

TOTAL = 36/50  
72%



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: 202223-336.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 "student number" 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 2024. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. 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 2024 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2024. If you elect to submit by 1 March 2024, you may not**

submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of 9 pages.

**ANSWER ALL THE QUESTIONS**

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

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

Car Corp, incorporated and headquartered in Michigan, owes Parts Inc, incorporated and headquartered in Mexico, USD 10,000 on a past-due invoice for components used to build Car Corp vehicles. May Parts Inc file an involuntary petition to place Car Corp into chapter 11 bankruptcy proceedings?

- (a) Yes, regardless of the circumstances.
- (b) Yes, if Car Corp has fewer than 12 non-contingent, non-insider creditors.
- (c) Yes, if other creditors owed at least USD 5,775 join in the petition. (this should be USD 6,750)
- (d) No, because Parts Inc does not know whether Car Corp is insolvent.
- (e) No, because Parts Inc is not a US company.

Commented [FV1]: 0, correct answer is c

Question 1.2

Answer this question with reference to the set of facts set out in question 1.1 above: Which of the following is likely to be a party in interest in the bankruptcy of Car Corp?

- (a) A shareholder in Parts Inc, to which Car Corp is indebted.
- (b) A journalist writing about Car Corp's bankruptcy.
- (c) A shareholder in Investment Corp, Car Corp's parent company.

Commented [FV2]: 1, correct

**(d) A retired employee of Car Corp who receives payments from the company's pension plan.**

**(e) A non-profit organization that advocates for companies like Car Corp to be held responsible for climate change**

Question 1.3

**Which of the following entities does not satisfy the minimum presence requirement to be a debtor under any chapter of the Bankruptcy Code?**

**(a) A foreign domiciled company that pays a US attorney a retainer.**

**(b) A company with several US bank accounts, but no physical presence in the United States.**

**(c) A company with US patents, but no physical presence in the United States.**

Commented [FV3]: 1, correct

**(d) Options (a) to (c) above satisfy the minimum requirement for presence in the United States.**

**(e) None of the above (options (a) to (d)) satisfy the minimum requirement for presence in the United States.**

Question 1.4

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

**(a) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.**

**(b) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.**

**(c) An insolvency professional appointed by the court overseeing the foreign proceeding.**

Commented [FV4]: 1, correct

**(d) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.**

**(e) All of the above.**

Question 1.5

**Which of the following regarding executory contracts is false?**

(a) A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.

**(b) Executory contracts are clearly defined by the Bankruptcy Code.**

(c) In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.

(d) Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign 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.

Commented [FV5]: 1, correct

Question 1.6

Which of the following is not a requirement to confirm a "cramdown" plan?

(a) That the plan is fair and equitable to dissenting classes of creditors.

(b) Acceptance of the plan by at least one class of impaired, non-insider creditors.

Commented [FV6]: 1, correct

**(c) Acceptance of the plan by all classes of secured creditors.**

(d) That the plan does not discriminate unfairly against dissenting classes of creditors.

(e) That the dissenting creditors receive no less than they would under a liquidation scenario.

Question 1.7

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.

Commented [FV7]: 1, correct

(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 1.8

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

- (a) *The manufacturer has a claim for damages for breach of contract.*
- (b) *The manufacturer must immediately stop using the trademark.*
- (c) *The manufacturer can continue using the trademark for the remaining period of the license.*
- (d) *Both options (a) and (b).*
- (e) Both options (a) and (c).**

Commented [FV8]: 1, correct

Question 1.9

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

- (a) *A good faith purchaser at a 363 sale may retain the property notwithstanding a subsequent reversal of court approval for the sale on appeal.*
- (b) *The debtor-in-possession must establish that the transaction is in the best interests of the estate as a whole.*
- (c) *In chapter 15 proceedings, a foreign court's approval alone suffices for a 363 sale.*
- (d) *Debtors must carry out a robust marketing process for the sale.*
- (e) A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.**

Commented [FV9]: 0, correct answer is c

Question 1.10

Which of the following regarding substantive consolidation is true?

- (a) *It respects the boundaries of corporate separateness.*
- (b) *If a creditor can show it extended credit on the basis of corporate separateness, it has a valid objection to substantive consolidation.*
- (c) *It is the treatment of two or more creditors as a single creditor to simplify the claims process.*
- (d) *Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.***
- (e) *Authority for substantive consolidation comes from the Bankruptcy Code.*

Commented [FV10]: 0, correct answer is b

QUESTION 2 (direct questions) [10 marks]

Question 2.1 (1 mark)

**What is setoff and why is it not permitted in many circumstances?**

*Setoff permits a creditor holding a claim against the debtor and at the same time owing money to the debtor, to net out the two obligations.*

*It is not permitted in many circumstances as setoff rights can improve the position of the creditor as compared to other unsecured creditors who are not owed money by the debtor as it decreases its obligation to the estate by the full amount owed by the debtor rather than the lesser amount the debtor would pay on the unsecured claims.*

Commented [FV11]: 1, correct

Question 2.2 [2 marks]

**What is a "priming lien" and what requirements must be met for such a lien to be granted to secure DIP financing?**

*A priming lien is a type of lien that is granted priority over existing liens or claims in bankruptcy proceedings.*

*The priming lien must be senior or equal to a pre-petition lien on estate property in order to secure financing.*

*Furthermore, the debtor must demonstrate the interest of the secured creditor being primed is adequately protected. "Rolling up" may be used by pre-petition creditors to improve their position into the facility granted the priming lien.*

*A good faith debtor-in-possession lender is protected from the effects of a reversal of a DIP financing order on appeal.*

Commented [FV12]: 1.5. Full credit not given because answer did not note that priming lien can be granted only if DIP financing is unavailable without such a lien.

Question 2.3 [2 marks]

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

*Violation of the stay constitutes contempt of court and is void or voidable. Parties in interest may seek to lift the stay to validate an act that would otherwise be a stay violation. Failure to obtain such relief may result in imposition of contempt sanctions against the stay violator which could include payment of legal fees of the debtor and requirement for the violator to take affirmative acts to undo the effect of its violation.*

*The court may also impose coercive contempt sanctions e.g. daily fine to be paid until the stay violation is rectified.*

Commented [FV13]: 2, correct

Question 2.4 [2 marks]

**In voting on a plan of reorganization, which class(es) of creditors are (i) deemed to accept the plan, (ii) deemed to reject the plan and (iii) permitted to vote on the plan? What vote is necessary for a class of creditors to accept a plan?**

*The following classes of creditors could vote on the plan:*

- *Creditors secured by real property*
- *Creditors secured by personal property*
- *Unsecured creditors*
- *Shareholders*

*A given class of creditors is deemed to accept the plan if a simple majority of the creditors in the class (holding at least two-thirds of the value of the claims in the class), vote in favour. For shareholders, if two-thirds in amount of interests vote in favour, they can approve the plan.*

*An unimpaired class is deemed to accept the plan, and a class that will receive nothing is deemed to reject the plan.*

Commented [FV14]: 1.5 FULL credit not given because answer did not note that impaired classes that receive something will be permitted to vote.

Question 2.5 [3 marks]

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

- Which cause of action applies only to transfers made on account of antecedent debt?**
- Which cause of action requires that the debtor be presumed or proven to have been insolvent at the time of the transfer?**
- Which cause of action requires that the debtor be proven to have intended to frustrate creditors' recoveries?**



- a) Preferences
- b) Constructive fraudulent conveyance
- c) Actual fraudulent conveyance

**Commented [FV15]:** 2. Answer to b is also preferences. Cosntructive fraudulent transfer does not require insolvency.

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

**Commented [la16]:** 13/15 marks

**Question 3.1** [3 marks]

**Commented [la17]:** 2/3

**Describe the circumstances in which a bankruptcy court may enter a final order consistent with the US Constitution, who reviews appeals from bankruptcy court orders and how orders that are not constitutionally final are reviewed.**

*If the bankruptcy court had authority to enter a final order, the district court or the Bankruptcy Appellate Panel (BAP) reviews conclusions of law de novo and reviews findings of fact for abuse of discretion. It also recognizes that the bankruptcy court had greater opportunity to weigh the evidence.*

**Commented [la18]:** Correct, 1/2 mark

**Commented [la19]:** Correct, 1/2 mark

*If the bankruptcy court did not have authority to enter a final order, the district court/BAP reviews de novo all findings of fact and conclusions of law to which party has objected.*

**Commented [la20]:** Correct, 1 mark

*A constitutionally final order is not final for the purposes of appeal and does not resolve the entire issue in dispute.*

**Commented [la21]:** This can be true, but is not always true. For example, a final order resolving a claim with the consent of the parties is both constitutionally final and final for purposes of appeal.

*Bankruptcy courts may enter final orders in the circumstances where jurisdictional requirements under Article III of the US constitution are met, and due process clause of the Fifth Amendment is also met.*

**Commented [la22]:** Specifically, the bankruptcy court can enter a final on a core matter if it arises exclusively in the Bankruptcy Code (such as a challenge to a petition) or if the parties consent.

*Not constitutionally final orders can be reviewed via interlocutory appeals (seek permission to appeal before the bankruptcy case reaches final disposition), objections and motions and direct appeals.*

**Question 3.2** [3 marks]

**Commented [la23]:** 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?**

*The following provisions of the Bankruptcy Code may not be invoked by a foreign representative in Chapter 15 proceeding:*

- Automatic stay;
- Sale, transfer and use of property outside the ordinary course; and
- Avoidance of post-petition transfers and post-petition perfection of security interests.

**Commented [la24]:** Correct, 1 mark, the others can be invoked on in chapter 15 under certain circumstances. The foreign representative can pursue analogous claims under applicable US or foreign law.

A foreign representative may only invoke the Bankruptcy Code avoidance powers in a plenary proceedings under Chapter 7 and Chapter 11 and not in a chapter 15 proceeding.

However, the foreign representative may choose to enter plenary proceedings under the Bankruptcy Code once recognition of the foreign proceeding under chapter 15 was granted. In this case, the scope of the proceedings would be limited to the US assets of the debtor and would be coordinated with the foreign proceedings.

The foreign representative can enter plenary proceedings to obtain access to the avoiding powers under the Bankruptcy Code where relief under other law is not satisfactory e.g. when the statute of limitations expired or applicable law does not allow claims for constructive fraudulent conveyance.

Commented [la25]: Correct, 1 mark

Question 3.3 [4 marks]

Commented [la26]: 4/4

What rules should one review when preparing a filing for a bankruptcy court?

The following rules should be reviewed when preparing for a bankruptcy court filing:

- The Bankruptcy Rules;
- The Federal Rules of Civil Procedure;
- The local rules of the bankruptcy court - advice from local practitioner can be sought; and
- The judge's personal practices.

Commented [la27]: Correct, 1 mark

Commented [la28]: Correct, 1 mark

Commented [la29]: Correct, 1 mark

Commented [la30]: Correct, 1 mark

Question 3.4 [5 marks]

Commented [la31]: 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 of Delaware corporations owe the following fiduciary duties:

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

Commented [la32]: Correct, 1 mark

Commented [la33]: Correct, 1 mark

Directors are protected from liability for any errors of judgement by the business judgement rule, under which the directors are presumed to have acted in good faith and on the basis of reasonable information. This presumption can be rebutted only if it is shown that majority of the directors are not reasonably informed and did not honestly believe that their decision was in the best interest of the corporation. However, the business rule doesn't apply when a transaction is approved by the majority of the board of directors that is not disinterested and independent or when a controlling shareholders is on both sides of the transaction. In those circumstances the transaction would be void unless the entire fairness standard is satisfied.

In the ordinary course of business, the duties would be owed to the corporation and its shareholders.

Commented [la34]: Correct, 1 mark

Commented [la35]: Correct, 1 mark

*When the corporation is potentially or actually insolvent, the duties would still be owed to the corporation and its shareholders and not to any creditors of the corporation.*

Commented [la36]: Correct, 1 mark

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

Commented [la37]: 8/15 marks

**Question 4.1** [5 marks]

Commented [la38]: 0/5

*iWork Ltd leases office space from office building owners and sublets the space to small businesses. Due to the increases in the numbers of businesses operating remotely, iWork Ltd has suffered a decline in revenues. As a result, it has failed to pay rent on some of its office space leases. What protections does the Bankruptcy Code provide to lessors of office space to iWork Ltd?*

*If iWork Ltd (iWork) files for bankruptcy, the Bankruptcy code would provide the following protections to the lessors:*

- *Automatic stay is granted upon the filing of the petition for bankruptcy. The stay would prevent legal actions against the debtor, collections of unpaid rent or eviction.*
- *The debtor can also reject or assume leases, which might be burdensome. If leases are rejected, that would be considered breach of contract and the lessor may be entitled to submit a claim for damages.*
- *If leases are rejected, the lessor may submit a claim for damages, but the debtor would be protected under the Bankruptcy code as claims for unpaid rent accruing after the filing of the petition would have priority over claims submitted prior to the petition.*
- *Lessors also have rights to adequate assurance of future performance.*

Commented [la39]: Most of these are protections for the debtor, not the landlord. The lessor of commercial property is protected by a 120 deadline for the debtor to assume or reject the lease, which may be extended 90 days for cause but no longer without the landlord's consent. Prior to the assumption or rejection of the lease, the debtor must pay rent as an administrative priority. If the debtor assumes the lease and then rejects it, it must pay 2 years rents as an administrative priority claim. The landlord also has a claim in the bankruptcy for unpaid pre-petition rent.

**Question 4.2** [5 marks]

Commented [la40]: 4/5

*Skin Luxe is incorporated and has a principal place of business in France where it develops and manufactures high end skincare products. Skin Luxe sells its skin care products through its own boutiques in many international cities, including Paris, Las Vegas, London and Hong Kong. Skin Luxe's English law-governed bonds are due to mature in one year, but it is unable to repay or refinance them. Skin Luxe 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.*

*In order to determine whether the English scheme of arrangement could be granted recognition under US chapter 15, we can first discuss whether the proceedings would qualify as foreign main or foreign non-main.*

Foreign main proceeding

***Skin Luxe is incorporated in France and its business operations are in France.***

***The country where the debtor has its center of main interest (COMI) is therefore likely France.***

***However, this presumption might be rebutted if Skin Luxe would be able to demonstrate that its COMI is in fact in England. This could be the case if for example Skin Luxe's creditors or management operations are located in England.***

***Skin Luxe has creditors with English law-governed bonds. If that is the case, the proceeding under Chapter 15 in the US for a scheme in England could be potentially recognized as foreign main proceeding as the contractual rights and obligations of Skin Luxe and its creditors are subject to the English law.***

Commented [la41]: Correct, 1 mark

Commented [la42]: Correct, 1 mark. Here it would not be rebutted.

Foreign non-main proceeding

***If Skin Luxe has an establishment in England but its COMI is in France, the scheme application in England could be potentially recognized as a foreign non-main proceeding. As Skin Luxe has establishments in London, England where it operates some of its boutiques, the company can be eligible for non-main proceeding recognition.***

Commented [la43]: Correct, 1 mark

Commented [la44]: Correct, 1 mark

Question 4.3 [5 marks]

Commented [la45]: 4/5

***Speculation Inc is engaged in day-trading stocks from leased office space with two employees. It funds its trading through a margin loan from its broker, where the shares it purchases are held as collateral. For a while, Speculation Inc was very successful in trading, and the US Department of Justice (DOJ) has announced an investigation into whether its success was due to illegally trading on insider information. More recently, Speculation Inc has had serious trading losses, causing its broker to declare a default on the margin loan. It also has fallen behind on its rent and has been sued in civil suit by a former employee alleging she was fired due to gender bias.***

***What would be the effect of a chapter 11 petition being filed by Speculation Inc on each of (i) the DOJ investigation, (ii) margin loan default; (iii) the delinquent lease and (iv) the employment discrimination lawsuit?***

The effect of Chapter 11 petition filed by Speculation Inc on the DOJ investigation

***The DOJ investigation would likely continue independently of the bankruptcy proceedings under chapter 11. This is because the automatic stay is subject to statutory exceptions for regulatory investigations and criminal proceedings.***

Commented [la46]: Correct, 1 mark

The effect of Chapter 11 petition filed by Speculation Inc on the margin loan default

**Upon filing of chapter 11 petition, Speculation Inc would receive automatic stay which would prevent any legal actions including defaults enforcements on the margin loan. The broker would be temporarily unable to seize the company's collateral, too.**

The effect of Chapter 11 petition filed by Speculation Inc on the delinquent lease

**Upon filing of chapter 11 petition, Speculation Inc would receive automatic stay which would prevent legal actions including eviction proceedings or collection actions for the delinquent rent.**

The effect of Chapter 11 petition filed by Speculation Inc on the employment discrimination lawsuit

**Upon filing of chapter 11 petition, Speculation Inc would trigger automatic stay which would prevent legal actions including the civil lawsuit filed for employment discrimination. The former employee would be unable to pursue further legal actions or collect monies for damages from Speculation Inc. and the lawsuit would become a claim of the employee in the potential bankruptcy of Speculation Inc.**

\* End of Assessment \*

**Commented [la47]:** Incorrect, the margin loan is a securities contract that is exempt from the automatic stay, so the broker can sell the collateral to pay down the loan.

**Commented [la48]:** Correct, 1 mark

**Commented [la49]:** Correct, 1 mark