



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 10/10

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)]: Correct, 1 mark

QUESTION 2 (direct questions) [10 marks]

Commented [H(13)]: Total marks 6.5/10

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 the debtor filing the petition under any applicable chapter. Automatic stay will be invoked under the Bankruptcy Code.

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

An involuntary petition for bankruptcy is on the other hand, commenced by the creditors against an eligible debtor under either chapter 7 or chapter 11.

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

Question 2.2 (2 marks)

Commented [H(17)]: Total marks 1.5/2

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

The party that violated the automatic stay (and fail to obtain the relief to permit or retroactively validate the act of violation) may be required to pay debtor's attorneys' fees, and/or take affirmative acts to undo effect of its violation.

Commented [H(18)]: Correct, 1 mark, this would be a contempt sanction

Commented [H(19)]: Partially correct, 1/2 mark, looking for you to say that the act in violation of the stay is void or voidable

Question 2.3 (3 marks)

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

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

A claim is "impaired" if the holder's legal, equitable and contractual rights are altered, including delayed repayment in full.

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

A class may be deemed as unimpaired if the proposed plan reverses contractual acceleration by curing the monetary default and compensate the creditor for any damages caused. The unimpaired creditors are deemed to accept the plan.

Commented [H(22)]: The holder of a claim that receives nothing under the plan cannot 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?

The transfer where the recipient contemporaneously gave the debtor new value, including money, goods or services or new credit, but not simply constitute new obligation for an old one.

Commented [H(24)]: Incorrect, the relevant cause of action is preference

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

For the purpose of determining preference claims, the debtor is presumed to have been insolvent on or during the 90 days prior to the petition.

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

(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 has intended to delay, hinder or default on any entity to which the debtor is or became indebted.

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

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

Commented [H(27)]: Total marks 9/15

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?

Before *Stern v Marshall*, the bankruptcy court resolve the issues presented in the core proceeding seem well established, however, in *Stern v Marshall* case, despite the counterclaim from the debtor is a core proceeding, the bankruptcy court still cannot issue final order as it invades Article III jurisdiction. The first order issued by the bankruptcy court was subsequently overridden by the jury verdict.

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

Commented [H(30)]: Correct, 1 mark, it is now accepted that the bankruptcy court can enter a final order on a challenge to a petition or with the consent of the parties

Question 3.2 (3 marks)

Commented [H(31)]: Total marks 0/3

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?

Filing the petition by a foreign representative under chapter 15 does not invoke the automatic stay of creditor action. Two ways to obtain the stay are:

1. Receiving the recognition that the foreign proceeding is the main proceeding, and the stay is limited to the properties of the debtor within the territorial jurisdiction of the United States
2. Bankruptcy court to grant a stay on an interim basis pending the recognition or following the recognition of a non-main proceeding

Commented [H(32)]: True, but this question is about the avoidance powers of the bankruptcy code not being available in chapter 15. The foreign representative may obtain equivalent relief under other applicable US or foreign law, or by filing a subsequent chapter 11 proceeding.

Question 3.3 (4 marks)

Commented [H(33)]: Total marks 4/4

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?

Final orders are those that dispose of all issues and left nothing further to be decided, whereas interlocutory orders resolve only some issues or claims.

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

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

Final orders may only be appealed as of right, whereas interlocutory orders may only be appealed with leave of the appellate court. US Supreme Court recognises that a bankruptcy order resolving a discrete dispute is a final order for appeals purposes.

Commented [H(36)]: Correct, 1/2 mark

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

In general, appeals from bankruptcy court are heard by the district court for the district they sit. In certain circumstances, appeals from bankruptcy courts are heard by a Bankruptcy Appellate Panel (BAP), convened from the judges of the bankruptcy courts within that circuit. In rare cases, an appeal may go straight to the court of appeals, if the bankruptcy court or district court certifies that either the appeal raises a question of law or require resolving conflicting controlling decisions, or immediate appeal will significantly advance the progress of the case.

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

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

Question 3.4 (5 marks)

Commented [H(40)]: Total marks 3/5

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

Based on law of Delaware, which is the pre-eminent US jurisdiction for corporate law, directors owe fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision-making in ordinary course of business. Directors owe no duty to the creditor, even in circumstances where the corporation is potentially or actually insolvent.

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

Commented [H(42)]: Correct, 1 mark

Commented [H(43)]: Correct, 1 mark, the duties are owed to the corporation and its shareholders

There is no equivalent US law of the concept of "wrongful trading" or "deepening insolvency"

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

Commented [H(44)]: Total marks 11/15

Question 4.1 [4 marks]

Commented [H(45)]: Total marks 3/4

Gambling Corporation is incorporated and has a principal place of business in Greece and it operates casinos and betting parlors in many international cities, including Athens, Las Vegas, London and Macau. Gambling Corp's bonds (governed by English law) are due to mature in one (1) year, but it is unable to repay or refinance them. Gambling Corp is considering using an English scheme of arrangement to restructure the bonds.

Discuss whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding.

Foreign main proceedings are those that are commenced in the debtor's centre of main interests (COMI).

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

The debtor's COMI is presumed to be its place of incorporation, but this presumption is rebuttable with other relevant factors in the COMI analysis to be considered.

In the case of Gambling Corporation, its COMI is likely to be Greece, therefore, the English Scheme of arrangement could be granted as foreign non-main proceeding.

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

Commented [H(48)]: Correct, 1 mark, specifically the casino in London would constitute the necessary establishment in the jurisdiction of the foreign proceeding

Question 4.2 [5 marks]

Commented [H(49)]: 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?

Filing for chapter 11 debtor in possession will have the following effect on Oil Corporation (OC)'s four situations:

First situation where customer filed a lawsuit in Texas state court against Oil Corporation (OC) – the legal action will be prohibited under the worldwide automatic stay that comes into effective immediately on the filing (litigation on pre-petition claims).

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

Commented [H(51)]: Correct, 1 mark

Second situation where OC is investigated by US Department of Justice for illegally purchasing oil from countries subject to US sanction, the case may fall under the statutory exceptions (regulatory investigations), which will not be prohibited under the automatic stay.

Commented [H(52)]: Correct, 1 mark

Third situation of missing payment on its secured loan from US Bank and the bank is threatening to foreclose on an OC refinery oversea, the action from the bank is prohibited under the automatic stay (any act to obtain possession or control of property of the estate; any attempt to collect on pre-petition claims).

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

Fourth situation of missing the rent payment and the landlord is threatening to evict OC, this action from the landlord is prohibited under the automatic stay (any act to obtain possession or control of property of the estate). The landlord will be able to evict OC if it is because the lease has expired, which is not the case here.

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

Question 4.3 [6 marks]

Commented [H(55)]: Total marks 3/6

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) Trademark "Interconnect" is licensed from Plastic Corp to Oil Corp, it is not assignable absent licensor (Plastic Corp) consent
- (ii) The patent licenses are licensed to Plastic Corp by Oil Corp, under chapter 11, the licensee of patents (Plastic Corp) is protected so that the license may not be terminated with the sale of intellectual property with their consent. Therefore, in

Commented [H(56)]: Correct, 1 mark, this is because applicable trademark law excuses the licensor from accepting performance by an assignee without consent

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

order to reject the patent licenses, Oil Corp will need to get the consent from Plastic Corp.

- (iii) Under §363 sales of property (non-ordinary course transaction), the debtor (Oil Corp) must establish that it is proposing the transaction in its business judgement and that the transaction is in the best interest of the estate. The secured creditor (USA Bank) can credit bid by offsetting a portion of the purchase price if such property against its claim secured (\$500m) by this plastic business.

*** End of Assessment ***

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

Commented [H(59)]: Oil Corp can sell the property free and clear of USA Bank's lien, with the lien attaching instead to the proceeds of the sale