



**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 29/50

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

Commented [H(2): Total marks 6/10

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): Incorrect, the correct response is (a)

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 response 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)]: No marks because 2 options are selected, (c) is the correct response

**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)]: No marks because two options are selected, the correct response is (e)

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

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

**Question 1.7**

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

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

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

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

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

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

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

**Question 1.8**

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

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

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

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

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

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

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

**Question 1.9**

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

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

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

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

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

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

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

**Question 1.10**

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

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

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

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

Commented [H(13)]: Total marks 4/10

**Question 2.1 (2 marks)**

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

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

The key between voluntary and involuntary petition for bankruptcy are:

- In a voluntary petition one need not be insolvent while in an involuntary petition the petitioner must claim that the debtor is not paying its debts as and when they become due (exception if amount is disputed).
- Normally a debtor files the voluntary petition this is done by one or more creditors for involuntary
- Involuntary petition there is an immediately effective to open proceedings with involuntary the court will enter an order confirming the position.

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

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

**Question 2.2 (2 marks)**

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

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

- Contempt of court sanctions
- Payment of debtors' attorneys' fees
- Court could impose a daily fine until violation has been rectified.

Commented [H(18)]: Correct, 1 mark, also the act in violation of the stay is void or voidable, depending on the circuit

**Question 2.3 (3 marks)**

Commented [H(19)]: 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 creditors claim is considered impaired if the plan negatively effects the holders (i.e. legal, equitable and/or contractual rights are impaired).

Commented [H(20)]: Correct, 1 mark. An impaired claim that will receive nothing under the plan cannot vote and is deemed to reject the plan.

An impaired claim holder is not entitled to vote on a proposed reorganization plan when

Instead what will occur is

**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?

Fraudulent Conveyance

Commented [H(21)]: Total marks 0/3

Commented [H(22)]: Incorrect, the correct response is preference

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

Setoff

Commented [H(23)]: Incorrect, the correct response is preference

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

Safe harbours for securities and commodities contracts

Commented [H(24)]: Incorrect, the correct response is actual fraudulent conveyance

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

Commented [H(25)]: Total marks 9/15

**Question 3.1 (3 marks)**

Commented [H(26)]: Total marks 1/3

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

*Stern v Marshall* changed the law of bankruptcy jurisdiction and authority to enter a final order because even in a core proceedings the bankruptcy court is not able to issue final orders that contravene Article III jurisdiction.

Commented [H(27)]: Correct, 1 mark. This departed from the prior understanding that bankruptcy courts could enter final judgments in core proceedings. Now, a bankruptcy court may enter a final order on a challenge to a petition or where the parties consent

**Question 3.2 (3 marks)**

Commented [H(28)]: Total marks 0/3

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?

[Type your answer here]

**Question 3.3 (4 marks)**

Commented [H(29)]: Total marks 3/4

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 make a final decision and answer all conflicts with no further decisions to be made. Interlocutory orders deal with partial issues and there may be a need for a continuation on the remaining matters.

Commented [H(30)]: Correct, 1/2 mark, there is an automatic right of appeal from a final order

Commented [H(31)]: Correct, 1/2 mark, appeal from an interlocutory order requires permission

Normally decisions appealed from the bankruptcy court I sheard by the relevant district court. There are also instances where bankruptcy appeals will be heard by a Bankruptcy Appellate Panel.

Commented [H(32)]: Correct, 1 mark

A bankruptcy court appeal can also go directly to the court of appeals.

Commented [H(33)]: Correct, 1 mark

#### Question 3.4 (5 marks)

Commented [H(34)]: Total marks 5/5

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

Directors owe a fiduciary duty as follows:

- Duty of loyalty to the corporation's best interests; and
- Duty of care in educated decision making.

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

These duties are owed to the corporation and its shareholders in the ordinary course of business.

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

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

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

When the company is potentially or actually insolvent they directors duties are still owed to the business and its shareholders and not to the creditors.

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

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

Commented [H(40)]: Total marks 10/15

#### Question 4.1 [4 marks]

Commented [H(41)]: Total marks 3.5/4

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.

The issue in this scenario is if the Foreign (English) Scheme of arrangement can be granted under US chapter 15 as a foreign main or foreign non-main proceeding.

A foreign main proceeding is one that is commenced in the debtors center of main interests (COMI).

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

Gambling Corporation is incorporated in Greece and this is the presumption of its COMI. Even though it has business in other jurisdictions its principal business is in Greece so its fair to assume with the information we have that the COMI is Greece.

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

A proceeding in a jurisdiction other than a debtors COMI can be recognized as a foreign non-main proceeding only if the debtor has an establishment in the jurisdiction (that carried out non-transitory economic activity prior to the section 15 proceedings).

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

This is the case as Gambling corporation has casinos in England and Las Vegas.

Commented [H(45)]: Partially correct, 1/2 mark, the casino in England is the establishment because it is where the foreign proceeding is pending. There does not need to be any business in the US for chapter 15 recognition to be granted



**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 Oil Corp filing a chapter 11 voluntary petition on each scenario is noted below:

- I am assuming that chapter 11 is filed after the above 4 events take place.

ShipCo Breach of contract

Once the filing of the bankruptcy occurs there is an automatic stay on all lawsuits, protecting Oil Corp from the legal action of ShipCo while the stay is active as this is litigation on pre-petition claims.

US Department of Justice investigating illegal oil purchases

The stay of proceedings is subject to statutory exceptions, in this case regulatory investigations. Even if chapter 11 is filed the US department of justice can investigate the potentially illegally purchase of oil. If found guilty the automatic stay may not protect Oil Corp.

Threat of foreclosure in Philippines Refinery

The stay of proceedings has a worldwide effect, so threatening to close its foreign (Philippines) refinery is barred.

Texas landlord eviction threat

The stay of proceedings is effective across the US. However, the Texas landlord may want to sue Oil Corp outside of the Bankruptcy court. In this case the entering into Chapter 11 will not stop this process. If the landlord tries to sue in the bankruptcy court this will violate the stay as this will be considered a litigation against pre-petition claims.

**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

**Commented [H(46)]:** Total marks 4/5

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

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

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

**Commented [H(50)]:** Correct, 1 mark

**Commented [H(51)]:** Incorrect, proceedings inside the bankruptcy court are allowed, but proceedings on unpaid rent before the bankruptcy could not be brought outside the bankruptcy court, and the automatic stay would bar eviction because the lease did not expire prior to the bankruptcy

**Commented [H(52)]:** Total marks 2.5/5

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?

The issue in this scenario is if Oil Corp needs the consent of Plastic Corp and USA bank in the three scenarios mentioned. I am assuming that 4.2 and 4.3 are independent scenarios.

- (i) Assume and assign trademark license.

OilCorp manufacturing business operates under the trademark provided by Plastic Corp. OilCorp can assume and assign the contract (transfer the rights to a third party) however said third party must give PlasticCorp assurances of future performance. Directly OilCorp need not get direct consent. But in substance Plastic Corp does need to consent to the assignment of the contract.

**Commented [H(53):** Incorrect, because trademark law permits Plastic Corp to refuse to accept an assignment, its consent is required

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

OilCorp patented the process for manufacturing. Which it licences to Plastic Corp. Given that Plastic Corp is the Licensee of the patent owned by the debtor (OilCorp) Plastic Corp is protected and this license cannot be terminated without Plastic Corps consent.

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

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

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

Usually, the debtor can sell property free and clear of creditor interests with court approval in a 363 Sale. Additionally, debtors can sell property in the ordinary course of business. Given that OilCorp isn't a real estate company, its safe to assume that property sales are out of the ordinary. To sell the property OilCorp must clearly establish that the sale in its business judgement and the transaction is in the best interests of the estate as a whole.

Given the US bank has a security interest in the property the property can be sold via a "credit bid" where the proceeds of the property offset the liability. OilCorp won't need written approval but may need to market the property well as such value can be offset accordingly.

**Commented [H(56):** Partially correct, 1/2 mark, if the sales price is above the value of the secured claim, consent is not required and the lien attaches to the proceeds

**\* End of Assessment \***