



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 31/50

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): 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.

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.

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(6)]: Incorrect, the correct response is (a)

Commented [H(7)]: Correct, 1 mark

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

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

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

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).

Commented [H(9)]: Incorrect, the correct response is (a)

Commented [H(10)]: Incorrect, the correct response is (c)

Commented [H(11)]: Incorrect, the correct, response is (e)

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.

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QUESTION 2 (direct questions) [10 marks]

Commented [H(13)]: Total marks 5/10

Question 2.1 (2 marks)

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What is the difference between a voluntary petition for bankruptcy and an involuntary petition for bankruptcy?

Voluntary petition is filed by the debtor, involuntary petition is filed by creditors that meet certain requirements.

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

Question 2.2 (2 marks)

Commented [H(17)]: Total marks 1/2

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

The act would either be (i) void; or (ii) voidable. This depends on the circuit, where the bankruptcy proceeding is pending.

Commented [H(18)]: Correct, 1 mark, the act also constitutes contempt of court that may be punished with sanctions

Question 2.3 (3 marks)

Commented [H(19)]: Total marks 1/3

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

Impaired claims are those that are not going to be paid completely or in which some legal, equitable, or contractual right is altered. In case of a cram down, not all the impaired claims holders are entitled to vote. The plan may be then approved by the court (in case at least one impaired class of creditors approved the plan).

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

Commented [H(21)]: Incorrect, the correct response is that an impaired claim that will receive nothing under the plan cannot vote and is deemed to reject the plan

Question 2.4 (3 marks)

Commented [H(22)]: Total marks 1/3

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?

Actual fraudulent conveyance

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

Commented [H(23)]: Incorrect, the correct response is preference

Constructive fraudulent conveyance

Commented [H(24)]: Incorrect, the correct response is preference

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

Actual fraudulent conveyance

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

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

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Question 3.1 (3 marks)

Commented [H(27)]: Total marks 1/3

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

The Supreme Court held that the Constitution does not permit non-Article III federal bankruptcy courts to enter final judgments on a debtor's counterclaims when those claims are based solely on state law. Under *Stern v Marshall*, a bankruptcy court, even in core proceedings, cannot issue final orders and invade Art. III jurisdiction.

Commented [H(28)]: Correct, 1 mark, previously jurisdiction was based on the core/non-core distinction and now bankruptcy judges can enter final orders on challenges to a petition or with the parties' consent

Question 3.2 (3 marks)

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

What provisions of the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding? What are two ways that the foreign representative can obtain equivalent relief?

They cannot use the avoidance powers provided by the Bankruptcy Code (excluded relief - ss.: 533, 544, 545, 547, 548, 550, 724(a)).

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Two ways:

- 1. Commence a plenary proceeding after the recognition of the foreign proceeding under chapter 15 (under § 1511).
- 2. Seek to avoid pre-petition transactions.

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Commented [H(32)]: Specifically, under other applicable US and/or foreign law

Question 3.3 (4 marks)

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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 – dispose of all issues, interlocutory – resolve some, but leave further issues/claims to be resolved.

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

Final orders can be appealed as of right, interlocutory - only after obtaining the leave of the court.

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

District courts hear direct appeals from bankruptcy court orders, in some circuits they will be heard by Bankruptcy Appellate Panel. There is a further appeal as of right to the circuit court

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

of appeals and in rare cases an appeal from a bankruptcy court can go directly to the court of appeal.

Question 3.4 (5 marks)

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

Directors of Delaware corporations are subject to the fiduciary duties of **care and loyalty** (including the subsidiary duties of good faith, oversight and disclosure).

Duties are owed to the **shareholders and the corporation** in either ordinary course of business or in case of actual/potential insolvency and **not to the creditors** (*North Am Catholic Educational Programming Foundation, Inc v Gheewalla*, 930 A.2d 92, 103 (Del 2007)).

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

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

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

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

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

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

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Question 4.1 [4 marks]

Commented [H(47)]: 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.

- I. English scheme of arrangement could be granted recognition under US chapter 15.

Schemes of arrangement do not automatically constitute a "foreign proceeding" under the Bankruptcy Code. However, the bankruptcy court may presume it does in some cases (for example, if the foreign court's certificate states that the scheme is a "foreign proceeding").

Under 11 U.S.C. § 101(23), the following are the criteria of the "foreign proceeding":

1. the existence of a proceeding;
2. the proceeding is either judicial or administrative;
3. the proceeding is collective in nature;
4. the proceeding was issued in a country other than the United States;
5. the proceeding is authorised/conducted under insolvency/adjustment of debts law; and
6. the purpose of the proceeding is to reorganise/liquidate.

The listed above criteria have been broadly interpreted by the U.S. courts. Schemes of arrangement are routinely recognised by US bankruptcy courts as "foreign proceedings" for the purposes of Chapter 15 as they have become key restructuring tools, including in the UK. A great example is the *Magyar Scheme* case, in which the English scheme of arrangement was recognized under the chapter 15.

- II. The proceeding will likely be the non-main proceeding.
The court has broad discretion to grant provisional relief to the debtor upon the filing of a petition under Chapter 15. The main difference between the recognition as foreign

main/non-main proceeding would be that upon recognition of a foreign proceeding as a foreign main proceeding (in accordance with criteria listed above), certain relief is granted automatically (for example, the application of the automatic stay).

1. The main proceeding – the proceeding that was commenced in the centre of the main interests (“COMI”) of the debtor (assessing domicile, principal place of business, location of assets). Normally the place of incorporation is a presumed COMI, but this is not absolute, and the following factors are considered: location of headquarters, management, assets and majority of the creditors; jurisdiction of the law applicable to most of the disputes.
 - a. Under the given fact pattern, the English scheme of arrangement will be likely recognized as a foreign non-main proceeding.
 - i. Gambling Corporation is set up in Greece; its principal place of business is Greece. It operates internationally, including in Athens, Las Vegas, London and Macau. Its bonds are governed by English law. Based on this, either Greece or the UK are to be considered as Gambling Corporation’s COMI. The presumed COMI would be Greece as a place of incorporation. This is also supported by the fact that the principal place of business is in Greece, where also some of the operations are performed (and, presumably, assets are located).
 - ii. Thus, it is likely that Greece will be considered as COMI of Gambling Corporation, as this is the country with which it has the strongest connection, so the English scheme will be considered as a non-main proceeding.

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

Commented [H(50)]: Correct, 1 mark, also the casino in London is the necessary establishment in the jurisdiction of the foreign proceeding

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?

Commented [H(51)]: Total marks 4/5

1. ShipCo breach of contract lawsuit – since this will be considered as litigation on pre-petition claims, this will automatically be stayed.
2. DOJ investigation – will continue (regulatory investigation is a statutory exception from the stay).
3. Payment on secured loan and foreclosure on refinery in Philippines – the automatic stay will apply. However, the USA Bank as a secured creditor can seek a court order of to lift this stay and to permit the foreclosure, then sell it, and apply the proceeds to the debt. 11 U.S.C. § 362(d). This will work in case Oil Corporation has no equity in the refinery and the refinery is not necessary for an effective reorganization of Oil Corporation.
4. Eviction from Texas office – in case the lease has expired, Oil Corporation can be evicted.

Commented [H(52)]: Correct, 1 mark, also the filing of the petition will bring the stay into effect

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

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

Commented [H(55)]: Correct, 1 mark, though the facts here don’t say that the lease term has expired

Question 4.3 [6 marks]

Commented [H(56)]: Total marks 2/6

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?

Oil Corp can achieve each of the listed goals without the consent of Plastic Corp and USA Bank.

- (i) Under the hypothetical test (applied in Third, Fourth, Ninth and Eleventh Circuits), a licensee of a third-party's intellectual property might be in a position, where it can't assume/continue performing based on the pre-petition license without firstly getting the licensor's consent. So, the consent of Plastic Corp might be required.
- (ii) The Bankruptcy Code provides for an opportunity to the debtor to reject an executory contract (for example, a burdensome contract), if doing so will increase the value of the estate for the creditors. Thus, to achieve this goal Oil Corp would most likely not require any consents of Plastic Corp and USA Bank.
- (iii) The sale of the manufacturing facility free and clear of the USA Bank lien through 363 sale will be possible without the consent of the USA Bank provided it increases the value of the estate for creditors. The lien will, however, attach to the proceeds of the sale of the plastic manufacturing business.

Commented [H(57): Incorrect, the provisions of trademark law provide that the licensor's consent is required for assignment; therefore the consent of Plastic Corp is required

Commented [H(58): Incorrect, section 365(n) of the Bankruptcy Code protects licensees of patents, so the debtor could not terminate the license without the consent of the licensee

Commented [H(59): Correct, 1 mark

Commented [H(60): Correct, 1 mark

*** End of Assessment ***