



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 39.5/50

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

Commented [H(2)]: Total mark 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)]: Incorrect, the correct response is (c). Because the sale under 363 is free and clear of liens and claims, a higher price may be received

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.

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

QUESTION 2 (direct questions) [10 marks]

Commented [H(13)]: Total marks 7/10

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?

A voluntary petition for bankruptcy is commenced by the debtor and in commencing the same, the debtor need not prove that it is unable to pay its debts. However, an involuntary petition for bankruptcy is commenced by a creditor and it will require the creditor to allege either that the debtor is generally not paying its debts as and when they fall due, unless they are the subject of bona fide dispute as to liability or amount or that, within 120 days before the filing of the petition, a custodian, other than a trustee, receiver, or an agent appointed or authorised 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.

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

Question 2.2 (2 marks)

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

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

1. The act taken in violation of the automatic stay is either void or voidable depending on the circuit in which the bankruptcy is pending.
2. Imposition of contempt sanctions against the violator, which may include the payment of the debtor's attorneys' fees and requiring the violator to take affirmative action in undoing the violation.

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

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

Question 2.3 (3 marks)

Commented [H(20)]: 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?

A claim is impaired if, with respect to each claim, the plan alters the legal, equitable and contractual rights to which such claim or interest entitles the holder of such claim or interest. (11 U.S. Code, Section 1124).

Commented [H(21)]: Correct, 1 mark, alteration in any of those ways is sufficient

A holder of an impaired claim is not entitled to vote on a proposed plan where a cramdown is in effect. Essentially, once a cramdown has been initiated and there is one impaired class supporting a plan, the votes of the other classes, especially where there is a holdout problem.

In such a case, it will only be necessary to show that in addition to the other conditions considered by the court before confirming the plan, the same has been accepted by at least one impaired class and that the plan does not unfairly discriminate and is fair and equitable to the non-dissenting impaired classes.

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?

Preferences.

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

Constructive fraudulent conveyances.

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

Actual fraudulent conveyances.

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?

Contrary to Title 28 of the United States Code, Section 157(b)(2)(C), the US Supreme Court in *Stern v Marshall* held that even in core proceedings, a bankruptcy court cannot issue final orders that invade Article III jurisdiction.

Question 3.2 (3 marks)

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 foreign representative cannot invoke the provisions of the Code that enable the representative make use of the avoidance powers in the Code.

Equivalent relief may be obtained by the representative pursuing the use of these powers in a plenary proceeding such Chapter 7 or 11. In such cases, the scope of the proceedings will be limited to the debtor's US assets and will be coordinated with the foreign proceeding.

Commented [H(22)]: Incorrect, in a cramdown the votes still occur, though dissenting votes may be disregarded if the requirements are met. An impaired claim does not get to vote if it will receive nothing under the plan; it is deemed to reject.

Commented [H(23)]: Total marks 2/3

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

Commented [H(25)]: Incorrect, the correct answer is preference. Insolvency may be a factor leading to the conclusion that a transfer is constructively fraudulent, but it is not required in all circumstances.

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

Commented [H(27)]: Total marks 13/15

Commented [H(28)]: Total marks 2/3

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

Commented [H(30)]: Correct, 1 mark. However a bankruptcy court can enter a final order on a challenge to a petition or where the parties consent

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

The foreign representative may also pursue relief under other applicable US or foreign law, which would be consistent with practice in cases under Section 304 of the Bankruptcy Code prior to the enactment of the chapter 15. This would be subject to whether the foreign representative ably obtains a satisfactory result. In case he or she is unable to obtain a satisfactory result such as where the statute of limitations has expired or there are limitations within the applicable law, the representative may still obtain access to the Bankruptcy Court through a plenary proceeding described above.

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

Question 3.3 (4 marks)

Commented [H(34)]: Total marks 3/4

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?

Interlocutory orders are orders that resolve only some issues or claims while final orders are those that dispose of all issues and leave nothing further to be decided by the courts.

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Commented [H(36)]: Correct, 1/2 mark

An appeal from an interlocutory order may only be taken with leave of the appellate court whereas an appeal from final order arises as of right.

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

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

The district court for the district in which the bankruptcy court sits is the court that hears the direct appeals from the bankruptcy court.

Commented [H(39)]: Correct, 1 mark, however in certain circuits the appeal may be heard by a Bankruptcy Appellate Panel instead

Commented [H(40)]: Total marks 5/5

Question 3.4 (5 marks)

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?

Directors owe the fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision – making subject to the laws governing liability for errors of judgment by the business judgment rule in which the board of directors is presumed to have in good faith on the basis of reasonable information.

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

In the ordinary course of business, these duties are owed to the corporation and its shareholders.

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

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

Where the corporation is potentially or actually insolvent, the Delaware Supreme Court, in the case of North Am Catholic Educational Programming Foundation, Inc v Gheewalla, put to rest any lingering suggestion that these duties shift to creditors when the corporation is operating within the zone of insolvency or is actually insolvent.

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

Commented [H(46)]: Total marks 10.5/15

Question 4.1 [4 marks]

Commented [H(47)]: Total marks 2/4

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.

Whereas English schemes of arrangement, which would qualify as foreign proceeding, dependant on whether the courts of Greece approve the same, are one of the proceedings that have been granted recognition in the United States, the point of contention comes in in the categorisation of the proceedings either as foreign main or non – main proceedings.

In this case, to qualify as foreign main proceedings, it must be shown that the proceedings were commenced in the debtor's COMI. The relevant factors to consider in determining COMI include the location of the debtor's headquarters, location of management, location of primary assets, location of a majority of the debtor's creditors or a majority of the creditors that will be affected by the relief requested by the foreign representative and the jurisdiction whose law will apply to most disputes.

Proceedings can be recognised as foreign non-main proceedings only if the debtor has an establishment, a place where the debtor carries out non – transitory economic activity, in the jurisdiction prior to the commencement of chapter 15 proceedings.

Given that the debtor has a betting parlour in Las Vegas, the question would be whether it qualifies as an establishment and if it is found to do so, then the proceedings commenced in Greece would be recognised as foreign non – main proceedings.

Question 4.2 [5 marks]

Oil Corporation is incorporated in Delaware and has its principal place of business in Texas. Oil Corp is facing a number of 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?

Each of these four situations presents a threat to Oil Corp's business and it is also seen from the facts that Oil Corp could be in the zone of insolvency. By filing a chapter 11 petition, the following would arise: -

- a) The worldwide automatic stay that comes as one of the consequences of the filing has the effect of providing some breathing space for the corporation to continue operating in the ordinary course of business while it comes up with a plan of reorganisation that will adjust its debts. This implies that it will also affect the continuation of the suit for breach of contract (in case it was Oil Corp that had commenced this proceeding, it would have been different) and the eviction by the landlord.
- b) Secondly, the ability to seek avoidance of preferential and fraudulent transfers would assist the company in dealing with the issue relating to the issue of it having allegedly purchased oil from countries that are the subject of US sanctions.

Question 4.3 [6 marks]

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

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

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

Commented [H(50)]: Incorrect, the relevant establishment for non-main treatment is the casino in London, where the foreign proceedings are pending

Commented [H(51)]: Incorrect, the proceedings are pending in England and can be recognized in the US as non-main, regardless of whether recognition occurs in Greece

Commented [H(52)]: Total marks 3/5

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

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

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

Commented [H(56)]: Probably not--simply undoing the transfer would not eliminate liability for breach of sanctions law

Commented [H(57)]: The investigation regarding this conduct would continue under an exception to the automatic stay, but USA Bank would be stayed from enforcing on the assets in the Philippines because the stay has worldwide effect

Commented [H(58)]: Total marks 5.5/6

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?

i. Assume and assign the trademark license:

Federal trademark law would ban the assignment of Plastic Corp's trademark licenses without Plastic Corp's consent. (Re Trump Entertainment Resorts, Inc 526 BR 116).

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Commented [H(60)]: Correct, 1 mark

ii. Reject the patent licenses so the purchaser has the exclusive right to use the patents:

On the patent rejection, licensees of patents owned by the debtor are protected such that their licenses may not be terminated in connection with the sale of the intellectual property without their consent. This would imply that the licenses cannot be rejected without Plastic Corp's consent.

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

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

iii. Sell the manufacturing facility free and clear of the USA Bank lien

Under Section 363(f), Oil Corp may sell its assets free and clear with the consent of the Bank if it is shown that the value of the property exceeds the value of the Bank's interest (that is, that the value of the facility exceeds the sum secured). In such circumstances, the Bank's interest will attach to the proceeds of the sale and it will receive priority in distribution of those proceeds.

Commented [H(63)]: Partially correct, 1/2 mark, it can do so without consent if the requirements are met

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

*** End of Assessment ***