

**TOTAL = 40.25/50**  
**80.5%**  
**Rounded up to 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]: 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.*

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.

**(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?

(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.

Commented [FV6]: 1, correct

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]: 1, correct

QUESTION 2 (direct questions) [10 marks]

Question 2.1 (1 mark)

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

Setoff is where a creditor that has a claim against a debtor and at the same time owes money to the debtor and the 2 amounts are netted off against each other. This is not permitted in many circumstances as the set off may result in the creditor being better off than other creditors as the net claim is reduced after the setoff.

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 over the debtor's assets which may be senior or equal in ranking to other liens on the same assets.

Where a debtor is not able to raise post-petition funding, a bankruptcy court may be approached to approve a priming lien. The court must be satisfied by the debtor that the interest of the secured creditor with the existing lien is adequately protected.

Commented [FV12]: 2, correct

Question 2.3 [2 marks]

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

Potential consequences of a violation of the automatic stay could be:

- The act in violation of the stay constitutes contempt of court;
- The act in violation of the stay is void or voidable



- The debtor may be entitled to institute a damages claim against the creditor for the 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?**

*The unimpaired class of creditors is deemed to accept the plan;  
A class of creditors that will not receive anything is deemed to reject the plan;  
The impaired classes of creditors are permitted to vote on the plan.  
The acceptance vote of a simple majority of creditors in a particular class of creditors which hold 2/3 of the value of the claim is needed 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]: 3, correct

- (a) Preferences
- (b) Preferences
- (c) Actual fraudulent conveyance

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

Commented [la16]: 13.75/15 marks

Question 3.1 [3 marks]

Commented [la17]: 2.75/3 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 when the issue at hand is determined to be a core proceeding as relates to bankruptcy. Appeals from bankruptcy court order are heard by the district court for the district in which the bankruptcy court is based. In some circuits the Bankruptcy Appellate Panel*

Commented [la18]: Partially correct, 1/4 mark, it must be a core proceeding that is exclusive to the Bankruptcy Code, like a challenge to a petition.

Commented [la19]: Correct, 1/2 mark

(BAP), a panel of circuit bankruptcy judges, will hear the appeals. A further opportunity to appeal may exist in circuit court of appeals. When orders are not constitutionally final due to the bankruptcy judge not having the constitutional authority to do so, the judge may submit a report and request that the district court issue a final order. Alternatively the parties to the litigation may consent that the bankruptcy court issue final orders or judgement.

Commented [la20]: Correct, 1/2 mark

Commented [la21]: Correct, 1 mark

Commented [la22]: Correct, 1/2 mark

Question 3.2 [3 marks]

Commented [la23]: 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 may not invoke the Bankruptcy Code avoidance powers. Ways in which the foreign representative can obtain equivalent relief:

Commented [la24]: Correct, 1 mark

- The representative may invoke these avoidance powers in a bankruptcy process such as a Chapter 7 or chapter 11.
- The representative may start other plenary proceedings under the applicable state laws to get access to the Bankruptcy Code avoidance powers if they are not able to do so under other relevant law.

Commented [la25]: Correct, 1 mark

Commented [la26]: Incorrect, the term plenary proceeding in this context refers to a chapter 7 or 11 proceeding under the Bankruptcy Code. A state law proceeding wouldn't have access to Bankruptcy Code claims. However, the foreign representative could bring state law or foreign law claims in the chapter 15 proceeding.

Question 3.3 [4 marks]

Commented [la27]: 4/4 marks

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

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

- The Federal Rules of Bankruptcy Procedure;
- The Federal Rules of Civil Procedure;
- The local rules of procedure of the bankruptcy court in which the filing will be lodged; and
- The issued personal practices of the judges in the particular district with emphasis on the practices of the presiding judge in the matter.

Commented [la28]: Correct, 1 mark

Commented [la29]: Correct, 1 mark

Commented [la30]: Correct, 1 mark

Commented [la31]: Correct, 1 mark

Question 3.4 [5 marks]

Commented [la32]: 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 of Delaware corporations owe the duties of:

- Loyalty
- Care

The above duties are owed to Corporation and its Shareholders.

Commented [la33]: Correct, 1 mark

Commented [la34]: Correct, 1 mark

Commented [la35]: Correct, 1 mark

Commented [la36]: Correct, 1 mark

*These duties of loyalty and care are owed to the corporation and shareholders even if the corporation is potentially or actually insolvent. The directors do not owe duties to creditors at any stage.*

Commented [la37]: Correct, 1 mark

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

Commented [la38]: 9.5/15

Question 4.1 [5 marks]

Commented [la39]: 2.5/5 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?*

*The following protections are available to lessors from the Bankruptcy Code:*

- *The decision to assume, reject or assume and assign the lease must be made within 120 days of filing the bankruptcy petition. Other contracts need only be decided on confirmation of the plan of reorganization (Chapter 11)*
- *The debtor must continue to meet its obligations under the lease (incl payment) during the 120 days*
- *Unpaid post-petition rent is entitled to priority as an administrative claim*
- *If the lease is assumed by the debtor, (1) all defaults must be cured and (2) the debtor must provide assurance of future performance under the lease.*
- *If the lease is rejected by the debtor, (1) this is a breach of the lease and the debtor must immediately vacate the premises, (2) the lessor can submit a damages claim which is treated as a pre-petition unsecured claim.*
- *If the lease is assumed and assigned to a new tenant, (1) all defaults must be cured, (2) the debtor and new tenant must provide assurance of future performance and (3) the Code allows the lessor to request a deposit or security from the assignee*
- *The Lessor may also submit a claim for unpaid pre-petition rentals as a pre-secured pre-petition claim*

Commented [la40]: Correct, 1 mark, and this is subject to a maximum of 90 days extension for cause, and any further extension requires landlord consent.

Commented [la41]: Correct, 1 mark

Commented [la42]: If the lease is assumed and then rejected, the debtor must pay 2 years' rent as an administrative claim.

Question 4.2 [5 marks]

Commented [la43]: Partially correct, 1/2 mark, this is an unsecured claim

Commented [la44]: 4/5 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.*

In order for the English scheme of arrangement to be granted recognition under Chapter 15 the following requirements should be fulfilled by the foreign representative:

- establish that a foreign court or administrative proceeding in respect of Skin Luxe
- that the representative is empowered to act by the proceeding

To determine whether the arrangement is a foreign main or foreign non-main proceeding, one must determine where the debtor has its centre of main interests (COMI).

Skin-Luxe has its principal place of business in France while it has an establishment (a retail boutique) in London.

Normally, a COMI would be determined by the place of incorporation of the debtor. Other relevant factors to look at would be the company's location of head office, location of management and location of primary assets. In this case, France could be considered the COMI.

Given that Skin-Luxe's scheme of arrangement relates to only English-Law governed bonds and is considering an English scheme of arrangement, there is an argument that England (United Kingdom) may be the COMI as relates to this particular scheme.

France would most likely be considered as the COMI of Skin-Luxe.

As such, the recognition under US Chapter 15 of the English Scheme of Arrangement would be as a foreign non-main proceeding.

Commented [la45]: Specifically the proceedings in the jurisdiction of COMI are main proceedings.

Commented [la46]: Correct, 1 mark

Commented [la47]: Correct, 1 mark

Commented [la48]: Correct, 1 mark

Commented [la49]: Correct, 1 mark

Commented [la50]: 3/5 marks

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 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 Chapter 11 petition filing brings into effect a worldwide automatic stay immediately as relates to the estate of Speculation Inc. This stay would impact on each of the below:

- the DOJ investigation - a Chapter 11 stay is subject to certain statutory exceptions which includes Regulatory Investigations. Thus the investigation may continue as prior to the filing.
- Margin loan default - the broker is prohibited from litigating on the loan default, the broker may not create, perfect or enforce a lien (collateral of

Commented [la51]: Correct, 1 mark

Commented [la52]: Correct, 1 mark

Commented [la53]: Incorrect, the margin loan is a securities contract exempt from the automatic stay so the broker can sell the collateral even after the petition is filed

shares) against the shares as a result of the pre-petition default and may not set off the value of the shares against the loan in default

- (iii) **The delinquent lease** - the rental due can be claimed as a pre-petition unsecured claim by the landlord. Speculation Inc must within 120 days of filing for Chapter 11 elect to either reject, assume or assume and assign the lease. All post-petition rentals should be paid. If the lease is assumed by Speculation, (1) all defaults must be cured and (2) Speculation must provide assurance of future performance under the lease. If the lease is rejected by Speculation, (1) this is a breach of the lease and Speculation must immediately vacate the premises, (2) the lessor can submit a damages claim which is treated as a pre-petition unsecured claim. If the lease is assumed and assigned to a new tenant, (1) all defaults must be cured, (2) Speculation and new tenant must provide assurance of future performance and (3) the Code allows the lessor to request a deposit or security from the assignee.
- (iv) **The employment discrimination lawsuit** - the lawsuit will be subject to the automatic stay which is effective immediately on filing and all actions must cease. Should the employee have won the suit prior to filing, the amounts due would be a pre-petition unsecured claim.

**Commented [la54]:** The automatic stay bars the landlord from seeking eviction of the debtor for unpaid pre-petition rent.

**Commented [la55]:** Correct, 1 mark

\* End of Assessment \*