

TOTAL = 25.75/50  
51.5%  
Rounded up to 52%



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.
- (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.

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

Commented [FV3]: 0, correct answer is d

**(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.

**(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.

Commented [FV6]: 1, correct

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.

(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 [FV7]: 0, correct answer is a

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]: 0, correct answer is e

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]: 1, correct

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.**

QUESTION 2 (direct questions) [10 marks]

Question 2.1 (1 mark)

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

*Setoff allows a creditor to offset its debt against a debtor's obligation, with the intent of reducing or eliminating what the debtor owes to the creditor.*

*However, it's generally not permitted due to the automatic stay, which prohibits collection actions upon filing. The principles underpinning this is the equal treatment of creditors and avoiding preferential treatment amongst the creditors.*

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 grants priority to a lender's lien over existing claims on a debtor's assets, often in the context of debtor-in-possession (DIP) financing during the debtor's bankruptcy process.*

*Requirements: (a) the financing must be necessary and in good faith; (b) provide adequate protection to existing creditors; (c) receive court approval (d) involve notice and opportunity for objection from affected parties; and (e) generally offer terms comparable to market standards.*

Question 2.3 [2 marks]

Commented [FV10]: 0, correct answer is b

Commented [FV11]: .5. Full credit not given because answer does not refer to the improvement of position as a reason for setoff not being permitted.

Commented [FV12]: 1.5. Full credit not given because answer does not note that priming lien may only be granted if DIP financing is not otherwise available



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

1. Violating the automatic stay can result in penalties and sanctions imposed by the bankruptcy court (eg fines, damages, and attorney's fees awarded to the debtor or other affected parties).
2. The bankruptcy court may deem actions in violation of automatic stays void or voidable, potentially rendering the relevant actions ineffective. Creditors will be required to compensate the debtor for any damages resulting from such violation.

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?**

- i. Deemed to Accept - Creditors whose claims are unimpaired by the plan or those who vote in favor of the plan.
- ii. Deemed to Reject - Creditors whose claims are impaired by the plan and who vote against the plan.
- iii. Permitted to vote - Creditors whose claims are impaired by the plan.

Commented [FV14]: 1.5 full credit not given because answer does not note that classes that receive nothing are deemed to reject.

For creditors to accept a plan of reorganization, a **class of impaired creditors** must vote to accept the plan by: (i) a majority in number; and (ii) two-thirds in dollar amount of the claims actually voted on the plan within that class.

Question 2.5 [3 marks]

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

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

Commented [FV15]: 2. Preferences is also the answer to b.

- (a) Preferences apply only to transfers made on account of antecedent debt.
- (b) Constructive fraudulent conveyances require that the debtor be presumed or proven to have been insolvent at the time of the transfer.

(c) *Actual fraudulent conveyances require that the debtor be proven to have intended to frustrate creditors' recoveries.*

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

Commented [la16]: 8.75/15

**Question 3.1** [3 marks]

Commented [la17]: 0.75/3

**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.**

**A. *Bankruptcy court may enter a final order consistent with the US Constitution***

*A bankruptcy court may enter a final order consistent with the US Constitution when it has jurisdiction over the matter and has provided all parties with due process rights. The court must ensure that its order does not violate any constitutional provisions. Final orders typically resolve substantive legal issues (eg confirmation of a plan of reorganization). Accordingly and where relevant, these are then subject to appellate review.*

Commented [la18]: Partially correct, 1/4 mark. The bankruptcy court can enter a final order on a core matter if it relates to a matter solely in the Bankruptcy Code (like confirmation of the plan) or with the parties' consent.

**B. *How orders that are not constitutionally final are reviewed.***

*Appeals from bankruptcy court orders are reviewed by the district courts. The district courts, further to deciding whether or not the bankruptcy court orders are correct based on the law and the facts of the case, will also review orders that are not constitutionally final. A party may seek permission to file an interlocutory appeal with the court of appeals, if the party wishes to challenge a non-final order.*

Commented [la19]: Correct, 1/2 mark; in some circuits, appeals from bankruptcy courts are heard by a Bankruptcy Appellate Panel

Commented [la20]: In this circumstance, the bankruptcy court's order is treated as a report and recommendation and is reviewed de novo with respect to each finding of fact that a party objects to, in addition to reviewing questions of law de novo as it would on a final order

**Question 3.2** [3 marks]

Commented [la21]: 1/3

**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?**

*Provisions that may not be invoked are those that are specific to domestic bankruptcy proceedings (eg domestic avoidance actions) and are not applicable or relevant in the context of cross-border insolvency cases.*

Commented [la22]: Correct, 1 mark

**Two ways a foreign representative can obtain equivalent relief:**

- Seek recognition of the foreign proceeding.*
- Work with domestic creditors, stakeholders, and authorities to achieve the objectives of the foreign insolvency proceeding.*

Commented [la23]: Incorrect, the foreign representative can pursue equivalent claims under applicable US or foreign law, or can commence plenary proceedings under chapter 7 or 11

**Question 3.3** [4 marks]

Commented [la24]: 3/4 marks

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

*The rules that should be reviewed include, but are not limited to:*

1. the **US Bankruptcy Code** (and associated cases that interpret the Code);
2. the **Federal Rules of Bankruptcy Procedure**;
3. the **Local Bankruptcy Rules**; and
4. **Court Forms and Instructions** specific to that bankruptcy court.

**Question 3.4** [5 marks]

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

*Directors of Delaware corporations owe fiduciary duties to the relevant **corporations** and their **shareholders**. These duties include the duty of **care**; the duty of **loyalty**; and the duty of good faith. Within the context of day to day management of the corporations, they must make decisions and take actions that they reasonably believe are in the **best interests** of the relevant corporation and their shareholders as a whole.*

*When the corporation is potentially or actually insolvent, the duties of Delaware directors may also owe duties to the relevant corporations' **creditors**. Accordingly, directors must then consider the interests of the creditors, as well as the shareholders and the relevant corporations, when making decisions and taking actions. They must act prudently to preserve and maximize the value of the corporation's assets for the benefit of **all stakeholders, including creditors**. Depending on the circumstances, Delaware directors may have a duty to consider instances of avoiding preferential or fraudulent transfers and maximizing the value of the bankruptcy estate for the benefit of all creditors.*

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

**Question 4.1** [5 marks]

**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?**

*The Bankruptcy Code provides protections that include, but are not limited to:*

- (a) **Allowing the lessors to benefit from automatic stay relief, ie evicting iWork Ltd for non-payment of rent or for terminating the lease.**

Commented [la25]: Correct, 1 mark

Commented [la26]: Correct, 1 mark

Commented [la27]: Correct, 1 mark

Commented [la28]: You should also look at the judge's personal practices.

Commented [la29]: 4/5

Commented [la30]: Correct, 1 mark

Commented [la31]: Correct, 1 mark

Commented [la32]: Correct, 1 mark

Commented [la33]: Correct, 1 mark

Commented [la34]: Incorrect, the duties remain owed to the corporation and its shareholders. In some circumstances, creditors may enforce these duties on behalf of the corporation in bankruptcy.

Commented [la35]: 4.5/15 marks

Commented [la36]: 0/5

- (b) *Allowing the lessors adequate protection of their interests with solutions such as periodic payments to compensate for the decline in the value of the leased property and/or additional collateral to secure the lessor's interest in the property.*
- (c) *Allowing the lessors priority claim for unpaid rent from the bankruptcy estate of iWork Ltd.*

**Question 4.2** [5 marks]

*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.*

*The key factor in determining whether a foreign proceeding qualifies as a foreign main proceeding under Chapter 15 is Skin Luxe's (SL) COMI. If SL's COMI is in France, where it has its principal place of business and conducts most of its operations, then the English scheme of arrangement might not qualify as a foreign main proceeding.*

*However, even if Skin Luxe's COMI is not in England, the English scheme of arrangement may still qualify as a foreign non-main proceeding if there is a substantial connection to England. The governing law of the bonds (English law) must be accounted for together with the location of the relevant creditors; and the location of the relevant assets to arrive at a firm conclusion as to whether there is a substantial connection to England.*

*If the scheme of arrangement involves significant restructuring of debt and affects the rights of SL's creditors, it would be more likely than not to qualify for recognition under Chapter 15.*

*Finally SL would still need to comply with the procedural requirements of Chapter 15, including but not limited to filing a petition for recognition with the US bankruptcy court; providing notice to creditors; and demonstrating to the relevant US bankruptcy court that the English scheme of arrangement meets the criteria for recognition under Chapter 15.*

**Question 4.3** [5 marks]

*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*

**Commented [la37]:** Incorrect. The first is true but a protection to the debtor, not the lessor. there is only a priority claim for rent due post-petition prior to the assumption or rejection of the lease. Pre-petition unpaid rent is a general unsecured claim. The lessor is protected by a 120-day deadline for the assumption or rejection of the lease which may be extended up to 90 days for cause, but no further without landlord consent. If the lease is assumed but then rejected, the lessor is entitled to an administrative priority claim for 2 years' rent.

**Commented [la38]:** 0.5/5

**Commented [la39]:** Partially correct, 1/2 mark. A proceeding not in the same jurisdiction as COMI cannot be a foreign main proceeding unless the COMI is shifted prior to filing the US bankruptcy proceeding. COMI is presumed to be in France because of Skin Luxe's incorporation there and on these facts, the presumption is unlikely to be rebutted.

**Commented [la40]:** Incorrect, this is the English jurisdictional test for opening proceedings. For foreign non-main recognition, there must be an establishment in the jurisdiction where the foreign proceeding is pending. That would be satisfied here because of the London boutique.

**Commented [la41]:** 4/5

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?

In the first instance, a Chapter 11 bankruptcy filing by Speculation Inc (SI) will trigger automatic stays on the margin loan default, delinquent lease, and employment discrimination lawsuit, providing Speculation Inc with some relief and the opportunity to address these issues within the context of the bankruptcy proceedings. (This is why Chapter 11 is the gold standard for insolvency procedures globally :)

Commented [la42]: Correct, 1 mark

(i) DOJ Investigation

Filing for Chapter 11 bankruptcy will not automatically halt or prevent the DOJ investigation into potential illegal trading activities. The bankruptcy filing does not provide immunity from criminal prosecution, and the DOJ could continue its investigation independently of the bankruptcy proceedings.

Commented [la43]: Correct, 1 mark

(ii) Margin Loan Default

The margin loan default would likely be brought up within the context of the bankruptcy proceedings. The bankruptcy court would potentially stay any actions by the broker to enforce this default, providing SI with an opportunity to restructure its debts and negotiate with the broker to address that default via means of a repayment plan.

Commented [la44]: 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.

(iii) Delinquent Lease

The bankruptcy filing would trigger an automatic stay that would temporarily prevent SI's landlord from evicting Speculation Inc. In a similar vein with the margin loan default, SI will then probably negotiate with its landlord, potentially restructure the lease agreement, or even terminate the lease if it is not economically viable.

Commented [la45]: Correct, 1 mark

(iv) Employment Discrimination Lawsuit

An automatic stay on the employment discrimination lawsuit would be triggered. Accordingly, that former employee alleging discrimination would then need to file a claim in the bankruptcy proceedings to seek recovery for her alleged damages, and the bankruptcy court would oversee the resolution of the claim together with the SI's other creditors' claims.

Commented [la46]: Correct, 1 mark

\* End of Assessment \*