



**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**.

**Commented [DB1]:** Please read and comply with the instruction – the footer was prepopulated for you and all you had to do was insert your student ID. Instead you have deleted the footer and only inserted your ID.

**ANSWER ALL THE QUESTIONS**

Commented [H(2)]: Total marks 43.5/50

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

Commented [H(3)]: Total marks 8/10

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

**Question 1.1**

Commented [H(4)]: 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(5)]: 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(6)]: Correct, 1 mark

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

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

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

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

(e) None of the above.

**Question 1.4**

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

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

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

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

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

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

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

**Question 1.5**

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

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

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

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

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

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

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

**Question 1.6**

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

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

(a) The exclusivity period is 1 year.

(b) The exclusivity period cannot be extended.

(c) The exclusivity period cannot be shortened.

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

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

**Question 1.7**

Commented [H(10)]: 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(11)]: Incorrect, the correct response is (c)

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(12)]: Incorrect, the correct response is (e)

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.

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

Commented [H(14)]: Total marks 8/10

**Question 2.1 (2 marks)**

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

A voluntary petition is made by the debtor under any applicable chapter.

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An involuntary petition is made by the creditor of the debtor under chapter 7 and 11 only.

Commented [H(17)]: Correct, 1 mark

**Question 2.2 (2 marks)**

Commented [H(18)]: Total marks 2/2

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

The act which violates the stay may be void or voidable.

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The party which acts in violation may be subject to court sanctions, which can include paying the debtor's legal fees in relation to the violation of the automatic stay and also be required to undo the act.

Commented [H(20)]: Correct, 1 mark

**Question 2.3 (3 marks)**

Commented [H(21)]: Total marks 1/3

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 class is considered to be impaired if the claims in that class are altered in any way in respect of its legal, equitable and contractual rights.

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A holder of an impaired claim is not entitled to vote if the holder is an 'insider'. The votes of insiders are disregarded when calculating the votes required to approve any plan.

Commented [H(23)]: An impaired claim that will not receive anything under the plan is not entitled to vote and is deemed to reject the plan.

**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.

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?

Preference.

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

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

Actual fraudulent conveyance.

Commented [H(27)]: Correct, 1 mark

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

Commented [H(28)]: Total marks 14.5/15

#### 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 2011, the US supreme Court handed down its ruling in *Stern v Marshall*.

The son of the deceased made a claim in the bankruptcy estate of the wife of the deceased, the debtor. The wife then went on to make a counterclaim against the son in the Bankruptcy Court as a core proceeding.

Simultaneously the son had made a claim against the wife in the State Court which was to be determined by jury.

Parallel proceedings between the State and Federal Courts are allowed under US law – with the first judgment handed down being the one that takes effect.

In *Stern v Marshall*. The Bankruptcy Court handed down its judgment first in favour of the wife, the debtor. This was appealed to the District Court.

During the appeal process, the State Court handed down its judgment in favour of the son, the claimant.

The matter as to which court had the right to provide a final order went to the US Supreme Court, who found that whilst the wife's counterclaims was a core proceeding and therefore the Bankruptcy Court had statutory authority to hand down the final order, it lacked the constitutional authority to do so. As a result, the final order provided by the State Court took effect.

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

Since *Stern v Marshall*, further guidance and rulings have provided more clarity. It is understood that the Bankruptcy Court may hear a core proceeding without constitutional authority but, unless all parties have agreed it may provide a final order, as with a non-core

Commented [H(32)]: Correct, 1/2 mark, also the bankruptcy court may enter a final order on a challenge to a petition

proceeding, the Bankruptcy Court cannot issue a final order and must refer back to the District Court with recommendations.

**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 may not invoke avoidance actions under Chapter 15 proceedings.

Avoidance actions include both constructive and actual fraudulent conveyances and preferences.

The foreign representative could look to the applicable US law or foreign law which could provide similar results to the Bankruptcy Code's avoidance actions.

The foreign representative can invoke avoidance powers if they begin plenary proceedings under Chapter 7 or 11.

**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?

An interlocutory order does not resolve all matters, it only deals with certain claims and/or issues.

An interlocutory order can only be appealed with permission from the appellate court.

A final order resolves all issues meaning there is nothing further to deal with.

A final order may be appealed as of right.

The District Court of the district in which the Bankruptcy Court sits would hear the appeal from any Bankruptcy Court Order.

In certain circuits there exists the Bankruptcy Appellate Panel, made up of bankruptcy judges in that circuit. The appellant can decide between the BAP and the District Court.

There is a further right of appeal to the circuit court of appeals.

An appeal from the Bankruptcy Court can miss the District Court/BAP and go directly to the circuit court of appeals.

**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?

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Commented [H(35)]: Correct, 1 mark

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

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

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

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

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

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

Commented [H(42)]: Correct, 1 mark

Commented [H(43)]: Correct, 1 mark

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



The fiduciary duties of directors of Delaware corporations is set out under Delaware State Law.

A director of a Delaware corporation has fiduciary duties of:

- Loyalty to the corporation's best interest
- Care in educated decision making – it is possible under the certificate of incorporation to remove the directors duty of care.

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

The duties of the directors are owed to the corporation and its shareholders.

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

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

If the corporation is insolvent or potentially insolvent the duties are still only owed to the corporation and the shareholders, despite the fact that the shareholders would have no economic interest in an insolvent company. Unlike UK Insolvency law, the duties of the directors never transfer to the creditors.

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

In comparison to other worldwide jurisdictions the liability of directors under Delaware State Law, and more widely in the US, is seen to be quite limited.

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

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##### Question 4.1 [4 marks]

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

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.

To obtain recognition under Chapter 15 the applicant would need to evidence that the Scheme is a foreign proceeding under the definition set out in the Bankruptcy Code and that the applicant was entitled to make the application as a representative.

The definition of a foreign proceeding under the Bankruptcy Code is:

*'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 the control and supervision by a foreign court, for the purposes of reorganisation or liquidation.'*

The English Scheme of Arrangement is not an insolvency proceeding, it is a Court approved restructuring under the Companies Act. A company does not need to be in financial distress to propose a scheme and it can be used purely as a reorganisation tool.

The definition of a foreign proceeding under the bankruptcy code is sufficiently wide enough to allow an English Scheme of Arrangement to be recognised as a foreign proceeding.

Whether the Scheme would be recognised as a main or non-main proceeding is a matter of the debtor's COMI (centre of main interests).

If it were determined that Gambling Corporation's COMI was in England – the Scheme would be recognised as a foreign main proceeding. If its COMI was based elsewhere and only an establishment was held to be in England then the Scheme would be recognised as a foreign non-main proceeding.

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

There is no absolute determining factor as to the location of the debtor's COMI but it is presumed to be where the debtor is incorporated although this can be rebutted.

Gambling Corporation is incorporated and has its main place of business in Greece. It also operates a casino in Athens. All of these factors support the presumption that Gambling Corporation's COMI is located in Greece.

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

The applicant could rebut this and make the case for an English COMI using factors such as;

- The bonds set to be restructured are under English Law
- A casino in London means there is at least an establishment in England.

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

However, based on this evidence alone and without knowing details regarding the location of the bondholders and the size of operations and assets in each jurisdiction, it would seem that the COMI of Gambling Corporation is in Greece and that the English Scheme would be recognised as a foreign non-main proceeding.

#### Question 4.2 [5 marks]

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

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

Immediately on filing its Chapter 11 petition, Oil Corporation would be beneficiary of a worldwide automatic stay of creditor enforcement proceedings. This is a very broad and far-reaching stay.

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

The effects of the worldwide stay on each of the situations is as follows:

#### SITUATION ONE – Shipco's lawsuit in the Texas State Court

The stay includes a stay on any litigation on pre-petition claims. Shipco's lawsuit is in relation to a claim it potentially has for damages incurred pre-petition. Therefore, the stay would apply to this lawsuit and the action would be stayed.

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

#### SITUATION TWO – US Department of Justice's investigations

The investigation by the US DoJ in respect of the illegal purchase of oil is a criminal investigation. There are certain exemptions to the stay - criminal proceedings are one such exemption and as a result I would expect the investigations of the DoJ to continue.

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

#### SITUATION THREE – Missed payment on secured loan of USA Bank

USA Bank has security over the Oil Refinery in the Philippines and is threatening foreclosure due to a missed payments. Oil Corp has defaulted on its loan.

The stay would prevent the Bank from foreclosing on the oil refinery. However, the Bank could apply for relief from the Court to lift the stay if it can prove lack of adequate protection.

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

An independent valuation would need to be obtained and USA Bank would need to prove to the debtor held no equity in the refinery to allow relief from the stay.

SITUATION FOUR – Threatened eviction by the Houston landlord

The stay would protect Oil Corp from eviction from its Texas office in respect of the pre-petition missed rent.

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

If Oil Corp wanted to remain in the office post-petition it would need to pay its rent as an expense of the estate or come to an agreement with the landlord.

If the lease has expired the landlord would be entitled to evict Oil Corp despite the stay.

#### Question 4.3 [6 marks]

Commented [H(62)]: Total marks 4/6

Oil Corp has filed for bankruptcy and is planning to sell its plastic manufacturing business through a 363 sale. The plastic manufacturing business operates under the trademark "Interconnect", which is licensed from Plastic Corp. Oil Corp has invented several patented processes for plastic manufacturing, which it licenses to Plastic Corp. The main manufacturing facility for the plastic business is in Dallas, and Oil Corp has granted a lien on the facility to USA Bank to secure its USD 500 million loan.

Oil Corp thinks it will get the highest return for the plastics manufacturing business if it can (i) assume and assign the trademark license; (ii) reject the patent licenses so the purchaser has the exclusive right to use the patents; and (iii) sell the manufacturing facility free and clear of the USA Bank lien. Can Oil Corp achieve each of these goals without the consent of Plastic Corp and USA Bank? Why or why not?

- (i) Assume and assign the trademark licence from Plastic Corp

One of the benefits of the Bankruptcy Code is that it allows debtors party to executory contracts the ability to reject or assume and assign the contract.

An executory contract is one under which both parties have unperformed obligations. The US Courts have found that a licence for a trademark is an executory contract as both parties have one or more outstanding obligation.

Commented [H(63)]: Trademark law permits a licensor to refuse to accept performance from an assignee; therefore the consent of Plastic Corp would be required

The trademark licence between Plastic Corp and Oil Corp is an executory contract and Oil Corp has the right to assume and assign. This means that Oil Corp can transfer its rights under the contract to a third party as part of a sale. The third party must give adequate assurances of future performance to Plastic Corp.

- (ii) Reject the patent licence provided to Plastic Corp

Whilst Oil Corp has the ability to reject executory contracts, the licence of patents owned by Oil Corp are protected so that they may not be terminated in connection with a sale without the consent of Plastic Corp.

Commented [H(64)]: Correct, 1 mark

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

(iii) Sale of the manufacturing facility free and clear of USA Bank lien

The Bankruptcy Code allows Oil Corp to sell its property free and clear of creditor interest with court approval via a 363 sale.

Commented [H(66)]: Correct, 1 mark

The interests of the creditor then attach to the proceeds of the sale.

Commented [H(67)]: Correct, 1 mark

Therefore Oil Corp could sell the manufacturing facility free and clear of USA Bank's lien without the consent of USA Bank.

As a 363 sale is court approved, Oil Corp would need to demonstrate to the Court that the sale it is proposing in its business judgment is in the best interests of the estate as a whole.

**\* End of Assessment \***