



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**.

Commented [DB1]: Please do me the courtesy of reading and complying with the instructions. If you do not, I have to do this! Thank you.

ANSWER ALL THE QUESTIONS

Commented [H(2)]: Total marks 26/50

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

Commented [H(3)]: Total marks 5/10

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(4)]: 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(5)]: 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(6)]: Incorrect, the correct response is (d)

In which of the following scenarios does a bankruptcy court have constitutional authority to issue a final order? Assume in each that the counterparty to the dispute has not consented to the bankruptcy court's exercise of jurisdiction.

- (a) A counterclaim against the estate that introduces a question under state law.
- (b) Since the list of core proceedings is non-exhaustive, a bankruptcy court may issue a final determination on any matter that comes before it.

- (c) A creditor's claim against an affiliate of the debtor that has guaranteed the debtor's obligation to the creditor
- (d) A debtor's motion to dismiss an involuntary bankruptcy petition.

(e) None of the above.

Question 1.4

Which of the following statements about "pre-packs" is **false**?

- (a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.
- (b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.
- (c) A pre-pack debtor may spend as little as a single day in bankruptcy.
- (d) The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.
- (e) Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.

Question 1.5

Which of the following statements regarding cramdowns is **true**?

- (a) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.
- (b) Because cramdowns do not require the consent of all classes, the plan of reorganization may not be fair and equitable to all impaired classes.
- (c) Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.
- (d) Class definition is rarely a battleground when a debtor tries to cramdown classes.
- (e) Dissenting creditors are not permitted to challenge the classification of a creditor supporting the cramdown.

Question 1.6

Which of the following statements about the plan exclusivity period is **true**?

- (a) The exclusivity period is 1 year.
- (b) The exclusivity period cannot be extended.
- (c) The exclusivity period cannot be shortened.

Commented [H(7): Incorrect, the correct answer is (a), the shortest pre-packs are less than 24 hours

Commented [H(8): Correct, 1 mark

Commented [H(9): Correct, 1 mark

(d) During the exclusivity period, only a creditor may propose a plan of reorganization.

(e) During the exclusivity period, only the debtor may propose a plan of reorganization.

Question 1.7

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

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

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).

Commented [H(10)]: Incorrect, if the foreign representative is not under the debtor's control, the chapter 15 may be filed without its consent; the correct response is (a)

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

Commented [H(12)]: Incorrect, the correct response is (e)

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 [H13]: Incorrect, the correct response is (e)

QUESTION 2 (direct questions) [10 marks]

Commented [H14]: Total marks 6.5/10

Question 2.1 (2 marks)

Commented [H15]: Total marks 2/2

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

A voluntary petition is a bankruptcy proceeding that is initiated by the debtor, while an involuntary petition is a bankruptcy proceeding that may be initiated by a creditor against an eligible debtor, whether natural person, estate, or corporation. An involuntary petition can only be executed under chapter 7 and 11 of the US Bankruptcy Code.

Commented [H16]: Correct, 1 mark

Commented [H17]: Correct, 1 mark

Question 2.2 (2 marks)

Commented [H18]: Total marks 1/2

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

A creditor who is deemed to have violated an automatic stay can be held in contempt of court and subject to contempt sanctions. These sanctions may include the requirement to pay legal expenses incurred by the debtor such as attorney's fees and may be needed to take affirmative actions to reverse the effect of the violation.

Commented [H19]: Correct, 1 mark, also the act is void or voidable depending on the circuit.

Question 2.3 (3 marks)

Commented [H20]: 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?

An impaired claim is any claim where the legal, equitable and contractual rights of creditor is compromised or altered, usually in a negative way, from the pre-petition agreements or terms. The increase in length of repayment period or reduction in the interest rate are examples of impairment. In some situations, a proposal may result in the reversal of the impairment to the creditors, for example if the proposal remedies any monetary default or damages. In such a scenario, the acceptance of the proposal plan would not require a vote from the impaired class of creditors.

Commented [H21]: Correct, 1 mark

Commented [H22]: An impaired class that will receive nothing under the plan is not entitled to vote and is deemed to reject the plan

Question 2.4 (3 marks)

Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:

(1) Which cause of action applies only to transfers made on account of antecedent debt?

A transaction carried out by a debtor to settle an antecedent or pre-petition debt with a creditor may be considered as a preference transfer. In determining whether there was preference, the insolvency practitioner will examine applicable non-bankruptcy to determine if the transfer was made while the debtor was insolvent, whether the transfer occurred within ninety days of the bankruptcy petition, as well as whether the value obtained by the creditor in exchange for the debtor's property would have been less in liquidation or chapter 7 bankruptcy.

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

A preference claim is one in which there is presumption or evidence to indicate that the debtor was insolvent at the time of the debtor's transfer of property or interest to the creditor. In such a scenario, the trustee is responsible for proving that debtor was indeed balance sheet insolvent at the time of the transaction.

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

A fraudulent conveyance is a transfer of debtor's property that occurred within two years of the bankruptcy petition, where the possible to establish that the debtor intentionally attempted to lengthen, obstruct, or defraud any creditor (personal or business) to which a debt was owed.

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?

The judgement of *Stern v Marshall* held that bankruptcy courts do not have the authority to adjudicate matters that fall under the purview of Article III of the Bankruptcy code, that is, matters that can only be properly determined by judges appointed under Article II who have the constitutional authority to hear those matters in court. Instead, bankruptcy courts can make submissions based on gathering of facts, preparing a report, and making a recommendation to the district court.

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?

Commented [H(23)]: Total marks 2.5/3

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

Commented [H(25)]: Correct, 1 mark

Commented [H(26)]: Partially correct, 1/2 mark, specifically an actual fraudulent conveyance

Commented [H(27)]: Total marks 6.5/15

Commented [H(28)]: Total marks 1/3

Commented [H(29)]: Correct, 1 mark. This changed the prior understanding that bankruptcy courts had jurisdiction to enter final orders on "core" proceedings. Now, a bankruptcy court can enter a final order on a challenge to a petition and with consent of the parties

Commented [H(30)]: Total marks 0/3

A foreign representative is prevented from filing a petition for an ancillary proceeding where the US has no jurisdiction. Instead, the foreign representative is allowed to provide assistance to the courts in which the foreign proceeding concerning to debtor is occurring.

Commented [H(31): The foreign representative cannot bring claims under the Bankruptcy Code's provisions for avoidance of preferences and fraudulent conveyances in chapter 15, but it can bring analogous claims under foreign or non-bankruptcy US law or under the bankruptcy code by commencing a plenary proceeding

Question 3.3 (4 marks)

Commented [H(32): Total marks .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?

An interlocutory order may be defined as a temporary order issued during a legal proceeding. Since these orders are not final in nature, they are rarely appeal. A final order is one that provide a resolution on some claim or issue, due to finality of such a judgement, appeals are more likely. For the purposes of bankruptcy courts, a final order would have to sufficiently address an entire issue in dispute and have the consent of parties to the jurisdiction of the bankruptcy court making the final order. Direct appeals from bankruptcy courts are heard by the Court of Appeals once certain conditions are met. The issues must relate at a question of law, it must be demonstrated the no controlling decision exist in case law from either the circuit court or the US Supreme Court. Secondly, it must be shown that immediate appeal would positively affect the progress of the case. Certification from both the bankruptcy both and the circuit court as to these conditions being met is also necessary.

Commented [H(33): Incorrect, an interlocutory order resolves some, but not all, issues in a proceeding and appeal requires permission of the court of appeal

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

Commented [H(35): This may be true, but the important thing is that parties can appeal final orders without needing permission of the court of appeals

Commented [H(36): Incorrect, the direct appeal is principally to the district court or the Bankruptcy Appellate Panel.

Question 3.4 (5 marks)

Commented [H(37): 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 for Delaware corporations are bound by the state law as it relates to incorporation. A director for a Delaware corporation has a fiduciary duty to of loyalty to act in the best interest of the corporation, a duty of care to make educated decision regarding the affairs of the business and exercise business judgment. They are not liable for errors made based on business judgement, as it is presumed that the director would have acted in good faith based on the available information at the time of the decision. These fiduciary duties are owed to the corporations and its shareholders in the normal course of business, no such duties are owed to creditors whether are not the business is potentially insolvent or insolvent. However, directors may be held liable for breaches in the duty of loyalty.

Commented [H(38): Correct, 1 mark

Commented [H(39): Correct, 1 mark

Commented [H(40): Correct, 1 mark

Commented [H(41): Correct, 1 mark

Commented [H(42): Correct, 1 mark

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

Commented [H(43): Total marks 8/15

Question 4.1 [4 marks]

Commented [H(44): Total marks 2/4

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.

US Chapter 15 bankruptcy is founded in the Model Law of Cross Border Insolvency. The model law allows for the recognition of a foreign non main proceeding once it can be

determined that the debtor has an establishment in the foreign state. In this scenario Gaming Corporation operates a gambling casino in Las Vegas, which is a city in Nevada, a US State. Therefore, a foreign representative appointed by the debtor could apply for recognition with the appropriate bankruptcy court for the district which Las Vegas belongs. However, since the principal place of business for the Gaming corporation resides in Greece that is, the centre of min interest (COMI) is presumed to be the location in Athens, Greece, both proceedings would be considered foreign non main proceedings unless there is other evidence available.

Commented [H(45): This is not the relevant jurisdiction for the establishment; the test is whether there is an establishment in the jurisdiction where the foreign proceedings are pending, and the London casino would qualify as the establishment. The Las Vegas casino would be relevant to venue however.

Commented [H(46): Correct, 1 mark

Commented [H(47): Correct, 1 mark, whereas proceedings in the COMI jurisdiction would be foreign main proceedings

Question 4.2 [5 marks]

Commented [H(48): 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?

The effect of the chapter 11 petition of ShipCo's lawsuit would be an automatic stay. This would prevent ShipCo from pursuing legal action against the debtor, Oil Corp, unless it can be proven that Oil Corp knowingly and intentionally sold ShipCo contaminated oil, at which point ShipCo could open a criminal proceeding against Oil Corp, such a proceeding is an exception to the automatic stay.

Commented [H(49): Correct, 1 mark

Commented [H(50): Correct, 1 mark

The investigation by the US Department of Justice can be a regulatory investigation, and such as would be exempt from the automatic stay. It would be prudent for Oil Corp could to include both the investigation and the lawsuit in the disclosure notes of the financial statements presented as part of the reorganization plan. The arrears on the Loan from US Bank would be subject to the automatic stay. The bank would be able to bring foreclosure action once the chapter 11 petition was filed. Finally, the landlord of the Texas office would not be able to evict Oil Corp unless the lease agreement was expired.

Commented [H(51): Correct, 1 mark

Commented [H(52): Incorrect, the foreclosure action would be stayed unless USA Bank moved to lift the stay

Commented [H(53): Correct, 1 mark

Question 4.3 [6 marks]

Commented [H(54): Total marks 2/6

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?

A 363 sale in bankruptcy, usually Chapter 11 bankruptcy allows a debtor in possession or the debtor's representative such as a trustee, to sell property free and clear of the creditor's interest, but with approval from the relevant court. Plastic Corp owns the license for the patented manufacturing process invented by Oil

Corp, therefore, Oil Corp cannot sell the patent's license with Plastic Corp's consent. Similarly, since Plastic Corp was granted the trademark for Interconnect, Oil Corp cannot sell trademark with Plastic Corp agreeing to the sale. Considering these factors, Oil Corp would have a difficulty in pursuing a §363 sale to settle its debts with the creditors.

Commented [H(55)]: Correct, 1 mark, specifically 365(n) prevents the termination of a patent license without licensee consent

Commented [H(56)]: Correct, 1 mark, under trademark law, the owner must consent to assign the license

Commented [H(57)]: With respect to USA Bank, the manufacturing facility could be sold free and clear without its consent (assuming the value exceeds the amount of the loan), with the lien attaching to the proceeds

*** End of Assessment ***