



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 34.5/50

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

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

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Commented [H(3): Correct, 1 mark

ABC Corp is filing for bankruptcy under chapter 11. Which of the following **is not** a party in interest in that proceeding?

- (a) A neighboring land owner who has leased equipment to ABC Corp.
- (b) ABC's government regulator.
- (c) A bank that has loaned money to ABC.
- (d) A local advocacy group.**
- (e) All of the above.

Question 1.2

Commented [H(4): Correct, 1 mark

Which of the following statements regarding executory contracts is **false**?

- (a) Executory contracts are clearly defined by the bankruptcy code.**
- (b) Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.
- (c) In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.
- (d) A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.
- (e) Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.

Question 1.3

Commented [H(5): Correct, 1 mark

In which of the following scenarios does a bankruptcy court have constitutional authority to issue a final order? Assume in each that the counterparty to the dispute has not consented to the bankruptcy court's exercise of jurisdiction.

- (a) A counterclaim against the estate that introduces a question under state law.
- (b) Since the list of core proceedings is non-exhaustive, a bankruptcy court may issue a final determination on any matter that comes before it.

(c) A creditor's claim against an affiliate of the debtor that has guaranteed the debtor's obligation to the creditor

(d) A debtor's motion to dismiss an involuntary bankruptcy petition.

(e) None of the above.

Question 1.4

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

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)]: Correct, 1 mark

Commented [H(11)]: Incorrect, the correct response is (e)

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 mark 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?

(i) Voluntary Bankruptcy

A voluntary bankruptcy petition is initiated by the debtor, who file an application for the opening of bankruptcy proceedings over his own assets.

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Generally, it is required from the debtor to submit the court with certain information/schedule such as an overview of his assets and liabilities and a list of the concerned creditors. However, in case of a failure to do so, bankruptcy proceedings will still be opened. A so called "naked" petition is sufficient.

(ii) Involuntary proceedings

An involuntary proceeding is initiated by a creditor under either chapter 7 or chapter 11. Farmers, family farmers or not-for-profit corporations are excluded as debtor in these proceedings.

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

Also, depending on the number of creditor the debtor has, the involuntary proceedings may need to be initiated by more than one creditor. An application for involuntary proceedings requires the creditor to provide the court with information that prove that the debtor is in fact insolvent.

He has to claim that either (a) the debtor is generally 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 the filing of this petition, a custodian, other than a trustee, receiver, or (b) 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 possession."

Question 2.2 (2 marks)

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

- (i) **Void or voidable:** any action that violate the automatic stay may under certain circumstances be considered void or voidable.
- (ii) **Sanctions** against the stay violator: In case of a violation of the automatic stay, the concerned parties may seek for a retrospective validation of the act taken. However, failure to obtain a relief from the stay may result in the imposition of contempt sanctions, such as payment of the debtors' attorneys' fees and the obligation to undo the effect of its violation.

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Commented [H(18): Correct, 1 mark

Commented [H(19): Correct, 1 mark

Question 2.3 (3 marks)

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?

- (i) **A claim is considered "impaired"** when the legal or contractual rights of the respective creditor are altered by a proposed Chapter 11 plan. The concerned creditor will receive less than under the original agreement.
- (ii) The holder of an **impaired claim** may not be entitled to vote if he fails to prove his claim in due time. Also, any creditor who makes the § 1111(b) election is not entitled to vote on the plan because creditors which have chosen to have their claims treated as fully secured under 11 U.S.C. § 1111(b)(2), actually relinquish their right to vote on the plan.¹⁾

Commented [H(20): Total marks 1/3

Commented [H(21): Correct, 1 mark

Commented [H(22): An impaired claim that receives nothing under the plan cannot vote and is deemed to reject it

¹⁾ https://www.govinfo.gov/content/pkg/USCOURTS-nmb-1_20-bk-12241/pdf/USCOURTS-nmb-1_20-bk-12241-3.pdf

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?

Preferences: Preferences only arise, when a debtor pays an existing debt of a specific creditor before filing for the opening of insolvency proceedings over his assets. This means that the creditor gets 100% of his receivables paid in full rather than just a pro rata share. As a result, the remaining assets of the debtor are reduced and the other creditors get paid less.

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Commented [H(24): Correct, 1 mark

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

An action made against the **preference** must prove that the payment has been made while the debtor was insolvent. With regard to actual fraudulent conveyance and the constructive fraudulent conveyance, the insolvency of the debtor is only one of the factors among others that can be used to prove the claims.

Commented [H(25): Correct, 1 mark

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

Actual fraudulent conveyance: This requires that the debtor has made a transfer or incurred an obligation “with actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted”.

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

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

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Question 3.1 (3 marks)

Commented [H(28)]: Total marks 2/3

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

After J. Howard died, Vickie filed for bankruptcy in federal court. Pierce filed a proof of claim in that proceeding, asserting that he should be able to recover damages from Vickie’s bankruptcy estate because Vickie had defamed him by inducing her lawyers to tell the press that he had engaged in fraud in controlling his father’s assets. Vickie responded by filing a counterclaim for tortious interference with the gift she expected from J. Howard. The Bankruptcy Court granted Vickie summary judgment on the defamation claim and eventually awarded her hundreds of millions of dollars in damages on her counterclaim. Pierce objected that the Bankruptcy Court lacked jurisdiction to enter a final judgment on that counterclaim because it was not a “core proceeding” as defined by 28 U. S. C. §157(b)(2)(C). As set forth in §157(a), Congress has divided bankruptcy proceedings into three categories: those that “aris[e] under title 11”; those that “aris[e] in” a Title 11 case; and those that are “related to a case under title 11.” District courts may refer all such proceedings to the bankruptcy judges of their district, and bankruptcy courts may enter final judgments in “all core proceedings arising under title 11, or arising in a case under title 11.” §§157(a), (b)(1). In non-core proceedings, by contrast, a bankruptcy judge may only “submit proposed findings of fact and conclusions of law to the district court.”

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

Article III, §1, of the Constitution mandates that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” and provides that the judges of those constitutional courts “shall hold their Offices during good Behaviour” and “receive for their Services[] a Compensation[] [that] shall not be diminished” during their tenure. The questions presented in this case are whether a bankruptcy court judge who did not enjoy such tenure and salary protections had the authority under 28 U. S. C. §157 and Article III to enter final judgment on a counterclaim filed by Vickie Lynn Marshall (whose estate is the petitioner) against Pierce Marshall (whose estate is the respondent) in Vickie’s bankruptcy proceedings.

Did the bankruptcy court have jurisdiction to enter a judgment on a counterclaim for tortious interference?

The U.S. Supreme Court held that, although the bankruptcy court had the statutory authority to enter judgment on the core counterclaim, it lacked the constitutional authority to do so under U.S. Const. art. III. While § 157 purported to extend bankruptcy jurisdiction to any counterclaim by a debtor, the bankruptcy court was not established under U.S. Const. art. III and was not subject to the constitutional assurances of independence that would allow adjudication of the debtor’s state common law claim. Further, resolving the Pierce’s claim would not necessarily resolve Smith’s counterclaim, which was otherwise unrelated to the claim-allowance process. Also, Smith’s claim did not involve public rights to allow the congressional extension of bankruptcy jurisdiction, since her claim flowed from state law rather than the federal bankruptcy scheme.²⁾

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

²⁾ <https://www.lexisnexis.com/community/casebrief/p/casebrief-stern-v-marshall>

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?

(i) Avoidance actions

Foreign representatives are not entitled to use the Bankruptcy Code's avoidance powers, which would permit enable them to set aside fraudulent transactions.

(ii) Equivalent relief:

- Foreign representatives are entitled to pursue any cause of action, including avoidance actions, available to them under other applicable USA and foreign law.
- Foreign representatives may also commence plenary proceedings such as chapter 7 or 11 and invoke the Bankruptcy Code avoidance powers.

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?

(i) Interlocutory and final orders

- "Final orders are those that dispose of all issues" related to the ongoing insolvency proceedings.
- Interlocutory orders are issued in the course of the insolvency proceedings and only resolve some issues or claims. They do not have a final nature and as a result, appeals from them are rare.

(ii) Possibility to appeal

- Final orders may be appealed as of right.
- Interlocutory orders may be appealed only with leave of the appellate court, with the exception of orders extending the period of exclusivity to propose a plan, which are appealable as of right.

(iii) Competent appellate courts

Appeals against final orders or interlocutory orders issued by the bankruptcy court are heard by the district court. However, in some instances, these appeals are heard by a Bankruptcy Appellate Panel (BAP).

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?

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

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

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

Commented [H(34)]: Correct, 1 mark

Commented [H(35)]: Total marks 4/4

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

Commented [H(37)]: Correct, 1/2 mark, though note the same concept of interlocutory orders exist in non-bankruptcy litigation

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 3/5

The financial situation of Delaware corporations has no impact/influence on the answer to this question. In fact, the **directors' fiduciary duties** are owed to the **corporation and its shareholders** and not also to **creditors**, even if the corporation is insolvent or about to become insolvent. Whether the corporation is insolvent or not, the duties of directors are the same.

Commented [H(43)]: The duties are of loyalty and care

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

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

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

Commented [H(47)]: Total marks 6.5/15

Commented [H(48)]: Total marks 0/4

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

Question 4.1 [4 marks]

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 **English schemes of arrangement** could be granted recognition in the case at hand. Indeed, the requirements of recognition of foreign insolvency proceedings are minimal and it is not required for foreign proceedings to be recognized to be similar to US bankruptcy proceedings. In fact, the term foreign proceedings is to be understood as "a collective judicial or administrative proceeding in a foreign country under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."

Commented [H(49)]: COMI is in Greece on these facts, so recognition as foreign main proceeding would be inappropriate. The London casino constitutes the necessary establishment, so recognition as foreign non-main would be appropriate

This broad definition enable different kinds of proceedings such as the English schemes of arrangement to be recognized in the US. In his application for the recognition of the English insolvency proceedings, the foreign representative will have to establish that (a) an insolvency proceedings over the assets of the debtor is pending; and that (b) he has been empowered by an English court to act as such.

Question 4.2 [5 marks]

Commented [H(50)]: 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?

Chapter 11 is a US innovation in restructuring — **the worldwide automatic stay** of any proceeding against the debtor or its property provides breathing space for a debtor to continue operating more or less in the ordinary course of business and work with its key constituencies to propose a plan of reorganization that will adjust its debts.

Commented [H(51)]: Partially correct, 1/2 mark, specifically the filing of the petition would bring the stay into effect

(i) **Lawsuit in Texas:** ShipCo's claim fall into the scope of the automatic stay since it is to be considered a litigation on pre-petition claims.

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

(ii) Investigation of the US Department of Justice: This does not fall into the scope of the automatic stay since the provisions related to the automatic stay makes an exception when it comes to criminal proceedings or regulatory investigations.

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

(iii) Foreclosure on an Oil Corp refinery located in the Philippines: This act fall into the scope of the automatic stay since it is an act aiming at obtaining possession or control of property of the estate.

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

(iv) Eviction from the Houston, Texas office space: Under the assumption that the lease agreement of Oil Corp has not expired, the eviction from the office space does not fall into the exception, which concerned only eviction from non-residential property where the lease has expired is possible. Thus, it may be assumed that the eviction process would not be possible due to the automatic stay.

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

Question 4.3 [6 marks]

Commented [H(56)]: Total marks 2/6

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) Trademark licenses are only assignable upon prior consent of the licensor, meaning Plastic Corp.

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

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

(ii) Licensees of patents owned by Oil Corp can be terminated/rejected in connection with the sale of the intellectual property without any consent.

Commented [H(59)]: Under 365(n), the licensee can continue to perform the patent following rejection so exclusivity requires Plastic Corp's consent

(iii) The sale of the manufacturing is only possible upon approval of the creditor, meaning the USA Bank.

Commented [H(60)]: Incorrect, the sale can be without creditor consent in a number of scenarios, including if the value of the assets exceeds the amount of the lien, which then attaches to the proceeds

*** End of Assessment ***