



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 36.5/50

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

Commented [H(2)]: 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(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): 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 for bankruptcy is commenced by debtor under any applicable chapter. Debtor not necessarily need to be insolvent or to claim so and, although Federal Rules of Bankruptcy Procedure specify certain schedules, even if they are not filed with the voluntary petition the case can be commenced and the automatic stay will be invoked.

Commented [H(15): Correct, 1 mark

An involuntary proceeding is commenced by a creditor against an eligible debtor – except farmer, family farmer or not-for-profit corporations –, but only under chapter 7 or chapter 11. To qualify as a petitioning creditor, the creditor must have a claim against debtor that is non-contingent, not the subject of *bona fide* dispute as to liability or amount and unsecured or unsecured in the amount of at least USD15,775 (separately or considering other petitioning creditors' claim). If debtor has fewer than 12 of such creditors, only one is required to file an involuntary petition; if it has 12 or more such creditors, the petition must be joined by at least 3 of such creditors.

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 violation of the automatic stay is not only a contempt of court but can be considered void or voidable. If the stay violator fails to obtain relief from the stay, the violator may be fined daily until the stay violation is rectified. The violator is also subject to contempt sanctions, such as payment of the debtor's attorneys' fees, and can be ordered to take affirmative acts to undo the effects of its violation.

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?

Impaired claims are those claims that are modified by the plan regarding the holder's legal, equitable and contractual rights. A holder of an impaired claim is not entitled to vote whenever it can be considered an insider. In this case, the votes of insiders are disregarded (unless there is no impaired class) to determine whether the quorum for approval of the plan has been reached.

Commented [H(21)]: Correct, 1 mark

Commented [H(22)]: An impaired claim that will receive nothing under the 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 claim, whose purpose is to return to the estate a debtor's property transferred in a suspect period before the petition date, if it exceeds the amount the recipient should have received in a chapter 7 liquidation had the transfer not been made.

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, which occurs when the value received by the debtor is less than the consideration received in a transfer or assumption of obligation and one other additional factor such as debtor's insolvency at the time of the transaction is present.

Commented [H(25)]: Incorrect, the correct answer is preference as a constructive fraudulent conveyance can be established without insolvency of the debtor at the time

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

An actual fraudulent conveyance, which occurs when debtor expect to become indebted and make a transfer or incur in obligations with the intent to hinder, delay or defraud any of its creditors.

Commented [H(26)]: Correct, 1 mark

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

Commented [H(27)]: Total marks 11.5/15

Question 3.1 (3 marks)

Commented [H(28)]: Total marks 1.5/3

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

In *Stern v Marshall*, the Supreme Court established that the bankruptcy judge cannot issue final orders even in core proceedings if such final order disregard Article III jurisdiction. In the case, a final order by a bankruptcy court was considered unconstitutional because it was issued over a state law claim.

Commented [H(29)]: Correct, 1 mark, previously the rule was that bankruptcy courts could enter final orders in core proceedings

After that, Bankruptcy Rules have been amended and now litigants are required to state in their pleadings whether they consent that bankruptcy court issues final orders or judgments and by authorizing a district court to treat an order issued by a bankruptcy court that did not have jurisdiction as proposed findings of fact and conclusions of law

Commented [H(30)]: Correct, 1/2 mark, also the bankruptcy court can still 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?

Chapter 15 excludes the use of avoidance powers provided by the Bankruptcy Code from the rights of the foreign representative. The avoidance powers can only be invoked by the foreign representative in a plenary proceeding, such as chapter 7 and 11, so the foreign representative may wish to initiate a plenary proceeding to obtain access to the avoiding powers.

Also, the filing of the petition of a chapter 15 case by the foreign representative does not automatically invoke the automatic stay. For such stay to arise, the petition for recognition of a foreign main proceeding must be granted.

Commented [H(32)]: Correct, 1 mark

Commented [H(33)]: Correct, 1 mark, alternatively the foreign representative may bring analogous claims under foreign or non-bankruptcy US law

Question 3.3 (4 marks)

Describe the differences between interlocutory and final orders and how an appeal may be taken from each. Which courts hear direct appeals from bankruptcy court orders?

The main difference between interlocutory and final orders is that a final order settles all issues discussed, whereas interlocutory orders only resolve a specific issue or claim during proceedings. Therefore, a final order can be appealed as of right, whereas an interlocutory order can only be appealed with leave of the appellate court.

In general, appeals from bankruptcy court orders are heard by the corresponding district court. However, the First, Sixth, Eighth, Ninth and Tenth Circuits have elected to form Bankruptcy Appellate Panels, consisting of the judges of the bankruptcy courts of the circuit. In these cases, a party can request that the appeal be heard by the district court instead.

Finally, in rare occasions a direct appeal from bankruptcy court orders can go directly to the court of appeals if the bankruptcy or district court certifies either that (i) there is a question of law which has no controlling decision issued by the circuit or the US Supreme Court or requires resolving conflicting controlling decisions, or (ii) the progress of the case may materially advance by the immediate appeal.

Commented [H(34)]: Total marks 4/4

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

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 mark

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

Question 3.4 (5 marks)

What fiduciary duties do directors of Delaware corporations owe and to whom are the duties owed in the ordinary course of business? To whom are duties owed when the corporation is potentially or actually insolvent?

The directors of Delaware must always act in good faith and owe to the corporation and its shareholders the fiduciary duty of loyalty to the corporation's best interests and the duty to care in educated decision-making.

Whenever the corporation is insolvent or on the verge of becoming insolvent, in addition to the entities listed above, such duties must be complied by Delaware corporation directors to corporation's creditors.

Commented [H(41)]: Total marks 4/5

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)]: Incorrect, the duties are never owed to creditors, even if the company is insolvent

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

Commented [H(47)]: Total marks 9/15

Question 4.1 [4 marks]

Commented [H(48)]: 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.

In general, a foreign main proceeding is processed under the jurisdiction of the debtor's center of main interests (COMI), which is usually at the place of its incorporation. However, although Gambling Corp is incorporated in Greece, it also has operation in London and, considering that the bonds are governed by English Law and will be subject to an English scheme of arrangement, it is more appropriate to consider that Gambling Corp's COMI is London. In this scenario, the English scheme of arrangement could be granted recognition under US Chapter 15 as a foreign main proceeding, whereas proceedings in different jurisdictions would be non-main proceedings.

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

Commented [H(50)]: Incorrect, Greece is the principal place of business so would be the COMI

Commented [H(51)]: Correct, 1 mark, however there would also have to be an establishment in the jurisdiction; here, the London casino satisfies this requirement

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

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?

By filing a chapter 11 petition, Oil Corp will be granted an automatic stay. In this scenario, all litigation on pre-petition claims is prohibited, so Shipco lawsuit would be suspended. The US DOJ investigation, however, would not be affected and would continue, considering the exception regarding regulatory investigations. Regarding the USA Bank, it would not be able to foreclose on the refinery located in the Philippines, because the automatic stay prohibits any act to obtain possession or control of debtor's property worldwide. Finally, considering that the lease of the Texas office space has not expired, the exception of the automatic stay would also not apply to the landlord, and it would not be able to evict Oil Corp.

Commented [H(53)]: Correct, 1 mark

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

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

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

Commented [H(57)]: Correct, 1 mark

Question 4.3 [6 marks]

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

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

Commented [H(58)]: Total marks 2/6

The only goal that Oil Corp can achieve is to reject the patent licenses without consent of Plastic Corp. However, in this scenario Plastic Corp will be entitled to an unsecured pre-petition claim in damages. In regards of assuming and assigning the trademark license, Oil Corp needs consent of Plastic Corp according to *In re Trump Entertainment Resorts, In, 526 BR 116*, because trademark licenses are not assignable absent licensor consent. Finally, Oil Corp also needs consent from USA Bank to sell the manufacturing facility, because it involves a financial accommodation.

*** End of Assessment ***

Commented [H(59)]: Incorrect, under section 365(n), the licensee of a rejected license can continue to practice the patent and therefore consent would be required to give exclusive use of the patent to the purchaser

Commented [H(60)]: Correct, 1 mark

Commented [H(61)]: Correct, 1 mark

Commented [H(62)]: Incorrect, a financial accommodation is an extension of new credit, whereas USA Bank has a secured claim. The facility could be sold free and clear if the value of the property exceeds the secured claim, and the lien would transfer to the proceeds of the sale