



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 40/50

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): 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

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

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

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

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

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

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

Question 1.8

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

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

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

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

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

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

Question 1.9

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

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

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

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

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

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

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

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

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

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 7/10

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?

The difference between a voluntary petition for bankruptcy and involuntary petition for bankruptcy, is merely the party that files the petition. A voluntary petition is a debtor applying for bankruptcy on itself, whereas an involuntary petition requires a petitioning creditor to apply for the debtor's bankruptcy.

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

Question 2.2 (2 marks)

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

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

Two potential consequences of a violation of the automatic stay are 1) Imposition of contempt sanctions (i.e. paying the debtor's attorneys' fees and requiring the violator to take affirmative acts to undo the effects of the its violation) and 2) impose coercive contempt sanctions (i.e. paying daily fines to the court until the stay violation has been remedied).

Commented [H(18)]: Correct, 1 mark, also the act is void or voidable depending on which circuit you are in

Question 2.3 (3 marks)

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

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

A claim is considered "impaired" when the plan leaves the holder of the class "legal, equitable and contractual rights unaltered". A holder of an impaired claim not entitled to vote when they are not entitled to receive something under the plan.

Commented [H(20)]: Incorrect, the claim is unimpaired if its rights are unaltered

Commented [H(21)]: Correct, 1 mark, also the holder is deemed to reject the plan

Question 2.4 (3 marks)

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

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?

Preferences only arise to transfers made on account of antecedent debts.

Commented [H(23): 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 Preference requires that the debtor be presumed or proven to have been insolvent at the time of the transfer.

Commented [H(24): Correct, 1 mark

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

An actual fraudulent conveyance requires that the debtor be proven to have intended to frustrate creditors' recoveries.

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

Commented [H(26): Total marks 11/15

Question 3.1 (3 marks)

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

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

In 2011, Stern v Marshall, set a precedent that even core proceedings, bankruptcy court cannot issue final orders that overturn orders in Article III jurisdiction. Before Stern v Marshall, the impression was given that core proceedings were well established. The supreme court in Stern v Marshall held that the issuance of a final order of the bankruptcy court over a state law claim was unconstitutional under Article III.

Commented [H(28): Partially correct, 1/2 mark, their orders cannot concern a matter within Article III jurisdiction even if no other court has issued an order on the same subject

Commented [H(29): Partially correct, 1/2 mark, specifically the bankruptcy court was understood to have jurisdiction over core proceedings

Commented [H(30): Now a bankruptcy court can enter a final order on a challenge to a petition or on a core proceeding with consent of the parties

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

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?

Prior to the enactment of Chapter 15, Provisions of the Bankruptcy Code provided foreign representatives with the right to use the avoidance of powers. Chapter 15 excludes this provision. Chapter 7 & 11 is the only way a foreign representative can invoke avoidance of powers in a plenary proceeding.

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Commented [H(33): Correct, 1 mark, also a foreign representative may bring claims under analogous US or foreign law

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

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 difference between interlocutory and final orders are interlocutory orders only resolve some issues or claims and may be appealed only with the permission of the appellate court whereas final orders take care of all issues and can be appealed without any permission from the appellate court because one has a right to.

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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

Appeals are heard by the district court but in certain circuits bankruptcy appeals are heard by a Bankruptcy Appellate Panel (BAP)

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

Question 3.4 (5 marks)

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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?

The Directors of Delaware corporations owes a duty of care in educated decision-making and a duty of loyalty to the corporation's best interest to the corporation and its shareholders, even in those cases where the corporation may be potentially or actually insolvent.

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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)]: And the duties are never owed to creditors

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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.

When considering if the scheme of arrangement can be granted recognition under the provision of Chapter 15 of the US bankruptcy code, we will have to consider the center of main interest (COMI) of Gambling Corp. The company's COMI is in Greece. Although the company operates casinos and betting parlor in London, this is not their COMI. The scheme of arrangement is a proceeding in the United Kingdom and therefore the proceedings would be outside of the company COMI and will be recognized as a foreign non-main proceeding.

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

Commented [H(51)]: Correct, 1 mark, also the casino in London qualifies as the required establishment in the jurisdiction

Question 4.2 [5 marks]

Commented [H(52)]: 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?

Filing a chapter 11 petition, Oil Corp will be protected by the invocation of a worldwide automatic stay of creditor enforcement proceedings. A worldwide automatic stay will give Oil Corp or any property owned by Oil Corp the opportunity to continue operating in an ordinary fashion and go on with their course of business, while any lawsuits, foreclosure of property or evictions from principal business places will be halted. ShipCo's lawsuit will be put on pause; USA Bank will be unable to foreclose the refinery in the Philippines and the landlord of the

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

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

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

Texas office space cannot threaten to or actually evict Oil Corp from its principal place of business, during the period of restructuring of Oil Corp.

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

Although Oil Corp will be safe from these actions stated above under chapter 11, the investigation regarding Oil purchases from countries subjected to US sanctions will continue although the automatic stay has been invoked.

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Question 4.3 [6 marks]

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

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?

In each of the scenarios here are the outcomes under the Bankruptcy Code:

i) Assume and assign the trademark license – The trademark licenses are not assignable absent licensor consent, this is according to federal trademark laws. Therefore, Oil Corp needs to get consent from Plastic Corp to achieve assuming and assigning the trademark license of "Interconnect".

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

ii) Reject the patent licenses so the purchaser has the exclusive right to use the patents – According to 365 (n) of the Bankruptcy Code; a licensee's of patents' licenses may not be terminated in connection with a sale of the intellectual property without their consent. Therefore, rejecting the licenses will not be permitted for the buyer to gain exclusive rights to use the patents.

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

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

iii) Sell manufacturing facility free and clear of the USA Bank lien – In accordance to chapter 11, in an 363 sale Oil Corp can sell its property free and clear of the creditors (USA Bank) interests with court approval. Therefore, Oil Corp can sell the manufacturing facility free and clear of the USA Bank lien. The lien would be attached to sale.

Commented [H(63)]: Correct, 1 mark

Commented [H(64)]: Correct, 1 mark

* End of Assessment *