

TOTAL = 34.5/50
69%



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]: 0, correct answer is D

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

Commented [FV3]: 1, correct

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

Commented [FV4]: 0, correct answer is E

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.

Commented [FV5]: 1, correct

(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.

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.

Commented [FV6]: 1, correct

(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.

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]: 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.

Commented [FV10]: 1, correct

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.]

Commented [FV11]: 1, correct

The reason is not permitted in some circumstances is that setoff rights can improve the position of one creditor as compared to other unsecured creditors who are not owed money by the debtor.

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 lien that is granted in priority over the pre-petition secured lenders or claims on a debtor's assets.]

Some of the requirements to be granted is that is required to have a court approval and that the existing creditors and lien holders will be treated fairly and that it is in the best of their interest.

Commented [FV12]: 1. Full credit not given because answer failed to note that priming lien can only be granted if DIP Financing is otherwise unavailable and other secured creditors are adequately protected.

Question 2.3 [2 marks]

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

Two potential consequences are:

- 1) Contempt of Court and therefore is void or voidable
- 2) The violating party may suffer damages and liabilities

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?

[After the court has approved the disclosure statement to accompany the proposed plan, it will set a time period for creditor voting.]

Not all the creditor must approve the plan for it to be confirmed, however the Bankruptcy Code provides for cramdown of dissenting classes.

A given class of creditors approves the plan if a simple majority of creditors in the class holding at least 2/3 of the value of claim in the class, vote in favor or, for equity interest, if 2/3 in amount of interests vote in favor. An unimpaired class, is deemed to accept the plan, and a class that will receive nothing is deemed to reject the plan. Thus the balance of decision making powers lies with those who have the most to gain or lose: the impaired classes.]

Commented [FV14]: 1.5. Full credit not given because the answer does not note that only impaired classes that receive something may vote.

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?

[a) Preference claim - the cause of action that applies only to transfers made on account of antecedent debt

b)

c)]

Commented [FV15]: 1. Failed to answer b and c.

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

Commented [la16]: 10/15 marks

Question 3.1 [3 marks]

Commented [la17]: 1/3

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.

[In US, bankruptcy order may enter a final order consistent with the US constitution, under certain circumstances by Article II of the US Constitution, bankruptcy judges are appointed by court of appeal, rather than the president, do not have lifetime tenure and have limited jurisdiction to enter final orders other than on core bankruptcy issues]

Appeals from bankruptcy court order are typically reviewed by the District courts. The District courts have jurisdiction to hear appeals from final orders of bankruptcy courts.

Order that are not constitutionally final are reviewed through the District Courts.

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?

[Some of the provisions that may not be invoked by a foreign representative are:

- Provisions regarding automatic stay
- Provisions related to the commencement of a bankruptcy case

The two ways that a foreign representative can obtain relief are:

- Apply to court for seeking recognition
- Apply to court by filing motions for specific relief

Question 3.3 [4 marks]

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

When preparing a filing for a bankruptcy court, the following rules should be reviewed:

- Local Bankruptcy rules - Many bankruptcy courts have local rules therefore these should be heeded in mind
- Bankruptcy code - The code would provide a guidance on the bankruptcy proceedings
- The Federal rules Bankruptcy procedures - These rules outline procedures for initiating bankruptcy cases
- Judge's personal practices

Commented [la18]: A bankruptcy court may enter a constitutionally final order in core matters with the consent of the parties or where the core matter is specific to the Bankruptcy Code (such as a challenge to a petition)

Commented [la19]: Correct, 1 mark, although in some circuits appeal from bankruptcy courts may be heard by a Bankruptcy Appellate Panel

Commented [la20]: The standard of review is to treat the bankruptcy court's order as a report and recommendation

Commented [la21]: 0/3

Commented [la22]: The foreign representative cannot bring claims under the Bankruptcy Code avoidance powers. It may bring similar claims under applicable US or foreign law, or commence a plenary proceeding under chapter 7 or 11.

Commented [la23]: 4/4

Commented [la24]: Correct, 1 mark

Commented [la25]: Correct, 1 mark

Commented [la26]: Correct, 1 mark

- **Federal rules of Civil Procedures**

Commented [la27]: Correct, 1 mark

Question 3.4 [5 marks]

Commented [la28]: 5/5

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

[Directors owe a fiduciary duty of loyalty to the corporation's best interest and duty of care in educated decision making, but are protected from liability for errors of judgement by the business judgement rule. In addition, directors have a duty of loyalty to the corporation and its shareholders which requires them to act in good faith.

Commented [la29]: Correct, 1 mark

Commented [la30]: Correct, 1 mark

Commented [la31]: Correct, 1 mark

Commented [la32]: Correct, 1 mark

Director's duties are owed to the corporation and its shareholders not to creditors even in circumstances where the corporation is potentially insolvent and therefore the shareholders send to receive nothing in bankruptcy.

Commented [la33]: Correct, 1 mark

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

Commented [la34]: 11/15 marks

Question 4.1 [5 marks]

Commented [la35]: 3/5

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?

[The Bankruptcy Code offers several protections to lessors of office space, such as iWork Ltd.

Firstly lessors have the right to participate in the bankruptcy proceedings, including attending hearings and filling proof of claim for any pre-bankruptcy rent owed to them.

Commented [la36]: Correct, 1 mark

In addition, the lessors have the right to file a motion for relief from stay, if iWork fails to pay post-bankruptcy rent.

Commented [la37]: Correct, 1 mark

The priority of the lessors after IWorks Ltd bankruptcy filing will be on the top ranking since unpaid rent relates to administrative expenses claim, receiving priority treatment in bankruptcy.

Commented [la38]: Correct, 1 mark, also the debtor must decide whether assume or reject the lease within 120 days of the petition, with a potential 90 day extension for cause. If the debtor assumes and then rejects the lease, the lessor has an administrative priority claim for 2 years' rent.

Question 4.2 [5 marks]

Commented [la39]: 4.5/5

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.

[The English scheme of arrangement is a legal mechanism used to restructure debt obligation and is governed by English law.

The recognition of the English scheme of arrangement under the US Chapter 15 would depend on the determination of Skin Luxe COMI.

Foreign main proceedings: *A foreign main proceedings is the one that is taking place in the jurisdiction where the debtor has its center of main interest (COMI).*

Commented [la40]: Correct, 1 mark

From the facts of the case, it appears that Skin Luxe COMI is in France, as it where it incorporated and develops its products.

Commented [la41]: Correct, 1/2 mark, on these facts the presumption in favor of the jurisdiction of incorporation is unlikely to be rebutted.

Therefore, since Skin Luxe COMI is in France, any restructuring proceedings initiated like English scheme of arrangement would not qualify as a foreign main proceedings under US Chapter 15

Foreign non-main proceedings: *A foreign non main proceeding is the one that is taking place in a jurisdiction where the debtor has an establishment but not its COMI.*

Commented [la42]: Correct, 1 mark

While Skin Luxe does not have its COMI in UK, it has an establishment because of its boutiques in London.

Commented [la43]: Correct, 1 mark

Therefore, it could potentially qualify as a foreign non-main proceedings under US Chapter 15, provided that the Company has significant business operations and assets in England.

Commented [la44]: Correct, 1 mark

Question 4.3 [5 marks]

Commented [la45]: 3.5/5

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 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?

(i) Filing bankruptcy under Chapter 11, will not affect the DOJ investigation, as it is likely to continue until the final results, independently of the bankruptcy proceedings

However, the bankruptcy filing will impact DOJ's ability to seize any assets or start criminal proceedings against the Company

ii) Filing bankruptcy under Chapter 11 in relation to margin loan default, would make an automatic stay and therefore prevent the broker from taking action, such as seizing any collaterals.

iii) As above, Filing bankruptcy under Chapter 11 will trigger an automatic stay, which would stop any evictions or legal actions from landlord.

iv) As above, Filing bankruptcy under Chapter 11 will trigger an automatic stay, which would stop any legal actions regarding the employment discrimination.

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* End of Assessment *

Commented [la46]: Partially correct, 1/2 mark, the DOJ investigation will continue and it may bring criminal proceedings regardless of the stay

Commented [la47]: Correct, 1 mark

Commented [la48]: Incorrect, the margin loan is a securities contract that is exempt from the automatic stay, so the broker may sell the collateral and use the proceeds to pay down the loan.

Commented [la49]: Correct, 1 mark

Commented [la50]: Correct, 1 mark