



**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 37/50

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

Commented [H(2)]: Total marks 7/10

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)]: Incorrect, the correct answer is (d)

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)]: Incorrect, the correct response is (c)

**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):** Incorrect, the correct response is (e)

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

**Question 2.1 (2 marks)**

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

A voluntary petition requires no allegation of insolvency and may commence under any applicable chapter by a debtor filing.

An involuntary petition requires the petitioning creditors to commence proceedings against the eligible debtor under either chapter 7 or chapter 11. The involuntary proceeding cannot be commenced under any other chapter or against a farmer or not-for-profit corporation.

**Commented [H(13):** Total marks 6/10

**Commented [H(14):** Total marks 2/2

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

**Commented [H(16):** Correct, 1 mark

**Question 2.2 (2 marks)**

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

Payment of the debtors' attorneys' fees and requirement for the violator to take actions to undo the effect of the violation.

**Commented [H(17):** Total marks 1/2

**Commented [H(18):** Correct, 1 mark, these are both potential contempt sanctions. The act itself is void or voidable, depending on the circuit

**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?

A claim is impaired if the class are getting less than 100% return. During a cramdown, a plan of organization may be confirmed by the court without approval of all classes of creditors. One impaired class of creditors must approve the plan for the cramdown to qualify. The plan must also make no crammed down class no worse off than they would be in chapter 7 liquidation.

**Commented [H(19):** Total marks 1/3

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

**Commented [H(21):** An impaired class that will receive nothing under the plan is not entitled to vote and is deemed to reject the plan

**Question 2.4 (3 marks)**

Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:

**Commented [H(22):** Total marks 2/3

(1) Which cause of action applies only to transfers made on account of antecedent debt?

A preference claim.

Commented [H(23)]: 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?

A preference claim, actual fraudulent conveyances and constructive fraudulent conveyances.

Commented [H(24)]: Incorrect, while insolvency can be a factor in the other two claims, but only preference requires it

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

An actual fraudulent conveyance.

Commented [H(25)]: Correct, 1 mark

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

Commented [H(26)]: Total marks 13/15

#### Question 3.1 (3 marks)

Commented [H(27)]: Total marks 2/3

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

In the 2011 case, *Stern v Marshall*, the US Supreme Court held that even in core proceedings, a bankruptcy court could not issue final orders that are unconstitutional under Article III jurisdiction. Before this case the jurisdiction of bankruptcy courts had seemed well established to resolve core proceedings issues so the decision in *Stern v Marshall* came as a shock to many.

Commented [H(28)]: Correct, 1 mark

Commented [H(29)]: Correct, 1 mark, now a bankruptcy court may enter a final order on a challenge to a petition or with the consent of the parties

In the case, a bankruptcy claim had been filed against the debtor and the debtor counterclaimed. According to US law, parallel proceedings in state and federal courts are permitted and the first judgement issued is binding on the parties. The bankruptcy court issued judgement first, however, the state court case continued while the judgement of the bankruptcy court was appealed to the district court. Although 28 US Code Section 157 outlines that a counterclaim is a core proceeding as to which a bankruptcy court can issue a final order, the US Supreme Court held that the issuance of a final order from the bankruptcy court over a state law claim was unconstitutional under Article III. Therefore, the verdict of the jury was the first final judgement and disposed of all issues.

#### Question 3.2 (3 marks)

Commented [H(30)]: 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?

Avoidance powers under the Bankruptcy Code can only be invoked by a foreign representative in a plenary proceeding such as chapter 7 or 11, not chapter 15. Two ways that equivalent relief can be obtained is if the proceeding was commenced by a debtor prior to involvement of the foreign representative or the foreign representative chooses to commence a plenary proceeding after recognition of the foreign proceeding under chapter 15. However, in both of those cases the scope is limited to the debtor's US assets and will be coordinated with the foreign proceeding.

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

Commented [H(32)]: Correct, 1 mark, alternatively the foreign representative may invoke analogous foreign or non-bankruptcy US law

**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?

Final orders dispose of all issues so that there is nothing further to be decided, whereas only some issues or claims are resolved in interlocutory orders. Sometimes it is difficult to distinguish between final and interlocutory orders, for example, when a court resolves not only claims between two parties but an issue of broad applicability. Bankruptcy court orders may be appealed by the litigants involved in an issue plus others adversely affected by the ruling. Final orders may be appealed as of right, whereas interlocutory orders may only be appealed with leave of the appellate court. Appeals from bankruptcy court decisions are generally heard by the district court according to the district they sit in. Bankruptcy appeals may be heard by a Bankruptcy Appellate Panel which is convened by the judges of bankruptcy courts within a certain circuit. Not commonly, an appeal from a bankruptcy court may go directly to the court of appeals, however, there is discretion by the court as to whether to accept the case certified by the bankruptcy or district court.

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Commented [H(34)]: Correct, 1/2 mark

Commented [H(35)]: Correct, 1/2 mark

Commented [H(36)]: Correct, 1/2 mark

Commented [H(37)]: Correct, 1/2 mark

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

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

**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?

Directors of Delaware corporations owe duties to the corporation and its shareholders. As confirmed by the Delaware Supreme Court, duties are not owed to creditors. If the corporation is potentially insolvent, that is operating in the zone of insolvency or actually insolvent, duties are still not owed to creditors. Therefore there is no equivalent of 'wrongful trading' or 'deepening insolvency' under US law. Duties are owed to shareholders in the case of bankruptcy and therefore the shareholders will not receive anything in the bankruptcy.

Directors of Delaware corporations are protected from liability for errors of judgment by the business judgement rule, however, they do owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision-making. The board of directors is presumed to have acted in good faith under the business judgement rule on the basis of reasonable information. If majority of the board are shown to be not reasonably informed, did not honestly believe their decision was in the corporation's best interest or were not acting in good faith the presumption can be rebutted. The directors will not be liable in the absence of showing of gross negligence unless the presumption is rebutted. If directors breach duty of care they may be exculpated by a corporations' certificate of incorporation from liability.

Commented [H(40)]: Total marks 5/5

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

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

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

Commented [H(44)]: Correct, 1 mark

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

**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.

Commented [H(46)]: Total marks 11/15

Commented [H(47)]: Total marks 3/4



Discuss whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding.

A chapter 15 proceeding may be commenced by the filing of a petition by a foreign representative of Gambling Corporation. The filing of the petition will not automatically invoke a stay of creditor action. Only upon the petition for recognition of a foreign main proceeding being granted will a stay arise and be limited to the property of Gambling Corporation within the United States.

Foreign main proceedings are those that are commenced in the centre of main interests (COMI) of a debtor. In the case of Gambling Corporation, it was incorporated in and has a principal place of business in Greece which are strong factors to state the COMI is in Greece. However, as the location of the primary assets, the bonds, are governed by English law it might be decided that the COMI is in fact in England. The COMI should be ascertainable by its creditors or other third parties based on the evidence presented. If the COMI is determined to be in England the proceedings will be foreign main and if the COMI is determined to be in Greece the proceedings will be foreign non-main. If they are foreign main proceedings then the automatic stay will be invoked.

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

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

Commented [H(50)]: Correct, 1 mark, the London casino will be the qualifying establishment

#### Question 4.2 [5 marks]

Commented [H(51)]: 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?

Under Chapter 11 a worldwide automatic stay of any proceeding against the debtor or its property provides breathing space for the debtor to continue operating in the ordinary course of business and work to propose a plan of reorganization to adjust its debts.

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

Therefore, an automatic stay would apply to the breach of contract lawsuit from ShipCo as it is considered litigation on a pre-petition claim.

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

The US Department could continue their investigations into Oil Corp and if criminal proceedings were commenced this would be an exception to the automatic stay.

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

The Chapter 11 filing would allow Oil Corp to open negotiations with USA Bank to develop a plan of reorganization. As the automatic stay is worldwide it would apply to the Philippines refinery and pause the threat to foreclose.

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

The Chapter 11 filing would also allow Oil Corp to open negotiations with its Houston landlord to develop a plan of reorganization. If the office space is no longer needed Oil Corp has the ability to reject the burdensome contract. The automatic stay would apply to the eviction notice so Oil Corp could remain in the office if required.

Commented [H(56)]: Correct, 1 mark

#### Question 4.3 [6 marks]

Commented [H(57)]: 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?

Under Chapter 11 a debtor is able to sell property free and clear of creditor interests with court approval in a 363 sale. A potential purchaser may prefer a 363 sale as the bankruptcy sale will be free and clear of creditor interests.

Oil Corp would only be able to assume and assign the trademark license if it was an executory contract i.e. material unperformed obligations on both sides. Based on the facts it is not an executory contract and therefore Oil Corp cannot achieve the first goal.

As Plastic Corp is a licensee of the patents owned by Oil Corp they are protected as the license may not be terminated in connection with the sale of the patents without their consent. Therefore, Oil Corp cannot achieve the second goal of rejecting the patent licenses without the consent of Plastic Corp.

Oil Corp is able to sell the manufacturing facility free and clear of the USA Bank lien and so it could achieve the third goal. However, it is important to note that USA Bank could submit a "credit bid" and offset a portion of the purchase price against the amount of its claim secured against the manufacturing facility.

**\* End of Assessment \***

**Commented [H(58):** Incorrect, a license is usually an executory contract because there is ongoing permission to use and freedom from suit. However, Plastic Corp's consent is required because substantive trademark law permits it to refuse performance by an assignee

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

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

**Commented [H(61):** Correct, 1 mark, the lien would attach to the proceeds of the sale