

TOTAL = 40.5/50
81%



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.

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 [FV1]: 0, correct answer is C

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.

(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.

(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?

Commented [FV3]: 1, correct

Commented [FV4]: 1, correct

(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.

Commented [FV5]: 1, correct

(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.*

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?

Commented [FV7]: 1, correct

(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 1.8

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.

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?

A setoff permits a creditor holding a claim against the debtor and simultaneously owing money to the debtor to net out the two (or more) obligations. It is not permitted in many circumstances because setoff rights can improve the position of the creditor as compared to other unsecured creditors who are not owed money by the debtor because it decreases its obligation to the estate by the full amount owed by the debtor than the lesser amount the debtor would pay on the unsecured claim.

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 lien that is senior to or equal to a pre-petition lien on estate property to secure post-petition financing. The debtor must be able to demonstrate that the interest of the secured creditor being primed is adequately protected and that financing could not be obtained on any other terms.

Commented [FV12]: 2, correct

Question 2.3 [2 marks]

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

First, an act taken in violation of the automatic stay constitutes contempt of court and is void or voidable (depending on the circuit in which the bankruptcy is pending due

to a circuit split on this issue). Second, it may result in the imposition of contempt sanctions against the stay violator, which may include payment of the debtor's attorney fees and requiring the violator to take affirmative acts to undo the effect of its 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?

An unimpaired class of creditors will be deemed to have accepted the plan and a class that will receive nothing is deemed to reject the plan. The impaired classes will be permitted to vote on the plan. A class of creditors approves 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 votes in favour to accept the plan.

Commented [FV14]: 2, correct

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. Answer to (b) is also preference

(a) - Preferences; (b) - constructive fraudulent conveyance; (c) - actual fraudulent conveyance

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

Commented [la16]: 13.5/15

Question 3.1 [3 marks]

Commented [la17]: 2.5/3

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 in circumstances where parties have consented to the bankruptcy court's jurisdiction or the bankruptcy court otherwise had authority to enter the final order by law.

Commented [la18]: Correct, 1/2 mark

Commented [la19]: Bankruptcy courts may enter final orders in core matters that are specific to the Bankruptcy Code, like a challenge to a petition

Appeals from bankruptcy court decisions are generally heard by the **district court** for the district in which they sit. However, in certain circuits, bankruptcy appeals are heard by a **Bankruptcy Appellate Panel (BAP)** convened from judges of the bankruptcy courts within the circuit.

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Commented [la21]: Correct, 1/2 mark

Orders that are not constitutionally final are reviewed by the district court or BAP *de novo* all findings of fact and conclusions of law to which a party has objected. The order of the district court or BAP is then reviewed by a circuit court of appeal *de novo* as to conclusions of law and for abuse of discretion for findings of fact.

Commented [la22]: Correct, 1 mark

Question 3.2 [3 marks]

Commented [la23]: 2/3

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?

The foreign representative may not invoke the use of **avoidance powers** provided by the Bankruptcy Code. The automatic stay provisions are also not invoked to stay a creditor action.

Commented [la24]: Correct, 1 mark

Commented [la25]: Incorrect, they are applicable, but under different circumstances

The foreign representative can obtain equivalent relief by commencing **plenary proceedings** (such as chapter 7 or 11) under the Bankruptcy Code after recognition of the foreign proceeding under chapter 15.

Commented [la26]: Correct, 1 mark. Alternatively, the foreign representative can bring similar claims under applicable US or foreign law.

In relation to the automatic stay relief, the stay could arise once the foreign representative's petition for recognition of a foreign main proceeding is granted or if the court is willing to grant the same as a discretionary relief should the foreign proceeding be recognized as a non-main proceeding. However, this stay granted in a chapter 15 proceeding would be limited to the property of the debtor within the territorial jurisdiction of the United States.

Question 3.3 [4 marks]

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

One should review the **Bankruptcy Rules**, the **Federal Rules of Civil Procedure**, the **local rules of the bankruptcy court** and the **judge's personal practices**.

Commented [la28]: Correct, 1 mark

Commented [la29]: Correct, 1 mark

Commented [la30]: Correct, 1 mark

Question 3.4 [5 marks]

Commented [la31]: Correct, 1 mark

Commented [la32]: 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 a fiduciary duty of **loyalty** to the corporation's best interest and a duty of **care** in educated decision-making, but are protected from liability for errors of judgment by the business judgment rule. These duties are owed to the **corporation and its shareholders** in the ordinary course of business and **even in situations where the corporation is potentially or actually insolvent.**

Commented [la33]: Correct, 1 mark

Commented [la34]: Correct, 1 mark

Commented [la35]: Correct, 1 mark

Commented [la36]: Correct, 1 mark

Commented [la37]: Correct, 1 mark

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

Commented [la38]: 10/15 marks

Question 4.1 [5 marks]

Commented [la39]: 1/5

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 allows lessors of office space to iWork Ltd to file a relief from stay motion to permit creditor actions that would be otherwise prohibited by an automatic stay that iWork Ltd may be able to avail itself on the filing of any plenary petition under the following circumstances.

First, the lack of adequate protection of the lessors' interest in the office spaces. If it can be showed that the value of the properties may decline during the course of proceedings and result in the lessors making less than full recovery the stay may be lifted. Second, given that iWork Ltd has no equity in the office spaces, if the lessors are able to show that the office spaces are not necessary for reorganization (or if there is no reorganization contemplate). In such a scenario, the stay will be lifted unless iWork Ltd is able to show a reasonable prospect of reorganization within a reasonable time to avoid the stay being lifted.

Commented [la40]: Correct, 1 mark. Other lessor protections include a 120 deadline to assume or reject the lease, which may be extended 90 days for cause, but no longer without landlord consent. The debtor must pay rent as an administrative priority for the period between the filing of the petition and the assumption or rejection of the lease. Unpaid pre-petition rent is a general unsecured claim. If the lease is assumed and then rejected, the lessor has an administrative priority claim for 2 years' rent.

Question 4.2 [5 marks]

Commented [la41]: 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 could arguably be granted recognition under US chapter 15 as a foreign main proceeding if the **presumption that Skin Luxe's center of**

Commented [la42]: Correct, 1 mark

main interest (COMI) is in its place of incorporation (i.e., France) can be rebutted and it can instead be established that Skin Luxe's center of main interest (COMI) is in England. The main factor that points in favour of this would be the fact the bonds to be restructured are English-law governed and therefore it is the jurisdiction that will apply to most disputes. England would also therefore be ascertainable by the debtor's creditors on the basis that it is the governing law of the relevant debt instrument that is being restructured.

Commented [la43]: Correct, 1 mark

In the event, that the presumption that France is Skin Luxe's COMI cannot be rebutted and France is found to be the COMI as it is Skin Luxe's principal place of business, the English scheme of arrangement can still be recognized instead as a foreign non-main proceeding as Skin Luxe has an establishment in England by way of its boutique in London.

Commented [la44]: Correct, 1 mark

Commented [la45]: Correct, 1 mark

Commented [la46]: Correct, 1 mark

Question 4.3 [5 marks]

Commented [la47]: 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?

A worldwide automatic stay comes into effect immediately on the filing of the chapter 11 petition. However, the stay will have no effect on the DOJ investigation as it is a regulatory investigation which is a statutory exception to the stay.

Commented [la48]: Correct, 1 mark

Commented [la49]: Correct, 1 mark

The margin loan will remain in default but the creditor will not be able to enforce on the default / collect on the defaulted loan.

Commented [la50]: 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.

The landlord will not be able to repossess the property as a result of the automatic stay. The delinquent lease if unexpired will become a property of the bankruptcy estate which allows the debtor to decide whether to assume the lease or reject the lease within 120 days of the order for relief.

Commented [la51]: Correct, 1 mark

The former employee will be precluded from proceeding with the employment discrimination lawsuit as a result of the automatic stay.

Commented [la52]: Correct, 1 mark

* End of Assessment *