



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 44/50

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

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

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

Question 1.1

Commented [H(3)]: Correct, 1 mark

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

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

Question 1.2

Commented [H(4)]: Correct, 1 mark

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

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

Question 1.3

Commented [H(5)]: Correct, 1 mark

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

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

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

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

(e) None of the above.

Question 1.4

Which of the following statements about "pre-packs" is **false**?

(a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.

(b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.

(c) A pre-pack debtor may spend as little as a single day in bankruptcy.

(d) The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.

(e) Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.

Commented [H(6)]: Correct, 1 mark

Question 1.5

Which of the following statements regarding cramdowns is **true**?

(a) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.

(b) Because cramdowns do not require the consent of all classes, the plan of reorganization may not be fair and equitable to all impaired classes.

(c) Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.

(d) Class definition is rarely a battleground when a debtor tries to cramdown classes.

(e) Dissenting creditors are not permitted to challenge the classification of a creditor supporting the cramdown.

Commented [H(7)]: Correct, 1 mark

Question 1.6

Which of the following statements about the plan exclusivity period is **true**?

(a) The exclusivity period is 1 year.

(b) The exclusivity period cannot be extended.

(c) The exclusivity period cannot be shortened.

Commented [H(8)]: Correct, 1 mark

(d) During the exclusivity period, only a creditor may propose a plan of reorganization.

(e) During the exclusivity period, only the debtor may propose a plan of reorganization.

Question 1.7

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

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

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

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

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

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

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

Question 1.8

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

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

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

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

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

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

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

Question 1.9

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

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

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

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

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

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

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

Question 1.10

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

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

Commented [H(12)]: Correct, 1 mark

QUESTION 2 (direct questions) [10 marks]

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

Question 2.1 (2 marks)

Commented [H(14)]: Total mark 2/2

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

A voluntary petition for bankruptcy is where the proceeding has been brought to the court by the debtor. The Federal Rules of Bankruptcy requires the debtor to file a schedule of assets and liabilities, current income and expenditures, statement of financial affairs, a schedule of executory contracts and others upon the filing of a voluntary petition for bankruptcy.

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

An involuntary petition for bankruptcy is where the proceeding has been brought to the court by the creditor. The proceeding may be commenced by a petitioning creditor under either chapter 7 or chapter 11.

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?

Filing for bankruptcy triggers the automatic stay under section 362. This automatic stay prevents creditors from taking certain actions against the debtor and also protects the assets of the debtor. The stay comes into effect immediately on filing and lasts until the liquidation has been finalized, unless lifted by a court order.

Two potential consequences of a violation of the automatic stay include:

- Any action taken by the creditor during this time will be deemed void/voidable and considered as contempt of court.
- The Court may award damages and payment of attorney fees to the debtor.

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

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

Question 2.3 (3 marks)

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

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 claim changes either the legal, equitable or contractual rights of a creditor.

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

Unimpaired creditors and creditors receiving nothing are not allowed to vote. Therefore, the impaired creditors have all the voting power.

Commented [H(22)]: Correct, 1 mark

When a creditor is receiving nothing, they are automatically assumed to reject the reorganisation plan.

Commented [H(23)]: Correct, 1 mark

Question 2.4 (3 marks)

Commented [H(24)]: 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?

Preference claims.

Commented [H(25)]: 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?

Preferential payments.

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

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

Chapter 11 US Bankruptcy Code §548 a1A – Fraudulent transfers and obligations.

Commented [H(27)]: Correct, 1 mark, also known as an actual fraudulent conveyance

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

Commented [H(28)]: Total marks 13/15

Question 3.1 (3 marks)

Commented [H(29)]: Total marks 1/3

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

New provisions were introduced as the 1978 Bankruptcy Code was deemed unconstitutional by the Supreme Court. The new provisions created a distinction between "core" and "non-core" matters. This statute allowed the bankruptcy court to hear only core proceedings. Non-core proceedings could also be heard by a bankruptcy judge if they are sufficiently related to bankruptcy proceedings but it is the district court who would make the final order in this regard.

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

However, in 2011 *Stern v Marshall*, the US Supreme Court ruled that even in core proceedings, a bankruptcy court cannot issue final orders that invade Article III jurisdiction. The reasoning behind this is that the Supreme Court determined that the issuance of a final order over a state law claim by the bankruptcy court was unconstitutional under Article III.

Commented [H(31)]: Correct, 1 mark

Following this case, subsequent rulings and amendments to the Bankruptcy Rules were introduced. These include the bankruptcy court exercising the district courts authority to enter

a final order. Also, when the bankruptcy court lacks constitutional authority, they may still determine a core proceeding by issuing a report and recommendation to the district court.

Commented [H(32): Specifically, the bankruptcy court has delegated authority to enter an order on a challenge to a petition and may enter a final order on a core proceeding with the consent of the parties

Question 3.2 (3 marks)

Commented [H(33): Total marks 3/3

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?

Chapter 15 of the US Bankruptcy Code involves the enactment of UNCITRAL Model Law, with certain modifications and procedures for recognition of foreign proceedings and coordination of US and foreign proceedings.

The relief a foreign representative is entitled to under chapter 15 depends on whether the proceeding is a main or non-main proceeding. The relief a foreign representative may avail of are those that a domestic debtor or trustee would be able to use. Chapter 15 does however, exclude from the rights granted to foreign representatives the use of avoidance powers provided by the Bankruptcy court.

Commented [H(34): Correct, 1 mark

Two ways that a foreign representative can obtain equivalent relief include:

- Invoking the Bankruptcy Code avoidance powers in a plenary proceeding such as chapter 7 or 11.
- Seeking to avoid pre-petition transactions under the applicable US or foreign law.

Commented [H(35): Correct, 1 mark

Commented [H(36): Correct, 1 mark

Question 3.3 (4 marks)

Commented [H(37): Total marks 4/4

Describe the differences between interlocutory and final orders and how an appeal may be taken from each. Which courts hear direct appeals from bankruptcy court orders?

Interlocutory orders are orders that only resolve some issues or claims, whereas with final orders, there is nothing further to be decided and all issues have been dealt with.

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

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

In order to appeal an interlocutory order, you need leave from the appeal court. Final orders can be appealed as of right and no leave is required.

Commented [H(40): Correct, 1/2 mark

Commented [H(41): Correct, 1/2 mark

The district court generally hears direct appeals from bankruptcy court orders. Also, dependent on the circuit, bankruptcy appeals are heard by a Bankruptcy Appellate Panel. In these circuits, the interested party can request that the appeal be heard by the district court instead. It should also be noted that an appeal from a bankruptcy court may also be heard by the court of appeals. This can occur when there are issues around controlling decisions such as no decision or conflicting decisions, and if appealing to the court of appeal will significantly advance the progress of the case.

Commented [H(42): Correct, 1 mark

Commented [H(43): Correct, 1 mark

Question 3.4 (5 marks)

Commented [H(44): Total marks 5/5

What fiduciary duties do directors of Delaware corporations owe and to whom are the duties owed in the ordinary course of business? To whom are duties owed when the corporation is potentially or actually insolvent?

Many US corporations set up operations in Delaware as there are certain advantages of incorporating in Delaware. When it comes to director liability, US director liability is generally more limited in Delaware than elsewhere. This is due to the fact that director liability is determined by the law of the state.

Directors of Delaware corporations have fiduciary duties of loyalty and care to the company and its shareholders. However, the business judgement rule in Delaware protects the directors from liability for errors of judgement as it is presumed that they have acted in good faith. The directors will only be found liable if it is determined that the directors were reasonably informed or were not acting in good faith.

When the corporation is potentially or actually insolvent, the directors' duties are still owed to the company and its shareholders. They do not have a fiduciary duty to the creditors. There is no obligation under Delaware law on insolvent companies to cease operations and to liquidate.

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.

We must look at where the center of main interest ("COMI") is established in determining whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding. Chapter 15 may be filed where the debtor has a principal place of business.

Foreign main proceedings can be filed where the debtor's COMI is located. If the COMI cannot be established in a location, this would be a foreign non-main proceeding. Domicile, principal place of business and location of assets are all considered when determining a debtor's COMI.

This scheme of arrangement would be granted recognition under US chapter 15 as a foreign non-main proceeding. This is on the basis that Gambling Corporation is incorporated and has a principal place of business in Greece.

Foreign non-main proceedings may only be recognized only if the debtor has an establishment in the jurisdiction. We see that Gambling Corporation operates casinos and better parlors in Athens, Las Vegas, London and Macau.

Parallel proceedings could also be considered here (a scheme of arrangement in the UK and chapter 11 in the US). This attempts to harmonize the laws of both nations for the benefit of the creditor. 75% or more in value of the creditors must agree for this plan to be approved.

Question 4.2 [5 marks]

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

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

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

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

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

Commented [H(50)]: Total marks 11/15

Commented [H(51)]: Total marks 4/4

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

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

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

Commented [H(55)]: Correct, 1 mark, specifically the London casino is the qualifying establishment

Commented [H(56)]: Total marks 4/5

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 would trigger the automatic stay under section 362. This automatic stay will prevent creditors from taking certain actions against Oil Corporation and will also protect their assets. The stay comes into effect immediately on filing and lasts until the liquidation has been finalized, unless lifted by a court order.

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

Filing a chapter 11 petition would have the following effects:

1. ShipCo Breach of Contract Lawsuit

ShipCo may commence a breach of contract claim against Oil Corporation as this is not a violation of the automatic stay. Oil Corporation may file a counterclaim with the approval of the bankruptcy court or debtors.

Commented [H(58)]: It may file a claim in the bankruptcy court, but the pre-existing litigation will be stayed

2. US Sanctions

Chapter 11 would have no effect on the US Department of Justice investigations as this is a criminal offence. No relief is available to Oil Corporations on this matter.

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

3. USA Bank Loan Payments

The automatic stay has worldwide effect so while the automatic stay is in place, the USA Bank is barred from foreclosing on the refinery located in the Philippines. Oil Corporation may also want to consider the local laws in the Philippines in relation to the rights of USA Bank around this property.

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

4. Texas Office Rent

The landlord will not be able to evict Oil Corporation from the Texas office as this would violate the automatic stay. Assets of Oil Corporation are protected under the automatic stay.

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

Question 4.3 [6 marks]

Commented [H(62)]: Total marks 3/6

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?

Section 363 governs the sale of assets under US Bankruptcy Law. Under s363, a debtor can continue selling assets in the ordinary course of business without court approval. We would need to look at whether Oil Corporation in the previous twelve months has sold plastic business in the ordinary course of business. Oil Corporation will have to seek court approval to sell the plastic manufacturing business if not.

Oil Corporation wants to get the highest return for the plastic manufacturing business by:

- i) Assuming and assigning the trademark license

As the plastic manufacturing business operates under the trademark "Interconnect", this trademark will need to form part of the sale. The trademark is licensed from Plastic Corp. Therefore, Oil Corp cannot just assign this licence to the purchaser. They will need to seek the agreement of Plastic Corp first as Plastic Corp owns the trademark.

- ii) Rejecting the patent licences so the purchases has the exclusive right to use the patents

Oil Corp should review the terms of the contract with plastic Corp to determine if there are any termination clauses in the contract so that Oil Corp may reject the licenses. If there are no specific performance issues that constitute a breach of contract, Oil Corp will need the consent of Plastic Corp to terminate this licence agreement.

- iii) Selling the manufacturing facility free and clear of the USA Bank lien

We will need to determine the value that Oil Corp would receive for the sale of the manufacturing plant. If the facility is sold at a value greater than the USA bank lien, then Oil Corp may sell the facility without the consent of the USA Bank. This is because the USA Bank claim would not be impaired as they would be receiving their claim in full.

The USA Bank is a secured creditor and are therefore entitled to proceeds from the sale of the facility. Oil Corp should review the lien to see what it includes before finalizing any sale. They should also consider any interest payments that may also be due.

Commented [H(63)]: Correct, 1 mark, specifically this is due to the provisions of non-bankruptcy law

Commented [H(64)]: Incorrect, section 365(n) governs rejection of patent licenses. Rejection is possible without consent, but the licensee has the option to retain its rights under the license so exclusivity for the purchaser is not possible without the consent of Plastic Corp

Commented [H(65)]: Correct, 1 mark

Commented [H(66)]: Correct, 1 mark, the lien would attach to the sale proceeds

*** End of Assessment ***