

TOTAL = 44.25/50
88.5%
Rounded up = 89%



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]: 1, correct

(d) A retired employee of Car Corp who receives payments from the company's pension plan.

(e) A non-profit organization that advocates for companies like Car Corp to be held responsible for climate change

Question 1.3

Which of the following entities does not satisfy the minimum presence requirement to be a debtor under any chapter of the Bankruptcy Code?

(a) A foreign domiciled company that pays a US attorney a retainer.

(b) A company with several US bank accounts, but no physical presence in the United States.

(c) A company with US patents, but no physical presence in the United States.

(d) Options (a) to (c) above satisfy the minimum requirement for presence in the United States.

(e) None of the above (options (a) to (d)) satisfy the minimum requirement for presence in the United States.

Question 1.4

Who may serve as a foreign representative to seek recognition of a foreign proceeding under chapter 15?

(a) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.

(b) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.

(c) An insolvency professional appointed by the court overseeing the foreign proceeding.

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

(e) All of the above.

Question 1.5

Which of the following regarding executory contracts is false?

Commented [FV3]: 1, correct

Commented [FV4]: 1, correct

(a) A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.

(b) Executory contracts are clearly defined by the Bankruptcy Code.

(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.

Commented [FV6]: 1, correct

(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.

Commented [FV7]: 1, correct

(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.

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 allows for claims between two parties which are both creditors and debtors to each other to net the obligations that they owe to each other.

Commented [FV11]: 1, correct

The problem with setoff is that this can improve the position of a creditor over unsecured creditors solely because the debtor owes that creditor money as well.

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 security over assets of the debtor which is senior or equal to liens which already existed. In DIP financing, a priming lien would be given to secure additional financing where other forms of financing are not available.

In order for a priming lien to be granted the following requirements must be met:

i) financing must not be obtainable on other terms such as unsecured debt / credit with certain priority requirements / security; and

ii) the debtor must be able to convince the court that the interests of secured creditors whose debt is now subordinated to the priming lien are protected.

Commented [FV12]: 1.5. Full credit not given because answer fails to note that existing liens must be adequately protected, which is defined by the Bankruptcy Code. Protected alone is insufficient.

Question 2.3 [2 marks]

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

If an automatic stay is violated, this would be considered contempt of court and the action would be considered void or voidable.

Commented [FV13]: 2, correct

This could involve sanctions which could include costs orders for the debtors' legal fees and orders which would require the creditor to undo the actions. Significant breaches of the stay could result in daily fines.

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) Unimpaired creditors are deemed to have accepted the plan.

ii) A class of creditors which receives nothing is deemed to reject the plan.

iii) Impaired classes: creditors secured by real or personal property and unsecured creditors are permitted to vote on the plan.

Commented [FV14]: 2, correct

Each class of creditors must approve the plan by a simple majority holding two-thirds of the value of claims in 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) Preference. One of the elements of a preference claim is that it was done in relation to antecedent debt before the transfer was made.

Commented [FV15]: 3, correct

(b) Preference. One of the elements of a preference claim is that it was done while the debtor is presumed or proven to have been insolvent at the time of the transfer. Preferences claims look 90 days before the date of the petition.

(c) Actual fraudulent conveyances are where intent is required by the debtor to frustrate creditors' recoveries.

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

Commented [la16]: 12.75/15 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 where it has authority to enter it. A bankruptcy court does not have authority where it deals with matters subject to Article III of the US Constitution. Bankruptcy judges have the power to determine 'core' proceedings but if a matter is 'non-core' they may only hear it where it is sufficiently connected to bankruptcy issues. Even still, for non-core matters they do not have the power to make a final determination on the issues - their proposed determinations are submitted to the district court who do have the power to rule on those issues. Therefore, for 'core' issue bankruptcy cases, a court may enter into a final order consistent with the constitution. However, if the parties consent to the bankruptcy court's jurisdiction, the court will be able to enter into a final order.

Commented [la18]: Partially correct, 1/4 mark, this is limited to core proceedings exclusive to the Bankruptcy Code, such as a challenge to a petition.

Despite this, while an order may be constitutionally final, it may still have issues to be resolved within the dispute (i.e. it is interlocutory).

Commented [la19]: Correct, 1/2 mark

Most appeals from the bankruptcy court go to the relevant district court but in some circuits it may be that the appeal goes to the Bankruptcy Appellate Panel. If there is a further appeal, it could be heard by the circuit court of appeals.

Commented [la20]: Correct, 1/2 mark

Commented [la21]: Correct, 1/2 mark

For appeals for 'core decisions', the court reviewing the appeal will look to the court's decisions from the start and will review findings of facts to see if the court erred in their discretion. For 'non-core decisions' or where the court didn't have the authority for a final order, the court reviewing the appeal would look at findings of fact and decisions from the beginning for anything that was objected to. Where the appeal is going to the circuit court of appeal, it would follow the same process as for 'core decisions'.

Commented [la22]: Correct, 1 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?

The Model Law prescribes under Article 23 that foreign representatives should be given the power of avoidance actions which are available in that state for a domestic party. Chapter 15 does not give the power of avoidance actions under the Bankruptcy Code to foreign representatives. This is understood to mean an exclusion of the foreign representatives' right to use preference and fraudulent conveyances powers but not stop them from avoiding pre-petition transactions.

Commented [la24]: Correct, 1 mark

In order for a foreign representative to have access to the Bankruptcy Code avoidance powers they could:

1. Rely on Chapter 7 or 11 proceedings which were commenced prior to the foreign representative becoming involved; or
2. The foreign representative could commence a Chapter 7 or 11 proceeding themselves following Chapter 15 Recognition.

Commented [la25]: Correct, 1 mark, alternatively the foreign representative can bring equivalent claims under applicable US or foreign law

Question 3.3 [4 marks]

Commented [la26]: 3/4 marks

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

When preparing a filing for bankruptcy court, you should review:

1. The Federal Rules of Bankruptcy;
2. The Federal Rules of Civil Procedure;
3. The local rules of each bankruptcy court as they have local rules which will contain the local rules / procedures preferred by the local judges; and
4. Beyond the rules, it would be important to confirm with local state lawyers as there could be unwritten rules which it would be useful to know about.

Commented [la27]: Correct, 1 mark

Commented [la28]: Correct, 1 mark

Commented [la29]: Correct, 1 mark

Commented [la30]: Incorrect, in addition to the local rules, the individual judges usually have their own personal practices posted on the webpage for their chambers

Question 3.4 [5 marks]

Commented [la31]: 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?

In Delaware, directors owe a 'duty of loyalty' the best interests of the Company and a duty of care in 'educated decision-making'. In the ordinary course of business directors in Delaware are protected under the 'business judgement rule' meaning provided that they are reasonably informed then they are presumed to have acted in good faith provided that they have an honest belief that the action was in the best interests of the company or were not acting in good faith.

Commented [la32]: Correct, 1 mark

Commented [la33]: Correct, 1 mark

Unlike the UK, there is no duty-shift towards creditors in circumstances where the company is potentially or actually insolvent. In those circumstances, the directors still owe a duty to the company and its shareholders.

Commented [la34]: Correct, 1 mark

Commented [la35]: Correct, 1 mark

Commented [la36]: Correct, 1 mark

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

Commented [la37]: 13/15 marks

Question 4.1 [5 marks]

Commented [la38]: 3/5 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 Bankruptcy Code allows debtors to assume, reject or assume and assign executory contracts. Generally, a decision about the executory contracts must be made within 60 days of the petition date and within Chapter 11 cases the debtor had until the date the plan of reorganisation is confirmed. However, for non-residential unexpired leases, this decision is required to be made within 120 of the order for relief. This period may also be extended to 90 days, the lessors to iWork Ltd will have to give their consent if there is to be any further extension.

Commented [la39]: Correct, 1 mark

Commented [la40]: Correct, 1 mark

iWork Ltd may also be deemed to have assumed the contract due to their conduct. In this case, iWork Ltd will still be continuing to occupy the leased premises as they have sublet the space to small businesses. Even if they were to explicitly 'reject' the lease, they may be deemed to have assumed.

Commented [la41]: Correct, 1 mark, in which case on subsequent rejection, the debtor will be liable for 2 years' rent as an administrative priority. Also, post-petition rent must be paid as a post-petition administrative expenses, and the lessor has an unsecured claim for unpaid pre-petition rent.

Question 4.2 [5 marks]

Commented [la42]: 5/5 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 to consider if the English scheme of arrangement could be granted recognition as foreign main or foreign non-main proceedings, you will need to consider if the proceedings launched in England and Wales were commenced at the company's center of main interests. A Foreign main proceeding is a foreign proceeding which takes place in the debtor's COMI. The rebuttable presumption is that the COMI of the debtor is that it is in its place of incorporation.

Commented [la43]: Correct, 1 mark

Commented [la44]: Correct, 1 mark

The following facts indicate that England is the COMI of the company:

- *it is the location of Skin Luxe's creditors of its bonds which was ascertainable by third parties;*
- *it would be the jurisdiction where any dispute under the bonds would take place; and*
- *there are some assets in London.*

The following facts indicate England is not the COMI of the company:

- *the headquarters of the business is in France and is likely an establishment;*
- *it only sells its products in boutiques in London (there are not substantial assets in England); and*
- *the way it handles business in England (besides its bonds), is how it conducts business in other establishments around the world.*

As its headquarters are in France, I think it is likely that the COMI could be seen to be in France. Based on this Chapter 15 recognition would be granted for the scheme of arrangement as a foreign non-main proceedings in England based on the fact that it is not the place of its incorporation despite the fact that the majority of its creditors are based in England and that is where any dispute would take place. This analysis is also supported by the fact that Skin Luxe only has a store in London (i.e. an establishment).

Commented [la45]: Correct, 1 mark

Commented [la46]: Correct, 1 mark

Commented [la47]: Correct, 1 mark

Question 4.3 [5 marks]

Commented [la48]: 5/5 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 general rule is that the effect of opening a chapter 11 petition would create an automatic stay which would affect the property of the Speculation Inc from enforcement actions for claims from before the chapter 11 petition.

Commented [la49]: Correct, 1 mark

(i) the DOJ Investigation: the automatic stay under the Bankruptcy Code does not apply to criminal proceedings or regulatory investigations so the DOJ investigation would not be impacted by the chapter 11 petition.

Commented [la50]: Correct, 1 mark

(ii) the margin loan default: the Bankruptcy Code prevents any enforcement of security against property of the estate. However, exercise of rights under securities contracts are exempt from the automatic stay. The broker would be entitled to liquidate the shares.

Commented [la51]: Correct, 1 mark

(iii) the delinquent lease: the Bankruptcy Code prevents an act to take control of property, therefore, the chapter 11 petition would prevent the landlord from obtaining possession of the property. If the lease had expired, they would be able to evict Speculation Inc.

Commented [la52]: Correct, 1 mark

(iv) the employment discrimination lawsuit: the Bankruptcy Code prevents litigation on claims prior to the petition date so the litigation will be stayed by the chapter 11 petition.

Commented [la53]: Correct, 1 mark

* End of Assessment *