



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 43/50

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

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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

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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

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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.

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

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".

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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(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 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?

[Type your answer here]

The debtor commences a voluntary petition for bankruptcy; the creditors commence an involuntary petition for the debtor's bankruptcy. Both petitions can be under either chapter 7 or chapter 11.¹

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?

[Type your answer here]

An act taken in violation of the stay constitutes contempt of court and is void or voidable. If the stay is not lifted, contempt of court sanctions may be imposed on the violator, which includes payment of the debtors' attorneys' fees and requiring the violator to take affirmative actions to undo the effect of its violation.²

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

Question 2.3 (3 marks)

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

[Type your answer here]

A claim is considered "impaired" unless the holders legal, equitable and contractual rights are unaltered³. In confirming a plain with use of cram down, an impaired claim

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

¹ Hall, Laura R, Foundation Certificate in International Insolvency Law Module 3A Guidance Text Insolvency System of the United States ("Guidance Text") page 10, 5.3.3

² Guidance Text page 22, 5.4.2.1

³ Guidance Text page 37, 5.3.3.1

of a class of creditor may have a plan forced upon it with at least one impaired class who is not an insider voting to accept the plan⁴.

Question 2.4 (3 marks)

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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?

[Type your answer here]

Preferences⁵ - transfer of the debtor's property made in a suspect period before the petition date to the benefit of a creditor for an account of an antecedent debt made while the debtor was insolvent that enables the creditor to receive more than it would have in a chapter 7 liquidation.

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

[Type your answer here]

Constructive fraudulent conveyances⁶ - the debtor receives less than the reasonably equivalent value in exchange for a transfer or incurrence of an obligation.

Commented [H(25)]: Incorrect, the correct response is preference

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

[Type your answer here]

Actual fraudulent conveyances⁷ - where the debtor makes 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?

[Type your answer here]

Even in core proceedings, a bankruptcy court cannot issue final orders that invade Article III jurisdiction (of the US Constitution)⁸. Bankruptcy Courts are created by legislation under power granted to Congress by Article I of the US Constitution⁹. Prior to *Stern v Marshall*, issues that arise in and relate to bankruptcy proceedings that would otherwise be within the jurisdiction of Article III courts, were referred by the district courts to the bankruptcy court of their district with a distinction between "core" and "non-core" matters; bankruptcy courts may hear non-core proceedings provided

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

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

⁴ Guidance Text page 40, 5.5.4.3

⁵ Guidance Text page 50, 5.7.2

⁶ Guidance Text page 57, 5.7.3

⁷ Guidance Text page 56, 5.7.3

⁸ Guidance Text page 17, 5.3.4.4

⁹ Guidance Text page 13, 5.3.4.1

they are sufficiently related to the bankruptcy proceeding but cannot make a final determination but could resolve matters presented in core proceedings¹⁰.

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?

[Type your answer here]

Use of avoidance powers for preference and fraudulent conveyances as provided by the Bankruptcy Code. To get around it is to bring the debtor into formal Bankruptcy proceedings under either chapter 7 or chapter 11 of the Bankruptcy Code; or to use an equivalent US or foreign law that will result in the same outcome outside the Bankruptcy Code¹¹.

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?

[Type your answer here]

Final orders are those that disposes of all issues, leaving nothing further to be decided and may be appealed as of rights; Interlocutory orders only resolve some issues or claims and may only be appealed with leave of the court¹².

The court that can hear direct appeals from the Bankruptcy Court is usually the district court in the district where they sit. In certain circuits, appeals are heard by a Bankruptcy Appellate Panel with the right of a party to request the appeal be heard by the district court instead.¹³

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?

[Type your answer here]

Directors of Delaware corporations owe fiduciary duties to the corporation and to its shareholders (not the creditors), this is confirmed even if the corporation is "in the zone of insolvency" by the Supreme Court of Delaware (906A.2d 168 (Del Ch 2006)). The fiduciary duties that the directors owe are the duty of loyalty to the corporation's best interest and the duty of care in educated decision-making but are protected from liability for errors in judgment by the business judgment rule¹⁴.

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

Question 4.1 [4 marks]

¹⁰ Guidance Text page 17, 5.3.4.4

¹¹ Guidance Text page 65, 6.2.4

¹² Guidance Text page 19, 5.3.5.2

¹³ Guidance Text page 20, 5.3.5.3

¹⁴ Guidance Text page 59, 5.7.5

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

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

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Commented [H(49)]: Total marks 2/4

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.

[Type your answer here]

The Centre of Main Interest (COMI) of Gambling Corporation would be considered to be Greece as it is incorporated and has its principal place of business in Greece. Even though there is activity by Gambling Corporation in London, the COMI is usually presumed to be where the corporation is incorporated though this is rebuttable¹⁵. On the face of it accordingly, recognition under US chapter 15 would be as a foreign non-main proceeding and any relief may be granted on a discretionary basis, which may include automatic stay; operation of the debtor's business in the ordinary course by the foreign representative; sale, transfer or use of property outside the ordinary course; avoidance of post-petition transfers and post-petition perfection of security interest¹⁶.

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

Commented [H(51)]: Correct, 1 mark, it could not be foreign main because the COMI is not in the jurisdiction where the proceedings are pending and the London casino constitutes the necessary establishment in the jurisdiction of the foreign proceedings

Question 4.2 [5 marks]

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

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[Type your answer here]

Filing of Chapter 11 proceedings will cause an automatic stay of all proceedings as soon as the petition is filed, giving Oil Corp the protection it needs and will allow it to deal with its property in the ordinary course of business with the added ability to sell its property free and clear of creditor interest with a court approval in a 363 sale¹⁷.

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

ShipCo – the breach of contract lawsuit is stayed by filing the chapter 11 petition, it will be contempt of court if Ship Co continues to pursue its damages claim without lifting of the stay¹⁸.

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

US Department of Justice – investigation into illegally purchased oil from countries subject to US sanctions – these are investigations in criminal proceedings, it falls outside the operation of bankruptcy law. Chapter 11 will not assist and automatic stay will not be extended to these proceedings¹⁹.

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¹⁵ Guidance Text page 62, 6.2.2

¹⁶ Guidance Text page 64, 6.2.3

¹⁷ Guidance Text page 26, 5.4.3.2

¹⁸ Guidance Text page 22, 5.4.2.2

¹⁹ Guidance Text page 23 5.4.2.2

USA Bank – threat of foreclosure on a refinery in the Philippines on the basis of a missed payment of a secured loan - a chapter 11 proceedings invokes the automatic stay of this enforcement with the property of the estate anywhere in the world, including in this case the refinery in the Philippines²⁰. This will also allow Oil Corp to sell the refinery in a 363 sale free and clear of USA Bank's interest in the refinery provided that it received court approval if it chooses to do so²¹.

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Landlord – eviction because of missed rent payment on the Houston office space – this proceeding is also stayed and Oil Corp has the option to assume, reject or assume and assign the lease, which lease may be assigned despite anything within the lease disallowing it without landlord approval²².

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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?

[Type your answer here]

The trademark licence is an executory contract, and is not assignable without the licensor's consent. The debtor's intention here is clearly to assume and assign the trademark which is prohibited without the licensor's consent, it meets the prohibition requirements when applying both the hypothetical test and the actual test²³. Accordingly, assumption and assignment of the trademark is not possible without the consent of Plastic Corp.

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

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

Rejection of the patent licence will require Plastic Corp to consent to it. Licensees of patents and copyrights owned by the debtor are protected such that their licences may not be terminated in connection with the sale of intellectual property without their consent²⁴ (s365(n)).

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

Selling of the manufacturing facility free and clear of the USA Bank lien can be achieved in a 363 sale. A 363 sale will allow Oil Corp to sell the manufacturing facility free and clear of creditor interest with court approval²⁵. Oil Corp must establish that it is proposing the transaction in its business judgment and that the transaction is in the best interests of the estate as a whole²⁶. As USA Bank has a lien over it ranks high in

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²⁰ Guidance Text page 22, 5.4.2.2

²¹ Guidance Text page 26, 5.4.3.2

²² Guidance Text page 22, 5.4.2.2; pages 30 – 31, 5.4.5

²³ Guidance Text pages 31 – 32, 5.4.5

²⁴ Guidance Text page 26, 5.4.3.2

²⁵ Guidance Text page 26, 5.4.3.2

²⁶ Guidance Text page 27, 5.4.3.2

the application of the absolute priority rule, however if the sale price will achieve less than what the manufacturing facility will be realised for in chapter 7 proceedings, USA Bank will need to consent²⁷.

Commented [H(64): Correct, 1 mark, the lien will attach tot he sale proceeds

*** End of Assessment ***

²⁷ Guidance Text page 37, 5.5.3.1