



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 25/50, note copying of course text in response to Question 3

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

Commented [H(2)]: 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(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)]: 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.

Commented [H(6): Incorrect, the correct response is (a). The record for a pre-pack is less than 24 hours from filing to emergence.

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.

Commented [H(7): Incorrect, the correct response is (c)

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(8): 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

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 answer is (c). Because sale under 363 is free and clear of liens and encumbrances, the price received may be higher.

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)]: Correct, 1 mark

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** proceeding may be commenced by the **debtor** by filing a petition under any applicable chapter. A number of schedules are specified by The Federal Rules of Bankruptcy that are to be filed with a voluntary petition, in case of absence of such schedules, a "naked" petition is sufficient to invoke automatic stay and commence a case under bankruptcy code. The form requires the debtor to disclose estimated funds on hand, number of creditors, assets and liabilities, it need not be or claim to be insolvent

Commented [H(15)]: Correct, 1 mark

An **involuntary** proceeding against an eligible debtor may be commenced by **creditors** under either chapter 7 or chapter 11. The number of petitioning creditors required depends on how many non-contingent, non-insider creditors the debtor has — if it has fewer than 12 such creditors, only one is required to file an involuntary petition; if it has 12 or more such creditors, at least three qualifying creditors must join in the petition.

Commented [H(16)]: Correct, 1 mark

To qualify as a petitioning creditor, the creditor must have a claim against the debtor that is:

- Non-contingent
- A contingent claim is one that depends on the occurrence of a future event. For example, a claim under a guarantee is typically contingent on the occurrence of a default under the guaranteed obligation.
- A debt that is unmatured (because the payment is due in the future) is not contingent if all requirements for liability, other than the passage of time, have occurred.]

Question 2.2 (2 marks)

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

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

[An act taken in violation of the stay constitutes contempt of court and is void or voidable. Failure to obtain relief from the stay may result in the imposition of contempt sanctions against the stay violator, which may include payment of the debtors' attorneys' fees and requiring the violator to take affirmative acts to undo the effect 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?

[A class of claims is impaired unless, as to every claim or interest in the class, the plan leaves the holder's "legal, equitable, and contractual rights unaltered". Delayed payment in full (after the effective date of the plan) is considered impairment. Only impaired classes have the right to vote on the plan.]

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

Commented [H(22)]: However a 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)

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?

[Preferences arise where the debtor is paying a creditor for a pre-existing debt, a contemporaneous exchange of value is not a preference. In addition, a prepayment for goods and services cannot be a preference because 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?

[Constructive fraudulent conveyance is proven by showing that the debtor received less than reasonably equivalent value in exchange for a transfer or incurrence of obligation]

Commented [H(25)]: Incorrect, the correct response is preference. There are circumstances in which a constructive fraudulent transfer can be proven by showing insolvency at the time of transfer, but it is not required.

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

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

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

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

Commented [H(27)]: Total marks 11/15

Question 3.1 (3 marks)

Commented [H(28)]: Total marks 2/3

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

[In *Stern v Marshall*, that even in core proceedings, a bankruptcy court cannot issue final orders that invade Article III jurisdiction. In that case, a bankruptcy claim had been filed against the debtor and the debtor counterclaimed. At the same time, the issues in the counterclaim were the subject of separate state court proceedings. Here, the bankruptcy

Commented [H(29)]: Correct, 1 mark, whereas previously core proceedings were subject to final orders of the bankruptcy court

court issued its judgment first, awarding USD 400 million to the debtor, but the state court case continued while the bankruptcy judgment was appealed to the district court

Stern threw the already complicated area of bankruptcy court jurisdiction into new turmoil, because district courts have exclusive jurisdiction to adjudicate a petition commencing bankruptcy proceedings, a bankruptcy court may exercise a district court's delegated authority to enter a final order on a motion challenging the validity of a petition. The US Supreme Court has held that bankruptcy judges may determine a core proceeding over which they lack constitutional authority by issuing a report and recommendation for review by the district court the same procedure as in non-core proceedings, or, with the consent of the parties, may issue final orders. The Bankruptcy Rules have implemented these rulings by requiring litigants to state in their pleadings whether they consent to the entry of final orders or judgment by the bankruptcy court, and by permitting a district court that determines that a bankruptcy court did not have jurisdiction to enter a final order to treat that its order as proposed findings of fact and conclusions of law.

Commented [H(30)]: Correct, 1/2 mark

Commented [H(31)]: Correct, 1/2 mark

Commented [H(32)]: Copied from the course text

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(33)]: Total marks 2/3

A foreign representative can only invoke the Bankruptcy Code avoidance powers in a plenary proceeding such as chapter 7 or 11. In some circumstances, such a proceeding was commenced by a debtor or its creditors prior to involvement of the foreign representative; in other, rarer circumstances, the foreign representative may choose to commence a plenary proceeding under the Bankruptcy Code after recognition of the foreign proceeding under chapter 15. A foreign representative may wish to commence plenary proceedings to obtain access to the Bankruptcy Code's avoiding powers where relief under other applicable law is unsatisfactory, such as where the statute of limitations has expired or applicable law does not allow claims for constructive fraudulent conveyance.

Commented [H(34)]: Correct, 2 marks, the foreign rep may also bring claims under analogous foreign or non-bankruptcy US law

Commented [H(35)]: Copied from course text

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?

Commented [H(36)]: Total marks 2/4

US non-bankruptcy procedure distinguishes between final and interlocutory orders.

1. Final orders are those that dispose of all issues, leaving nothing further to be decided, whereas interlocutory orders resolve only some issues or claims.
2. Final orders may be appealed as of right, whereas interlocutory orders may be appealed only with leave of the appellate court. In bankruptcy proceedings, this same framework applies, except that orders extending the period of exclusivity to propose a plan are appealable as of right.
3. The distinction between interlocutory and final orders can be an elusive one where a court resolves not simply claims between two parties, but an issue of broad applicability, such as the post-petition interest rate applicable to the debtor's obligations.

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, 1/2 mark

Appeal as of right or the granting of permission to pursue an interlocutory appeal divests the bankruptcy court of jurisdiction to alter its decision, but does not stay its effect.⁴⁶ A stay pending appeal may be obtained from the bankruptcy court or, if that request is not timely granted, from the appropriate appellate court. The standard applied is the same as that

applicable to injunctive relief generally – the party seeking a stay must establish that it has a likelihood of success on appeal, that it faces imminent, irreparable harm if the stay is not granted and that the equities of the situation favour granting the stay.

In rare circumstances, an appeal from a bankruptcy court may go directly to the court of appeals, where the bankruptcy court or district court certifies that either that

- (i) The appeal raises a question of law as to which there is no controlling decision of the circuit or the US Supreme Court, or requires resolving conflicting controlling decisions, or
- (ii) Immediate appeal may materially advance the progress of the case. The court of appeals has discretion whether to accept a case so certified.

Commented [H(41)]: Ordinarily, an appeal is heard by a district court or, in certain circuits, a Bankruptcy Appellate Panel

Commented [H(42)]: Copied from course text

Question 3.4 (5 marks)

Commented [H(43)]: 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 owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision-making, but are protected from liability for errors of judgment by the business judgment rule. Under the business judgment rule, the board of directors is presumed to have acted in good faith on the basis of reasonable information.

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

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

Directors' duties are owed to the corporation and its shareholders, not to creditors, even in circumstances where the corporation is potentially insolvent and therefore the shareholders stand to receive nothing in bankruptcy. The Delaware Supreme Court suggests that directors owe duties to creditors when a company is operating "in the zone of insolvency", or indeed is actually insolvent.]

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

Commented [H(47)]: Correct, 1 mark

Commented [H(48)]: Correct, 1 mark

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

Commented [H(49)]: Total marks 2/15

Question 4.1 [4 marks]

Commented [H(50)]: 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.

[Gambling Corporation is incorporated and has a principal place of business in Greece, thus its COMI is Greece. Its bonds are governed by English Law, and its considering using English scheme of arrangement to restructure its bonds, thus, in the US it will be recognized as foreign non-main proceedings.]

Commented [H(51)]: Correct, 1 mark, therefore English proceedings cannot be foreign main

Commented [H(52)]: Correct, 1 mark, also the London casino will be the necessary establishment in England

Question 4.2 [5 marks]

Commented [H(53)]: Total marks 0/5

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?

[Type your answer here]

Question 4.3 [6 marks]

Commented [H(54)]: Total marks 0/6

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?

[Type your answer here]

End of Assessment