



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3A
THE INSOLVENCY SYSTEM OF THE UNITED STATES

This is the **summative (formal) assessment** for **Module 3A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 3**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 3A. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment3A]**. An example would be something along the following lines: 202122-514.assessment3A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). **Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 3A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 3A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

Commented [DB1]: It would have been nice if you read and followed the instructions . . . I had to do this for you.

ANSWER ALL THE QUESTIONS

Commented [H(2)]: Total marks 42/50

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

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

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Commented [H(4)]: Correct, 1 mark

ABC Corp is filing for bankruptcy under chapter 11. Which of the following **is not** a party in interest in that proceeding?

- (a) A neighboring land owner who has leased equipment to ABC Corp.
- (b) ABC's government regulator.
- (c) A bank that has loaned money to ABC.
- (d) **A local advocacy group.**
- (e) All of the above.

Question 1.2

Commented [H(5)]: Correct, 1 mark

Which of the following statements regarding executory contracts is **false**?

- (a) **Executory contracts are clearly defined by the bankruptcy code.**
- (b) Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.
- (c) In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.
- (d) A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.
- (e) Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.

Question 1.3

Commented [H(6)]: Correct, 1 mark

In which of the following scenarios does a bankruptcy court have constitutional authority to issue a final order? Assume in each that the counterparty to the dispute has not consented to the bankruptcy court's exercise of jurisdiction.

- (a) A counterclaim against the estate that introduces a question under state law.
- (b) Since the list of core proceedings is non-exhaustive, a bankruptcy court may issue a final determination on any matter that comes before it.

(c) A creditor's claim against an affiliate of the debtor that has guaranteed the debtor's obligation to the creditor

(d) A debtor's motion to dismiss an involuntary bankruptcy petition.

(e) None of the above.

Question 1.4

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(7)]: Correct, 1 mark

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(8)]: Correct, 1 mark

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(9)]: 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(10)]: Correct, 1 mark

Which of the following statements about chapter 15 is **false**?

(a) The automatic stay applies upon the filing of a petition for recognition.

(b) A debtor cannot be subject to an involuntary chapter 15 proceeding.

(c) A chapter 15 petition must be filed by a foreign representative.

(d) The automatic stay applies only to property within the territorial jurisdiction of the United States.

(e) Recognition may be granted to a foreign proceeding as either foreign main or foreign non-main.

Question 1.8

Commented [H(11)]: Correct, 1 mark

Which of the following statements about 363 sales is **false**?

(a) A 363 sale permits a debtor to sell an asset free and clear of encumbrances.

(b) A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.

(c) A 363 sale must be conducted as an auction with a stalking horse bidder.

(d) Purchasers may pay a higher price for assets sold in a 363 sale than in an out-of-court transaction.

(e) Sophisticated parties will insist on a 363 sale if there is any question regarding whether the sale is "in the ordinary course of business".

Question 1.9

Commented [H(12)]: Correct, 1 mark

If a debtor rejects an executory trademark license agreement under which it licenses a trademark to its counterparty, which of the following is **true**?

(a) The counterparty has a claim for damages for breach of contract.

(b) The counterparty must immediately stop using the trademark.

(c) The counterparty can continue using the trademark for the remaining period of the license.

(d) Both (a) and (b).

(e) Both (a) and (c).

Question 1.10

Who may serve as a foreign representative to seek recognition of a foreign proceeding under chapter 15?

- (a) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (b) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.
- (c) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (d) An insolvency professional appointed by the court overseeing the foreign proceeding.**
- (e) All of the above.

Commented [H(13)]: Incorrect, the correct response is (e)

QUESTION 2 (direct questions) [10 marks]

Commented [H(14)]: Total marks 7/10

Question 2.1 (2 marks)

Commented [H(15)]: 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 voluntarily by the debtor and does not require the debtor to say that they are insolvent.

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

On the other hand, an involuntary petition can be filed by creditor(s) (the number depending on how many non-contingent, non-insider creditors the debtor has) under chapter 7 or 11 and requires the creditors to allege that the debtor is insolvent – not paying its debts as they fall due.

Commented [H(17)]: Correct, 1 mark

Question 2.2 (2 marks)

Commented [H(18)]: Total marks 2/2

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

Violating the automatic stay, even without notice of the petition, is contempt of court. The action is void, or voidable depending on the court the bankruptcy is pending in. The violator may be sanctioned for contempt of court, required to pay the debtor's fees and required to undo its violation.

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

Commented [H(20)]: Correct, 1 mark

Question 2.3 (3 marks)

Commented [H(21)]: 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 by a reorganisation plan when a claim or interest holder in that class has a legal, equitable or contractual right altered by the plan. In other words, a claim is impaired unless every legal equitable or contractual right of any claim or interest holder in that class is unaltered by the plan.

Commented [H(22)]: Correct, 1 mark

The holders of impaired claims are always entitled to vote on the plan, however the votes of insiders are disregarded and an impaired classed can be crammed down by other impaired classes.

Commented [H(23)]: Incorrect, a creditor that will receive nothing under the plan cannot vote and it is deemed to reject the plan

Question 2.4 (3 marks)

Commented [H(24)]: 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 action.

Commented [H(25)]: 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?

Both actual fraudulent conveyance and constructive fraudulent conveyance.

Commented [H(26)]: Incorrect, the correct response is preferences

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

Actual fraudulent conveyance.

Commented [H(27)]: Correct, 1 mark

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

Commented [H(28)]: Total marks 14/15

Question 3.1 (3 marks)

Commented [H(29)]: Total marks 2/3

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

Stern v Marshall was a decision from the US Supreme Court in 2011. Prior to this date, it was commonly accepted that Bankruptcy Courts could resolve any issues presented in core proceedings. However in *Stern v Marshall*, the US Supreme court found that the Bankruptcy Courts cannot issue final order that invade the jurisdiction of Article III.

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

Commented [H(31)]: Correct, 1 mark, however the bankruptcy court can enter final orders on a challenge to a petition or with the consent of the parties.

Question 3.2 (3 marks)

Commented [H(32)]: 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?

Chapter 15 does not give foreign representatives the right to use the avoidance powers in the Bankruptcy Code. This has generally been interpreted to apply to the avoidance of preferences and fraudulent conveyances, and not to avoiding pre-petition transactions under other laws.

Commented [H(33)]: Correct, 1 mark

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

However a foreign representative can use the avoidance powers in chapter 7 or chapter 11 proceedings, so sometimes, after recognition is obtained under chapter 15, the foreign

representative will commence a chapter 7 or chapter 11 proceeding, where they will be able to use avoidance powers in relation to the debtor's US assets.

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

Question 3.3 (4 marks)

Commented [H(36)]: 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?

An interlocutory order is a provisional order given during the course of a proceeding (such as a directions order).

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

A final order is an order that resolves a dispute. In bankruptcy proceedings this can mean that one dispute/ issue is resolved by way of final order but more final orders may be made in the same proceeding, whereas usually in non-bankruptcy proceedings there is one final order (or one document with multiple orders in it) in a proceeding.

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

A final order can be appealed as of right, meaning no leave is required. However if there is a dispute over the bankruptcy court's jurisdiction to make the order, it may not be treated as final for the purposes of appealing.

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

On the other hand, an interlocutory order can only be appealed with leave from the appellate court or without when it relates to the extension of the period of exclusivity for proposing a plan.

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

In most cases an appeal from a bankruptcy court will be heard by the district court where the bankruptcy court that made the order sits. However in some circuits (1st, 6th, 8th, 9th and 10th), there is a Bankruptcy Appeal Panel will hear the appeal unless a party asks for it to be heard by the relevant district court.

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

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

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?

In Delaware directors owe a fiduciary duty to act in the corporation's best interest and a duty of care in educated decision making. Directors' duties are more limited in the US/Delaware when compared to other jurisdictions, and directors are protected by the "business judgment rule" under which the directors are presumed to have acted in good faith.

Commented [H(44)]: ie duty of loyalty, 1 mark

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

In both the ordinary course of business and when the corporation is potentially insolvent or insolvent, the directors' duties are owed to the corporation and its shareholders. This was confirmed by the Delaware Supreme Court, and differs from the norm in many jurisdictions, where the directors' duties shift to being owed to creditors when the company is in the zone of insolvency.

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 12/15

Question 4.1 [4 marks]

Commented [H(50)]: 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.

A proceeding will be treated as a foreign main proceeding if the debtor's centre of main interest (COMI) is in the country where that proceeding is taking place. A foreign non-main proceeding is a proceeding that is taking place in a country that is not the debtor's COMI.

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

COMI is assessed as at the date of the petition being filed and the place of incorporation is presumed to be the COMI, so Gambling Corporation's COMI will be presumed to be Greece. However this presumption can be rebutted, and other relevant factors for that rebuttal include the location of the company's headquarters, management, primary assets, the majority of its creditors and the jurisdiction whose law will apply to most of the disputes relating to the insolvency. A proceeding can only be recognised as a foreign non-main proceeding if the company had an establishment (a place where it carries out non-transactory economic activity) in that country prior to the chapter 15 petition being filed.

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

Thus here, for the US Court to recognise England as the COMI (and therefore treat the English proceeding as the foreign main proceeding) it would need to be shown that the majority of the company's creditors are in England and that the law of England would apply to most disputes in the insolvency. This may be the case if the only creditors are the bondholders, but may not be if there are other creditors. If England is not treated as the COMI and the English proceeding not as the foreign main proceeding, and assuming that the company does not have an establishment in England, it is unlikely that the court would recognise the UK proceeding as a foreign non-main proceeding.

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

Commented [H(54)]: The facts state that there is a casino in London, so there is an establishment

Question 4.2 [5 marks]

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

Oil Corporation is incorporated in Delaware and has its principal place of business in Texas. Oil Corp is facing a number of challenges to its business. First, ShipCo, one of its key customers, has filed a breach of contract lawsuit in Texas state court alleging that Oil Corp sold it contaminated oil that caused USD 1 billion in damage to ShipCo's container ships. Second, the US Department of Justice is investigating whether Oil Corp illegally purchased oil from countries subject to US sanctions. Third, Oil Corp. has missed a payment on its secured loan from USA Bank, and USA Bank is threatening to foreclose on an Oil Corp refinery located in the Philippines. Fourth, because of all these distractions, Oil Corp has forgotten to pay rent on its Houston, Texas office space and its landlord is threatening to evict it. What would be the effect of Oil Corp filing a chapter 11 petition on each of these four situations?

The claim by ShipCo would be stayed when the petition is filed as a result of the automatic stay on proceedings against the debtor.

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

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

The US Department of Justice investigation could continue.

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

The automatic stay has worldwide effect so would function to prevent steps taken in the Philippines to control the refinery or to bring proceedings in relation to it. The insolvency practitioner may wish to seek recognition in the Philippines in order to obtain assistance from the Filipino court.

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

The lease is an executory contract, meaning the debtor can chose to assume, reject, or assign the lease. It the eviction process in Texas requires proceedings to be commenced against the

company, then the automatic stay would prevent this. The debtor would still be liable for any outstanding rent (in the ordinary course of the insolvency).

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

Question 4.3 [6 marks]

Commented [H(61)]: Total marks 4/6

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 licenses are not assignable absent licensor consent, so Plastic Corp would need to consent to the assignment of the trademark license.
- (ii) Licenses of patents owned by the debtor cannot be terminated in connection with the sale of the patent without licensee consent, but can be rejected as an executory contract, meaning as long as Oil Corp does not plan to sell the patents, then it can reject the licenses without Plastic Corp's consent.
- (iii) Pursuant to section 363 of the Bankruptcy Code, a debtor in chapter 11 proceedings can sell its property free of any creditor interest (such as liens) if it obtains court approval. Thus assuming the proceeding is under chapter 11 and not chapter 7, then the property can be sold through a 363 process.

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

Commented [H(63)]: Correct, 1 mark

Commented [H(64)]: Correct, 1 mark

Commented [H(65)]: Incorrect, 365(n) applies to executory contracts and protects a patent licensee from termination irrespective of whether the patent is to be sold

Commented [H(66)]: Correct, 1 mark, the lien then applies to the proceeds

*** End of Assessment ***