



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 20/50

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

Commented [H(2)]: Total marks 3/10

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

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.

Commented [H(6): Correct, 1 mark

Question 1.5

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.

Commented [H(7): Correct, 1 mark

Question 1.6

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.

Commented [H(8): Correct, 1 mark

- (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)

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

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]

Question 2.1 (2 marks)

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

[Under the voluntary petition for bankruptcy, the insolvency of corporation is not a mandatory criteria for filing of petition. Further, a number of schedules (list of assets and creditors, etc) are to be filed with voluntary petition, however even if they are absent, a naked petition is sufficient to invoke the automatic stay and commence a case under the Bankruptcy Code. However, the petition can be dismissed if it has been filed for an improper purpose.

Involuntary bankruptcy proceedings can be commenced against eligible debtors either under chapter 7 or chapter 11. Further, the filing of the petition is dependent on the petitioning creditors, i.e., if it has more than 12 creditors, then atleast three qualifying creditors must join in the petition, and if it has less than 12 creditors, then only one is required to file an involuntary petition.

Also, to qualify as a petitioning creditor, the creditor must have a claim against the debtor that is non- contingent and not the subject of bona fide dispute as to liability or amount. Further, unlike the voluntary petition (requiring no allegation of insolvency), the involuntary petition form mandates that the petitioning creditors must allege that the dues are not being paid by the debtor.]

Commented [H(13)]: Total marks 6/10

Commented [H(14)]: Total marks 1/2

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

Commented [H(16)]: By contrast, a voluntary petition is filed by the debtor

Question 2.2 (2 marks)

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

[Any action taken which is in violation of the automatic stay has consequences attached to it. An act against the automatic stay would be considered as contempt of court and would be considered as void or voidable. Further, if relief is not obtained, it may also result in sanctions against the stay violator including the payment of debtors' attorneys' fees. Actions should also be taken to undo the effects of its violations.]

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

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

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

Question 2.3 (3 marks)

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 considered as "impaired" whose contractual rights are to be modified, i.e., the legal equitable or contractual rights are altered or who would be paid less than the value of the claims under the proposed plan. Only one consenting impaired class is required for the approval of the plan and it would be sufficient to invoke the cramdown of all other dissenting creditors.]

[The holder of an impaired claim is not entitled to vote on a proposed plan of reorganisation when the impaired class is an insider and thereafter the plan would not be deemed to have been accepted.]

Commented [H(20)]: Total marks 1/3

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

Commented [H(22)]: A class that will receive nothing under the plan cannot vote and is deemed to reject the plan.

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?

[Transfer made on account of antecedent debt- Preference.]

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

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

(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 conveyance]

Commented [H(25)]: Incorrect, the correct response is preference. A constructive fraudulent conveyance may be proven without the debtor having been insolvent at the time.

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

[Actual fraudulent conveyance]

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

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

Commented [H(27)]: Total marks 11/15

Question 3.1 (3 marks)

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

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

[In *Stern v Marshall*, the US Supreme Court shocked the bankruptcy practitioners by stating that even in core proceedings, a final order cannot be issued by the bankruptcy courts that would be against Article III jurisdiction.]

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

In the aforementioned case, a bankruptcy claim was filed against the debtor and the debtor filed a counterclaim. Simultaneously, the issues related to counter claim were the subject of separate state court proceedings. As per the US laws, a parallel proceeding is permitted in state and federal courts and the first judgment passed would be binding on the parties. The judgment was passed by the bankruptcy court first awarding USD 400 million to the debtor, however, the state court case was still continuing while the bankruptcy court judgment was appealed to the district court. The district court judgment affirmed the bankruptcy court's

decision, however, the state court's verdict was passed before in favor of the claimant. Finally, the US Supreme Court held that the bankruptcy court's final order over a state law court was unconstitutional under article III, even though the law provides that a counterclaim is a core proceeding as to which a bankruptcy court can issue a final order. Hence, the verdict given by the jury was the first final judgment and was conclusive of the issues. Thus, Stern v Marshall changed the law of bankruptcy court jurisdiction and the authority to enter the final order.]

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

Commented [H(31)]: A bankruptcy court can enter a final order on a challenge to a petition or with the consent of the parties.

Commented [H(32)]: Total marks 2/3

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?

[Under the chapter 15 proceedings, the proceedings are commenced when a petition is filed by the foreign representative of the debtor, i.e., the debtor cannot be placed involuntary by the creditor filing under chapter 15.

- The provisions of bankruptcy code, with regard to automatic stay, may not be invoked by a foreign representative in a chapter 15 proceeding. The filing of the petition does not automatically invoke the stay of creditor action. Also, it is limited to the property of the debtor within the territorial jurisdiction of the United States. **The stay is granted only when the petition for the recognition of the foreign main proceedings is allowed.**
- Further, Chapter 15 also does not provides the rights granted to foreign representatives for using the avoidance powers as provided by the bankruptcy code. **However, the foreign representative can choose to initiate a plenary proceeding after the recognition of the foreign proceeding under chapter 15 under bankruptcy code.** Also, the foreign representative can commence plenary proceedings for obtaining access to bankruptcy code's avoiding powers where reliefs granted under other laws are unsatisfactory.]

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

Commented [H(34)]: Correct, 1 mark, or the foreign representative may pursue claims under foreign or non-bankruptcy US law

Commented [H(35)]: Total marks 4/4

Question 3.3 (4 marks)

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 resolves only some issues or claims whereas Final orders disposes all the issues leaving nothing to be resolved under the US non-bankruptcy procedure. Interlocutory orders can be appealed only with the leave of the appellate court whereas the final order may be appealed as of right. Under the bankruptcy proceedings, the same framework is applicable except for the orders extending the period of exclusivity to propose a plan which are appealable as of right. The distinction between the interlocutory and final order can be a difficult since the court resolves not simply the claims between the two parties but an issue of broad applicability, such as the post-petition interest rate applicable to the debtor's obligation. Also, an order can be constitutionally final cannot be considered as final for the purpose of appeal if it does not resolve the entire issue in dispute. Similarly, an order that resolves an entire dispute would be final for the purpose of appeal, but the same would not be considered as final constitutionally if the parties had not consented to bankruptcy court's jurisdiction.

In general, appeals from the bankruptcy court decisions are heard by the district court for the district in which they are situated, however, in certain appeals, the bankruptcy appeals are heard by Bankruptcy Appellate Panel (BAP) comprising of judges of bankruptcy court within the circuit. In some circumstance, an appeal from the bankruptcy court goes directly to the court of appeal and the court of appeal has discretion to accept the case.]

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

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

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

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

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

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

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?

[The directors' liability in US is more limited than anywhere else. The directors of Delaware corporations owe a **fiduciary duty of loyalty to corporation's best interest and duty of care in the decision making process** but are protected from the liability for errors of judgment by the business judgment rule. The directors are presumed to have acted in good faith on the basis of the reasonable information under the business judgment rule. Under the following conditions the presumption can be rebutted, i.e., by showing that the majority of the board were not reasonably informed, did not honestly believe that the decision was in the corporation's best interest or they were not acting in good faith. Unless the presumption is rebutted, the directors would not be liable in the absence of gross negligence. In the ordinary course of business, **the duties is to safeguard the interest of the creditors as a whole and the interest of the equity holders may not be preferred.** In circumstances where the corporation is potentially or actually insolvent, **the directors' duties are owed to the corporation and its shareholders and not to its creditors, and therefore, the shareholders would not receive anything in case of bankruptcy.** It has been further clarified by the Delaware Supreme court that no duties are owed by the directors to its creditors when the company is insolvent or is operating in the zone of insolvency. Hence, the duties are towards the corporation and its shareholders and not to the creditors.]

Commented [H(42): Total marks 3/5

Commented [H(43): Correct, 1 mark

Commented [H(44): Correct, 1 mark

Commented [H(45): Incorrect, the statement below regarding the position in insolvency is correct when the company is solvent as well.

Commented [H(46): Correct, 1 mark

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.

[As per the aforementioned facts, **the casino is situated within the territorial jurisdiction of the United States, thus, the petition for recognition of foreign main proceeding, if granted would invoke the stay of creditor actions.**

For the purpose of recognition, it is not mandatory for a foreign proceeding to resemble US bankruptcy case. A foreign proceeding is defined under the Bankruptcy Code as "a collective judicial or administrative proceeding in a foreign country....under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation. As per the abovementioned definition, proceedings as diverse as English Schemes of arrangement, Australian creditor- appointed receivers amongst others were granted arrangement. Hence, the English Scheme of arrangement could be granted recognition under the US chapter 15 as a foreign main proceedings."]

Commented [H(47): Total marks 0/15

Commented [H(48): Total marks 0/4

Commented [H(49): True, but was looking for you to analyze the COMI of the company (likely Greece on the facts here), so therefore foreign main recognition is not available. Foreign non-main is appropriate because the debtor has an establishment (a casino) in the jurisdiction of the English proceedings.

Question 4.2 [5 marks]

Commented [H(50): Total marks 0/5

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?

[Venue would be proper for all the members of the group in any of Delaware, Texas, Philippines, Houston as long as the first petition filed in a given jurisdiction is on behalf of the entity incorporated, headquartered or having its principal assets in that jurisdiction. Filing in Delaware where the venue is proper only on the basis of incorporation of one entity can attract a motion by the creditors for transfer of venue to a jurisdiction with a greater connection to the assets of the estates and the creditors as a whole.]

Commented [H(51): This question is about the application of the automatic stay to each of these proceedings, not venue.

Question 4.3 [6 marks]

Commented [H(52): Total marks 0/6

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?

[Type your answer here]

*** End of Assessment ***