



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 37.5/50

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

Commented [H(2): Total marks 8/10

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.

Commented [H(6)]: 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(7)]: Incorrect, the correct response is (c)

Question 1.6

Which of the following statements about the plan exclusivity period is **true**?

(a) The exclusivity period is 1 year.

(b) The exclusivity period cannot be extended.

(c) The exclusivity period cannot be shortened.

(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.

Commented [H(8)]: Correct, 1 mark

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.

Commented [H(9)]: Correct, 1 mark

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".

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

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(11)]: Correct, 1 mark

Question 1.10

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

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.

QUESTION 2 (direct questions) [10 marks]

Commented [H13]: Total marks 6.5/10

Question 2.1 (2 marks)

Commented [H14]: Total marks 2/2

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

The difference is that a voluntary bankruptcy petition is filed by the debtor, whereas the involuntary petition is filed by the creditors with relation to debts owed.

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Commented [H16]: Correct, 1 mark

Question 2.2 (2 marks)

Commented [H17]: Total marks 1.5/2

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

Any action taken in contempt of the stay is void or voidable.

If the stay violator fails to obtain relief, the violator may need to pay the debtors' attorneys' fees and also require the violator to take actions to undo the impact of its violation.

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Commented [H19]: Partially correct, 1/2 mark, the act constitutes contempt of court and these may be imposed as contempt sanctions

Question 2.3 (3 marks)

Commented [H20]: 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 considered impaired if the terms of the debt are altered in a negative manner, for example by reducing the interest rate or extending the payment period. The claim will be considered impaired if the holder's rights are not 'legal, equitable and contractual unaltered'.

A holder of an impaired claim is not entitled to vote when a party in interest objects. The value of the claim is returned to the estate.

Commented [H21]: Correct, 1 mark

Commented [H22]: Incorrect, the holder of 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 [H23]: 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.

Commented [H(24)]: Correct, 1 mark

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

A constructive fraudulent conveyance.

Commented [H(25)]: Incorrect, the correct response is preference; insolvency may be a factor in a constructive fraudulent transfer but is not required in all cases

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

An actual fraudulent conveyance.

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

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

Commented [H(27)]: Total marks 11.5/15

Question 3.1 (3 marks)

Commented [H(28)]: Total marks 1.5/3

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

The US Supreme Court held that a bankruptcy court cannot issue final orders that invade Article III jurisdiction.

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Bankruptcy courts were created by legislation, have limited jurisdiction to enter final orders, other than on core bankruptcy issues. The definition of 'core' matters is outlined within section 157(2) in Chapter 28 of the US Code.

The bankruptcy court may still hear the non-core proceedings, provided there is a sufficiently close connection to the bankruptcy proceeding.

At the outset of proceedings, the parties are obliged to state whether the matter is core or non-core, in order to allow the bankruptcy court to establish whether they have the jurisdiction to issue a final order or judgment.

Commented [H(30)]: Partially correct, 1/2 mark, this was the pre-Stern v. Marshall rule. Now, a bankruptcy court can enter a final order on a challenge to a petition or on another core matter with the consent of the parties

Question 3.2 (3 marks)

Commented [H(31)]: 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?

Avoidance powers may not be invoked in a chapter 15 proceeding by a foreign representative. The foreign representative may obtain equivalent relief by opening plenary proceedings under the Bankruptcy Code.

Commented [H(32)]: Correct, 1 mark

Further, the foreign representative may apply to the Court for an order that provides authorisation for the pursuit of claims on behalf of the creditors.

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

Commented [H(34)]: Incorrect, the foreign representative may bring claims on other applicable US or foreign law for the avoidance of transactions

Question 3.3 (4 marks)

Commented [H(35)]: 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 dispose of all issues, ensuring there are no further matters to be settled, whereas interlocutory orders would only address some of the outstanding issues or claims, leaving more to be settled.

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

Generally, appeals from bankruptcy court decisions are heard by the district court for the district in which they preside in. There are circumstances in which the appeal may be heard by a Bankruptcy Appellate Panel, which constitutes judges from the courts within the circuit. Although not common, it is possible for appeals for a bankruptcy to be heard directly by the court of appeals. This would happen in cases where the appeal produces a question of law where there is no controlling decision of the circuit or the US Supreme Court, or requires resolving conflicting controlling decisions. This could also happen in cases which the immediate appeal may materially advance the progress of the case.

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

In order to appeal against an interlocutory order, there needs to be leave granted by the appellate court, however with the appeal of a final order, they may be appealed as of right.

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

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

Question 3.4 (5 marks)

Commented [H(42)]: Total marks 4/5

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

Directors of Delaware corporations have the fiduciary duty of loyalty to act in the corporation's best interest and also have a duty of care with relation to educated decision making. The Directors are required to act in good faith on the basis of reasonable information.

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

The duty of care principle requires the directors to make informed and considered decisions based upon all of the material information that is available to them.

The duty of loyalty principle requires the directors acting on an independent basis with the genuine belief that actions taken are in the best interests of the shareholders of the company.

When the corporation is potentially insolvent or actually insolvent, the Directors continue to owe duties to the shareholders, not the creditors. The Delaware Supreme Court outlined this clearly within the case of *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla* - 930 A.2d 92 (Del. 2007).

Commented [H(45)]: Correct, 1 mark, the duties are also owed to the corporation itself

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

There is no concept within the US of wrongful trading or insolvent trading, as the Delaware Chancery Court found within *Trenwick America Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168 (Del. Ch. 2006), stating that "Delaware law imposes no absolute obligation on the board of an insolvent company that is unable to pay its bills to cease operations and to liquidate".

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

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Question 4.1 [4 marks]

Commented [H(48)]: 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.

English schemes of arrangement typically can be granted under Chapter 15 as foreign proceedings.

In order to class as a foreign main proceeding, the proceeding which is seeking to gain Chapter 15 recognition must be commenced in the debtor's centre of main interest (COMI). To establish the COMI of the debtor, the location of headquarters, location of management,

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

location of primary assets, location of creditors, and jurisdiction whose law will apply to most disputes must be established.

In the above case of Gamblin Corp, the COMI would appear to be in Greece due to the incorporation and principal place of business being in Greece.

As such, the English scheme of arrangement would likely be classified as the foreign non-main proceeding, despite the bonds being governed by English law.

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

Commented [H(51)]: Correct, 1 mark, with the casino in London qualifying as the necessary establishment in the jurisdiction of the foreign proceeding

Commented [H(52)]: Total marks 4/5

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?

Chapter 11 is a debtor-friendly reorganization procedure in which the debtor would seek to implement a plan of reorganization for the Company.

With relation to ShipCo filing a breach of contract lawsuit in Texas, Chapter 11 provides that all litigation is automatically stayed upon filing of the bankruptcy petition.

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

With relation to the US DoJ investigating whether Oil Corp illegally purchased oil from sanctioned countries, the filing of the chapter 11 petition will not prevent the DoJ from "the commencement or continuation of a criminal action or proceeding against the debtor", as per section 362 (b)(1) of Chapter 11 of the US Code. This means the DoJ are entitled to continue their investigations and may open criminal proceedings if appropriate. In essence, the Chapter 11 petition will have a very limited impact in this instance.

Commented [H(55)]: Correct, 1 mark

With relation to USA Bank seeking to foreclose on the refinery based in the Philippines, the filing of a Chapter 11 petition does not impact the secured creditor's ability to enforce upon the security. Should USA Bank make a claim in the bankruptcy estate, the claim must be paid in full, including a payment for interest for not receiving the cash immediately.

Commented [H(56)]: Incorrect, actions to take possession of assets of the estate are barred, worldwide and by any creditor

The filing of the Chapter 11 petition in relation to the eviction notice, is that the landlord cannot compel Oil Corp to become evicted. Per Section 265 of the Bankruptcy Code, the debtor then has 120 days from the filing of the petition to either assume or reject the lease, with an additional 90 days available should the Court wish to grant them.

Commented [H(57)]: Correct, 1 mark, the landlord may only evict if the lease term expired before the bankruptcy

Question 4.3 [6 marks]

Commented [H(58)]: Total marks 4.5/6

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?

With respect to part (i), trademark licenses are not assignable absent licensor consent. In this scenario, this would mean that Plastic Corp would need to provide consent to the assignment of the trademark license. This point of law was examined and proven in *re Trump Entertainment Resorts, Inc*, 526 BR 116 (Bank D Del 2015).

With respect to part (ii), patent licenses are protected to the effect that licenses may not be terminated in connection with the sale of the intellectual property without their consent. This is as per s 365 of Chapter 11 of the US Code. With respect to this scenario, Oil Corp would require the consent of Plastic Corp in order to terminate the licenses. Per paragraph N under s365 of US Chapter 11, Plastic Corp would retain the ability to all rights as they existed prior to the contract for the duration of the contract.

With respect to part (iii), pursuant to s 363(f) under Chapter 11 of the US Code, an asset may be sold free and clear with creditor consent. Should Oil Corp wish to sell the facility free and clear of liens, USA Bank would need to consent as they are the party with a lien in place.

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

Commented [H(61)]: Correct, 1 mark

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

Commented [H(63)]: Partially correct, 1/2 mark, their consent would not be needed if the value of the asset were greater than the amount of the secured debt and the lien would attach to the proceeds of the sale

*** End of Assessment ***