



**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 44.5/50

**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)]: 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**

Commented [H(6): 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(7): 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(8): 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(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 9/10

**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?

Voluntary petitions may be commenced by a debtor, under any applicable chapter. Involuntary petitions may be commenced by a creditor, and are only available under chapters 7 and 11.

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?

The court may impose contempt sanctions, such as payment of the debtor's attorney's fees or require the violator to take affirmative acts to undo the effect of its violation. Coercive sanctions, such as a daily fine, may be applied.

Commented [H(18)]: Correct, 1 mark, also the act is void or voidable

**Question 2.3 (3 marks)**

Commented [H(19)]: Total marks 3/3

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 claim is "impaired" unless the holder's "legal, equitable, and contractual rights" are left unaltered, albeit it is permissible to reverse contractual acceleration by curing any monetary default and compensating the holder for damages. An impaired creditor who receives nothing under the plan is not entitled to vote on the plan, but instead is deemed to oppose it.

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

Commented [H(21)]: Correct, 1 mark

Commented [H(22)]: Correct, 1 mark

**Question 2.4 (3 marks)**

Commented [H(23)]: 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?

A preference claim.

Commented [H(24)]: 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 requires that the debtor be presumed or proven to be insolvent; this can also be used as a factor in establishing a constructive fraudulent conveyance.

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

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

An actual fraudulent conveyance.

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

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

Commented [H(27)]: Total marks 13.5/15

#### Question 3.1 (3 marks)

Commented [H(28)]: Total marks 1.5/3

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

In *Stern v Marshall* the Supreme Court held that bankruptcy courts could not issue final orders which invade Article III jurisdiction, even in core proceedings. This meant that the bankruptcy court could not issue final orders over matters which were the subject of a state law claim. As a result, bankruptcy courts can now issue a report and recommendation to the district courts (much as in non-core proceedings) or can only issue final orders with the consent of the parties to the action.

Commented [H(29)]: Correct, 1 mark, prior to the decision, bankruptcy jurisdiction was understood to depend on the core / non-core distinction

Commented [H(30)]: Partially correct, 1/2 mark, the bankruptcy court can also enter a final order on a challenge to a petition

#### Question 3.2 (3 marks)

Commented [H(31)]: Total marks 3/3

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?

In a chapter 15 proceeding, the foreign representative may not invoke the provisions relating to avoidance powers, in particular relating to preferences and fraudulent conveyances. The foreign representative may use any other applicable US or foreign law to challenge the transactions or, if that is unsatisfactory (for example because the statute of limitations has passed), they may commence plenary proceedings such as chapter 7 or 11, in the context of which they may exercise those powers.

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

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

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

#### Question 3.3 (4 marks)

Commented [H(35)]: 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?

A final order disposes of all the issues in a case, leaving nothing further to be decided. Final orders are appealable as of right. An interlocutory order is one which resolves only some of the issues or claims in a case; it may only be appealed with leave from the appellate court. In general, appeals from bankruptcy court orders are heard by the district court for the district in which they sit; however, in certain circuits (such as the First) there is a Bankruptcy Appeal

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

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

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

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

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

Panel which is convened from the judges of the bankruptcy courts within that circuit (though parties may request that the appeal is heard by the district court instead).

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

### Question 3.4 (5 marks)

Commented [H(42)]: 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?

In the ordinary course of business, Delaware corporations owe a fiduciary duty of loyalty to the corporation's best interests and a duty of care in educated decision-making. These are owed to the corporation and its shareholders; this applies even when a corporation is potentially or actually insolvent, unlike in many other jurisdictions.

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

Commented [H(44)]: Assuming this is a typo for "care", correct, 1 mark

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

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

Commented [H(47)]: Correct, 1 mark, specifically the duties are not owed to creditors

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

#### Question 4.1 [4 marks]

Commented [H(48)]: Total marks 13/15

Commented [H(49)]: 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.

The key distinction between main or non-main proceedings is that main proceedings are commenced in an entity's Centre Of Main Interests (COMI). The COMI is presumed to be its place of incorporation, but this may be rebutted. Factors to be considered include the location of its headquarters, its management or primary assets, the majority of its creditors or the jurisdiction which applies to most disputes.

In the present case, there is a presumption that Gambling Corporation would have its COMI in Greece, as it is incorporated there. It also has its principal place of business there, which one presumes would include any or all of its headquarters, management and principal assets. The jurisdiction applying to most disputes is likely to be English (given that the bond issue is governed by English law), though it is not clear whether its creditors are based in England or worldwide. In the circumstances, it seems unlikely that there is enough evidence to displace the presumption that the COMI is in Greece. As such, an English scheme of arrangement would be not be a main proceeding. However, because GC has an establishment in England (i.e. a place where it carried out non-transitory economic activity) it seems likely that the scheme would be recognised as a non-main proceeding.

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

Commented [H(51)]: Correct, 1 mark

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

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

#### Question 4.2 [5 marks]

Commented [H(54)]: 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?

Filing a chapter 11 petition grants an automatic stay of proceedings. As such, the basic position is that any attempt to enforce action in relation to pre-petition claims will be prevented. In particular this would apply to the breach of contract litigation raised by ShipCo. The automatic stay applies to any attempt to interfere with the company's property anywhere in the world. As such, USA Bank would be prevented from foreclosing on the company's refinery in the Philippines. Regarding the eviction proceedings, there is an exemption within the stay for eviction of a debtor from non-residential property, but this only applies where the lease has expired, which does not appear to be the case here. Finally, in relation to the investigation by the DOJ, criminal proceedings and regulatory investigations are excepted from the automatic stay, and so these proceedings will not be affected by Oil Corp filing a Chapter 11 petition.

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

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

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

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

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

**Question 4.3 [6 marks]**

Commented [H(60)]: 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?

Regarding the trademark license, in principle this type of contract may be assumed and assigned. The transferee must give Plastic Corp adequate assurances of future performance. In principle, the Bankruptcy Code removes any contractual restrictions on assignment. However, intellectual property licensing law provides that Plastic Corp may not be compelled to accept performance from a transferee; as such, Oil Corp will require Plastic Corp's consent to achieve this.

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

Commented [H(62)]: Correct, 1 mark

Rejection, on the other hand, is a unilateral power. This would give Plastic Corp an unsecured pre-petition claim in damages for breach of contract, but would not require their consent.

Commented [H(63)]: Incorrect, because a patent license is being rejected, the provisions of 365(n) apply and Plastic Corp will be able to continue to practice the patent at its election, so exclusivity for the purchaser is possible only with consent of Plastic Corp

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

A 363 sale does allow Oil Corp to sell assets free and clear of any creditor interests. This requires court approval. It also requires creditor consent, unless the creditor's interest is disputed (which does not appear to be the case here) or the value of the property exceeds that of the lien. If that last exception applies, USA Bank will receive priority in the proceeds of the sale.

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

**\* End of Assessment \***