



**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 36/50

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

Commented [H(2)]: 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(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)]: 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.

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

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

**Commented [H(13):** Total marks 6.5/10

**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?

- A voluntary petition for bankruptcy is filed by the debtor company on their own volition.
- An involuntary petition is filed by a creditor of a company to have the debtor company wound up without their consent.
- If a debtor company has 12 or more creditors, at least three of the debtor companies must join the petition to have the company wound up.

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

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

**Question 2.2 (2 marks)**

**Commented [H(17):** Total marks 1.5/2

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

- A potential consequence would mean that the stay is void as this action would usually qualify as being in contempt of court.
- Where a court sees that a violator of a stay has not acted promptly to rectify the violation, a daily fine may be imposed on them until the situation has been rectified.
- Failure of a violator to obtain relief from the stay may result in other contempt sanctions which could include payment of the debtors attorneys fees.

**Commented [H(18):** I think you mean that the act is void, so I will give partial credit, 1/2 mark, in certain circuits the act is voidable and not void

**Commented [H(19):** Correct, 1 mark

**Question 2.3 (3 marks)**

**Commented [H(20):** 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 claim is impaired if it leaves the creditors claim altered either by value, or altering their legal or contractual rights to their claim.
- A delayed payment of a claim in full would also be deemed as an impaired claim.
- As a general rule, only creditors holding an impaired claim are entitled to vote on a proposed plan or restructuring.

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

**Commented [H(22):** An impaired claim that will receive nothing under the plan is not permitted to vote and is deemed to reject the plan

- It is within the remit of the courts to decide that some classes of creditors are unimpaired. If this decision is made, these claims would not be entitled to a vote.
- An impaired claim is also not entitled to vote if they are considered to be an insider of the company. This vote will not be considered when evaluating the votes of each class of creditor in a restructuring.
- In this instance, if a proposed plan is approved and the dissenting creditor was not entitled to vote, their vote is crammed down and the plan may still be approved by the court, subject to the approval of one class of creditor in the estate.

#### 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?

- For transfer made on account of antecedent debt before such transfer was made, the transaction should be reversed and the proceeds returned to the debtor estate. The party would be entitled to an unsecured claim in the estate, following the reversal of the transaction.

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

- A transfer must be reversed if the transfer deemed to be a preference transfer was made in the 90 days prior to the petition date. A creditor may present evidence to rebut this claim and the burden of proof will then be on the trustee/debtor to prove insolvency on the date of the transfer.

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

- If a debtor is proven to have intended to frustrate creditors recoveries and payments relate to the ordinary course of business, the debtor would be become indebted to the creditor and the creditor could seek a money judgement. This would constitute an actual fraudulent conveyance.
- A stay on proceedings would also be lifted for the creditor to pursue the debtor for loss of funds.

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

##### Question 3.1 (3 marks)

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

- It changed the court's jurisdiction to issue final orders where the order is deemed to invade Article III Jurisdiction.

Commented [H(23)]: Total marks 2/3

Commented [H(24)]: Specifically, this is a preference claim

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

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

Commented [H(27)]: Total marks 12/15

Commented [H(28)]: Total marks 1/3

Commented [H(29)]: Correct, 1 mark, prior to the decision, bankruptcy jurisdiction was understood to depend on the core/non-core distinction, and now bankruptcy courts can enter final orders on challenges to petitions or on core proceedings with consent of the parties

- The U.S. Supreme Court asserted that a bankruptcy court judgement, in issuing a final order over a state law claim was unconstitutional and cannot be upheld.
- In parallel proceedings with the state court and the bankruptcy court, it was deemed that the state court decision had the authority to supersede any bankruptcy court decision in the same jurisdiction.

**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?

- Unlike when a petitioner commences proceedings within the U.S., a foreign petitioner does not invoke an automatic stay of creditor action on application. This stay on creditor action may only be invoked upon the application being accepted by the U.S. courts.
- Even at that, this stay is only limited to the debtor company's property within the territorial jurisdiction of the U.S.
- Chapter 15 also excludes the rights granted to foreign representatives the use of avoidance powers by the Bankruptcy code.
- A foreign representative attains equivalent relief by commencing a plenary proceeding under Chapter 7 or Chapter 11.
- This can be commenced either before, or after Chapter 15 recognition has been recognised.
- A foreign representative may also apply to the court to void preference transactions on a one off basis under section 304 of the Bankruptcy code, prior to the enactment of chapter 15.

Commented [H(30)]: Total marks 2/3

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

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

Commented [H(33)]: Incorrect, section 304 has been repealed, but the foreign representative can invoke other US or foreign laws with similar effects

**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 only deals with one aspect, or issue within a wider dispute, whereas a final order is all encompassing, meaning the order will dispose of all issues relating to a particular case.
- Final orders may be appealed as is an entities/individuals right to do so under U.S. Law.
- An interlocutory order only be appealed with leave from the appellate court.
- In recognizing bankruptcy orders however, as the Supreme Court has acknowledged bankruptcy proceedings as "an aggregation of individual controversies". Thus, a bankruptcy order in any capacity is deemed to be a final order for the purposes of appeals.
- Generally it is the district court that hears appeals arising from a bankruptcy court order. It is the district court in which the appellant resides in that hears the appeal.
- In certain circuits, appeals may also be heard by a bankruptcy Appellate Panel.

Commented [H(34)]: Total marks 4/4

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, 1/2 mark

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

Commented [H(40)]: 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 have a fiduciary duty to act at all times in a corporation's **best interest**.
- They must also have a duty of **care** in making important business decisions.
- It must be noted a director would be protected from legal action being taken against them for damages if a decision was made (that lead to bankruptcy proceedings) and was deemed to be an error in judgement, rather than intentional.
- Directors are protected under the Business Judgement Rule.
- In the ordinary course of business, these duties are owed to the **corporation itself**, as well as to the **shareholders** of the entity.
- The Supreme Court has distinctly laid out that directors do not owe fiduciary duties to creditors of an estate in the ordinary course of business.
- This is also the case for entities where the corporation is potentially or actually insolvent. The Delaware Supreme Court has ruled has stated that duties are not owed to **creditors** in the zone of insolvency or actually insolvent.

**Commented [H(41)]:** Total marks 5/5

**Commented [H(42)]:** Correct, 1 mark, also known as a duty of loyalty

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

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

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

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

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

**Commented [H(47)]:** Total marks 9.5/15

**Question 4.1 [4 marks]**

**Commented [H(48)]:** Total marks 2/4

Gambling Corporation is incorporated and has a principal place of business in Greece and it operates casinos and betting parlors in many international cities, including Athens, Las Vegas, London and Macau. Gambling Corp's bonds (governed by English law) are due to mature in one (1) year, but it is unable to repay or refinance them. Gambling Corp is considering using an English scheme of arrangement to restructure the bonds.

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

- Under U.S. chapter 15, it is possible for an English scheme of arrangement to be granted recognition.
- The Bankruptcy Code allows for a foreign proceeding to be recognised and defines it as a collective or judicial proceeding in a foreign country under a law relating to restructuring of a debt in which preceding the asset and affairs of a debtor are subject to control or supervision of a foreign court for the purpose of reorganisation.
- This would in principle allow for recognition of an English scheme of arrangement in the U.S.
- In relation to Gambling Corporation ("GC"), it would appear that Chapter 15 recognition would only be granted as a **foreign non-main proceeding**. **GC's COMI does not appear to be based in the U.S. with only one betting parlour operating from Las Vegas.**
- The determining factors in making this decision would be based on i) the location of headquarters (presumably Greece), ii) location of management (Greece), iii) primary assets (number of jurisdictions), iv) majority of creditors and jurisdiction whose law disputes will apply (bondholders in England and bond governed by English Law).
- For this reason, a foreign non-main proceeding would be applicable.

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

**Commented [H(50)]:** This is true, but the relevant comparison is COMI vs. location of the foreign proceedings. As COMI is not in England, where the foreign proceeding is pending, so foreign main recognition would not be appropriate

- The only reason why GC could apply for foreign recognition relates to the fact they have a gambling parlour in Vegas. The application for recognition must also assist in the restructuring of the debt for the benefit of the estate.

**Commented [H(51):** Incorrect, the relevant establishment is the casino in London where foreign proceedings are pending--whether there need to be assets in the US is still unclear but a minimal asset would be sufficient

**Question 4.2 [5 marks]**

**Commented [H(52):** Total marks 4.5/5

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?

- If Oil Corp were to file a chapter 11 petition, it would place an automatic stay on any creditor action being taken against it, where approved by the court or not.
- ShipCo would no be able to enforce proceedings against Oil Corporation from the point of filing the application. This would allow for time for the debtor company, or trustee some breathing space to assess any actions being made by ShipCo and potentially come to an agreement on the potential repayment of the lawsuit. Proceedings for the time being would be halted as the bankruptcy code prohibits litigation on pre-petition claims.
- With reference to the Dept. of Justice claim, there would be no stay placed on these proceedings, as there is exceptions allowed for criminal claims against the Company. This would constitute and criminal claim and the proceedings would continue
- The US Bank would be unable to exercise its rights under the secured loan as the stay on proceedings relates to assets that are held by companies worldwide, not just in the U.S.
- With reference to the landlord foreclosing its Houston and Texas offices, the landlord is not permitted to foreclose on offices immediately, however if the landlord has security of the property, Oil Corp has not submitted a proposal to repay in 90 days, and no further payments have been made, the landlord is permitted to evict Oil Corp.

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

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

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

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

**Commented [H(57):** Partially correct, 1/2 mark, eviction would be barred so long as the lease term had not expired prior to the petition date

**Question 4.3 [6 marks]**

**Commented [H(58):** 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?

- In a bankruptcy scenario, Oil Corp is not permitted assign the trademark license to the prospective buyer.
- Licenses for the patent name "Interconnect" is owned by Plastic Corp. It would not be assignable as the brand name is not assignable absent licensor consent. If this was to be provided by Plastic Corp, they would be permitted to do so. This may be possible by offering one of their patents on manufacturing plastic to Plastic Co.
- Oil Corp. would be within their rights to reject the patent licenses it has in place with Plastic Corp. Under Chapter 11 proceedings, a debtor in possession (being Oil Corp) has the ability to reject burdensome contracts that may be effecting the potential value of sale to increase value for the estate
- In order to achieve the highest selling price, Oil Corp. could cancel the contract they have with Plastic Corp. relating to the trademarks and sell exclusively to the prospective buyer. This can be achieved without the consent of Plastic Corp.
- The Chapter 11 debtor in possession gives the ability for Oil Corp to asset assets free and clear of any liens it may have against them.
- In a bankruptcy scenario a claim attached to a lien on property, being the manufacturing business, would be considered a secured claim.
- In this scenario, Oil Corp would be permitted to sell the manufacturing business without the consent of USA Bank, but would need court consent.
- The proceeds of the sale would be paid to US Bank to the extent that it covers the USD500 million loan. Any excess funds would be paid back to the debtor estate.
- The reason for the ability for Oil Corp to sell this business is a result of section 363 which aims to achieve improved recoveries on assets of the estate and protection of purchasers.

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

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

**Commented [H(61)]:** They could reject, but 365(n) would permit Plastic Corp to continue to practice the patent and so exclusivity would not be possible without Plastic Corp consent

**Commented [H(62)]:** Incorrect, as you note above, trademarks are not assignable without the owner's consent

**Commented [H(63)]:** Correct, 1 mark

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

**\* End of Assessment \***