

TOTAL = 29.5/50  
59%



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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.*

202324-1296assessment3A

## 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]: 1, correct

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.

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

Commented [FV4]: 1, correct

**(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.

Commented [FV5]: 1, correct

**(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.

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.

Commented [FV7]: 0, correct answer is a

(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]: 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.**

QUESTION 2 (direct questions) [10 marks]

Question 2.1 (1 mark)

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

[Setoff is a legal principle that allows parties to offset mutual debts owed to each other. Setoff is not permitted in many circumstances in bankruptcy because allowing it **could** disrupt the principle of equality of distribution among creditors, which is fundamental to bankruptcy law.]

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" refers to a lien that is granted priority over existing liens or claims in bankruptcy proceedings. It is typically associated with debtor-in-possession (DIP) financing, which is financing provided to a debtor who is in bankruptcy and continuing to operate its business.]

For a priming lien to be granted to secure DIP financing, certain requirements must typically be met, including Court Approval and Adequate Protection for Existing Secured Creditors. The granting of a priming lien to secure DIP financing involves a careful balancing of the interests of the debtor, the lender providing the financing, and other creditors in the bankruptcy proceedings.]

Question 2.3 [2 marks]

Commented [FV10]: 0, correct answer is B

Commented [FV11]: .5. Answer fails to mention that it is not allowed because it can improve the position of the creditor compared to others

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

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

*[Sanctions and Penalties: If a creditor or other party willfully violates the automatic stay, they may be subject to sanctions and penalties imposed by the bankruptcy court.]*

*Voiding of Actions: Any actions taken in violation of the automatic stay may be deemed void or voidable by the bankruptcy court. This means that any transactions or activities undertaken in violation of the stay may be invalidated or unwound, potentially resulting in financial losses or other adverse consequences for the violating party.]*

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 the Plan: Classes of creditors whose claims are unimpaired by the plan are deemed to accept the plan by default. (ii) Deemed to Reject the Plan: Classes of creditors whose claims are impaired by the plan and who vote against it are deemed to reject the plan. (iii) Permitted to Vote on the Plan: Classes of creditors whose claims are impaired by the plan are typically permitted to vote on the plan.]*

Commented [FV14]: 1.5. Answer fails to note that classes that do not receive anything are deemed to reject the plan

*The acceptance of a plan by a class of impaired creditors requires the affirmative vote of at least two-thirds in amount and more than one-half in number of those creditors who actually vote 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?**

*[(a) Actual fraudulent conveyances apply only to transfers made on account of antecedent debt. These are transfers made with the actual intent to hinder, delay, or defraud creditors.]*

Commented [FV15]: 1. Answer to a and b is the same. It is preference.



(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. These are transfers made with the actual intent to hinder, delay, or defraud creditors.]

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

Commented [la16]: 7/15 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.**

[In the United States, bankruptcy courts may enter final orders consistent with the U.S. Constitution in cases where they have jurisdiction over the matter at hand. Bankruptcy courts are courts of limited jurisdiction and derive their authority from Article I, Section 8 of the U.S. Constitution, as well as from the Bankruptcy Code.

They have the power to enter final orders in matters related to bankruptcy cases, such as confirming reorganization plans, approving asset sales, and resolving disputes among creditors. Appeals from final orders of bankruptcy courts are typically reviewed by the United States District Courts. Parties aggrieved by a final order of a bankruptcy

Commented [la18]: Correct, 1/2 mark, because these are core matters exclusive to the bankruptcy code. Also the bankruptcy court can enter a final order on a core proceeding with the consent of the parties

court may file a notice of appeal with the  district court within the time allowed by the Bankruptcy Rules. The district court reviews the bankruptcy court's decision and may affirm, reverse, or modify the order as appropriate.

Commented [la19]: Correct, 1/2 mark. In some circuits, appeals may be heard by a Bankruptcy Appellate Panel.

Orders that are not constitutionally final, such as proposed findings of fact and conclusions of law in certain core proceedings, are reviewed by the district court. The district court reviews these orders de novo, meaning it examines the issues anew without giving deference to the bankruptcy court's decision. The district court may accept, reject, or modify the proposed findings and conclusions, and enter a final order accordingly.]

Commented [la20]: Correct, 1 mark

**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?**

[In a Chapter 15 proceeding under the United States Bankruptcy Code, a foreign representative may not invoke certain provisions of the Bankruptcy Code, as Chapter 15 is designed to provide recognition and assistance to foreign bankruptcy proceedings rather than replicate all aspects of domestic bankruptcy law.

Commented [la22]: Specifically, the foreign representative cannot exercise avoiding powers under the Bankruptcy Code.

Two ways that a foreign representative can obtain equivalent relief despite the limitations in Chapter 15 are:

1. **Common Law or Equitable Relief:** Even if specific provisions of the Bankruptcy Code cannot be invoked, a foreign representative may seek relief through common law or equitable principles.
2. **Bilateral or Multilateral Agreements:** The foreign representative may seek relief through bilateral or multilateral agreements between the United States and the foreign jurisdiction.]

**Commented [la23]:** Correct, 1 mark, the foreign representative may invoke applicable US or foreign law to bring equivalent claims or may commence a plenary proceeding under chapter 7 or 11

**Question 3.3** [4 marks]

**Commented [la24]:** 2/4

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

[United States Bankruptcy Code: The Bankruptcy Code is the primary federal law governing bankruptcy proceedings in the United States.

**Local Bankruptcy Rules:** Each bankruptcy court has its own set of local rules that supplement the Federal Rules of Bankruptcy Procedure and govern practice and procedure within that court's jurisdiction.

**Commented [la25]:** Correct, 1 mark

**Federal Rules of Bankruptcy Procedure (FRBP):** The FRBP provide the detailed procedural rules for bankruptcy cases and proceedings, including rules governing the commencement of cases, filing requirements, service of process, hearings, and appeals.

**Commented [la26]:** Correct, 1 mark. You should also review the Federal Rules of Civil Procedure and the judge's personal practices.

**Bankruptcy Forms:** The Administrative Office of the U.S. Courts provides official bankruptcy forms that must be used when filing documents with the bankruptcy court.]

**Question 3.4** [5 marks]

**Commented [la27]:** 2/5

**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?**

[These fiduciary duties are typically categorized into three main duties:

**Duty of Care:** Directors owe a duty of care to the corporation, which requires them to act with the care that an ordinarily prudent person in a similar position would exercise under similar circumstances.

**Commented [la28]:** Correct, 1 mark

**Commented [la29]:** Correct, 1 mark. The duties are also owed to the shareholders.

**Duty of Loyalty:** Directors owe a duty of loyalty to the corporation, which requires them to act in the best interests of the corporation and its shareholders, rather than in their own personal interests or the interests of a particular group of shareholders.

**Commented [la30]:** Correct, 1 mark

**Duty of Good Faith:** Directors also owe a duty of good faith to the corporation, which requires them to act honestly, in good faith, and with a genuine belief that their actions are in the best interests of the corporation and its shareholders.

**When a corporation is potentially or actually insolvent, the duties of directors may shift, and additional considerations come into play:** Shift to Creditors Interests and Duty to Preserve Corporate Assets.]

**Commented [la31]:** Incorrect, the duties of directors under Delaware law are always owed to the corporation and the shareholders.

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

**Commented [la32]:** 9/15 marks

**Question 4.1** [5 marks]

**Commented [la33]:** 2/5

**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 provides certain protections to lessors of office space when a lessee, such as iWork Ltd, files for bankruptcy. These protections are primarily aimed at preserving the lessor's rights and ensuring that they receive payment for the use of their property. Some of the key protections available to lessors of office space under the Bankruptcy Code include:*

**Automatic Stay:** When a lessee files for bankruptcy, an automatic stay goes into effect, which temporarily halts most collection actions, including efforts to collect **unpaid rent**.

**Commented [la34]:** The lessor has an unsecured claim for pre-petition rent.

**Assumption or Rejection of Lease:** **The lessee has the option to assume or reject the office space leases in bankruptcy.**

**Commented [la35]:** If the debtor assumes and then rejects the lease, the lessor has an administrative priority claim for 2 years' rent.

**Priority Claims for Unpaid Rent:** **Unpaid rent accruing during the period after the lessee files for bankruptcy and before the lease is assumed or rejected may be treated as an administrative expense claim, which is given priority over other unsecured claims in bankruptcy.**

**Commented [la36]:** Correct, 1 mark

**Limited Period to Assume or Reject Lease:** **The Bankruptcy Code imposes strict deadlines for the lessee to assume or reject leases.**

**Commented [la37]:** Correct, 1 mark, specifically the debtor has 120 days with a maximum extension of 90 days for cause

**Question 4.2** [5 marks]

**Commented [la38]:** 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.**

*[To determine whether the English scheme of arrangement could be granted recognition under US Chapter 15 as a foreign main or foreign non-main proceeding, several factors need consideration:*

**Foreign Main Proceeding:**

- a) **A foreign main proceeding is typically the primary insolvency proceeding pending in the debtor's jurisdiction of incorporation or principal place of business.**
- b) **Skin Luxe is incorporated and has its principal place of business in France. Therefore, the English scheme of arrangement cannot be considered a foreign main proceeding based on Skin Luxe's incorporation.**
- c) **However, if Skin Luxe can demonstrate that its principal place of business is in England, the English scheme of arrangement could potentially be considered a foreign main proceeding.**

**Commented [la39]:** Correct, 1 mark

**Commented [la40]:** Correct, 1 mark. On these facts, the presumption that the COMI is in the place of incorporation is unlikely to be rebutted.

**Foreign Non-Main Proceeding:**

- a) **A foreign non-main proceeding is a secondary insolvency proceeding pending in a jurisdiction where the debtor has an establishment but is not its center of main interests.**
- b) **Since Skin Luxe's principal place of business is in France, the English scheme of arrangement could be considered a foreign non-main proceeding if Skin Luxe can establish that it has an establishment in England where the scheme of arrangement is being pursued.**
- c) **Skin Luxe's operation of boutiques in various international cities, including Paris, Las Vegas, London, and Hong Kong, suggests that it may have establishments in these jurisdictions, including England.]**

**Commented [la41]:** Correct, 1 mark

**Commented [la42]:** Correct, 1 mark

**Question 4.3 [5 marks]**

**Commented [la43]:** 3/5

**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?

**DOJ Investigation:** May temporarily halt or delay the DOJ investigation into insider trading allegations. The bankruptcy filing triggers an automatic stay, which generally stops most litigation and enforcement actions against the debtor, including governmental investigations.

**Commented [la44]:** Incorrect, the DOJ investigation is exempt as a regulatory or police matter.

**Commented [la45]:** Correct, 1 mark

**Margin Loan Default:** Would likely affect the margin loan default. The automatic stay would temporarily prevent the broker from taking further collection actions against Speculation Inc to recover the defaulted margin loan. Speculation Inc could use the Chapter 11 process to negotiate with its creditors, including the broker, to restructure its debts and potentially arrange for repayment terms that are more favorable and manageable.

**Commented [la46]:** Incorrect, the margin loan is a securities contract that is exempt from the automatic stay and so the broker can liquidate the collateral to pay down the loan.

**Delinquent Lease:** Would also affect the delinquent lease. The automatic stay would temporarily halt any eviction proceedings or other collection actions by the landlord to recover unpaid rent. Speculation Inc could use the Chapter 11 process to negotiate with its landlord to restructure the lease terms or potentially reject the lease if it is no longer viable for the business.

**Commented [la47]:** Correct, 1 mark

**Employment Discrimination Lawsuit:** Would have an impact on the employment discrimination lawsuit. The automatic stay would temporarily halt the civil lawsuit filed by the former employee alleging gender bias.

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

However, the automatic stay does not necessarily prevent the former employee from pursuing her claim within the bankruptcy proceedings. She may file a proof of claim in the bankruptcy case to seek recovery for damages arising from the alleged discrimination.]

\* End of Assessment \*