



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 34.5/50

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

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

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)]: 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)]: Correct, 1 mark

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

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

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

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

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

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

Question 1.9

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

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

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

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

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

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

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

Question 1.10

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

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

Commented [H(12): Correct, 1 mark

QUESTION 2 (direct questions) [10 marks]

Commented [H(13): Total marks 5.5/10

Question 2.1 (2 marks)

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

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

[Whilst a voluntary petition for bankruptcy is filled by the company/debtor itself, an involuntary petition for bankruptcy is filled by some of the debtor's creditors.]

Commented [H(15): Correct, 1 mark

Commented [H(16): Correct, 1 mark

Since the involuntary petition for bankruptcy is not "common", for the petition to be filled it is necessary a bigger number of petitioners/creditors. If the Company has fewer than 12 non-contingent and non-insider creditors, only one is required to file the involuntary petition; if the debtor has 12 or more of non-contingent and non-insider creditors, at least three qualifying creditors must join to file the petition.]

Question 2.2 (2 marks)

Commented [H(17): Total marks 1/2

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

[Amongst two of the potential consequences of a violation of the automatic stay it is relevant to point out the (i) imposition of a sanction determining and condemning the violator to pay the debtor's attorney's fees; and (ii) requiring the violator to take affirmative acts to undo the effects caused by the violation.]

Commented [H(18): Correct, 1 mark

Commented [H(19): In addition, the act violating the stay is void or voidable, depending on the circuit in which the bankruptcy court sits

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 considered to be impaired if the debtor foresees in its judicial reorganization plan, a change in the original debt terms in a negative way, such as reducing the interest rate or lengthening the pay-out period.]

Commented [H(21): Correct, 1 mark, any change to the creditor's contractual, legal or equitable rights constitutes impairment

The creditor that holds an impaired claim is not entitled to vote on a proposed plan of reorganization when the creditor is an insider of the debtor. In this scenario, in case de judicial reorganization plan is approved by the voting creditors, and confirmed by the court, the plan becomes enforceable over the creditor not entitled to vote.

Commented [H(22): Incorrect, insiders may vote, but an insider class may not be the sole consenting class in a cramdown. A class that will receive nothing may not vote and is deemed to reject the plan.

Question 2.4 (3 marks)

Commented [H(23): Total marks 1.5/3

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?

[The trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defences avoid any transfer of an interest of the debtor in property for or on account of an antecedent debt owed by the debtor before such transfer was made.]

Commented [H(24): Partially correct, 1/2 mark, this is the statutory authorization for avoidance of preferences, but was looking for you to specifically say this was a preference claim

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

[The constructive fraudulent conveyance requires proof that debtor was presumably or proven to have been insolvent at the time of the transfer, as well as showing that the debtor received less than reasonably equivalent value in exchange for the operation.]

Commented [H(25): Incorrect, only a preference requires insolvency at the time of transfer. It is possible to establish a constructive fraudulent transfer even if the debtor was not insolvent at the time.

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

[The actual fraudulent conveyance is proven by showing that the debtor made a transfer or incurred an obligation with the intention to hinder, delay or defraud any entity to which the debtor became indebted.]

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?

[The *Stern v Marshall* case, from 2011, was ruled by the US Supreme Court in the sense that, even when it came to core proceedings, a bankruptcy court could not issue final orders that invade the provisions of Article III jurisdiction.]

Commented [H(29): Correct, 1 mark

Therefore, the decision stated that the US Supreme Court held that the bankruptcy court's issue of a final order over a state law claim was unconstitutional under Article III.

This decision changed the bankruptcy scenario in the US, complicating the area even more, since the US Supreme Court has held that bankruptcy judges may determine a core proceeding over which they lack constitutional authority by issuing a report and recommendation for review by the district court.

The same procedure as in non-core proceedings, or, with the consent of the parties, may issue final orders.]

Commented [H(30): Correct, 1 mark; the bankruptcy court can also issue final orders on challenges to a petition.

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?

[According to the Chapter 15 regulations, foreseen in the bankruptcy law adopted in the US, foreign representatives are excluded the right to use avoidance powers provided by the Bankruptcy Law (that can be applied in the insolvency proceedings commenced in the United States.

The foreign representative can obtain equivalent relief by (i) invoking the avoidance powers in a plenary proceeding to obtain access to the Bankruptcy Code's avoiding powers, where relief under applicable law is unsatisfactory; and (ii) the foreign representative file a request to relief before the US Court.]

Commented [H(31): Total marks 2/3

Commented [H(32): Correct, 1 mark

Commented [H(33): Correct, 1 mark

Commented [H(34): Incorrect, the foreign rep may pursue analogous claims under foreign or non-bankruptcy US law

Commented [H(35): Total marks 2/4

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?

[Final orders are those that dispose of all issues, leaving nothing further to be decide. Final orders may be appealed as of right.]

Meanwhile, an interlocutory order resolves only some issues or some claims that arises from the insolvency proceeding. This kind of decision may be appealed only with leave of the appellate court.]

As for which courts hear direct appeals from bankruptcy court orders, the Court of Appeal has the jurisdiction over those cases/appeals.]

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): Incorrect, in most cases direct appeals from a bankruptcy court go either to the district court or to a Bankruptcy Appellate Panel, if the circuit has one. Only in rare cases where leave is granted does an appeal go directly to the circuit court.

Commented [H(41): 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?

[According to the Delaware law, directors have the fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision making. Those duties are, in a "normal" scenario in which the company is not undergoing an insolvency proceeding, owed before the company itself, its shareholders, and its activities.

As for when the corporation is potentially or actually insolvent, the Delaware Supreme Court has already discussed and decides the topic that arose, pledging that director owed duties to creditors when a company is potentially or actually insolvent.

For US Law, the fiduciary duties of the directors are owed, both when the company's operation is normal, or is potentially/already insolvent, to the company and its shareholders, and not to the creditors, in any scenario/occasion.]

Commented [H(42): Correct, 1 mark

Commented [H(43): Correct, 1 mark

Commented [H(44): Correct, 1 mark

Commented [H(45): Correct, 1 mark

Commented [H(46): Correct, 1 mark. To be clear, this is the position under Delaware law, not US law specifically, but most US corporations are incorporated in Delaware.

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

Commented [H(47): Total marks 8/15

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.

[Yes. The English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding taking into consideration that there US law does not have a reciprocity treatment required, meaning that US courts will recognize proceeding in countries that would not recognize US proceeding.]

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

Commented [H(49): True, but was looking for you to discuss where COMI is (Greece from the facts provided), that this means foreign main is not appropriate, but foreign non-main is appropriate because the casino in London is an establishment in the jurisdiction of the foreign proceeding

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?

[The effects would be the following:

First situation (ShipCo, one of its key customers, has filed a breach of contract lawsuit in Texas): After Oil Corp files its Chapter 11 petition, the Company will have recognized, automatically, its stay period, that will prohibit, amongst other things, the enforcement of pre-petition judgment against the debtor. Therefore, even if ShipCo ends up winning the lawsuit, ShipCo won't be able to enforce the judgement.

Commented [H(50): Total marks 4.5/5

Commented [H(51): Correct, 1 mark

Commented [H(52): Partially correct, 1/2 mark, the automatic stay would stop the litigation entirely, but if the stay were lifted to let it proceed, the judgment could not be enforced outside the bankruptcy

Second situation (the US Department of Justice is investigating whether Oil Corp illegally purchased oil from countries subject to US sanctions): the investigation can go on considering that, even with the filling of the Chapter 11 and the automatic stay that will be granted to Oil Corp, criminal proceeding is one of the statutory exceptions to which the automatic stay is subject to.

Commented [H(53): Correct, 1 mark

Third situation (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): As well as it happens in the first situation that Oil Corp is undergoing, the filling of a Chapter 11 is followed by an automatic stay. The automatic stay specifically prohibits any action to be taken in order to obtain possession or control of property of the State.

Specifically in this case, it is important that the bank does not forecloses one of Oil Corp's refineries, taking into account that the asset is vital for the maintenance of Oil Corp operation and, the main objective of the Chapter 11 proceeding is to maintain the Company's operation.

Commented [H(54): Correct, 1 mark, even though the factory is in the Philippines, it is covered by the worldwide stay

Fourth situation (Oil Corp has forgotten to pay rent on its Houston, Texas office space and its landlord is threatening to evict it): As well as it happens in the first and third situation that Oil Corp is undergoing, the filling of a Chapter 11 is followed by an automatic stay. That being said and, considering that one of the conditions for the Chapter 11 to be maintained (and the procedure not to be transformed into a Chapter 7 proceeding) is that the Company's activities to be maintained.

That being said and, considering the prohibition, imposed by the automatic stay, upon the creation, perfection or enforcement of a lien against property of the estate on account of a pre-petition claim, as well as the prohibition of any act to be made to obtain possession or control of the property of the estate, **the landlord is prohibited to evict Oil Corp out of the real estate.**]

Commented [H(55): Correct, 1 mark. The landlord could evict if the lease had expired before the bankruptcy, but that does not appear in the facts here.

Question 4.3 [6 marks]

Commented [H(56): Total marks 3.5/6

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

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

[As for if Oil Corp can assume and assign the trademark license, **the US Bankruptcy Law foresees those trademarks licenses are not assignable if absent the licensor consent.** Therefore, **Oil Corp could not sell the trademark license without Plastic Corp consent.**

Commented [H(57): Partially correct, 1/2 mark; the restriction on assignment is in US intellectual property law, not the Bankruptcy Code

[As for if Oil Corp can reject the patent licenses so the purchaser has the exclusive right to use the patents, after the Company files for the Chapter 11, the trustee or debtor in possession can terminate the contracts that they believe are not of interest of the Company. With that in mind, Oil Corp could reject the patent license.

Commented [H(58): Correct, 1 mark

Finally, when it comes to the possibility of Oil Corp to sell the manufacturing facility free and clear of the USA Bank lien, according to section 363 (f), **the asset can be sold free and clear without the creditor consent, where the value of the property exceeds the value of the interest.** In such circumstances, **the USA Bank credit will attach to the proceeds of the sale and will receive priority in distribution of the proceeds.]**

Commented [H(59): Incorrect, the Bankruptcy Code provides special treatment for licensees of patents, so the license could be terminated only with Plastic Corp's consent

Commented [H(60): Correct, 1 mark

Commented [H(61): Correct, 1 mark

*** End of Assessment ***