



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! Thank you.

ANSWER ALL THE QUESTIONS

Commented [H(2)]: Total marks 36.5/50

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

Commented [H(3)]: Total marks 9/10

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)]: 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(7): 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(8): 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(9): 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(10)]: 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(11)]: 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(12)]: 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 [H13]: Incorrect, the correct response is (e)

QUESTION 2 (direct questions) [10 marks]

Commented [H14]: Total marks 6/10

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?

The voluntary petition for bankruptcy is when the debtor itself files a petition to commence a bankruptcy proceeding, under any applicable chapter. The involuntary, in its turn, is when a creditor or creditors (if it has 12 or more creditors at least three must join the request) file against an eligible debtor chapter 7 or 11, and this debtor is not a farmer, family farmer, or not-for-profit corporation.

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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 violation of the automatic stay may result in the imposition of some sanctions against the violator, such as payment of the debtors' attorneys' fees and also the obligation to the violator to take some acts to undo the effects of its violation, if the act had changed the status quo of the estate's property.

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

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 a claim classified in an impaired class, that in its turn, means the class of creditors or equity interest holders whose legal, equitable, or contractual rights are altered by the proposed plan. Therefore, if the plan leaves the creditors' rights unaltered in this case it would be an unimpaired claim. Also, it is not entitled to vote a creditor considered an insider, which vote must be disregarded if there are no other impaired classes.

Commented [H21]: Correct, 1 mark; an impaired class that will receive nothing under the plan is not entitled to vote and is deemed to reject

Question 2.4 (3 marks)

Commented [H22]: 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?

Preferences. A preference could only be a transfer of the debtor's property, funds or an interest property made in a suspect period before the petition date, when the debtor was insolvent, in benefit of a creditor, for or on account of an antecedent debt owed by the debtor. In this case, the property must return to the estate if exceeds the amount that would be paid in chapter 7.

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(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. In order to use the constructive fraudulent conveyance as a cause of action, it should be proved that the debtor was insolvent at the time of the transaction or became insolvent because of it.

Commented [H(24)]: Incorrect, the correct response is preference. It is possible to establish a constructive fraudulent conveyance without the debtor having been insolvent at the time

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

Actual fraudulent conveyance. To use this cause of action, it must be proved that the debtor made a transfer or incurred an obligation with actual intent to hide, delay or defraud any entity to which the debtor was or became indebted. So, the intention must be proved.

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

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Question 3.1 (3 marks)

Commented [H(27)]: Total marks 2.5/3

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

In *Stern v Marshall*, the US Supreme Court decided that even in core proceedings, which as a rule allows the judges to hear and determine, issuing a final decision, a bankruptcy court cannot issue final orders that invade Article III jurisdiction. Considering this case, the Bankruptcy Rules have implemented rules requiring the litigants to state in their pleadings even if they consent about the judgment by the bankruptcy court, and permitting the district court to determine if a bankruptcy court did or did not have the jurisdiction to enter a final order.

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Commented [H(29)]: Correct, 1 mark

Commented [H(30)]: Correct, 1/2 mark, also the bankruptcy court can enter a final order on a challenge to a petition

Question 3.2 (3 marks)

Commented [H(31)]: 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?

The automatic stay cannot be invoked by a foreign representative. To be applicable, it demands that the request to recognition of a foreign main proceeding be granted, and it will be limited to the property of the debtor located in the US. Also, the foreign representative cannot invoke avoidance powers in a plenary in a chapter 15

Commented [H(32)]: The foreign representative may ask the court to bring the stay into effect on an interim basis pending resolution of the petition for recognition.

Commented [H(33)]: Correct, 1 mark, in a chapter 15 proceeding the foreign representative cannot bring claims under the Bankruptcy Code for avoidance of preferences and fraudulent transfers

proceeding, except if the foreign representative has requested to commence the proceeding over a plenary proceeding under the Bankruptcy Code.

Commented [H(34)]: Correct, 1 mark, also the foreign representative may bring analogous claims under foreign and non-bankruptcy US law

Question 3.3 (4 marks)

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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 an order that resolves only some issues or claims. If the order disposes about all issues and nothing is left to be decided, this order is considered a final order. The final orders are appealed as of right, and the interlocutory orders may be appealed only with leave of the appellate court. Concerning the bankruptcy, the US Supreme Court has already decided, in the Bullard v Blue Hills Bank, that an order resolving a discrete dispute is a final order for appeals purposes. An appeal, in general, should be heard by the district court for the district in which they sit. However, some circuits have their own Bankruptcy Appellate Panel (BAP), but in cases like this, the party has the option to request the district court to hear its appeal. From the district court or the BAP, there is a further appeal to the court of appeal, even if it is rare for the appeal to go directly to it.

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Commented [H(37)]: Correct, 1/2 mark

Commented [H(38)]: Correct, 1/2 mark

Commented [H(39)]: Correct, 1/2 mark

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

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

Question 3.4 (5 marks)

Commented [H(42)]: Total marks 4/5

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?

The directors of Delaware owe the fiduciary duty of loyalty to the corporation's best interest and also the duty of care in educated decision-making. They must act with good faith and they owe these duties to the corporation and its shareholders. If the company is operating in the zone of insolvency or is actually insolvent, the US Supreme Court has already decided that these duties are also owed to the creditors, that under the normal conditions (not insolvent) is not requested.

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

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

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

Commented [H(47)]: Incorrect, the Delaware Supreme Court (not US Supreme Court) held that creditors are never owed the duties, though they may be able to enforce them in the name of the company in bankruptcy

Commented [H(48)]: Total marks 9/15

Commented [H(49)]: Total marks 2/4

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

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.

A foreign main proceeding should proceed under the jurisdiction of the debtor's center of main interests (COMI). Usually, the COMI is presumed to be the place of the incorporation, but this concept can be challenged, and other factors can be used to determine the COMI. In the presented case, although Gambling Corporation is incorporated in Greece, considering that de majority of its creditors, the fact that the company also operates in London, and the law that should be applied over these bonds, it seems that the COMI should be London. Therefore, the English scheme of arrangement could

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

Commented [H(51)]: Most likely Greece would be the COMI because the principal place of business is there, but these are also relevant factors.

be granted recognition under US Chapter 15 as a foreign main proceeding, and any other proceeding in a different jurisdiction would be a foreign non-main proceeding.

Commented [H(52): Correct, 1 mark, though there would need to be an establishment in the foreign jurisdiction, which is met here by the London casino

Question 4.2 [5 marks]

Commented [H(53): Total marks 5/5

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 effects of filing a chapter 11 petition, considering the automatic stay that comes into effect when filing a chapter 11 request, would be:

Commented [H(54): Correct, 1 mark

- 1) The ShipCo's Lawsuit would be suspended, considering that all litigation on pre-petition claims is prohibited.
- 2) The US DOJ investigation would continue, considering that the automatic stay does not affect regulatory investigations, that is an exception.
- 3) The USA Bank would not be able to foreclose a refinery located in the Philippines, once during the automatic stay it is prohibited any act to obtain possession or control of property of the estate, and that the automatic stay applies to any interference with the property of the estate anywhere in the world.
- 4) The landlord would not be able to evict the Oil Corp., considering that the automatic stay only accepts as an exception the lease that has already expired, which is not the case.

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Commented [H(56): Correct, 1 mark

Commented [H(57): Correct, 1 mark

Commented [H(58): Correct, 1 mark

Question 4.3 [6 marks]

Commented [H(59): 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?

- (i) No, Oil Corp needs the consent of Plastic Corp to assume and assign the trademark, once the trademark license is not assignable absent licensor consent, accordingly to *In re Trump Entertainment Resorts, In, 526 BR 116*.
- (ii) Yes, Oil Corp can reject the patent without consent, but in this case, the effect would be the same as if Oil Corp has breached the contract immediately, which will give the counterparty an unsecured pre-petition claim in damages.
- (iii) No, Oil Corp needs the consent of USA Bank, once it involves a financial accommodation.

Commented [H(60): Correct, 1 mark

Commented [H(61): Correct, 1 mark

Commented [H(62): Technically correct, but this will not give the transferee of the patents exclusivity because the licensee will still have the right to use the patent under a rejected license under section 365(n); to get exclusivity consent of Plastics Corp is required

Commented [H(63): Incorrect, a financial accommodation is the extension of additional credit; with respect to an existing debt, the property can be sold free and clear without consent where the value of the property exceeds the secured claim and the lien attaches to the proceeds

* End of Assessment *