

TOTAL = 40.75/50
81.5%
Rounded up = 82%



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. the correct answer is c

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.**

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, the 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.*
- (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]: 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?

- Set off allows a creditor who has a claim against the debtor, and which creditor also owes a debt to the debtor, to net out or square off the two or more obligations, such that only a net debt or liability (if any) is claimable against the debtor.
- Set off is not permitted in the US as it improves the position of the creditor who seeks a set off vis a vis the other unsecured creditors. This is because the creditor enjoying the set off would obtain the benefit of decreasing its obligation to the estate by the full amount owed by the debtor, rather than obtaining a lesser amount/dividend that the debtor would pay to all unsecured creditors on a *pari passu* basis.

Commented [FV11]: 1/2 point. The blanket statement that setoff is not permitted in the US is incorrect. It is permitted in certain circumstances.

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 form of post-petition financing that is a senior or equal to pre-petition lien on the insolvent debtor's property.
- The debtor must show that: (a) the financing could not have been obtained on any other methods, and (b) the secured creditor (whose security is primed), is adequately protected.

Commented [FV12]: 2, correct

Question 2.3 [2 marks]

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

- **One potential consequence of an act taken in violation of the automatic stay is that it constitutes a contempt of court:**
 - **The court may impose contempt sanctions such as payment of the debtors' attorney's fees, or requiring the violator to take action to undo the effect(s) of the violation, or if the violator does not act promptly, impose a daily fine to be paid to the court until the violation has been undone.**
- **Another potential consequence is that act may be rendered void (i.e. invalid from the outset) or voidable (i.e. declared invalid by the court on application by the debtor), depending on the circuit in which the bankruptcy matter is heard, as the circuit courts are divided on this issue.**

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?

- **An unimpaired class of creditors i.e. paid in full, (including creditors' whose acceleration of debts which have been reversed) is deemed to accept the plan: ss 1126(c) and (d) of the Bankruptcy Code ("BC").**
- **A class of creditors that will receive nothing is deemed to reject the plan: ss 1126(f) and (g) of the BC.**
- **An impaired class of creditors i.e. whose debts would not be paid in full, will be permitted to vote on the plan.**
- **A class of creditors accepts a plan if a simple majority (in number) of the creditors in the class, holding at least two-thirds (in value) of the total value of the claims in the class vote in favour: ss 1126(c) and (d) of the BC.**

Commented [FV14]: 2

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 action applies only to transfer made on account of a pre-existing debt.

(b) Preference and fraudulent conveyances (whether actual or constructive) require that the debtor be presumed or proven to have been insolvent at the time of the transfer/transaction.

(c) Actual fraudulent conveyance requires that the debtor be proven to have intended to frustrate creditors' recoveries.

Commented [FV15]: 2.5. Constructive fraudulent transfer does not always depend on a debtor's solvency. A transfer may be subject to a constructive fraudulent transfer claim if, for example, it was made when the debtor had unreasonably small capital.

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

Commented [la16]: 13.25/15

Question 3.1 [3 marks]

Commented [la17]: 2.25/3 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 is created by the Bankruptcy Code rather than created by Article III of the US Constitution, and a bankruptcy judge is appointed by the courts of appeal rather than the president. The bankruptcy court may only enter final judgment on core bankruptcy issues, consistent with the US Constitution.

Commented [la18]: Partially correct, 1/4 mark, this is true only if the core matter is specific to the Bankruptcy Code (such as a challenge to the validity of the petition) or the parties consent to entry of final judgment

• The district court for the district in which they sit in, hears appeals from bankruptcy court decisions. In certain circuits, a Bankruptcy Appellate Panel ("BAP"), convened from judges of the bankruptcy courts within the circuit, hears the bankruptcy appeals.

Commented [la19]: Correct, 1 mark

• If the bankruptcy court order is not constitutionally final, the district court or BAP reviews de novo, all findings of fact and conclusions of law which a party has objected.

Commented [la20]: Correct, 1 mark

Question 3.2 [3 marks]

Commented [la21]: 2/3 mark

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 use of avoidance powers provided by the Bankruptcy Code.

Commented [la22]: Correct, 1 mark

- **A foreign representative may invoke the Bankruptcy Code avoidance powers: (a) when the debtor is already in Chapter 7 or 11 commenced by the debtor or its creditors before the foreign representative's involvement; or (b) upon the foreign representative's commencement of a plenary proceeding after recognition of the foreign proceedings under Chapter 15. In the latter situation, the ambit of the plenary proceedings will be limited to the debtor's assets located within the US and coordinated with the foreign proceeding.**

Commented [la23]: Correct, 1 mark. Alternatively, the foreign representative can bring claims under otherwise applicable non-bankruptcy 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?

One should refer to the following rules when preparing a filing for a bankruptcy court:

(a) Bankruptcy Code;

(b) **Federal Rules of Bankruptcy Procedure: which governs procedures in bankruptcy proceedings;**

Commented [la25]: Correct, 1 mark

(c) **Federal Rules of Civil Procedure, local rules of procedure, and judges' personal practices;**

Commented [la26]: Correct, 1 mark

Commented [la27]: Correct, 1 mark

Commented [la28]: Correct, 1 mark

(d) **Case law on the Bankruptcy Code and operation of non-bankruptcy law in bankruptcy proceedings; and**

(e) **If one does not practice regularly in a jurisdiction, one should consult with a local practitioner for guidance on unwritten local practices.**

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 of Delaware corporations owe a fiduciary duty of loyalty to act in the corporation's best interest and a duty of care in decision-making on behalf of the corporation. However, the business judgment rule protects directors from liability arising from errors of judgment.**

Commented [la30]: Correct, 1 mark

Commented [la31]: Correct, 1 mark

- **Directors' duties are owed to the corporation and its shareholders in the ordinary course of business. In situations where the corporation is potentially or actually insolvent, directors do not owe any duties directly to creditors.**

Commented [la32]: Correct, 1 mark

Commented [la33]: Correct, 1 mark

Commented [la34]: Correct, 1 mark

- **A decision of the Delaware Supreme Court has clarified that the directors do not owe duties to creditors when a corporation is operating "in the zone of insolvency" or is actually insolvent. There is no concept of "wrongful trading" or deepening insolvency under US law.**

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

Commented [la35]: 10.5/15 marks

Question 4.1 [5 marks]

Commented [la36]: 3.5/5 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?

- ***In the event that iWork Ltd (“iWork”) enters into Chapter 7 or 11 under the Bankruptcy Code, the lessors of office space to iWork enjoy the following protection/benefits under the Bankruptcy Code:***

(a) ***In a chapter 7 case, the lessor will know whether the trustee assumes, assigns or rejects the lease within 60 days of the petitions date;***

(b) ***In a chapter 11 case, the lessor will know whether the trustee assumes, assigns or rejects the non-residential lease within 60 days of the petitions date within 120 days of the order of relief.***

Commented [la37]: Incorrect, the deadline to assume or reject is the earlier of 120 days or the order of relief, which can be extended for cause for a maximum of 90 days.

(c) ***If the debtor assumes the lease and continues to occupy real property, rent on the property is usually paid on an ongoing basis after the petition and charged as part of the trustee’s administrative expense to be paid above all other unsecured claims.***

Commented [la38]: Partially correct, 1/2 mark, the rent is owed for the period prior to the assumption of the lease as well as after assumption

(d) ***Two years of lease payment from the date of rejection of the lease or turnover of the property as priority unsecured claim, if the lease of non-residential real property was assumed then rejected.***

Commented [la39]: Correct, 1 mark

Question 4.2 [5 marks]

Commented [la40]: 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 to obtain recognition of the English scheme of arrangement (“SOA”) under Chapter 15, the English representative must establish that the foreign proceeding***

with respect to Skin Luxe is pending, and that the English representative is empowered to act by the foreign proceeding.

- **Under the Bankruptcy Code, a foreign proceeding is a collective judicial or administrative proceeding in a foreign country "under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation".**
- **An English SOA is a foreign proceeding under Chapter 15 as it is a collective judicial proceeding in the UK for the adjustment of the debtor's debt under the control and supervision of the UK Court for the purpose of reorganisation.**
- **The English SOA may be recognized as a foreign main proceeding ("FMP") or a foreign non-main proceeding ("FNMP"). A FMP is commenced in the debtor's centre of main interests ("COMI"). A debtor's place of incorporation is presumed to be the COMI, but this is a rebuttable presumption on the facts. Factors taken into account to determine the COMI include: (a) location of the debtor's (i) headquarters; (ii) management; (iii) primary assets; (iv) majority of creditors or a majority of creditors that will be affected by the relief requested by the foreign representative; and (b) jurisdiction whose law will apply to most disputes.**
- **A debtor's COMI ought to be ascertainable objectively by its creditors or third parties and that the COMI would be assessed as of the date of the US petition rather than the date of the commencement of foreign recognition proceedings.**
- **A proceeding would be recognized as FNMP if it has an establishment i.e. a place where it carries out non-transitory economic activity, prior to the commencement of Chapter 15 proceedings.**
- **The English SOA is likely to be recognized as a FNMP. This is because:**
 - **Skin Luxe's COMI is likely to be France. This is because Skin Luxe's place of incorporation and principal place of business is in France.**
 - **Skin Luxe has an establishment in the UK by having English law-governed bonds due to mature in one year.**

Commented [la41]: Correct, 1 mark

Commented [la42]: Correct, 1 mark

Commented [la43]: Correct, 1 mark

Commented [la44]: Correct, 1 mark

Commented [la45]: Incorrect, the establishment is the London boutique

Commented [la46]: 3.5/5

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?

- Upon filing of chapter 11 petition by Speculation Inc, an automatic stay comes into effect to protect the Speculation Inc's estate against individual creditor enforcement actions for pre-petition claims.
- The DOJ investigation is not subject to the automatic stay; this is because the DOJ investigation is part of regulatory investigation and it is not subject to the automatic stay: s 362(b), Bankruptcy Code.
- The broker's claim on the margin loan default against Speculation Inc is automatically stayed. This is because the broker's claim is a pre-petition claim and the Bankruptcy Code specifically prohibits such an action.
- The lessor's claim on the delinquent lease is also stayed. However, Speculation Inc has 120 days of the court's order of confirmation of the debtor's plan of reorganization to make the election whether to assume, assign (if possible) or reject unexpired leases of non-residential property. Any subsequent extension of time (up to 90 days for cause) requires the consent of the lessor.
- The employment discrimination lawsuit is also stayed. The Bankruptcy Code specifically stays any litigation on pre-petition claims.

Commented [la47]: Correct, 1 mark

Commented [la48]: Correct, 1 mark

Commented [la49]: Incorrect, the margin loan is a securities contract that is exempt from the automatic stay so the broker can liquidate the collateral.

Commented [la50]: Correct, 1/2 mark, also the landlord cannot seek eviction on the basis of failure to pay rent.

Commented [la51]: Correct, 1 mark

* End of Assessment *