

TOTAL = 30.5/50
61%



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]: 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.

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

Commented [FV6]: 1, correct

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

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

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

Question 1.7

Which of the following statements about "pre-packs" is false?

(a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.

(b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.

(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.

Commented [FV7]: 1, correct

(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:

Commented [FV8]: 0, correct answer is E

- (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).*

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?

Set-off is the process whereby two or more mutual debts are offset against each other, such that only a single debt obligation is left, if any. It is not permitted in many circumstances because it reduces the pool of assets available for distribution to the general body of creditors.

Commented [FV11]: .5. Full credit not given because answer does not note the improvement in position of the creditor as compared to others.

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 an order of court conferring on a creditor who provides post-petition finance to a debtor in bankruptcy, a premier or equal lien to a pre-petition lien or encumbrance over the debtor's asset.

Commented [FV12]: 1. Full credit not given because answer does not explain that priming is only granted when there is no alternative DIP and secured creditor is adequately protected.

Question 2.3 [2 marks]

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

1. Avoidance of any action taken in reach of the automatic stay; and
2. Imposition of fines on the contemnor.

Commented [FV13]: 1. Full credit not given because answer does not note that act may be void or voidable depending on the circuit and that sanctions may result.

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?

In voting on a plan of reorganization, unimpaired creditors are deemed to accept the plan, while creditors who will receive no distribution are deemed to reject the plan. Impaired classes of creditors are permitted to vote on the plan. A simple majority vote of an impaired class of creditors will suffice to accept the plan.

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. *A preference*
 - b. *A preference*
 - c. *An actual fraudulent conveyance*

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

Question 3.1 [3 marks]

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 respect of core proceedings that are referred by the federal district courts. Appeals from bankruptcy courts are reviewed either by the Bankruptcy Appeal Panel (with the parties' concurrence) or the district courts. Regarding orders that are not constitutionally final, all findings of fact and legal conclusions of the bankruptcy court are reviewed de novo.

Question 3.2 [3 marks]

Commented [FV14]: 1.5. Full credit not given because last sentence fails to mention that majority must hold at least 2/3 in value of claims voting.

Commented [FV15]: 3, correct

Commented [la16]: 10.5/15 marks

Commented [la17]: 2.5/3

Commented [la18]: Partially correct, 1/2 mark. The bankruptcy court can enter final orders on core proceedings that are exclusive to the Bankruptcy Code (such as a challenge to a petition) or where the parties consent.

Commented [la19]: Correct, 1/2 mark

Commented [la20]: Correct, 1/2 mark

Commented [la21]: Correct, 1 mark, to the extent one of the parties objects to a given finding or conclusion.

Commented [la22]: 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?

Provisions relating to the **avoidance powers** of an insolvent estate representative under the Bankruptcy Code cannot be invoked by a foreign representative. Please see section 1521(a)(7) of the Bankruptcy Code.

The foreign representative can obtain equivalent relief by commencing **plenary proceedings either under chapter 7 or 11 of the Bankruptcy Code** upon recognition of the foreign proceedings or having the debtor or its creditors commence plenary proceedings prior to involving the foreign representative.

Question 3.3 [4 marks]

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

One should review the following rules when filing for bankruptcy:

1. The **Federal Rules of Bankruptcy Procedure**
2. **Federal Civil Procedure Rules**
3. **Local Rules of Procedure of the Bankruptcy Court**
4. **Personal practice directives of the of the 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?

Pre-insolvency, the directors of Delaware corporations owe a duty to the members or **shareholders** of their various companies/corporations to manage the corporations' business and assets in the **best interest** of the members. When the corporation is potentially or actually insolvent, these duties are owed to the corporations' creditors and the estate's best interest.

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?

Commented [la23]: Correct, 1 mark

Commented [la24]: Correct, 1 mark. Alternatively, the foreign representative can bring equivalent claims under applicable US or foreign law.

Commented [la25]: 4/4

Commented [la26]: Correct, 1 mark

Commented [la27]: Correct, 1 mark

Commented [la28]: Correct, 1 mark

Commented [la29]: Correct, 1 mark

Commented [la30]: 2/5

Commented [la31]: Correct, 1 mark, and the duties are also owed to the corporation itself

Commented [la32]: Correct, 1 mark. In addition to this duty of loyalty, there is also a duty of care.

Commented [la33]: Incorrect, the duties are always owed to the corporation and shareholders and never to creditors directly.

Commented [la34]: 7/15 marks

Commented [la35]: 1/5

The lessors are statutorily empowered to evict iWork from the office spaces with unpaid leases whilst iWork is undergoing bankruptcy where the leases have expired.

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 English scheme of arrangement may be granted recognition under US chapter 15 as a foreign non-main proceedings, if England is held to be Skin Luxe's COMI. An important consideration for determining a debtor's COMI is the location of a majority of its creditors that will be affected by the relief requested by the foreign representative; hence, where the majority of the English law-governed bond holders/creditors are located in England, England may be recognized as its COMI and the English scheme of arrangement, a main proceedings. It is unlikely that the English scheme of arrangement will be recognized as a main proceedings if this condition is not met. Skin Luxe's sale of its skin care products in London without more, is likely to result in the recognition of the English scheme of arrangement as a non-main proceedings, as London would be considered as a place where Skin Luxe has an "establishment" within the definition of the Chapter 15 as opposed to its COMI.

Conversely, Skin Luxe's incorporation in France raises a presumption under Chapter 15 that France is its COMI. Also, the facts disclosed that Sin Luxe carries out the development and manufacturing of its skincare products in France suggest that France may be the location of its headquarters, and/or location of primary assets, which are crucial metrics for determining a debtor's COMI. If this is the case, there is a high possibility that France is more likely to be considered its COMI than London. By extension, the English scheme of arrangement would be recognized as a foreign non-main proceeding.

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 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

Commented [la36]: Correct, 1 mark. Also, iWork only has 120 days to decide whether to assume or reject the leases if they haven't expired. This period can be extended by 90 days for cause, but not further without lessor consent. iWork must pay rent as an administrative expense for the period prior to rejection of a lease. Administrative priority treatment for 2 years of rental payments for leases that are assumed and subsequently rejected. Lessors have a claim in the bankruptcy for unpaid pre-petition rent.

Commented [la37]: 4/5

Commented [la38]: Incorrect, a proceeding in the jurisdiction of the debtor's COMI would be a foreign main proceeding.

Commented [la39]: Correct, 1 mark

Commented [la40]: Correct, 1 mark

Commented [la41]: Correct, 1 mark

Commented [la42]: Correct, 1 mark

Commented [la43]: 2/5

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 Chapter 11 petition would not prevent the DOJ investigation and any potential eviction of Speculation Inc. for default on rent for the leased office space. Conversely, the automatic stay would prevent the enforcement of the margin loan default and the employment discrimination lawsuit, unless a relief is granted by the Court.

*** End of Assessment ***

Commented [la44]: Correct, 1 mark. Also note the filing of the petition would bring the automatic stay into effect.

Commented [la45]: Incorrect, eviction would be barred because the cause is unpaid rent, not the pre-petition expiration of the loan.

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

Commented [la47]: Correct, 1 mark