



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 38/50

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

Commented [H(6): Correct, 1 mark

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

Commented [H(7): Correct, 1 mark

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

Commented [H(8): Correct, 1 mark

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.

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

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)]: Correct, 1 mark

QUESTION 2 (direct questions) [10 marks]

Commented [H(13)]: Total marks 6.5/10

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?

[A voluntary bankruptcy petition is commenced by the debtor and a key feature of this proceeding is that the commencement of the proceedings serves as an order for relief. There are three factors that distinguish a voluntary bankruptcy petition from an involuntary petition. The first is that an involuntary petition is commenced either under chapter 7 or 11. Secondly, it must be commenced by three or more parties that have a non-contingent and undisputed claim against the debtor. Thirdly, relief is not obtained on commencement or proceedings, but granted by the court.]

Commented [H(15)]: Correct, 1 mark

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 automatic stay may lead to sanctions for contempt of court. Any transaction effected in violation of automatic stay that is not within the permitted exceptions is void or voidable.]

Commented [H(18)]: Correct, 1 mark

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

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 in situations where the claimant will receive less than the full value (100%) of their claim. A holder of an impaired claim who is an insider (such as a shareholder or person exercising control over the debtor) is not entitled to vote on a reorganisation plan unless there are no impaired creditors. Therefore, in a reorganisation plan, the votes of insiders are excluded or disregarded for purposes of obtain approval of the plan.]

Commented [H(21)]: Correct, 1 mark

Commented [H(22)]: Incorrect, the holder of a claim that will receive nothing cannot vote and are 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?

[A preference action applies to transfers made on account of an antecedent debt]

(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 action requires proof or presumption 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?

[An action for a fraudulent conveyance requires proof that the debtor intended to frustrate creditor recoveries.]

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?

[The case of *Stern v Marshall* changed bankruptcy law on a matter that is unique to the United States and relates to authority of bankruptcy courts. The matter arises because bankruptcy courts in the United States are not established by Constitution but by federal law and therefore their authority is limited to core bankruptcy matters. Although this was clear, the US Supreme court further narrowed the authority of Bankruptcy courts by holding in *Stern v Marshall* that in core bankruptcy matters, bankruptcy courts do not have authority to make final orders on matters within the jurisdiction of courts established by Constitution. This is generally the position in the US except where the parties consent to the jurisdiction of the bankruptcy court.]

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?

[A foreign representative cannot invoke avoidance provisions in US Bankruptcy code by virtue of recognition of the foreign proceeding since avoidance powers are not within the scope of relief available upon recognition of foreign proceedings. However, the foreign representative may be able to invoke avoidance powers in chapter 7 or 11 proceedings commenced by the debtor or creditors of the debtor. The foreign representative may also commence proceedings

Commented [H(23)]: Total marks 1.5/3

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

Commented [H(25)]: Incorrect, insolvency can be an element of a constructive fraudulent conveyance but it is a required element of a preference claim

Commented [H(26)]: Partially correct, 1/2 mark, specifically an actual fraudulent conveyance

Commented [H(27)]: Total marks 13.5/15

Commented [H(28)]: Total marks 2.5/3

Commented [H(29)]: Correct, 1 mark

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

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

Commented [H(32)]: Total marks 2/3

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

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

in order to take benefit of avoidance powers in the bankruptcy code in situations where relief may be limited or unavailable such as under the statute of limitations.]

Question 3.3 (4 marks)

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?

[The distinction between interlocutory and final orders in relation to bankruptcy proceedings, is nebulous. Ordinarily, an interlocutory order is an order in which the court resolves only some of the issues or claims and an appeal of those orders requires leave of the appellate court. Final orders are those in which all issues in the matter before court are resolved and an appeal can be made as a matter of right. In relation to bankruptcy proceedings, orders in relation to issues outside the authority of bankruptcy courts can only be considered final, if the parties consented to the bankruptcy court's jurisdiction. On the other hand, orders made in relation to core matters that are within the Bankruptcy court's jurisdiction may not be final if they do not resolve all issues in the case.]

Appeals from bankruptcy courts are in most cases made to the district courts or to a Bankruptcy Appeals panel and further appeals in cases where the right of appeal exists by right, to the circuit appeals court. In situations where there are conflicting decisions at the district court's level or in situations a position of authority is required, an appeal may be made with leave of court from the bankruptcy courts to the circuit 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?

[Under Delaware law, in the ordinary course of business, directors owe a company and its shareholders a duty of care and duty of loyalty. In relation to fiduciary duties, the position in the US is different from other jurisdictions because these duties do not change as a company nears or actually goes into insolvency and therefore directors owe no fiduciary duties to creditors. In, North American Catholic Programming Educational Foundation Inc., v. Gheewalla and Others, the defendant directors were sued by the appellant (who had entered into contractual arrangements with a company -Clearwire, in which the defendants were directors) for breach of fiduciary duties in relation to decisions and actions made when the company was either insolvent or in the zone of insolvency. The Supreme Court of Delaware held that it is well established that directors owe their fiduciary obligations to the corporation and its shareholders. The court further stated that " while shareholders rely on directors acting as fiduciaries to protect their interests, creditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights....Accordingly, the general rule is that directors do not owe creditors duties beyond the relevant contractual terms...Recognizing that directors of an insolvent corporation owe direct fiduciary duties to creditors, would create uncertainty for directors who have a fiduciary duty to exercise their business judgement in the best interest of the insolvent corporation."]

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

Question 4.1 [4 marks]

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

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

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

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

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

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

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

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

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

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

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

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

Commented [H(48)]: Total marks 9/15

Commented [H(49)]: 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.

[The first issue to determine is whether the English scheme of arrangement is a foreign proceeding as defined by the US Bankruptcy code. According to § 101(23) of Chapter 15 of the US Bankruptcy Code, a foreign proceeding is a judicial or administrative proceeding in a foreign country...under a law relating to insolvency or adjustment of debt in which the debtor's assets and affairs are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation. A scheme of arrangement is a procedure under part 26 of the UK Companies Act of 2006 under which a company in financial difficulty may enter into a binding agreement with its creditors to pay back all or part of its debt over an agreed period. Although not under insolvency law, the courts in the US have adopted a wide interpretation of the term foreign proceeding and therefore the scheme of arrangement would be considered a foreign proceeding.]

The second issue to determine is whether the English scheme of arrangement is a foreign main or foreign non-main proceeding. The former is a proceeding that takes place in a jurisdiction where the debtor has its center of main interests (COMI) while the latter is a proceeding that takes place in a jurisdiction where the debtor has an establishment. Although the concept of COMI is alien to US law, the criteria used – domicile and principal place of business, lead to a COMI determination. According to the facts, Gambling Corporation was incorporated and has its principal place of business in Greece. However, the debtor operates a Casino in London and this qualifies an establishment for purposes of non-main proceedings. Therefore, the English Scheme of arrangement will be recognised under Chapter 15 of the US Bankruptcy Code as a foreign non-main proceeding.]

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

Commented [H(51)]: Thus, the COMI is in Greece

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

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

Question 4.2 [5 marks]

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

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

[The filing of a chapter 11 petition operates as a stay under 11 USC 362 against commencement or continuation of judicial or administrative proceedings or other action against the debtor including actions to enforce, obtain possession, perfect security, collect and recover claims against the debtor, among others. Each of the situations mentioned in the facts would be affected as follows:

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

a) The law suit by ShipCo. is a matter of contract law. Continuation of the suit is prohibited by

§ 362. However, being a breach of contract claim, it is not a core bankruptcy matter. Determination of liability will be in the state courts and not in the bankruptcy petition.

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

b) The investigation by the US Department is a criminal matter that is excluded from automatic stay by 11 USC § 362 (b).

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

d) USA Bank will not be in position to foreclose because doing so amounts to enforcement of a lien against the property of the estate (11 USC § 362 (4)) which is a violation of the automatic stay.

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

d) The ability of the Landlord to evict Oil Corporation will depend on whether the lease has expired or not. Non-payment of rent gives the landlord a pre-petition claim which the landlord had a right to recover against the debtor and is subject to automatic stay under 11 USC § 362 (a)(1). Eviction is only permitted under 11 USC § 362 (10) if the Lease has expired.]

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

Question 4.3 [6 marks]

Commented [H(60)]: Total marks 1/6

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 assume and assign the trademark licenses as well as reject the patent licenses to Plastic Corp. However, Plastic Corp. will be entitled to treat such action as amounting to breach or termination (11 USC § 365 (n)(1)). This implies that it may be more prudent for Oil Corp, to seek the consent of Plastic Corp. prior to taking the actions in relation to the trademark and patent licenses.

Commented [H(61)]: Incorrect, because trademark law permits a licensor to refuse to accept performance by an assignee, the consent of Plastic Corp would be required

Commented [H(62)]: 365(n) permits the licensee to continue to practice the patent under the license, so Oil Corp would need consent of Plastic Corp to deliver exclusivity

Oil Corp as debtor in possession need not seek the consent of USA Bank in order to sell the plastic manufacturing facility over which it has a lien. All that is required is notification and a hearing (11 USC § 363 (b)(1). The manufacturing facility may be sold free and clear of any interest provided the price at which it is sold is greater than the aggregate value of the liens on the property (11 USC § 363 (f)(3). However, court may condition such sale in order to protect any interests in the property ((11 USC § 363 (e).

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

*** End of Assessment ***