



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

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

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

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

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

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.

Commented [H(1)]: Total marks 24.5/50 (Course Leader: mark adjusted to 50%)

Commented [H(2)]: Total marks 6/10

Commented [H(3)]: Incorrect, the leased equipment could give rise to a claim in the bankruptcy. The correct answer is (d)

Commented [H(4)]: Correct, 1 mark

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

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

QUESTION 2 (direct questions) [10 marks]

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

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 requires no allegation of insolvency. On the other hand, an involuntary petition demands that the petitioning creditors to indicate that the debtor is unable to pay its debts as and when they fall due.

A debtor in an involuntary petition will still be in control of the business and may conduct the usual transactions and practises of business.

A voluntary proceeding may be filed by a debtor by filing a petition under any applicable chapter. In contrast, creditors may commence an involuntary proceeding against a debtor under chapters 7 or 11. The number of creditors required to initiate the action will depend on some factors. Should it be the case that the creditors are less than twelve, only one creditor is required to file the petition. Alternatively if the creditors are more than twelve then three creditors must initiate the process.]

Commented [H(15): Correct, 1 mark

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?

[Any action taken in violation of an automatic stay will be deemed to be contempt of the court. Two potential consequences flowing from such a violation are;

1. The action or actions deemed to have violated the automatic stay will be regarded as void or voidable. Whether the action is void or voidable will depend on the circuit in which the bankruptcy proceeding is pending.
2. [The violator will pay the Attorney fees of the debtor and the violator will need to take steps to remedy the violation.]

Commented [H(18): Correct, 1 mark

Commented [H(19): Correct, 1 mark, this is a possibility as sanctions for contempt

Question 2.3 (3 marks)

Commented [H(20): Total marks 0/3

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 to be impaired if the class of creditors approve a plan which changes their legal and equitable or contractual rights to the claim. In summary, a claim is impaired if the class of creditors change changes the initial debt terms.

[Generally a holder of an impaired claim is not entitled to vote on the plan.]

Commented [H(21): Incorrect, impairment is defined by the proposed plan, whether or not the class approves of its treatment.

Commented [H(22): Incorrect, only impaired claims may vote, but claims that will receive nothing under the plan do not vote and are deemed to reject the plan.

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

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: This arises on account of an antecedent debt owed by the debtor prior to the transfer.

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: For purposes of establishing this, a debtor is presumed to be insolvent at the time of the transfer.]

Commented [H(25): Incorrect, the correct response is preference and the presumption of insolvency is applicable only to preferences.

(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 9.5/15

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?

[Prior to the holding in the Stern v Marshall Case (Marshall Case), the jurisdiction of a bankruptcy court was quite clear. The bankruptcy court was seized with jurisdiction to determine issues presented in core proceedings. The Court could therefore make final orders as it relates to issues before it. This position was changed in the cited case.

Commented [H(29): Correct, 1 mark

In the Marshall case, the Court struck down the jurisdictional provisions given a bankruptcy court as unconstitutional as the said court did not fall within the courts in Article III of the US Constitution. In the case it was held that the bankruptcy court did not have the jurisdiction to give final judgement on a state law counterclaim that was not resolved.

Commented [H(30): Correct, 1 mark, following the decision bankruptcy courts may enter final orders on challenges to petitions and where the parties consent

This is a shift from the established position that dwelt much on core and non-core issues. The bankruptcy court before the Marshall case had the authority to make final orders in core proceedings.]

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 petition filed by the foreign representative of a debtor does not automatically invoke a stay of creditor's action against the said debtor. The stay will come about after the petition for recognition of a foreign main proceeding had been determined and recognised by the enacting state. The stay granted will only apply to properties owned by the debtor in the enacting state.

The Court of the enacting state may however, allow a stay or provide interim assistance pending recognition of a foreign main proceeding or following recognition of a non-main proceeding. The test for establishing whether or not an interim relief is required under the circumstances are; the likelihood of success, whether there are risks of irreparable harm should the interim order be made, whether on the balance of probabilities it is fair to grant the interim relief and whether it infringes on any public interest issues.]

Commented [H(31)]: Total marks 0/3

Commented [H(32)]: The foreign representative in a chapter 15 cannot invoke the transaction avoidance provisions, unless it commences a plenary proceeding or pursues claims under analogous foreign or non-bankruptcy US law

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?

[An interlocutory order, is given by the court seized with jurisdiction to determine some aspect of the issues or claim before the court. This order does not resolve all the issues at hand but rather made to dispose of a particular issue. A final order on the other hand, is made by a court to dispose of all the issues before the court. Orders of this nature may be appealed against with the leave of the appellate Court.

Once a final order is made on the matter the issues as resolved are final unless otherwise appealed. An appeal emanating from a final order is of right and does not require the leave of the appellate court before the order is appealed.

The district court in the district do hear appeals from the bankruptcy court. However, some circuits have elected to have Bankruptcy Appellate Panel hear appeals from the Bankruptcy courts. These Bankruptcy Appellate Panels are made up of the judges of the bankruptcy courts in the circuit.

In sum, though the district court within the district is seized with an appeal from a bankruptcy court, depending on the circuit within which the order was made, the appeal may be ripe before a Bankruptcy Appellate Panel.]

Commented [H(33)]: Total marks 3.5/4

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

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

Commented [H(36)]: Correct, 1/2 mark, whereas leave is required for interlocutory orders

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

Commented [H(38)]: 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 fiduciary duties of Delaware Corporation are the Directors loyalty to the corporation, their duty of care in taking decisions and obedience. The directors must therefore act in good faith when handling its obligations towards the Corporation.

Commented [H(39)]: Total marks 4/5

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

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

The duties outlined are owed to the corporation and its shareholders and not the creditors of the corporation.

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

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

Commented [H(44)]: Correct, but specifically address that this is in both ordinary course and in the "zone of insolvency"

During the ordinary course of business the Directors owe the corporation the duty to always act in the best interest of the corporation and duty of care in taking decisions in the ordinary course of the business of the corporation]

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

Commented [H(45)]: Total marks 3/15

Question 4.1 [4 marks]

Commented [H(46)]: Total marks 3/4

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.

[The English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main proceeding or foreign non-main proceeding based on some presumptions which are rebuttable. In the US, an answer to this is based on when the petition for recognition was filed in the US.

The importance of determining the type of proceeding is necessary for the purposes of recognition as this will inform the type of reliefs available.

A chapter 15 proceeding is initiated by filing a petition by the foreign representative of the debtor.

Essentially, a foreign main proceeding is a proceeding initiated in the debtor's (in this case the Company) centre of main interests (COMI). A foreign non main proceeding on the other hand is determined as such if the court in the enacting state decides that the debtor only has an establishment in the foreign court in which the proceeding was initiated.

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

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

Although the COMI concept is unknown under US law, the Court usually uses indices such as; domiciliation, principal place of business and location of the assets to determine the type of proceeding. Like the COMI concept the definition of "establishment" is as derived from the Model Law.

Considering that the debtor is a Company, there is a presumption that the debtor's COMI is the place of incorporation. The presumption is not cast in stone and can be rebutted with evidence. This therefore implies that, there is a presumption that the place of incorporation and registered office of a debtor is presumed to be the debtor's COMI for the purpose of recognising the foreign proceeding in the enacting state.

From the facts, the Company in question is incorporated in Greece. Unless the presumption is rebutted, the court will hold that the Company's COMI is Greece.

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

However per the Bear Sterns case, it is possible that the US court will determine the issue of COMI on the basis on when the petition for recognition was initiated in the court in the enacting state. So to determine the COMI, the status of the debtor i.e where it is incorporated, location of primary assets, registered address etc. will be used as the basis for determining whether

the foreign proceeding before the court is one termed as a foreign main proceeding or foreign non main proceeding.

Also, from the facts, it is also the case that the Company's bonds are governed by English law. The enacting state on the facts can determine that the foreign proceeding is a foreign non main proceeding if prior to the commencement of the chapter 15 proceedings it can be established that though the Company was incorporated in Greece and has its registered address in Greece, the debtor carries out only non-transitory economic activities in Greece then the foreign proceeding is a foreign non-main proceeding.

In summary, the English scheme of arrangement can be recognised as a foreign main proceeding or foreign non-main proceeding depending the evidence adduced in the US court on the date of filing the recognition application.]

Commented [H(50): Incorrect, the question is whether there is an establishment in England, where the scheme of arrangement is being heard.

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?

[Type your answer here]

Commented [H(51): Total marks 0/5

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 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]

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

*** End of Assessment ***