



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**.

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ANSWER ALL THE QUESTIONS

Commented [H(2)]: Total marks 38.5/50

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

Commented [H(3)]: Total marks 7/10

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)]: Incorrect, the correct response is (d)

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): Incorrect, the correct response is (a)

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): Incorrect, the correct response is (b)

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)]: Correct, 1 mark

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 for bankruptcy is filed by debtor and while it requires the debtor to disclose estimated funds on hand, number of creditors, assets and liabilities, it does not need to be or claim to be insolvent.

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

An involuntary petition for bankruptcy is filed by a creditor of the debtor and requires the petitioning creditor to allege either that the debtor is not paying its debts as they become due (unless they are the subject of a *bona fide* dispute as to liability or amount) or that "within 120 days before filing this petition, a custodian, other than a trustee, receiver, or an agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took position".

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?

Violation of a stay constitutes a contempt of court and is void or voidable. However, the interested parties may seek that the stay be lifted prospectively to permit or retrospectively to validate an act that would otherwise be a violation of an automatic stay.

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

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

Failure to validate or permit an act leading to a violation could lead to imposition of contempt sanctions including, *inter alia*, payment of the debtor's attorney's fees and requiring the violator to take affirmative acts to undo the effects of the violation.

Question 2.3 (3 marks)

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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?

Claims are considered impaired where the "legal, equitable, and contractual rights" are not left completely unaltered in respect of every claim or interest in the class. Effectively, an impaired class's rights are impacted by the plan of reorganisation. Accordingly, they are the only classes permitted to vote.

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

Commented [H(23)]: An impaired class that receives nothing under the plan cannot vote and is deemed to reject the plan

However, where there are multiple impaired classes, they only need one impaired class to agree to the plan which then allows for a "cramdown" of the plan to non-voting or dissenting creditors provided that the plan does not discriminate unfairly and is fair and equitable.

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?

Preference

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?

Constructive fraudulent conveyance

Commented [H(26)]: 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(27)]: Correct, 1 mark, prior to this decision the jurisdiction of the bankruptcy court was understood to depend on the core / non-core distinction

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

Commented [H(28)]: Total marks 12.5/15

Question 3.1 (3 marks)

Commented [H(29)]: Total marks 1.5/3

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

In 2011, the US Supreme Court in *Stern v Marshall* held that even in core proceedings a bankruptcy court could not issue final orders that invade on the jurisdiction of Article III of the Constitution.

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

This led to uncertainty in the area of bankruptcy law. However, because of further amendments to the Bankruptcy Rules and US Supreme Court decisions it has been held that in circumstances where a bankruptcy judge is required to determine a core proceeding over which they lack constitutional authority they may issue a report and recommendations for review by the district court (the same process as in non-core proceedings) or where there is the consent of the parties they may issue a final order.

Commented [H(31)]: Correct, 1/2 mark, also the bankruptcy court can enter a final order on a challenge to a petition

This has been implemented in the Bankruptcy Rules by requiring the litigants, in their pleadings, to state whether they consent to the bankruptcy court entering a final order or judgment.

Question 3.2 (3 marks)

Commented [H(32)]: 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?

By virtue of Chapter 15, foreign representatives may not use the avoidance powers provided for by the Bankruptcy Code. As such, it is only under Chapters 7 or 11 that a foreign representative can access the avoidance powers.

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

Accordingly, a foreign representative may obtain the equivalent relief where a plenary proceeding is commenced under chapter 7 or 11 by a debtor or creditor prior to any involvement of foreign representatives. Or after receiving recognition in a chapter 15 proceeding, the foreign representative may seek to commence a plenary proceeding under the Bankruptcy Code.

Commented [H(34)]: Correct, 1 mark, alternatively the foreign representative may bring claim under analogous US and foreign law

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 Order – dispose of all issues and leave nothing further to be determined. Final orders may be appealed as a right.

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

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

Interlocutory Order – resolves a certain issue but not all the issues and may only be appealed with leave of the appellate court.

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

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

Appeals from the Bankruptcy Court are heard by the district court for the district in which they sit. However, certain circuits have a Bankruptcy Appellate Panel which hears appeals.

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

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

Question 3.4 (5 marks)

Commented [H(42)]: 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?

Under the laws of the state of Delaware a director owes a fiduciary duty of loyalty to the corporation's best interest and a duty of care. In educated decision-making these duties are owed to the corporation and its shareholders. However, they are protected by the Business Judgment rule from liability for errors of judgment.

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

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

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

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

Even when a corporation is potentially insolvent the directors' duties are owed to the corporation and its shareholders, not to the creditors.

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

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

Commented [H(48)]: Total marks 12/15

Question 4.1 [4 marks]

Commented [H(49)]: Total marks 4/4

Gambling Corporation is incorporated and has a principal place of business in Greece and it operates casinos and betting parlors in many international cities, including Athens, Las Vegas, London and Macau. Gambling Corp's bonds (governed by English law) are due to mature in

one (1) year, but it is unable to repay or refinance them. Gambling Corp is considering using an English scheme of arrangement to restructure the bonds.

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

Foreign main proceedings are proceedings commenced in the debtor's center of main interest or COMI. A COMI is presumed to be in its place of incorporation (in this case Greece) but can be rebutted. However, the relevant factors to consider when determining a company's COMI include:

1. location of headquarters;
2. location of management;
3. location of primary assets;
4. location of a majority of debtor's creditors or a majority of the creditors that will be affected by the relief requested by the foreign representative; and
5. jurisdiction whose law will apply to most disputes.

In this case, all we know is that the company is incorporated in Greece and has its principal place of business in Greece, which supports the presumption that the COMI is Greece. However, the bonds are government by English law.

It is likely that the law of the bonds is not sufficient to make the COMI England. Accordingly, it would be recognized as foreign non-main proceeding. Noting that they have a casino in London providing them with the requisite establishment in the jurisdiction.

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?

Once a chapter 11 petition is filed there is an automatic worldwide stay providing Oil Corp breathing room to formulate a restructuring plan, negotiate with creditors and realise the value of its assets. This stay is broad with the Bankruptcy Code specifically prohibiting, inter alia, litigation on pre-petition claims – hence the breach of contract law suit in Texas by ShipCo would be stayed.

The stay only applies to property of the estate and is subject to certain statutory exceptions such as:

1. regulatory investigations – hence the investigation by the US Department of Justice would be permitted to continue;
2. exercise of rights under a financial repo contract – hence USA Bank will be able to foreclose on the refinery in the Philippines;
2. eviction of a debtor-tenant from a non-residential property where the lease has expired – in the circumstances that the lease has not expired Oil Corp would not be evicted from the Texas office space.

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

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

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

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

Commented [H(54)]: Total marks 4/5

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

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

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

Commented [H(58)]: Incorrect, this is a loan secured by the property and exercise of rights by a secured creditor is stayed

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

Question 4.3 [6 marks]

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?

The Bankruptcy code at section 363 provides for the sale of assets outside the ordinary course free and clear of all liens and other interests. Accordingly, Oil Corp would be able to sell the plastic manufacturing business without the consent of USA Bank.

The Bankruptcy Code also helpfully provides for the ability to assume, reject or assume and assign executory contracts.

Ordinarily under section 365 Oil Corp could assume and assign the contract. However, the third party would be required to give adequate assurance of future performance. Ordinarily, the consent of Plastic Corp is not required as it is not a contract for a loan or financial accommodation. However, in the circumstances that this is IP licencing law, it provides that a counterparty (Plastic Corp) cannot be compelled to accept performance from a transferee. Accordingly, Oil Corp cannot assume and assign the pre-petition licence without Plastic Corp's consent.

Further, Oil Corp could reject the patent licences. However, Oil Corp will be deemed to have breached the contract immediately prior to the petition date, giving Plastic Corp a pre-petition claim in damages. The contract would not be treated as Void, and therefore Plastic Corp could retain whatever it had received under the contract pre-petition.

*** End of Assessment ***

Commented [H(60): Total marks 4/6

Commented [H(61): Correct, 1 mark, the lien would attach to the proceeds of the sale

Commented [H(62): Correct, 1 mark

Commented [H(63): Correct, 1 mark

Commented [H(64): Correct, 1 mark, and therefore Oil Corp could not sell the patents for the exclusive use of the purchaser without the consent of Plastic Corp