



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 32/50

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

Commented [H(2)]: Total marks 7/10

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

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)]: Correct, 1 mark

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)

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]

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

Question 2.1 (2 marks)

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

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

A voluntary petition doesn't require allegations that the entity is insolvent. However, an involuntary petition required a petitioning creditor to allege that debts are not being paid as they fall due.

Debtors in an involuntary petition remain in control of the business and may continue to operate.

Commented [H(15)]: Correct, 1 mark, whereas a voluntary petition is filed by the debtor itself

Question 2.2 (2 marks)

Commented [H(16)]: Total marks 1/2

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

Suppose relief from a stay is not obtained. In that case, this can lead to contempt sanctions against the stay violator, including paying debtors' attorneys' fees, and the violator has to take steps to undo the violation.

If the court does not believe that the violator or the stay will not act promptly to undo the violation, the court can impose coercive contempt sanctions, including fines to be paid to the court until the violation is undone.

Commented [H(17)]: Correct, 1 mark, also the act is void or voidable

Question 2.3 (3 marks)

Commented [H(18)]: 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 considered impaired if the terms are changed negatively. i.e. the creditor is getting less than 100% of their claim.

A holder is not entitled to vote if they are insiders; their votes will be disregarded unless there is no impaired class. A plan will be crammed down for the dissenting impaired classes for it to be improved.

Commented [H(19)]: Correct, 1 mark, any change in legal, equitable or contractual rights suffices

Commented [H(20)]: Impaired classes that receive nothing under the plan are not entitled to vote and are 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?

Preference claim as the debtor is paying a pre-existing debt.

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

Preferences claim when the debtor is presumed or proven to be insolvent at the transfer.

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

Actual fraudulent conveyances where the debtor frustrated creditors' recoveries.

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?

In *Stern v Marshall*, a claim in the bankruptcy court and state court was filed. The bankruptcy court issued its judgement; first, this judgement was appealed to the district court. The state jury verdict issued second. The US Supreme Court held the bankruptcy court's ruling as the final order over state law; the jury verdict was the final judgment.

Subsequently, the US Supreme Court ruled because the district courts have jurisdiction to adjudicate a petition commencing bankruptcy, a bankruptcy court may use the district court's authority to enter a final order to challenge the validity of a petition.

The US Supreme Court has held that bankruptcy courts can determine core proceedings where they do not have constitutional authority by issuing a report and recommendations for a review by the district court, similar to a non-core proceeding.

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?

A foreign representative may not involve the use of avoidance powers in chapter 15. A foreign representative may only use avoidance powers in chapter 7 or chapter 11.

A foreign representative can obtain avoidance powers if the proceedings were commenced before a foreign representative's involvement, or the foreign representative may choose to commence a plenary proceeding after the recognition of chapter 15.

You can request approval for 363 sale.

Question 3.3 (4 marks)

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

Commented [H(22)]: Correct, 1 mark

Commented [H(23)]: Correct, 1 mark

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

Commented [H(25)]: Total marks 11/15

Commented [H(26)]: Total marks 1.5/3

Commented [H(27)]: Correct, 1/2 mark, they also can enter final orders where the parties consent

Commented [H(28)]: Correct, 1 mark, whereas prior to the decision bankruptcy courts had jurisdiction to enter final orders in core proceedings

Commented [H(29)]: Total marks 2/3

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

Commented [H(31)]: Correct, 1 mark, they also may make claims under analogous foreign or non-bankruptcy US law

Commented [H(32)]: Total marks 2.5/4

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?

A final order deals with all issues and leaves nothing further to be decided. An interlocutory resolves only some of the issues.

Commented [H(33)]: Correct, 1/2 mark

A final order can be appealed as a result, whereas an interlocutory order can only be appealed with leave.

Commented [H(34)]: Correct, 1/2 mark

Bankruptcy appeals are heard by a Bankruptcy Appellate Panel, made up of the judges of the bankruptcy courts in the circuit. A party can also choose to have the case heard in the district court. After the district court, the circuit court is the next court of appeal.

Commented [H(35)]: Correct, 1/2 mark

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

In rare circumstances, appeals from the bankruptcy court can go to the court of appeal where it is stated that: (a) the appeal raises questions of law (b) immediate appeal may materially progress the case.

Commented [H(37)]: Partially correct, 1/2 mark, this is only available in some circuits

Question 3.4 (5 marks)

Commented [H(38)]: 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?

Directors have a fiduciary duty of loyalty to the Company's best interest and a responsibility to make educated decisions.

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

Directors are protected under the business judgement rule for errors of judgement. This can only be rebutted by evidence that most of the board's directors were reasonably informed and that a decision was not in the Company's best interest, and the directors were not acting in good faith. For this reason, unless presumed otherwise, a director will not be liable without evidence of negligence.

Furthermore, a company's certificate of incorporation may exclude directors from liability for breach of duty of care; however, not a breach of loyalty.

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

The Directors' duties are to the Company and the Company's shareholders, opposed to creditors.

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

Even in potentially insolvent liquidation, the directors do not have a duty to creditors. There is no equivalent to "wrongful trading" or "deepening insolvency" under US law.

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

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

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

Commented [H(44)]: Total marks 8/15

Question 4.1 [4 marks]

Commented [H(45)]: Total marks 1/4

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.

Gambling Corporation could file an English scheme of arrangement and could be granted recognition under US chapter 15.

The requirements for chapter 15 are minimal; the foreign representative must establish that an administrative proceeding is pending and that the foreign representative is allowed to act in the proceeding.

Foreign proceedings such as an English scheme of arrangement can be granted recognition.

The location of the COMI would be determined as follows:

Creditors: the creditors appear to be in England. Given the limited information we could assume that the creditors believe that the location of the company is in England.

Assets: the assets are all over the world as the casinos are all over the world.

Incorporation: the company was incorporated in Greece

Management: Assuming that management are based in England due to the choice of an English scheme of arrangement.

Headquarters: Assuming the headquarters are in England as management are in England.

Jurisdiction : The jurisdiction would be considered to be England.

The scheme of arrangement would be considered a foreign main as the proceedings have been commenced outside as England is the COMI given the facts above. It is noted that the country of incorporation is not always the COMI.

Commented [H(46): Note that the principal place of business is said to be in Greece. More likely a scheme of arrangement would have been selected because the bonds are governed by English law

Commented [H(47): Correct, 1 mark, if COMI was in England, however, if COMI is Greece, recognition as non-main is appropriate because the casino in London qualifies as an establishment

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?

Commented [H(48): Total marks 3/5

A Chapter 11 is a US restructuring; after filing a Chapter 11, there is a worldwide stay on proceedings against the debtor. The following would be the impact in each of the situations:

Commented [H(49): Correct, 1 mark

ShipCo. Would be unable to continue with the breach of contract lawsuit as upon filing the Chapter 11, there would be a worldwide stay on any proceedings against the debtor.

Commented [H(50): Correct, 1 mark

The US Department of Justice would be allowed to continue its investigations. In accordance with Chapter 11, proceedings not stayed include proceedings by government agencies to enforce police or regulatory powers.

Commented [H(51): Correct, 1 mark

USA Bank's position would need to be reviewed and ensure that the Chapter 11 does not affect the property's value. A secured creditor must be offered adequate protection such as interest payments or alternative assets as collateral. 363 Sale

Commented [H(52): USA Bank would not be able to foreclose because the worldwide stay would apply to the property in the Philippines

The rent is considered an administrative priority expense incurred in the ordinary course of operating the business. The expense will be granted an administrative priority expense that will be paid.

Commented [H(53): The landlord could not evict because the lease did not expire before bankruptcy

Question 4.3 [6 marks]

Commented [H(54): Total marks 4/6

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?

(i) assume and assign the trademark license

Not achievable Plastic Corp would require consent to assume and assign the trademark licence. Per the case Trump Entertainment Resorts, Inc, 526 BR116 Federal trademark law generally bans assignment of trademark licenses absent the licensor's consent.

Commented [H(55): Correct, 1 mark

Commented [H(56): Correct, 1 mark

Plastic Corp would not require the consent of the Bank; the assumption and assignment of the trademark licence would not impact the lien on the facility to USA Bank for the secured loan.

(ii) reject the patent licenses, so the purchaser has the exclusive right to use the patents

Not achievable Oil Corp would require Plastic Corps consent the licensees of patents and copyrights owned by the debtors are protected, and licenses may not be terminated in connection with the sale of the intellectual property without their consent.

Commented [H(57): Correct, 1 mark

Commented [H(58): Correct, 1 mark

Oil would not have to tell USA Bank or require their consent.

(iii) sell the manufacturing facility free and clear of the USA lien

Is achievable Plastic Corp would not be required to consent to the sale however, the USA Bank would have to as they have a lien on the facility.

Commented [H(59): Incorrect, if the value of the property exceeds the lien or other circumstances are present, consent of the secured party is not required and the lien applies to the proceeds of the sale

*** End of Assessment ***