



**SUMMATIVE (FORMAL) RESIT ASSESSMENT: MODULE 3A**  
**THE INSOLVENCY SYSTEM OF THE UNITED STATES**

This is the **summative (formal) resit assessment** for **Module 3A** of this course and must be completed by all candidates who **qualify for a resit exam for this module**.

**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. The final submission date for this assessment is **28 September 2021**. This assessment must be submitted to [David.Burdette@insol.org](mailto:David.Burdette@insol.org) via e-mail no later than 23:00 (11 pm) on **Tuesday 28 September 2021**.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

**ANSWER ALL THE QUESTIONS**

Commented [DB1]: 35 out of 50 = 70%

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

Commented [DB2]: 8 out of 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**

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**

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**

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.

**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.

**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.

(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).

### 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.

### QUESTION 2 (direct questions) [10 marks]

Commented [DB3]: 7 out of 10

#### Question 2.1 (2 marks)

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

##### Voluntary petition for bankruptcy

- It can be initiated by the stressed corporate debtor itself to seek its reorganisation.
- To initiate voluntary proceeding, it is not mandatory for a corporate debtor to be an insolvent beforehand.
- Declining cash flows or disturbed balance sheet can be the grounds to voluntarily proceed for bankruptcy.
- The documentation requirement is comparatively less and simplified in this mode.
- A corporate debtor may initiate voluntary bankruptcy under any applicable chapter of US Bankruptcy Code.
- It operates on debtor in possession approach.

##### Involuntary petition for bankruptcy

- It can be initiated by the creditors (unsecured/ undersecured) who severally or jointly owe an amount of at least USD 15,775 from the corporate debtor.
- To initiate involuntary proceeding, it is mandatory for a creditor to prove the existence of non-contingent and bonafide claim outstanding against the corporate debtor.
- It can be initiated by the creditors of the corporate debtor whose debt remains unpaid at least for 120 days before filing of the bankruptcy petition
- A creditor may initiate involuntary bankruptcy under Chapter 7/11 of the US Bankruptcy Code.
- It operates on debtor in possession approach or creditor in possession approach if bankruptcy trustee is appointed subject to the bankruptcy court order.]

Long for 2 marks! – 2 marks

**Question 2.2 (2 marks)**

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

[Any act done regarding violation of the automatic stay will result in:

- Amounting of that act as a contempt of court and
- Act to be considered as void and voidable.]

2 marks

**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?

[Under the US Bankruptcy Code, Section 1124 provides that a claim is considered as impaired if the debtor's reorganisation plan changes the claim holder's (secured/unsecured) legal, equitable, and contractual rights. Eg: Reduced interest rate, enhanced pay out period.

A class of impaired claims is deemed to have accepted a plan if the holders of more than one-half in number and at least two-thirds in value of the voting claims in the class vote to accept the plan. An insider impaired claim holder is not entitled to vote on the reorganisation plan.]

?? 1 mark

**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?

[Preference Claim]

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

[Constructive Fraudulent Conveyance] No, preference

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

[Actual Fraudulent Conveyances]

2 marks

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

Commented [DB4]: 11 out of 15

**Question 3.1 (3 marks)**

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

[The Article III of the US Constitution provides for the judiciary system to be constituted of the Supreme Court, Federal District Court and the Circuit Courts of Appeals and since bankruptcy proceedings involves dealing with contractual and statutory rights of the parties therefore

jurisdiction to deal with bankruptcy matters also fell under Article III of the US Constitution and final order upon bankruptcy proceeding can only be issued upon by the courts established under Article III of the US Constitution.

In 1978, Congress provided for the established of the Bankruptcy Courts in the US to deal specifically with the core bankruptcy issues over the District Court and District Court to look after the non-core bankruptcy proceedings. By the virtue of this distinction, the Bankruptcy Courts could issue final judgments only on core bankruptcy issues.

The question of law that arise under the matter *Stern Vs Marshall* was that "Whether the Bankruptcy Courts have jurisdiction to entertain the bankruptcy proceedings involving counterclaims?"

In the matter *Stern Vs Marshal*, US Supreme Court held that a Bankruptcy Court does have the authority to adjudicate creditor claims that arise under state law. Though counterclaim is a core bankruptcy proceeding, however Bankruptcy Court's issuance of final order/judgment w.r.t state law claim will be unconstitutional under Article III of the US Constitution.

Alternatively, if the debtor has a counterclaim that arises under state law, the bankruptcy court may lack the constitutional authority to adjudicate it. This means that final resolution of that claim, taking in to account any such counterclaims will be dealt in a separate proceeding taking place in Federal District Court. Also, if a Bankruptcy Court lacks constitutional authority in determining the nature of bankruptcy proceeding as core/non-core then they may seek review from Federal District Court by way of issuance of report/recommendation on any such matter.]

**1 mark.** A long and convoluted answer to the question – it was simply:

Prior to *Stern v Marshall*, bankruptcy court jurisdiction was determined by looking at whether a proceeding was "core" or "non-core" (1 mark). In *Stern v Marshall*, the US Supreme Court held that, even in core proceedings, a bankruptcy court does not have constitutional authority to enter a final order on most matters (1 mark). Bankruptcy courts have constitutional authority to enter a final order on a challenge to a petition or where the parties consent (1 mark).

### Question 3.2 (3 marks)

What provisions of the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding? What are two ways that the foreign representative can obtain equivalent relief?

[A foreign representative **cannot take advantage of avoidance powers** under Chapter 15 proceedings like those that are available for domestic bankruptcies under US Bankruptcy Code such as avoiding preferential or fraudulent transfers. A foreign representative's powers are not coextensive with those of a Chapter 7 or Chapter 11 bankruptcy trustee. Chapter 15 expressly excludes the exercise of the substantive avoidance powers by the foreign representative that are usually available under the US Bankruptcy Code and foreign representative cannot use such powers without filing a separate Chapter 7 or Chapter 11 case.

However, w.r.t the abovementioned context, the foreign representative may seek relief in the following ways:

- Foremost the foreign representative must seek recognition of the foreign proceeding from the concerned US Bankruptcy Court. Post recognition of foreign proceeding as foreign main proceeding provisions related to adequate protection, automatic stay, use, sale or lease of property, post-petition transactions and post-petition effect of security interest become automatically applicable. However, avoidance powers related



to prepetition transfers are not included in that list of automatically applicable provisions.

- Upon the recognition of foreign proceeding, certain reliefs are also available at the court's discretion. Bankruptcy Court may grant appropriate relief at the request of foreign representative.]

**2 marks**

**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?

[Interlocutory Orders are interim in nature that doesn't dispose matter but only some of its issues or claims. Whereas final order is an order that disposes entire matter and left nothing further to be adjudicated.

Appeal in respect of Interlocutory Orders may be preferred with the leave of Appellate Court whereas appeal in respect of Final Order may be preferred as a right. Bankruptcy Proceeding involving exceed of exclusivity period are also appealable as a right.

Generally, appeal in respect of bankruptcy proceeding are preferable before the respective district court whereas in certain circuits bankruptcy proceedings are appealed before Bankruptcy Appellate Panel. Any party aggrieved by the order passed by district court or Bankruptcy Appellate Panel may prefer an appeal before Circuit Court of Appeal. In rare circumstances appeal from bankruptcy court goes directly to Circuit Court of Appeal.]

**4 marks**

**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?

[Fiduciary duties of Directors of Delaware Corporations are Duty of Care and Duty of Loyalty. By duty of care it implies making informed and deliberative decisions about the company whereas by duty of loyalty it means acting of directors in an independent and transparent manner while handling the interest of the stakeholders of the company. In the ordinary course of business these duties are owed towards the company who work towards the maximisation of its stakeholder's interest and towards company's stakeholders.

Delaware Law holds that the duties of the directors will remain intact irrespective of the fact whether the corporation is solvent or insolvent. However, when the corporation is potentially or actually insolvent then directors owe their duties towards the corporation and its shareholders. **?? last statement?**

**4 marks**

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

Commented [DB5]: 9 out of 15

**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.

[US Bankruptcy Code defines Foreign Proceeding 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 the foreign court for the purpose of reorganisation or liquidation. US Bankruptcy Courts may grant recognition to English scheme of arrangement provided same is not against the US public policy.

However, recognition to English scheme of arrangement as a foreign main or non-main proceeding will depend upon the determination of its "**Center of Main Interest**" (COMI). On the basis of facts of the case it can be seen that the principal place of business of Gambling Corporation is outside USA whereas one of the establishments of Gambling Corporation is located in USA i.e. in Las Vegas. Hence in the present case the English Scheme of Arrangement will be recognised as **Foreign Non-Main Proceeding**.]

You have not fully answered the question. Where is Gambling Corp's COMI? Scheme is not in country of COMI so recognition as a foreign main proceeding not possible. Gambling Corp has an establishment in London. **1 mark**

#### **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?

[The effect of filing of Chapter 11 petition in following mentioned situation will be as follows:

- a) **Filing of breach of contract lawsuit by Ship Co, in Texas state court on account of selling of contaminated oil by Oil Corp causing damage worth USD 1 billion to Ship Co's container ships:** US Bankruptcy Code will not prohibit this proceeding on account of automatic stay available to Oil Corp from the date of filing of Chapter 11 petition.
- b) **Investigation by US Department of Justice w.r.t purchase of oil by Oil Corp subject to US sanctions:** US Bankruptcy Code will not prohibit this proceeding on account of automatic stay available to Oil Corp from the date of filing of Chapter 11 petition, same being falling under regulatory investigation.
- c) **Foreclosure on an Oil Corp refinery located in the Philippines on account of missed payment on its secured loan from USA Bank:** US Bankruptcy Code will prohibit this proceeding on account of automatic stay available to Oil Corp from the date of filing of Chapter 11 petition.

d) **Failure on part of Oil Corp to pay rent on its Houston, Texas office space and its landlord is threatening to evict:** US Bankruptcy Code will prohibit this proceeding on account of automatic stay available to Oil Corp from the date of filing of Chapter 11 petition.]

**4 marks**

**Question 4.3 [6 marks]**

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?

**Assume and assign the trademark license :** Oil Corp cannot assume and assign the trademark license without the consent of Plastic Corp because in such case the Plastic Corp cannot be compelled to accept the performance of the contract from the third party to whom the trademark may be assigned. USA Bank has no role to play in this case.

**Reject the patent licenses so the purchaser has the exclusive right to use the patents:** Oil Corp can reject the patent license if same is done prudently based on a reasoned judgment, in good faith and in the best interests of the estate. No approval from Plastic Corp/USA Bank is required. **No**

**Sell the manufacturing facility free and clear of the USA Bank lien:** Since Oil Corp has granted a lien on the facility to USA Bank to secure its USD 500 million loan, then in Section 363 Sale two situations are possible:

- a) **If USA Bank itself bids for the property secured via loan:** USA Bank may make cash bid for the asset on which lien is created or may opt to bid the amount of debt owed to them by Oil Corp for which the asset served as collateral, subject to the court's approval.
- b) **If any other party (apart from USA Bank) bids for the property:** The property may be sold free and clear of creditors interest post obtaining consent from USA Bank. In such case USA Bank's interest will attach with the proceeds of the sale and will receive priority during the proceeds distribution.]

**4 marks**

**\* End of Assessment \***