



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 47/50

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

Commented [H(2): Total marks 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 9/10

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 is filed by a debtor to commence insolvency proceedings.

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

An involuntary petition is usually commenced by creditors against eligible debtors. The involuntary petition is commenced under chapter 7 or 11 of the Bankruptcy code and cannot be commenced under any other code or against farmers, family farmer or non-profit organizations.

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?

Two potential consequences of a violation of the automatic stay are (1) contempt of court and (2) the act would be deemed void or voidable.

Commented [H(18)]: Correct, 1 mark

Commented [H(19)]: Correct, 1 mark

Question 2.3 (3 marks)

Commented [H(20)]: Total marks 2/3

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?

1. A claim is considered impaired where a plan of reorganization alters the legal, equitable and contractual rights to which such claim or interest entitles the holder of such claim or interest of a class of creditors.

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

2. The holder of an impaired claim will not be entitled to vote on a proposed plan of reorganization when the holder receives any distribution under the plan of reorganization. In such case, the holder is deemed to have rejected the plan of reorganization and therefore cannot vote.

Commented [H(22)]: Incorrect, the holder cannot vote if it will receive no distribution

Commented [H(23)]: Correct, 1 mark

Question 2.4 (3 marks)

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

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

The cause of action that applies is **preferences**.

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

The cause of action that applies is **preferences**.

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

The cause of action that applies is **actual fraudulent conveyance**.

Commented [H(24): Total marks 3/3

Commented [H(25): Correct, 1 mark

Commented [H(26): Correct, 1 mark

Commented [H(27): Correct, 1 mark

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

Commented [H(28): Total marks 14.5/15

Question 3.1 (3 marks)

Commented [H(29): Total marks 2.5/3

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

Before *Stern v Marshall*, the general principle was that the bankruptcy court had jurisdiction to grant **final orders in respect of core matters**. The Supreme Court altered that position in *Stern v Marshall* when it established that that the **bankruptcy court cannot issue final orders that invade Article III jurisdiction**.

Commented [H(30): Correct, 1 mark

Commented [H(31): Correct, 1 mark

Following *Stern v Marshall*, there have been various amendments to the Bankruptcy Rules. These include (i) implementation of rules which permit district courts that determine whether a bankruptcy court has jurisdiction to enter a final order to treat its order as proposed findings of fact and conclusions of law; and (ii) implementation of rules requiring litigants to **state in their pleadings whether they consent to the entry of final orders or judgment by the bankruptcy court**.

Commented [H(32): Correct, 1/2 mark, also the bankruptcy court can enter a final order on a challenge to a petition

As a result of this case, the US Supreme Court has also determined 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. It may also, with the consent of the parties, issue final orders.

Question 3.2 (3 marks)

Commented [H(33): Total marks 3/3

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?

1. Foreign representatives are not entitled to invoke powers that a debtor in possession or trustee avoidance would use. This has been widely interpreted only to apply to the use of

avoidance powers such as avoidance of preferences and fraudulent conveyance and not to bar a foreign representative from seeking to avoid pre-petition transactions under other applicable US or foreign law.

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

2. A foreign representative can obtain relief equivalent to chapter 15 proceedings by (i) commencing plenary proceedings to obtain access to the Bankruptcy Code avoidance powers after the recognition of the foreign proceedings under chapter 15; or (ii) it can invoke the Bankruptcy Code avoidance powers in a plenary proceeding that was commenced by a debtor or creditor prior to its involvement.

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

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

Question 3.3 (4 marks)

Commented [H(37)]: 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?

1. Final orders are those that fully and finally dispose of all the issues in dispute. Interlocutory orders on the other hand only deal with some or one of the issues in dispute in the proceedings. Final orders may be appealed as of right whereas interlocutory orders may be appealed only with leave of the appellant court.

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

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

Commented [H(40)]: Correct, 1/2 mark

Commented [H(41)]: Correct, 1/2 mark

2. Generally, direct appeals from bankruptcy court orders are heard by the district court for the district in which they sit. However, in some instances, appeals are heard by the Bankruptcy Appellant Court (BAP) which usually comprises of judges from the bankruptcy court in the circuit. A party in this circuit can request for the matter to be heard before the district court if the party so desires.

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

Commented [H(43)]: Correct, 1 mark

Question 3.4 (5 marks)

Commented [H(44)]: 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?

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 corporations owe a fiduciary duty of loyalty to the corporations to act in the corporation's best interest and a duty of care in educated decision-making.

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

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

The directors also have a duty to act in good faith and the best interest of the corporation.

These duties are owed to the corporations and the shareholders of such corporations.

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

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

When the corporation is potentially or actually insolvent, these duties are only owed to the corporation and its shareholders. These duties are not owed to creditors when the corporation is potentially insolvent or actually insolvent.

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

In the case of North Am Catholic Educational Foundation, Inc v Ghreewalla, 930 A.2d 92, 103 (Del 2007), it was held that individual creditors of an insolvent corporation have no right to assert direct claims for breach of fiduciary duty against corporate directors.

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

Commented [H(50)]: Total marks 13.5/15

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.

English schemes of arrangement will typically be granted recognition as foreign main proceedings or foreign non-main proceeding unless they are manifestly contrary to US public policy. However, to determine whether the English scheme could be granted recognition under US chapter 15 as a foreign main or non-main proceeding, one must first consider the COMI (centre of main interest) of Gambling Corporation. As Gambling Corp is incorporated in Greece and its principal place of business is in Greece, its COMI is presumed to be in Greece. It follows then that the US Courts are likely to recognise the English scheme of arrangement as foreign non-main proceedings since Gambling Corporation has an establishment in London which operates casinos and betting parlours.

Commented [H(51)]: Total marks 3/4

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

Commented [H(53)]: Correct, 1 mark, the COMI would have to be in England for foreign main recognition to be appropriate

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

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?

If Oil Corp files a chapter 11 petition, the following would be the effect on Oil Corp in each situation:

(i) There will be a worldwide automatic stay of creditor enforcement proceedings against Oil Corp and its property. This would allow Oil Corp to continue its operations in the ordinary course of business and work with its key constituencies to propose a plan of reorganization to adjust to its debts. This plan of reorganization may be confirmed by the court (cramdown) without the approval of all its creditors. Therefore, the claim by ShipCo for a breach of contract in Texas will be automatically stayed upon the filing of the chapter 11 petition.

(ii) A stay is subject to exceptions such as regulatory investigations and criminal proceedings. Accordingly, the US Department of Justice could continue its regulatory investigation into whether Oil Corp illegally purchased oil from countries subject to US sanctions.

(iii) The stay would also prohibit USA Bank from proceeding with any action for foreclosure of the Oil refinery. In those circumstances, Oil Corporation could formulate a plan and negotiate with USA Bank during the exclusivity period for the repayment of the loan.

Commented [H(55)]: Total marks 5/5

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

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

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

Commented [H(59)]: Correct, 1 mark

(iv) If the lease in question has not expired, the landlord would be limited in the actions it could take. An eviction, for example, would be in breach of the stay. However, the lessor is at liberty to file a claim for pre-petition rent if it desires to be paid.

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

Question 4.3 [6 marks]

Commented [H(61)]: Total marks 5.5/6

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?

1. Oil Corp cannot assume and assign the trademark license without Plastic Corp's consent, as trademarks are generally not assignable. The US Bankruptcy code provides that the licensor cannot be compelled to accept performance of a transferee and as such the licensor must consent to the transfer of the assignor's rights to a third party. Before Oil Corp assume and assign the trademark license to a third party, it must first obtain consent from Plastic Corp.

Commented [H(62)]: Correct, 1 mark

Commented [H(63)]: Partially correct (1/2 mark), specifically they are not assignable without trademark holder's consent

Commented [H(64)]: Incorrect, this is a matter of substantive trademark law, not bankruptcy law

2. Oil Corp cannot unilaterally reject the patent licenses to Plastic Corp for the purchaser to have exclusive rights to use the patent. The bankruptcy code provides special protection in the event that a patent licensor (debtor) files for bankruptcy. This allows the licensees to retain their rights under a patent license even if the patent owner enters bankruptcy and seeks to terminate the license. (See *Mission Product Holdings, Inc. v. Tempnology, LLC* (Mission Product) where it was held that rejection in bankruptcy operates like a typical contract breach and thus, the debtor cannot rescind the license already conveyed. So the licensee can continue to do authorized by the license.)

Commented [H(65)]: Correct, 1 mark

Commented [H(66)]: Correct, 1 mark

3. The Bankruptcy code provides that a debtor in possession in a chapter 11 proceedings can sell its property free and clear of creditors' interests to a strategic purchaser or a successful corporate entity with court approval in a 363 sale and that a good faith purchaser may retain the property notwithstanding a subsequent reversal of court approval for the sale on appeal. Therefore, Oil Corp may sell the manufacturing facility free if its value exceeds the debt owed to USA Bank without USA Bank's consent. However, USA Bank will have a lien over the proceeds of sale in priority of other creditors.

Commented [H(67)]: Correct, 1 mark

Commented [H(68)]: Correct, 1 mark

* End of Assessment *