



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 42/50

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

Commented [H(2): 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(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)]: 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(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

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

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

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

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

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

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

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

Question 1.8

Commented [H(10)]: Correct, 1 mark

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

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

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

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

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

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

Question 1.9

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

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

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

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

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

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

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

Question 1.10

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

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

Commented [H(12): Incorrect, the correct response is (e)

QUESTION 2 (direct questions) [10 marks]

Commented [H(13): Total marks 8/10

Question 2.1 (2 marks)

Commented [H(14): Total marks 2/2

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

With a voluntary petition, a debtor may commence the voluntary proceedings by filing the petition and there does not need to be claim as to whether or not the debtor is insolvent.

Commented [H(15): Correct, 1 mark

With an involuntary petition, creditors commence the involuntary proceedings against the debtor and the creditors will have to claim that the debtor is not paying its debts as they fall due.

Commented [H(16): Correct, 1 mark

Question 2.2 (2 marks)

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

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

A violation of the automatic stay is a contempt of court and the act is void. The violation may result in contempt sanctions which could include the violator having to pay the debtor's attorney's fees to rectify the effect of the stay violation. The court could also impose a daily fine payable to the court until the effect of the stay violation has been rectified.

Commented [H(18): Correct, 1 mark

Commented [H(19): Partially correct, 1/2 mark, in some circuits it's voidable, not void

Question 2.3 (3 marks)

Commented [H(20): 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 where under the plan of reorganization the creditor will be paid less than the value of the claim (the creditors legal, equitable and contractual rights have been altered) or where delayed payment in full is after the effective date of the plan.

Commented [H(21): Correct, 1 mark

Only impaired creditor classes have the right to vote on a reorganization plan.

Where the holder of an impaired claim is an "insider creditor" their vote must be disregarded.

Commented [H(22): They still vote, though their vote is disregarded for certain purposes. A claim that will receive nothing under the plan cannot vote and is deemed to reject the plan

Question 2.4 (3 marks)

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

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

Preference applies to transfers made on account of antecedent debt (a debt is antecedent where incurred before the transfer or payment).

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

Preference requires that the debtor be presumed to be insolvent at the time of transfer. Constructive fraudulent conveyances also requires that the debtor was insolvent at the time of the transfer.

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

Actual fraudulent conveyance requires that the debtor is proven to have made a transfer with "actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted."¹

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

Question 3.1 (3 marks)

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

A bankruptcy court has constitutional authority to issue a final order in core proceedings – which includes counterclaims by the estate against persons filing claims against the estate.

In *Stern v Marshall*, where a claim had been filed against the debtor and the debtor counterclaimed, the US Supreme Court determined that where a final order invades Article III jurisdiction (the judicial branch of the federal government), a bankruptcy court cannot issue final orders.

In *Stern v Marshall* the bankruptcy court had issued its judgment, which was then appealed and at the same time there were ongoing separate state level proceedings where the judgment was made before the appeal was resolved in the bankruptcy court. The US Supreme Court determined that the bankruptcy court's final order was not constitutional over a state law claim under Article III.

Question 3.2 (3 marks)

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

¹ 11 U.S. Code § 548 a (1)(A)

Commented [H(23)]: Total marks 3/3

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

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

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

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

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

Commented [H(29)]: Partially correct, 1/2 mark, this was the position prior to Stern v. Marshall

Commented [H(30)]: Correct, 1 mark, therefore a bankruptcy court may now enter a final order on a challenge to a petition or with the consent of the parties

Commented [H(31)]: Total marks 2/3

In chapter 15 proceedings a foreign representative cannot invoke the provisions of the Bankruptcy Code regarding avoidance powers – typically interpreted to apply to powers to unwind avoidance preferences and fraudulent conveyances.

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

Upon recognition of the foreign proceeding, under 11 U.S. Code § 1523 a foreign representative has standing to obtain equivalent relief under chapter 7 or 11 plenary proceedings, however such relief is limited to US assets of the debtor.

Commented [H(33)]: Correct, 1 mark, alternatively it may bring claims under other applicable US or foreign law

Question 3.3 (4 marks)

Commented [H(34)]: Total marks 3/4

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?

Interlocutory orders are orders which resolve a specific issue or claim in a matter. Interlocutory orders may be appealed only with leave of the court.

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

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

Final orders are those which resolve all issues in a matter. Final orders may be appealed as a matter of absolute right.

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

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

28 U.S. Code § 158 – Appeals (a)(1)-(3) provides that “district courts of the United States have jurisdiction to hear appeals:

Commented [H(39)]: Correct, 1 mark, alternatively appeals may be resolved by a Bankruptcy Appellate Panel in certain circuits

1. from final judgments, orders, and decrees;
2. from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
3. with leave of the court, from other interlocutory orders and decrees.”

Question 3.4 (5 marks)

Commented [H(40)]: 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 the ordinary course of business, under § 102(b)(7) of the Del Gen Corp L, fiduciary duties owed by directors of Delaware corporations to the corporation or its shareholders include:

- duty of loyalty, being the duty to act in good faith, in the best interests of the corporation and its stockholders and not for their own personal interests;
- duty of care in making informed business decisions for the benefit of the corporation and its stockholders.

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

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

Delaware law provides directors with a set of presumptions being the “business judgment rule”, which can protect the directors from being held liable for any errors/losses. The business judgment rule presumes that directors were properly informed, had all relevant information, when discharging their duties as directors and making decisions affecting the corporation.

Directors should ideally be disinterested and independent, where this is not the case the business judgement rule would not apply.

The directors fiduciary duties are owed to the corporation or its shareholders whether a company is solvent, potentially insolvent or actually insolvent, directors fiduciary duties do not extend to creditors even in insolvency.

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]

Commented [H(46)]: Total marks 13.5/15

Question 4.1 [4 marks]

Commented [H(47)]: 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.

In considering if the foreign proceedings/English scheme of arrangement could be granted chapter 15 recognition as a foreign main or foreign non-main proceeding, you would need to consider the debtor's center of main interests ("COMI").

Foreign main proceedings are such proceedings commenced in a debtor's COMI. There is a rebuttable presumption that a debtor's COMI is its country of incorporation, being Greece in the case of Gambling Corporation, therefore when considering the COMI, the following factors should also be considered in analysis of the same, being the location of:

- headquarters
- management
- primary assets
- majority of debtors creditors or a majority of the creditors that will be affected by the relief requested by the foreign representative
- the jurisdiction whose law will apply to most disputes.

Gambling Corporation's place of incorporation and principal place of business is in Greece. With the information provided it is not clear of the location of the primary assets, majority of creditors of the company or those affected by the requested relief or jurisdiction that will apply to most disputes (as only aware of the dispute governed by English law) so we are unable to make a determination other than Greece being the debtor's COMI. As such based on the information provided the English scheme of arrangement would likely not be granted chapter 15 recognition as a foreign main proceeding.

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

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

Where the proceedings are taken place in a jurisdiction other than the debtor's COMI i.e., under English law in this case, then the proceedings can be granted chapter 15 recognition as a foreign non-main proceeding where the debtor has an establishment in the jurisdiction, that was in existence prior to commencement of the chapter 15 proceedings. Under 11 U.S. Code § 1502 establishment means "any place of operations where the debtor carries out a non-transitory economic activity". Gambling Corporation operates casinos and betting parlours in international cities, including London. In this instance we would need to consider if the casino is a non-transitory economic activity, i.e. permanent and if so the English scheme of arrangement would be granted chapter 15 recognition as a foreign non-main proceeding.

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

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

Question 4.2 [5 marks]

Commented [H(52)]: Total marks 4.5/5

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?

First Situation - 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.

When the chapter 11 petition is filed, there is a worldwide automatic stay that is triggered under section 362 of the Bankruptcy code. The stay applies to commencement or continuation of proceedings against the debtor. If the petition was filed prior to the breach of contract lawsuit being filed or the lawsuit is ongoing at the time of the filing of the petition, then the breach of contract lawsuit would be a violation of the automatic stay against the debtor granted by the chapter 11 proceeding.

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

ShipCo should seek approval of the bankruptcy court before filing the breach of contract lawsuit.

Commented [H(54)]: Partially correct, 1/2 mark, the litigation would be stayed by the operation of the automatic stay

Second Situation - the US Department of Justice is investigating whether Oil Corp illegally purchased oil from countries subject to US sanctions.

The automatic stay is subject to certain statutory exceptions, which include regulatory investigations. US Department of Justice can proceed with their investigations into whether Oil Corp illegally purchased oil from countries subject to US sanctions.

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

Third Situation - 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.

Foreclosure of the Oil Corp's non-US property (the Philippines refinery) securing the loan from USA Bank is prohibited by the automatic worldwide stay triggered upon the filing of the chapter 11 petition. Proceeding with foreclosure of the same would result in USA Bank violating the automatic stay.

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

Fourth Situation - Oil Corp has forgotten to pay rent on its Houston, Texas office space and its landlord is threatening to evict it.

The chapter 11 filing provides the debtor with powers to assume or reject executory or burdensome contracts which includes unexpired leases. The landlord is unable to evict Oil Corp once the chapter 11 filing has been made due to the automatic stay granted and the debtor would need to either assume or reject the lease. Only if the debtor elects to reject the lease can the landlord make a claim for any unpaid rent. The lease will be deemed to be rejected if the debtor does not assume or reject the contract within 120 days of the order.

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

Question 4.3 [6 marks]

Commented [H(58)]: Total marks 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?

- (i) assume and assign the trademark license;

In order for Oil Corp to assign the trademark license, licensed from Plastic Corp, Plastic Corp as licensor would need to provide consent to do so. Trademark licenses are not assignable without licensor consent.

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

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

- (ii) reject the patent licenses so the purchaser has the exclusive right to use the patents;

Under 11 U.S. Code § 365 (n), if Oil Corp were to reject the patent licenses, the licensee, being Plastic Corp, may elect to:

- a) treat the contract as terminated; or
b) to retain its rights (including a right to enforce any exclusivity provision in the contract)

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

Oil Corp therefore would require the consent of Plastic Corp to achieve this goal.

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

- (iii) sell the manufacturing facility free and clear of the USA Bank lien.

In chapter 11 proceedings the debtor has the powers to sell assets free and clear of liens. Oil Corp would not require the consent of USA Bank to sell the manufacturing facility free and clear of the USA Bank lien.

Commented [H(63)]: Correct, 1 mark, the lien would then attach to the proceeds

*** End of Assessment ***