



TOTAL = 28/50  
56%

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]: 1, correct

Question 1.5

*Which of the following regarding executory contracts is false?*

- (a) *A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.*
- (b) **Executory contracts are clearly defined by the Bankruptcy Code.**
- (c) *In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.*
- (d) *Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.*
- (e) *Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.*

Commented [FV5]: 1, correct

Question 1.6

*Which of the following is not a requirement to confirm a "cramdown" plan?*

Commented [FV6]: 1, correct

- (a) *That the plan is fair and equitable to dissenting classes of creditors.*
- (b) *Acceptance of the plan by at least one class of impaired, non-insider creditors.*
- (c) **Acceptance of the plan by all classes of secured creditors.**
- (d) *That the plan does not discriminate unfairly against dissenting classes of creditors.*
- (e) *That the dissenting creditors receive no less than they would under a liquidation scenario.*

Question 1.7

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

- (a) **A pre-pack cannot be used if the debtor wishes to reject executory contracts.**
- (b) *Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.*
- (c) *A pre-pack debtor may spend as little as a single day in bankruptcy.*
- (d) *The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.*
- (e) *Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.*

Commented [FV7]: 1, correct

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]: 0, correct answer is B

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 when a creditor is holding a claim against a debtor but also owes money to the debtor and a calculation is made in respect of the figure being claimed by the creditor vs the sum that the creditor is owed. It is not permitted in many circumstances because it **can** improve the position of the creditor as compared to other unsecured creditors who are not owed money by the debtor. The reason it is often not permitted is that it decreases the debtor's obligation to the estate thus diminishing the pot and the potential returns to other creditors.*

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 or is a charge on property of the estate which is higher or equal to a pre-petition lien or charge on estate property in order to secure post-petition financing. In **order** to secure such financing the debtor must have no other means by which to secure lending and demonstrate that the creditor being primed is protected.*

Commented [FV12]: 1.5. Full credit not given because the answer does not mention adequate protection which is defined in the Bankruptcy Code.

Question 2.3 [2 marks]

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

*The party in violation of the automatic stay (i) may be found in contempt of court and ordered to pay the debtors' attorneys' fees and (ii) be required to take actions reversing the violation while being fined a daily rate until rectified.*

**Commented [FV13]:** 1. Answer fails to mention that act may be void or voidable depending on the circuit.

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 is deemed to accept the plan, a class that will receive nothing is deemed to reject the plan. In order to accept a plan, a simple majority of the class of creditors holding at least two-thirds of the value of claims in the class, vote in favour or, for equity interests, if two-thirds in amount of interests vote in favour.<sup>1</sup>*

**Commented [FV14]:** 1.5. Answer fails to mention that impaired classes that receive something are permitted to vote (iii)

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.***

***(b) Constructive fraudulent conveyance***

***(c) A Fraudulent Conveyance claim.***

**Commented [FV15]:** 1.5. Answer to b is also preference. Answer to c is actual fraudulent conveyance (partial credit given to c)

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

**Commented [la16]:** 12.5/15 marks

Question 3.1 [3 marks]

**Commented [la17]:** 1.5/3 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.***

***The bankruptcy court may only enter a final order consistent with the US Constitution on core bankruptcy issues. Generally, appeals from the bankruptcy court are heard by***

**Commented [la18]:** Specifically, the core proceeding must be exclusive to the Bankruptcy Code, like a challenge to a petition, or the parties must have consented.

<sup>1</sup> Page 40 WG 16 FCIL Guidance Text Mod 3A Insolvency System of the US 202324 (FINAL)



the district in which they sit. If the order was not final then the district court reviews all findings of fact and conclusions of law to which a party has objected, *de novo*.<sup>2</sup>

Commented [la19]: Correct, 1/2 mark; also in some jurisdictions appeals are heard by a Bankruptcy Appellate Panel

Commented [la20]: Correct, 1 mark

Question 3.2 [3 marks]

Commented [la21]: 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?

A foreign representative ("FR") will not have the right of avoidance powers normally available under the Bankruptcy Code pursuant to a chapter 15 proceeding. The FR can only avail himself of these powers in a plenary proceeding under the Bankruptcy Code after recognition of the chapter 15 foreign proceeding.<sup>3</sup>

Commented [la22]: Correct, 1 mark

Commented [la23]: Correct, 1 mark, alternatively, the foreign representative can bring equivalent claims under applicable US or foreign law.

Question 3.3 [4 marks]

Commented [la24]: 4/4 marks

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

A review of the Bankruptcy Rules, the Federal Rules of Civil Procedure, the local rules of the bankruptcy court and the judge's personal practices should be undertaken in preparation for a filing in the bankruptcy court.<sup>4</sup>

Commented [la25]: Correct, 1 mark

Commented [la26]: Correct, 1 mark

Commented [la27]: Correct, 1 mark

Commented [la28]: Correct, 1 mark

Question 3.4 [5 marks]

Commented [la29]: 5/5 marks

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

Directors owe the duty of loyalty to act in the best interests of the corporation and of the exercise of educated decision-making. In circumstances where the corporation is potentially or actually insolvent, directors owe a duty to the corporation and its shareholders, not to creditors.<sup>5</sup>

Commented [la30]: Correct, 1 mark

Commented [la31]: Correct, 1 mark, also called the duty of care

Commented [la32]: Correct, 1 mark

Commented [la33]: Correct, 1 mark

Commented [la34]: Correct, 1 mark

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

Commented [la35]: 3/15 marks

Question 4.1 [5 marks]

Commented [la36]: 0/5 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?

<sup>2</sup> Page 20 WG 16 FCIL Guidance Text Mod 3A Insolvency System of the US 202324 (FINAL)

<sup>3</sup> Page 66 WG 16 FCIL Guidance Text Mod 3A Insolvency System of the US 202324 (FINAL)

<sup>4</sup> Page 73 WG 16 FCIL Guidance Text Mod 3A Insolvency System of the US 202324 (FINAL)

<sup>5</sup> Page 60 Page 66 WG 16 FCIL Guidance Text Mod 3A Insolvency System of the US 202324 (FINAL)

Once a party has commenced chapter 11 insolvency proceedings under the Bankruptcy Code, an automatic stay is imposed, which provides protection from creditors. It also provides time to restructure financial affairs, including the power to reject burdensome contracts and leases which will clearly be of benefit in circumstances where there is insufficient money to meet the payments caused by the increase in remote working.

**Commented [la37]:** The lessors are protected by a 120 day deadline to assume or reject the leases, which may be extended by a maximum of 90 days for cause. Prior to assumption or rejection, the debtor must pay rent as an administrative expense, and landlords also have an unsecured claim for unpaid pre-petition rent. If the debtor assumes and then rejects a lease, the landlord has an administrative priority claim for 2 years' rent.

**Question 4.2** [5 marks]

**Commented [la38]:** 3/5 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.**

**Under a Chapter 15 filing the foreign representative ("FR") must demonstrate that a foreign court or administrative proceeding with respect to the debtor is pending and that the FR is empowered to act by the proceeding. We are not told that proceedings have commenced yet in England in respect of the bonds, but we are told that Skin Luxe ("SK") anticipates being unable to repay or refinance the bonds.**

**Foreign main proceedings are those commenced in the debtor's center of main interest ("COMI"). We are told that SK has its principal place of business in France where it also develops and manufactures high end skincare products which are then sold in Paris, Las Vegas, London and Hong Kong. This indicates that SK's COMI is in France, so the scheme of arrangement would be recognized under US bankruptcy law as a foreign non-main proceeding as opposed to a foreign main proceeding.**

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

**Commented [la40]:** Correct, 1 mark, this is also supported by the presumption that COMI is where the debtor is incorporated.

**Commented [la41]:** Correct, 1 mark, also the boutique in London constitutes the necessary establishment in the jurisdiction of the foreign proceeding

**Question 4.3** [5 marks]

**Commented [la42]:** 0/5 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 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?**

**The effect of a chapter 11 petition being filed by Speculation Inc on:**

- **The DOJ investigation:** In cases of fraud, a court appointed trustee will step in to run the company throughout the bankruptcy proceeding.
- **The margin loan default:** the debtor would be entitled to an adjustment of debt through reorganization. This may enable him to restructure with a view to meeting his obligations under the loan.
- **The delinquent lease:** a debtor in possession has the ability to reject burdensome contracts and executory contracts such as a lease. It may also assign the lease even if there is a restriction prohibiting assignment contained in the lease itself.
- **The employment discrimination lawsuit:** as long as the lawsuit can be timely adjudicated, then the federal court will abstain from hearing such a proceeding.

\* End of Assessment \*

**Commented [la43]:** True, but specifically the automatic stay that comes into effect on the filing of the petition does not affect the investigation.

**Commented [la44]:** Incorrect, the margin loan is a securities contract that is exempt from the automatic stay so the broker can sell the shares.

**Commented [la45]:** The automatic stay will bar the landlord from seeking eviction or payment of pre-petition rent.

**Commented [la46]:** In the first instance, the proceeding is stayed by the automatic stay, but if the stay is lifted, you are correct that it may be adjudicated outside the bankruptcy proceedings