

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.

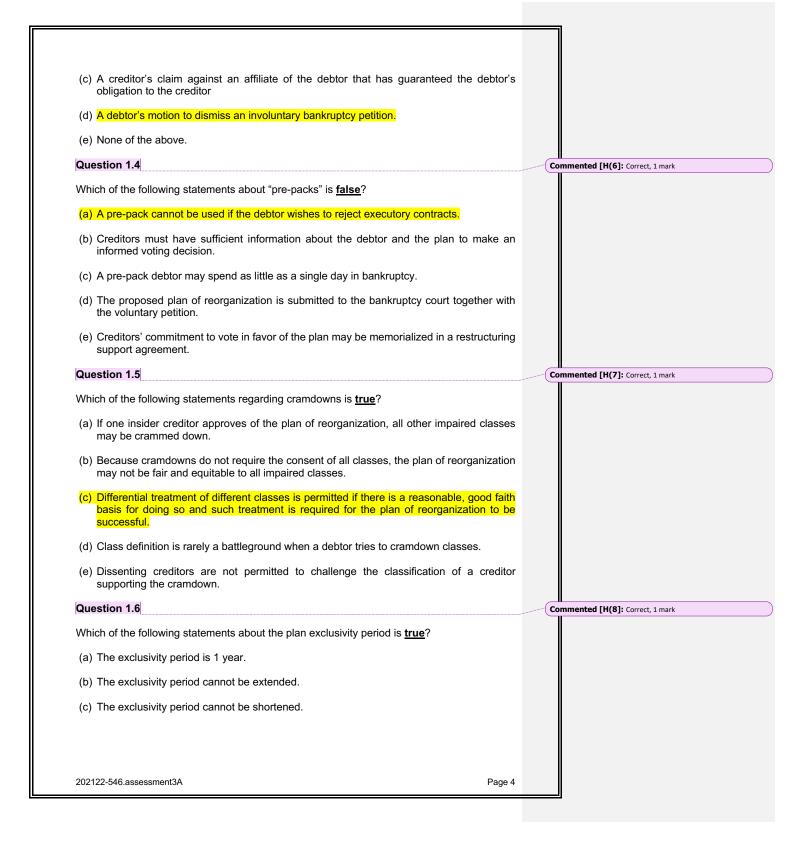
INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 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.
- 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.
- 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**.

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ANSWER ALL THE QUESTIONS Commented [H(1]: Total marks 41.5/50 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. 202122-546 assessment3A Page 3



(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 nonmain.

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 <u>true</u>?

(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).

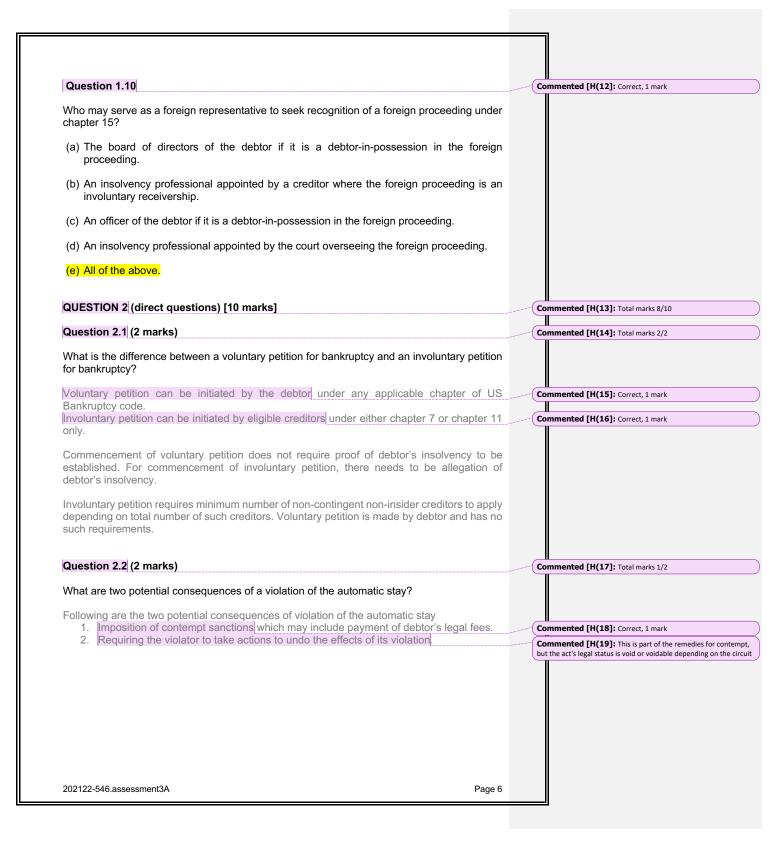
(e) Both (a) and (c).

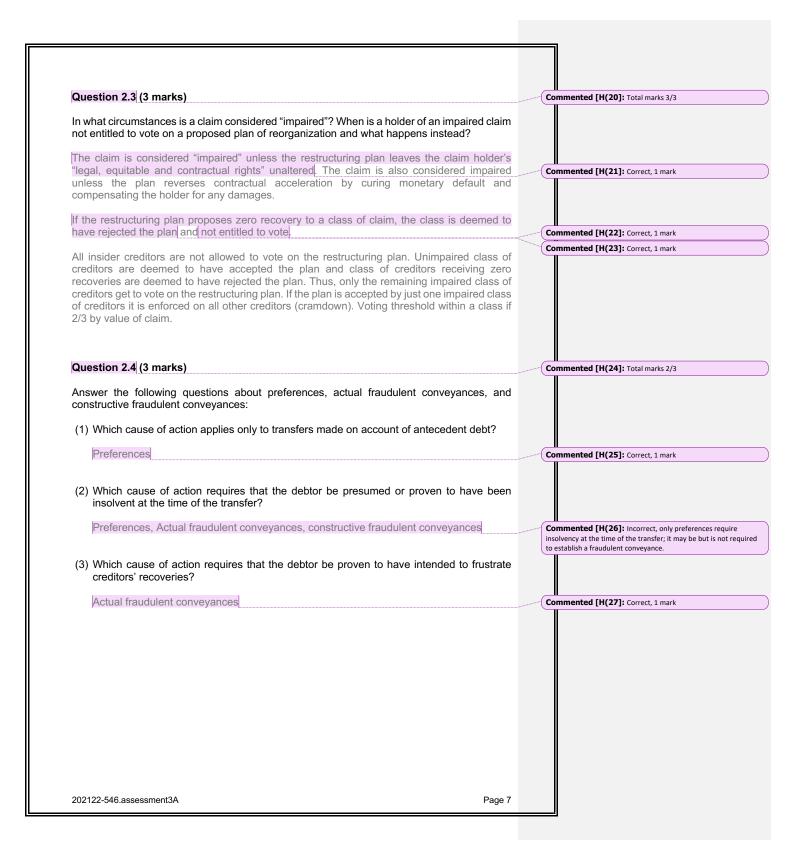
Commented [H(11]: Incorrect, the correct response is (e)

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Commented [H(10]: Correct, 1 mark

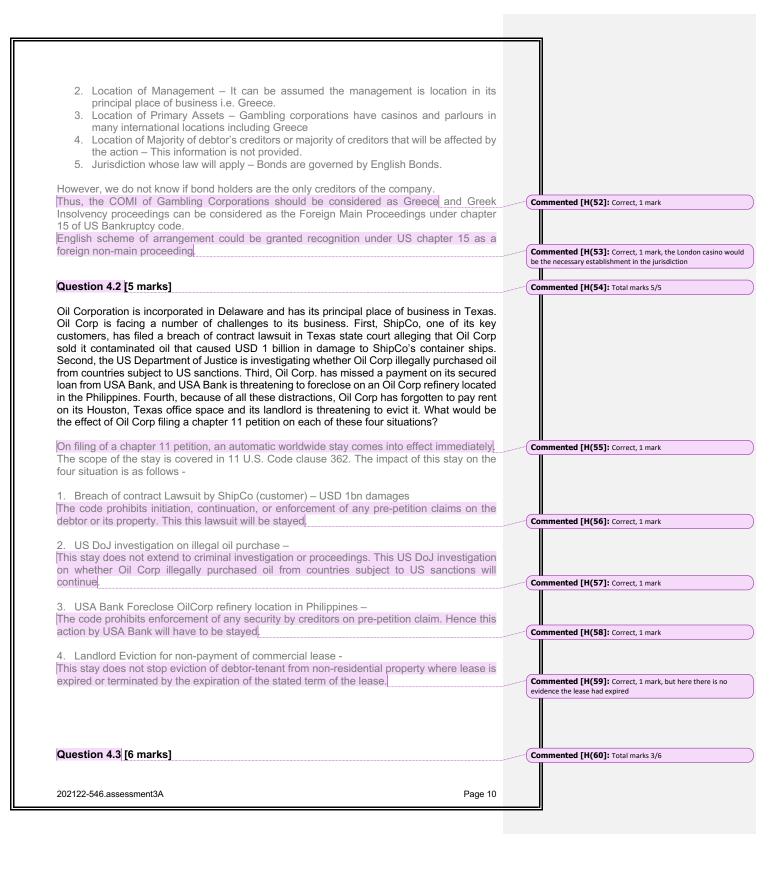
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QUESTION 3 (essay-type questions) [15 marks in total] Commented [H(28]: Total marks 13.5/15 Question 3.1 (3 marks) Commented [H(29]: Total marks 2.5/3 How did Stern v Marshall change the law of bankruptcy court jurisdiction and authority to enter a final order? In USA, the bankruptcy courts derive their powers from Bankruptcy legislation. This is unlike most other federal courts which are established under Article III of the US Constitution. This creates issues related to jurisdiction. Judges not appointed under Article III, such as bankruptcy judges, cannot exercise jurisdiction over matters subject to Article III. To resolve this issue, a distinction between "core" and "non-core" matters was created. The 1984 amendments to the Bankruptcy code gave authority to bankruptcy courts to issue final orders in core proceedings only. However, in Stern V Marshall case in 2011, US Supreme Commented [H(30]: Correct, 1 mark Court ruled that even in core proceedings the bankruptcy court cannot issue final orders that invade the Artcile III jurisdiction. Commented [H(31]: Correct, 1 mark However, subsequent supreme court rulings and amendments to the Bankruptcy rules have clarified the issue further. The Bankruptcy Judges may determine core proceedings over which they lack constitutional authority by issuing a report and recommendation for a review by the district court or with consent of the parties may issue final orders. This is the same procedure Commented [H(32]: Correct, 1/2 mark, also can enter a final as in non-core proceedings. Now the litigants have to state in their pleadings whether they order on a challenge to a petition consent to the entry of final orders by bankruptcy court. Question 3.2 (3 marks) Commented [H(33]: Total marks 2/3 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? A foreign representative in chapter 15 proceedings cannot invoke the avoidance powers provided by the bankruptcy code. These provisions are mainly related to use of bankruptcy Commented [H(34]: Correct, 1 mark code's powers of avoidance of preference and fraudulent conveyances. A foreign representative can invoke avoidance powers in a plenary proceeding such as chapter 7 or 11 Such proceedings may be initiated by debtor or creditors prior to involvement Commented [H(35]: Correct, 1 mark, or a foreign of foreign representative or foreign representative might commence these proceedings post representative can bring a claim under analogous foreign or nonbankruptcy US law recognition of foreign proceedings under chapter 15. Question 3.3 (4 marks) Commented [H(36]: 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? Final orders are those orders which dispose of all the issues, leaving nothing further to be decided. Final orders may be appealed as of right. Commented [H(37]: Correct, 1/2 mark Interlocutory orders are those orders which resolves only some issues or claims. Interlocutory Commented [H(38]: Correct, 1/2 mark orders may be appealed only with the leave of the appellate court. Commented [H(39]: Correct, 1/2 mark Commented [H(40]: Correct, 1/2 mark Bankruptcy proceedings are generally an aggregation of individual disputes. Thus, a bankruptcy court's order resolving a discrete dispute is considered final order for appeals 202122-546 assessment3A Page 8

purpose. Additionally, the orders extending the period of exclusivity to propose a plan are appealable as of right. Appeals from bankruptcy courts are heard by The district courts Commented [H(41]: Correct, 1 mark In some circuits (first, sixth, eighth, nineth, tenth) by Bankruptcy Appellate Panel (BAP) which is convened from the judges of the bankruptcy courts within the circuits. Parties can also request the appeal to be heard by the district court instead. Commented [H(42]: Correct, 1 mark Appeals from district courts or BAP are heard by the circuit court of appeals. In rare circumstances, the appeals may directly go to Supreme Court where the bankruptcy court or district court certifies either the case raises a question of law or immediate appeal may materially advance the case. Appeal from circuit court of appeals will go to Supreme Court. Question 3.4 (5 marks) Commented [H(43]: 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 insolvent? Directors of Delaware corporate owe a fiduciary duty of loyalty to the corporation's best interest Commented [H(44]: Correct, 1 mark and a duty of care in educated decision making (business judgement). Commented [H(45]: Correct, 1 mark Directors owe these duties to the corporation and its shareholders in all scenario i.e. both in Commented [H(46]: Correct, 1 mark ordinary course of business as well as when the corporation is potentially or actually insolvent. Commented [H(47]: Correct, 1 mark Directors do NOT owe these duties to the creditors of the corporation. Commented [H(48]: Correct, 1 mark The supreme court of Delaware has given a clear judgment in North American Catholic Educational Programming Foundation, Inc. v. Gheewalla. The Supreme Court of Delaware concluded that creditors of corporation, which is in the "zone of insolvency," could not assert a direct claim for breach of a fiduciary duty against the corporate directors. QUESTION 4 (fact-based application-type question) [15 marks in total] Commented [H(49]: Total marks 11/15 Question 4.1 [4 marks] Commented [H(50]: Total marks 3/4 Gambling Corporation is incorporated and has a principal place of business in Greece and it operates casinos and betting parlors in many international cities, including Athens, Las Vegas, London and Macau. Gambling Corp's bonds (governed by English law) are due to mature in one (1) year, but it is unable to repay or refinance them. Gambling Corp is considering using an English scheme of arrangement to restructure the bonds. Discuss whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding. Under Chapter 15, a bankruptcy court can recognize a foreign bankruptcy proceeding as either a "foreign main proceeding" or a "foreign nonmain proceeding." The Bankruptcy Code defines a foreign main proceeding as "a foreign proceeding pending in the country where the debtor has the center of its main interests (COMI). The Bankruptcy Commented [H(51]: Correct, 1 mark Code does not define the COMI. Relevant factors to be considered for COMI analysis are 1. Location of Headquarters – Gambling Corporation is incorporated and has a principal place of business in Greece. 202122-546 assessment3A Page 9



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?

Reference Clause 365 (Executory contracts and unexpired leases)

(i) Assume and assign the trademark license

Trademark (Interconnect) is owned by Pastic Corpn (executory contract).

While the bankruptcy law abrogates contractual restrictions on assignment to enable debtor to achieve higher value of its assets, counterparty consent is required in case of Intellectual property licensing law.

Thus, Oil Corp will require consent from Plastic Corp to assign the trademark license to the Purchaser.

Oil Corp does not require any consent from USA Bank for this goal.

(ii) Reject the patent licenses so the purchaser has the exclusive right to use the patents

Oil Corp owns patented process it has licensed to Plastic Corp (executory contract). If Oil Corp terminates this executory contract, the licensee (i.e. Plastic Corp) may choose to enforce its rights as per the terms of contract and as per non-bankruptcy law including damages.

Hence the propose course of action depends on the terms contract between Oil Corp and Plastic Corp

Oil Corp does not require any consent from USA Bank for this goal.

(iii) Sell the manufacturing facility free and clear of the USA Bank lien Reference Clause 363 (Use, sale, or lease of property)

Oil Crop can sell this manufacturing facility under 363 sale process and free and clear of USA Bank lien. Since this facility is lien marked to USA bank, its consent is required for the sale along with the consent of the court. USA bank will have priority on the proceeds from its sale.

Consent of Plastic Corp is not required for sale of this manufacturing facility.

* End of Assessment *

Commented [H(61]: Correct, 1 mark

Commented [H(62]: Correct, 1 mark

Commented [H(63]: Incorrect, contractual limitations are not enforceable in bankruptcy, but the Bankruptcy Code's section 365(n) protects licensees of patents and therefore consent would be required

Commented [H(64]: Incorrect, the property can sold without USA Bank consent where the value of the assets exceed the amount of the loan

Commented [H(65]: Correct, 1 mark, the lien will transfer to the proceeds of sale

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