parties will insist on a 363 sale if there is any question regarding whether the sale is "in the ordinary course of business".

Question 1.9

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

If a debtor rejects an executory trademark license agreement under which it licenses a trademark to its counterparty, which of the following is **true**?

(a) The counterparty has a claim for damages for breach of contract.

(b) The counterparty must immediately stop using the trademark.

(c) The counterparty can continue using the trademark for the remaining period of the license.

(d) Both (a) and (b).

(e) Both (a) and (c).

Question 1.10

Who may serve as a foreign representative to seek recognition of a foreign proceeding under chapter 15?

- (a) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (b) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.
- (c) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (d) An insolvency professional appointed by the court overseeing the foreign proceeding.
- (e) All of the above.

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QUESTION 2 (direct questions) [10 marks]

Commented [H(13)]: Total marks 6.5/10

Question 2.1 (2 marks)

Commented [H(14)]: Total marks 2/2

What is the difference between a voluntary petition for bankruptcy and an involuntary petition for bankruptcy?

First, the voluntary petition is made by the debtor and involuntary petition is made by creditors.

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

Second, Creditors could only apply involuntary proceeding under ch 7 and ch 11, voluntary petition does not have the limitation.

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

Third, in voluntary petition, the debtor does not need to claim to be insolvent, but in an involuntary petition the creditors need to allege the debtor is insolvent.

Forth, for involuntary petition, the number of the creditors should be at least 3 if the debtor has more than 12 creditors. The voluntary petition does not have that requirement.

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Question 2.2 (2 marks)

Commented [H(18)]: Total marks 2/2

What are two potential consequences of a violation of the automatic stay?

First, it may constitute a contempt of court. The violator must pay debtors' attorney's fees and take affirmative act to undo the effect of the violation.

Commented [H(19)]: Correct, 1 mark, it is contempt of court, but the nature of the sanction depends on the facts and circumstances--an innocent mistake may not carry financial penalties

Second, the violation will be void or voidable, depends on the circuit. But the parties in interest may seek to lift the stay prospectively to validate an act that would otherwise be a violation.

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Question 2.3 (3 marks)

Commented [H(21)]: Total marks 1/3

In what circumstances is a claim considered "impaired"? When is a holder of an impaired claim not entitled to vote on a proposed plan of reorganization and what happens instead?

The claim of the creditor is considered "impaired" unless the reorganization plan leaves the holder's "legal, equitable, and contractual rights unaltered". But if the plan cures the monetary

Commented [H(22)]: Correct, 1 mark. If an impaired claim receives nothing under the plan, it is not entitled to vote and is deemed to reject the plan.

default and compensate the holder for any damages, the holder's rights could be deemed as unimpaired.

If the following happen, the impaired claim is not entitled to vote, and a cram down happens:

- At least one impaired class has voted to accept the plan.
- All requirements of confirmation of the plan haven been met.
- The differential treatment of non-consenting classes must have a reasonable basis, be proposed in good faith.

Question 2.4 (3 marks)

Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:

(1) Which cause of action applies only to transfers made on account of antecedent debt?

Preference, actual fraudulent conveyances, and constructive fraudulent conveyances. Antecedent debt is usually debts only bring outflow of value from the estates of the debtors. For a contemporaneous exchange of value is not a reference. But the defence is not established if the creditor simply substitutes a new obligation for an old one, he must give money, goods, services, or new credit.

(2) Which cause of action requires that the debtor be presumed or proven to have been insolvent at the time of the transfer?

Preference and constructive fraudulent conveyance. The debtor is presumed to have been insolvent 90 days before the petition of preference claims. A creditor may present evidence to rebut the presumption. This requirement gives more certainty to commercial deals.

(3) Which cause of action requires that the debtor be proven to have intended to frustrate creditors' recoveries?

Actual fraudulent conveyance. It needs to be proved that the debtor made a transfer or incurred an obligation "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became....indebted."

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

Question 3.1 (3 marks)

How did *Stern v Marshall* change the law of bankruptcy court jurisdiction and authority to enter a final order?

Before *Stern v Marshall* case, it seemed it was established that the bankruptcy court had jurisdiction over core insolvency proceeding issues. But in the judgement of this case, the US Supreme court held that even in core proceedings, the bankruptcy could not issue final orders that invade Article III jurisdiction.

This case gave more complexity to the jurisdiction of US insolvency proceeding. The US supreme court held that the bankruptcy judges may determine a core proceeding issue which they lacked constitutional authority by issuing a report and recommendation for review by the district court. In a word, insolvency courts only give final order if it is delegated by the district

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Commented [H(24)]: Incorrect, only a preference claim requires an antecedent debt. A fraudulent transfer can be established where there is a gift or incurrance of new debt or obligation for inadequate consideration.

Commented [H(25)]: Partially correct, 1/2 mark. Only a preference claim requires that the debtor was insolvent. While insolvency may be a factor in finding a constructive fraudulent transfer has occurred, it is not required in every case.

Commented [H(26)]: Correct, 1 mark

Commented [H(27)]: Total marks 15/15

Commented [H(28)]: Total marks 3/3

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

Commented [H(30)]: Correct, 1 mark

courts, or each party could make a deal to grant jurisdiction to insolvency court to give the final order.

Commented [H(31)]: Correct, 1 mark, and the specific delegated authority is to adjudicate challenges to bankruptcy petitions

Question 3.2 (3 marks)

Commented [H(32)]: Total marks 3/3

What provisions of the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding? What are two ways that the foreign representative can obtain equivalent relief?

The rights of use of avoidance powers have been excluded from foreign representative. However, there are two ways the foreign representatives can obtain equivalent relief.

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

First, they can seek to avoid pre-petition transactions under other applicable US or foreign laws.

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

Second, they can choose to commence a plenary proceeding under the Bankruptcy Code after recognition of the foreign proceeding under chapter 15.

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

Question 3.3 (4 marks)

Commented [H(36)]: Total marks 4/4

Describe the differences between interlocutory and final orders and how an appeal may be taken from each. Which courts hear direct appeals from bankruptcy court orders?

The final orders deal with all issues, leaving nothing further to decide. In contrast, interlocutory orders only resolve some issues. Appeal in final order is a right, and appeal in interlocutory orders should be agreed by the appellate court. But the orders extending the period of proceeding for proposing a plan are appealable as a right and the bankruptcy order resolving a discrete dispute is a final order.

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

Commented [H(39)]: Correct, 1/2 mark

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

In general, appeals from bankruptcy court decisions are heard by the district court. In certain circuits, bankruptcy appeals are heard by a Bankruptcy Appellate Panel (BAP). From the district court or BAP, there is a further appeal of right to the circuit court of appeals. The court of appeals has discretion whether to accept the case.

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

Question 3.4 (5 marks)

Commented [H(43)]: Total marks 5/5

What fiduciary duties do directors of Delaware corporations owe and to whom are the duties owed in the ordinary course of business? To whom are duties owed when the corporation is potentially or actually insolvent?

The director has a duty to the corporation's best interest in the ordinary course of business. They have a duty to act in educated decision-making. However, the director's liability is every limited. Unless there is evidence to prove the majority of the board is not informed, the directors are presumed to act on good faith, which is called business judgement rule. What is more, the director is exculpated by a corporation's certificate of incorporation from liability for breach of the duty of care. The business judgement rule does not apply to transaction approved by a board majority that is not disinterested and independent or a controlling shareholder in both sides of the transaction.

Commented [H(44)]: Correct, 1 mark, this is the duty of loyalty

Commented [H(45)]: Correct, 1 mark, this is the duty of care

When the corporation is potentially or actually insolvent, the directors only have duties to the corporation and shareholders, not to creditor. There is no concept of “wrongful trading” or “deepening insolvency” about the obligation of the directors under Delaware Law.

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

Commented [H(47)]: Correct, 1 mark

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

Commented [H(49)]: Total marks 11.5/15

Commented [H(50)]: Total marks 3/4

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

Question 4.1 [4 marks]

Gambling Corporation is incorporated and has a principal place of business in Greece, and it operates casinos and betting parlors in many international cities, including Athens, Las Vegas, London and Macau. Gambling Corp’s bonds (governed by English law) are due to mature in one (1) year, but it is unable to repay or refinance them. Gambling Corp is considering using an English scheme of arrangement to restructure the bonds.

Discuss whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding.

Whether the English scheme of arrangement could be recognized as foreign main or foreign non-main proceeding depends on whether UK could be recognized as the COMI under chapter 15. COMI is presumed to be the incorporated place, in this case, Greece. But it is rebuttable considering to facts of location of headquarters, management, primary assets, majority creditors affected, jurisdiction to deal most of disputes. Gambling has principal place of business in Greece and there is no more information over other facts. So chances are that under US chapter 15 Greece is its COMI, English scheme of arrangement is a non-main proceeding.

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Commented [H(52)]: Correct, 1 mark

Commented [H(53)]: Correct, specifically the London casino constitutes the necessary establishment in the jurisdiction of the foreign proceedings

Commented [H(54)]: Total marks 4/5

Question 4.2 [5 marks]

Oil Corporation is incorporated in Delaware and has its principal place of business in Texas. Oil Corp is facing several challenges to its business. First, ShipCo, one of its key customers, has filed a breach of contract lawsuit in Texas state court alleging that Oil Corp sold it contaminated oil that caused USD 1 billion in damage to ShipCo’s container ships. Second, the US Department of Justice is investigating whether Oil Corp illegally purchased oil from countries subject to US sanctions. Third, Oil Corp. has missed a payment on its secured loan from USA Bank, and USA Bank is threatening to foreclose on an Oil Corp refinery located in the Philippines. Fourth, because of all these distractions, Oil Corp has forgotten to pay rent on its Houston, Texas office space and its landlord is threatening to evict it. What would be the effect of Oil Corp filing a chapter 11 petition on each of these four situations?

First, the lawsuit should be stayed for it is a litigation on pre-petition claim. ShipCo should file a proof of claim to the trustee.

Commented [H(55)]: Correct, 1 mark, and the stay will come into effect automatically on filing the petition

Second, the investigation of US Department of Justice is a regulatory investigation. It is an exception of Automatic Stay. So, the investigation will not be stayed.

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

Third, the automatic stay applies to secured creditor and the estate of debtor anywhere in the world. After the petition, The US bank is forbidden to obtain possession or control of the refinery in Philippine. The bank needs to file the claim to the trustee. If the bank could prove that the value of refinery is lack of protect, it could apply to court to pursue remedies about the property.

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

Fourth, the office space and its landlord should claim the rents owned by Oil Corporation before the filing of chapter 11 petition. If the lease expired after the Oil Corporation filed, the petition. The creditors could evict them, for it is an exception of Automatic Stay. If the lease

has not expired, the creditors could not evict the company. But the rents after the application could be paid as administrative expenses on an ongoing basis, subject to court approval after notice and hearing.

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Question 4.3 [6 marks]

Commented [H(59)]: Total marks 4.5/6

Oil Corp has filed for bankruptcy and is planning to sell its plastic manufacturing business through a 363 sale. The plastic manufacturing business operates under the trademark "Interconnect", which is licensed from Plastic Corp. Oil Corp has invented several patented processes for plastic manufacturing, which it licenses to Plastic Corp. The main manufacturing facility for the plastic business is in Dallas, and Oil Corp has granted a lien on the facility to USA Bank to secure its USD 500 million loan.

Oil Corp thinks it will get the highest return for the plastics manufacturing business if it can (i) assume and assign the trademark license; (ii) reject the patent licenses so the purchaser has the exclusive right to use the patents; and (iii) sell the manufacturing facility free and clear of the USA Bank lien. Can Oil Corp achieve each of these goals without the consent of Plastic Corp and USA Bank? Why or why not?

Both the issues of trademark and patent licenses are executory contracts issues.

For the first issue, the bankruptcy abrogates contractual restrictions on assignment of contract without the consent of the counterparty. But intellectual property licensing law provides that the counterparty cannot be compelled to accept performance from a transferee. So, the assume and assign the trademark license needs the consent from Plastic Corp. USA bank is not a party of the contract and it will not harm the value of the facility, the Oil Corp could achieve this goal without its consent.

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

For the second issue, the Oil Corp, as a DIP, can choose to reject the patent licenses base on the business judgement. But if the DIP does so, the contract is still seen as valid, so the counterparty can retain whatever it received before petition. If there are any damages caused by the default, PlasticCorp needs to file an un-secured claim. USA bank is not a party of the contract, and it will not harm the value of the facility, the Oil Corp could achieve this goal without its consent.

Commented [H(62)]: Partially correct, 1/2 mark, the bankruptcy code specifically protects patent licenses from termination

For the last issue, Whether the consent of US bank is needed depends on whether the bank is over secured by the facility. According to article 363 of the Insolvency Code, an asset may be sold free and clear with creditor consent, if the creditor interest is disputed or if the value of the property exceeds the value of the interests. If the above scenario happens, a creditor's interest will attach to the proceeds of the sale and receive priority in distribution of those projects.

Commented [H(63)]: Correct, 1 mark

Commented [H(64)]: Correct, 1 mark

* End of Assessment *