



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 34/50

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

QUESTION 2 (direct questions) [10 marks]

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

Question 2.1 (2 marks)

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

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

A voluntary petition is brought by the debtor. An involuntary petition is brought by a creditor of the debtor. Also, a voluntary petition requires no allegation of insolvency.

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?

The party in violation commits an act in contempt of court. Further, the act in violation is either void or voidable depending on the circuit that the act of bankruptcy is pending.

Commented [H(18): Correct, 1 mark

Commented [H(19): Correct, 1 mark

Question 2.3 (3 marks)

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

In what circumstances is a claim considered "impaired"? When is a holder of an impaired claim not entitled to vote on a proposed plan of reorganization and what happens instead?

A claim is considered impaired when the creditor receives less (or it is proposed that it is to receive less) than the full value of its claim. Where a holder of an impaired claim is an 'insider' (eg. a director of the debtor or an affiliate) they are not entitled to vote. Voting rests with the other creditors to either accept or reject the plan.

Commented [H(21): Correct, 1 mark, specifically if any legal, equitable or contract right is impaired

Commented [H(22): An impaired claim that will receive nothing under a plan is not entitled to vote and is deemed to reject

Question 2.4 (3 marks)

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

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?

A **preference** – where a payment is made to a creditor in respect of an antecedent debt where the payment is more than the creditor would have received in a liquidation. Preferences only arise where there is a pre-existing debt.

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?

A **constructive fraudulent conveyance**.

Commented [H(25): Incorrect, the correct response is preference

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

An **actual fraudulent conveyance**.

Commented [H(26): Correct, 1 mark

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

Commented [H(27): Total marks 10.5/15

Question 3.1 (3 marks)

Commented [H(28): Total marks 2.5/3

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

Generally, the bankruptcy court has authority to enter final orders in core proceedings. In *Stern v. Marshall* the US Supreme Court held that even in core proceedings a bankruptcy court cannot issue final orders that trespass on Article 3 of the US Constitution since the judges appointed to the bankruptcy court have not been appointed pursuant to Article 3. Amendments to the bankruptcy rules followed as have subsequent Supreme Court rulings such that now bankruptcy judges may determine a core proceeding over which they lack authority by issuing a report and recommendation which is passed to the district court for review or, alternatively, with the consent of the parties, final orders may be made.

Commented [H(29): Correct, 1 mark, this was the prior understanding of the law

Commented [H(30): Correct, 1 mark

Commented [H(31): Correct, 1/2 mark, and the bankruptcy court can issue a final order on a challenge to the petition

Question 3.2 (3 marks)

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

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?

Avoidance of preferences and fraudulent conveyances. The representative can get around this by commencing a plenary action after recognition has been granted to avoid pre-petition transactions.

Commented [H(33): Correct, 1 mark

Commented [H(34): Correct, 1 mark, or they can bring claims under analogous foreign or non-bankruptcy US law

Question 3.3 (4 marks)

Commented [H(35): Total marks 3.5/4

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?

Interlocutory orders are made during the course of proceedings and typically determine certain issues but not all. Final orders determine all issues. Final orders may be appealed as of right whereas interlocutory orders may only be appealed with the leave of the appellate court. Generally, appeals are heard in the district court for the district in which the bankruptcy court

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Commented [H(37): Correct, 1 mark

Commented [H(38): Correct, 1 mark

Commented [H(39): Correct, 1 mark

sits. Certain districts employ a Bankruptcy Appellate Panel to hear appeals instead of the district court. There also exists the possibility in certain limited cases to appeal directly to the circuit court of appeals.

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

Commented [H(41)]: Partially correct, 1/2 mark, the BAP is instituted on a circuit-wide basis, not in individual district courts

Question 3.4 (5 marks)

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

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 duties are owed to the corporation and its shareholders. Directors duties do not change to creditors and remain with the corporation and its shareholders in the event of potential or actual insolvency.

Commented [H(43)]: Specifically, the duties are of loyalty and care

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

Commented [H(45)]: Correct, 1 mark

Commented [H(46)]: Correct, 1 mark

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

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Question 4.1 [4 marks]

Commented [H(48)]: 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 definition of a foreign proceeding in the Bankruptcy Code is quite wide and English schemes of arrangement have been granted recognition in the past. With regard to the characterisation of the foreign proceedings as foreign main or foreign non-main, it is likely that they will be characterised as foreign non-main proceedings because such proceedings commenced in England would be outside of Gambling Corporation's centre of main interests (COMI), namely Greece. Greece is where the company is incorporated and has its principal place of business as such Gambling Corporation's COMI is Greece and not England. Gambling Corporation has an establishment in the US, namely Las Vegas, prior to commencing the intended proceedings in England. Therefore it is open to the bankruptcy court to recognise the English scheme of arrangement as a foreign non-main proceeding.

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

Commented [H(50)]: Correct, 1 mark

Commented [H(51)]: Incorrect, the relevant establishment is in the country where the foreign proceedings are pending, here the London casino

Question 4.2 [5 marks]

Commented [H(52)]: Total marks 4/5

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?

1. The proceedings by ShipCo will be stayed.

Commented [H(53)]: Correct, 1 mark, this would come into effect automatically on the filing of the petition

2. The stay does not apply to regulatory investigations and as such the US Department of Justice investigation may continue.
3. The asset will be protected but only if the petition is filed before the foreclosure takes place.
4. Eviction proceedings will be stayed.

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

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

Commented [H(56)]: Correct, 1 mark

Question 4.3 [6 marks]

Commented [H(57)]: Total marks 2.5/6

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?

- (i) No. Plastic Corp consent is required. Plastic Corp cannot be compelled to accept performance from a transferee.
- (ii) Yes it may reject the patent licence without the consent of Plastic Corp who then become a creditor.
- (iii) Yes it may do so in a 363 sale and sell free of the lien without the consent of USA Bank with court approval.

Commented [H(58)]: Correct, 1 mark

Commented [H(59)]: Correct, 1/2 mark, specifically this is due to trademark law

Commented [H(60)]: Incorrect, the licensee is protected by section 365(n) so its consent is required

Commented [H(61)]: Correct, 1 mark, the lien will then attach to the proceeds of the sale

*** End of Assessment ***