



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: **[student number.assessment3A]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. 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 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

Commented [A&O1]: Total marks 36/50

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [A&O2]: Total marks 6/10

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

Commented [A&O3]: Incorrect, the correct response is (c)

FabCo, based in Utah, owes SupplyCo, based in Mexico, US\$10,000 on a past-due invoice. May SupplyCo file an involuntary petition to place FabCo into chapter 11 bankruptcy proceedings?

- (a) Yes.
- (b) Yes, if FabCo has fewer than 12 non-contingent, non-insider creditors.**
- (c) Yes, if other creditors owed at least US\$5,775 join in the petition.
- (d) No, because SupplyCo doesn't know whether FabCo is insolvent.
- (e) No, because SupplyCo is not a US company.

Question 1.2

Commented [A&O4]: Correct, 1 mark

Which of the following is a *mandatory*, rather than *discretionary*, basis to deny recognition of a foreign judgment under state law based on one of the Uniform Acts?

- (a) The foreign judgment is subject to appeal in the foreign country.
- (b) The foreign judgment is an injunction.**
- (c) The foreign judgment was issued by a court, contrary to the parties' agreement to arbitrate.
- (d) The defendant did not have sufficient notice of the foreign proceeding to put on a defense.
- (e) The foreign judgment is inconsistent with another final judgment on the same subject matter.

Question 1.3

Commented [A&O5]: Incorrect, the correct response is (d)

Which of the following is likely to be a party in interest in the bankruptcy of XYZ Corp?

- (a) A shareholder in ABC Corp, to which XYZ Corp is substantially indebted.
- (b) A journalist writing about XYZ Corp's bankruptcy.
- (c) **A shareholder in MNO Corp, which owns all of XYZ Corp's shares.**

- (d) A retired employee of XYZ Corp who receives payments from the company's pension plan.
- (e) A non-profit organization that advocates for companies like XYZ Corp to be held responsible for climate change.

Question 1.4

If a debtor rejects an executory trademark license agreement under which it licenses a trademark to its counterparty, which of the following is true:

- (a) The counterparty must immediately stop using the trademark.
- (b) The counterparty can continue using the trademark for the remaining period of the license.
- (c) The counterparty has a claim for damages for breach of contract.
- (d) Both (a) and (c).**
- (e) Both (b) and (c).

Commented [A&O6]: Incorrect, the correct response is (e)

Question 1.5

In which of the following circumstances may a counterparty enforce a contractual *ipso facto* clause?

- (a) The contract would obligate the counterparty to extend a loan to the debtor.
- (b) The contract is a lease of real property.
- (c) The clause is triggered by the bankruptcy filing of a third party, not the debtor.
- (d) Both (a) and (c).
- (e) *Ipso facto* clauses are never enforceable against a debtor.**

Commented [A&O7]: Incorrect, the correct response is (d)

Question 1.6

What does a chapter 11 debtor have exclusivity to propose for the first 120 days of proceedings?

- (a) Avoidance actions.
- (b) A plan of reorganization.**
- (c) DIP financing.
- (d) Lifting the automatic stay.
- (e) Formation of an equity committee.

Commented [A&O8]: Correct, 1 mark

Question 1.7

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

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

Commented [A&O9]: Correct, 1 mark

Question 1.8

When may distributions to creditors diverge from the absolute priority rule?

- (a) In a chapter 7 proceeding with consent of the affected senior creditor.
- (b) In a chapter 7 proceeding with consent of the affected junior creditor.
- (c) In a chapter 11 proceeding with consent of the affected senior creditor.
- (d) In a chapter 11 proceeding with consent of the affected junior creditor.
- (e) The absolute priority rule cannot be deviated from.

Commented [A&O10]: Correct, 1 mark

Question 1.9

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 [A&O11]: Correct, 1 mark

Question 1.10

Which of the following is *not* available as relief in a chapter 15 proceeding?

- (a) Sale of US property free and clear pursuant to section 363.
- (b) Prosecution of avoidance actions pursuant to section 544.
- (c) Entrusting the management of US assets to the foreign representative.

Commented [A&O12]: Correct, 1 mark

(d) Application of the automatic stay under section 362 to the debtor's interests in US property.

(e) Discovery about the debtor's assets.

QUESTION 2 (direct questions) [10 marks]

Commented [A&O13]: Total marks 9/10

Question 2.1 [maximum 1 mark]

Commented [A&O14]: Total marks 1/1

What two alternative qualifications render a corporation eligible to be a debtor in a US chapter 7 or 11 proceeding?

The debtor must be present in the United States, that can be characterised by its place of business or any of its assets being in the US. Certain types of entities cannot be debtors for Chapter 7 proceedings (insurance companies for example, or banks or railroads). The list of non-eligible debtors is shorter for Chapter 11 proceedings.

Commented [A&O15]: Correct, ½ mark

Commented [A&O16]: Correct, ½ mark

Question 2.2 [maximum 2 marks]

Commented [A&O17]: Total marks 2/2

What is an executory contract?

The definition of an executory contract has mainly been defined by case law, as the definition is not defined in or by a specific piece of legislation or statute. Professor Vern Countryman held that a contract can be qualified as executory if the material obligations in the contract are ongoing, that is, have not been completely performed or discharge on both sides. The material obligations of each party are unperformed. This is known as "the Countryman test".

Commented [A&O18]: Correct, ½ mark

Commented [A&O19]: Correct, ½ mark

Commented [A&O20]: Correct, 1 mark

Question 2.3 [maximum 2 marks]

Commented [A&O21]: Total marks 2/2

What is a "priming lien" and what requirements must be met for such a lien to be granted to secure DIP financing?

A lien is a right to keep possession of property belonging to another person until a debt owed by that person is discharged. It is a charge against or interest in property to secure payment of a debt or performance of an obligation

In terms of bankruptcy, a primary lien can be granted by the court in order to secure debtor in possession financing (under certain conditions below), meaning that the "financer" takes a privileged and priority position over other creditors that may have already have existing liens.

Commented [A&O22]: Correct, 1 mark

The requirements that must be met in order to grant a priming lien to secure debtor in possession financing is firstly that DIP financing cannot be obtained on any other terms, and that the interest of the secure creditor being primed has been adequately protected. Also, this obviously only concerns Chapter 11 bankruptcy proceedings.

Commented [A&O23]: Correct, ½ mark

Commented [A&O24]: Correct, ½ mark

Question 2.4 [maximum 2 marks]

Commented [A&O25]: Total marks 1.75/2

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 accept the plan (11 USC §1126 (f) and (g)).

Commented [A&O26]: Correct, ½ mark

ii) A class that will receive nothing is deemed to reject the plan (11 USC §1126 (f) and (g)).

Commented [A&O27]: Correct, ½ mark

iii) Only classes of creditors that are impaired are permitted to vote on the plan. A class is considered impaired unless the reorganisation plan leaves the creditors "legal, equitable and contractual rights unaltered" (11 USC §1124).

Commented [A&O28]: Partially correct, ¼ mark, they must be both impaired and set to receive something under the plan

A class of creditors is deemed to accept the plan if the creditors in that class vote in favour of the plan by a simple majority regarding the number of creditors holding at least two-thirds in value of claims in the class (11 USC §1126 (c) and (d)).

Commented [A&O29]: Correct, ½ mark

Question 2.5 [maximum 3 marks]

Commented [A&O30]: Total marks 2.25/3

How does the automatic stay available in chapter 15 proceedings differ from that available in chapter 11 proceedings?

The automatic stay available under Chapter 11 bankruptcy come into effect immediately on the filing of a petition. However, under Chapter 11, the automatic stay will only come into play if a foreign main proceeding has been recognised by the US Courts. The automatic stay is not worldwide in this case, like in a chapter 11 bankruptcy, but "national", in that it applies automatically to the debtor's property within the territory of the US.

Commented [A&O31]: Correct, ½ mark

Commented [A&O32]: Partially correct, ¼ mark, the automatic stay comes into effect automatically in chapter 15 on recognition of a foreign main proceeding, though it may also come into effect sooner on an application for interim relief.

If the foreign proceeding is not considered main proceedings (foreign non-main proceedings), the implementation of an automatic stay becomes discretionary, evaluated if necessary, by the Bankruptcy Court. The "automatic character" of the stay is therefore questionable in this hypothesis.

Commented [A&O33]: Correct, ½ mark

Commented [A&O34]: Correct, ½ mark

Commented [A&O35]: Correct, ½ mark, we do still call it the automatic stay even though it is not in fact automatic in application in this circumstance

Equally, the automatic stay in chapter 15, per 11 USC §1520(c) is subject to a "carveout", in order to allow the filing of a US bankruptcy proceeding post recognition of a foreign proceeding and to cover administration expenses.

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

Commented [A&O36]: Total marks 13/15

Question 3.1 [maximum 3 marks]

Commented [A&O37]: Total marks 3/3

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 fiduciary duties of loyalty to the corporation's best interest and of care in educated decision-making.

Commented [A&O38]: Correct, ½ mark

Commented [A&O39]: Correct, ½ mark

In the execution of these duties, the "business judgment rule" lays down a presumption that is quite favourable to the managing directors or board of a company, notably that the board of directors is presumed to have acted in good faith on the basis of reasonable information. The only way to turn over this presumption is to show that a majority of the board was either not reasonably informed, did not honestly believe that their decision was in the corporation's best interest, or were not acting in good faith.

Therefore, unless the presumption can be rebutted, it will be presumed that the directors fulfilled their fiduciary duties, and the directors will not be held liable, because they would not have showed gross negligence in decision making.

This rule does not apply if a board of directors is not independent or disinterested, or a controlling shareholder is on both sides of a transaction. In these cases, the transaction will be void unless the "entire fairness standard" is satisfied.

Also, a company's corporation certificate of incorporation may limit the duty of care of some directors.

The duties are owed to the corporation and its shareholders. This is the same in the case of a potentially or actually insolvent debtor. The duties are never owed to the creditors, pre or post insolvency (North Am catholic Educational programming Foundation, Inc v Gheewalla, 930 A.2nd 92, 103 (Del 2007)). Indeed, per this decision, individual creditors of an insolvent corporation "have no right to assert direct claims for breach of fiduciary duty against corporate directors".

Commented [A&O40]: Correct, ½ mark

Commented [A&O41]: Correct, ½ mark

Commented [A&O42]: Correct, ½ mark

Commented [A&O43]: Correct, ½ mark

Question 3.2 [maximum 3 marks]

Commented [A&O44]: Total marks 2/3

Describe the circumstances in which a bankruptcy court may enter a final order, who reviews appeals from bankruptcy court orders and how non-final orders are reviewed.

A bankruptcy court may issue a final order in a proceeding over which it lacks constitutional authority (based on the Stern v Marshall case), by issuing a report and recommendation for review by the district court (the same as in non-core proceedings, notably illustrated in the decision Executive Benefits Ins Agency v Arkinson, 134 S. Ct. 2165 (2014)).

Commented [A&O45]: Partially correct, ½ mark, a report and recommendation is not a final order in the sense of constitutional finality

Another hypothesis in which the Bankruptcy Court can issue a final order could be if the parties consent to the fact that the bankruptcy court issues a final order even if it is lacking constitutional authority.

Commented [A&O46]: Correct, ½ mark. The bankruptcy court can also issue a final order on a challenge to a petition

A bankruptcy court may also enter a final order on a motion challenging the validity of a petition filed for bankruptcy.

As for appeals from bankruptcy court orders, they are heard by the district court for the district in which they sit. Indeed, the first appeal will go to an assigned judge (assigned at random), who will become the referential judge for all the appeals relating to that case.

Commented [A&O47]: Correct, ½ mark

In certain circuits, specific rules can apply. A special Bankruptcy Appellate Panel, made up of different judges from the bankruptcy courts within the circuit, can also hear the appeals. However, a party can request that a district court hears the appeal instead.

Commented [A&O48]: Correct, ½ mark

After these appeals, there is a further appeal available before the circuit court of appeals.

Sometimes an appeal can go directly to a court of appeal under certain circumstances, notably if there is no case law that already exists on the question at hand by the circuit court or US Supreme Court, where it requires resolving conflicting jurisprudence, or if the immediate appeal is fitting for the case timing and to advance the case quickly.

Final orders may be appealed as of right. However, non-final orders may only be appealed if the appellate court allows it. The difference between final and non-final orders can be quite ambiguous as to their qualification, especially when considering how bankruptcy proceedings are different from other legal areas, and the many conflicting and converging interests of the different parties.

Question 3.3 [maximum 4 marks]

Describe how claims for recovery of preferences, fraudulent conveyance and constructive fraudulent conveyance differ.

Firstly, all three of these claims share a common aim: to allow the trustee or debtor in possession to reconstitute the bankruptcy estate, by recovering property from pre-petition transfers or acts. However, there are several differences between these three claims.

Firstly, one difference between them is the timeframe in which the act/transfer takes place. For preferences, they are made in a suspect period before the petition date (90 days or 1 year if the beneficiaries of the transfer are considered insiders). However, fraudulent conveyances cover a period for two years before the petition date.

A second difference is the notion of fault of either the creditor / beneficiary of the transfer or the debtor. In the case of preferences, there is no need to show any fault of either the debtor or the beneficiary. The only "sanction" is suffered by the creditor, when the transaction is reversed, and the beneficiary will have a pre-judgment unsecured claim of the equivalent value. Constructive fraudulent conveyances also fit this bill, as these transactions may also be avoided without proving a fraudulent intent. However, this differs from an actual fraudulent conveyance, which implies an intention of the debtor to either defraud, delay, or hinder a creditor or future creditor.

A third difference is the effect for the creditor, touched on above. As mentioned above, whether the creditor that received a preferential transfer is in good faith or not, the recovery of preference happens, because the aim is to equalise the treatment of the collectively of creditors. However, for actual or constructive fraudulent conveyances, if the recipient shows (alongside the fact that the act was taken for value) that they were in good faith, the recipient may retain the property received or enforce the obligation created.

Another difference is the object of the act. A preference necessarily treats a transfer of an interest of the debtor in property. This is not the case for fraudulent conveyances, that seem to have a larger scope, because as well as covering property transfer, they also can also cover the transfer or creation of obligations for the debtor.

Preferences must also be to or for the benefit of a creditor, which is not the case for fraudulent conveyances. Also, in the matter of preferences there is a presumption that the debtor was insolvent at the time of the transaction, (that can be rebutted). The notion of insolvency can be present in fraudulent conveyances but can also be completely absent.

Lastly, recovery of preferences is conditioned to the appreciation that the creditor that benefited from the preference received more than they would have in a Chapter 7 proceeding in value. This is not a criterion of appreciation for fraudulent conveyances.

Question 3.4 [maximum 5 marks]

How does a US bankruptcy court determine whether a foreign proceeding is a main or non-main proceeding under chapter 15?

The US Bankruptcy Code in its Chapter 15 adopts the UNCITRAL Model Law on Cross Border Insolvency.

Commented [A&O49]: Total marks 3/4

Commented [A&O50]: Correct, ½ mark

Commented [A&O51]: Correct, ½ mark

Commented [A&O52]: Correct, 1 mark

Commented [A&O53]: Correct, ½ mark.

Commented [A&O54]: Correct, ½ mark, and it must be on account of an antecedent debt while the debtor was insolvent, whereas insolvency is not a required element for a fraudulent conveyance.

Commented [A&O55]: Total marks 5/5

In the Model Law, the use of the concept of a debtors' "Centre of Main Interests" determines whether proceedings are main or non-main foreign proceedings. The general rule is that in the case of existence of COMI in the enacting state, the proceedings shall be considered main proceedings. In the case of a simple establishment, and not "COMI", the proceedings will not be main proceedings, but non main proceedings.

Commented [A&O56]: Correct, 1 mark

Commented [A&O57]: Correct, 1 mark

The notion of COMI is a foreign concept to US Law. Indeed, US law uses the notion of domicile, principal place of business and location of assets to determine jurisdiction and venue.

A debtors COMI is presumed to be at its place of incorporation, but the presumption can be overturned. In the Model Law, two key factors are mentioned:

Commented [A&O58]: Correct, ½ mark

- The location where the central administration of the debtor takes place
- Which is readily ascertainable as such by creditors of the debtor

Commented [A&O59]: Correct, ½ mark

Commented [A&O60]: Correct, ½ mark

As well as these factors, other key factors that can help characterise these points are the location of headquarters, location of management, of primary assets, or the majority of creditors etc.

Commented [A&O61]: Correct, ½ mark

If after analysing the place of incorporation, and the above factors, it is decided that the debtor's COMI is not in the enacting State, then the Bankruptcy court must research if the debtor has an establishment in the enacting State.

Article 2(f) of the Model Law defines an establishment as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services", a notion imported from European insolvency Law.

The analysis on COMI is based on the day of the petition and not the commencement of the foreign proceedings (Bear Stearns case).

Commented [A&O62]: Correct, 1 mark

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

Commented [A&O63]: Total marks 8/15

Question 4.1 [maximum 5 marks]

Commented [A&O64]: Total marks 4/5

Rental Corporation is a publicly-traded company that leases office space from office building owners and sublets the space to small businesses. It has recently announced that it is being investigated by the US Department of Justice Fraud Division (DOJ) regarding allegedly fraudulent misstatements of revenues; shortly after the announcement, a securities class action litigation was filed against Rental Corporation in New York federal court. Due to the increase in the numbers of businesses operating remotely, Rental Corporation has suffered a decline in revenues. As a result, it has failed to pay rent on some of its office space leases and it has just defaulted on its quarterly payment on its credit facility. What would be the effect of a chapter 11 petition being filed by Rental Corporation on each of (i) the DOJ investigation, (ii) the securities class action litigation; (iii) the delinquent leases and (iv) the credit facility?

The effect of Chapter 11 bankruptcy on the four things mentioned above are as follows:

- (i) The DOJ Investigation: Firstly, Chapter 11 establishes an automatic stay. However, regulatory investigations are exempt from the automatic stay. Also, article 11 U.S. Code § 1104 – "Appointment of trustee or examiner" states that a Trustee can be appointed at any time, notably for cause including fraud. It could be possible therefore that a Trustee is appointed, and one of the missions of a Trustee is

Commented [A&O65]: Correct, 1 mark

Commented [A&O66]: Correct, 1 mark

investigating criminal, fraudulent, or abusive conduct for possible civil or criminal prosecution.

The U.S. Trustee pursues civil (non-criminal) penalties and refers cases of apparent criminal fraud to the U.S. Attorney for investigation and criminal prosecution.

The investigation is not interrupted by the opening of Chapter 11 proceedings. The investigation will continue and is governed by State Law.

- (ii) The securities class action litigation: the automatic stay comes into play on litigation on pre-petition claims. A creditor can ask for relief from the stay under certain circumstances (11 USC §362(d)).

Commented [A&O67]: Correct, 1 mark

Often, reorganisation plans discharge and release the bankrupt company from any obligations arising from securities class actions (for example, see *Notice of Class Action, Proposed Settlement and Hearing Thereon at 1, In re Mpower Commc'ns Corp. Sec. Litig., No. 00-CV-6463t(b) (W.D.N.Y. Feb. 20, 2003)*).

- (iii) The delinquent leases: a lease is qualified as an executory contract because there are unperformed obligations on both sides and is ongoing. Therefore, at the opening of Chapter 11 proceedings, the debtor or the Trustee has the option of assumption, assumption and assignment or rejection of the contract. If the debtor assumes the lease, they must remedy any outstanding defaults owed to the landlord. If the lease is rejected, then the landlord can file the appropriate claims. Any provisions in the lease that permit termination because of bankruptcy are neutralised (ipso facto clause). Normally there is no delay for executory contracts, but non-residential unexpired leases are an exception to this rule, and their fate must be decided within 120 days of the order of relief.

Any provision "accelerating" the lease or making its performance more difficult due to bankruptcy filing are also considered unlawful. Even if the landlord is lucky enough to have terminated the lease prior to the filing of bankruptcy, they cannot continue any pending unlawful detainer actions without permission of the bankruptcy court.

Commented [A&O68]: Correct, 1 mark

- (iv) Credit facility: the nature of the credit facility in the facts of the case is unknown. Therefore, the question is to know whether the credit facility is an executory contract or not. If it is considered that the credit facility is not an executory contract, then the creditor must file an appropriate claim. If the credit facility is an executory contract or part of an executory contract, then the same reasoning as (iii) applies.

Commented [A&O69]: The lenders would be barred from pursuing enforcement action by the automatic stay.

Question 4.2 [maximum 5 marks]

Commented [A&O70]: Total marks 1/5

Considering the facts set forth in Question 4.1, what protections does the Bankruptcy Code provide to lessors of office space to Rental Corporation?

The lessor of office space in the given case benefits from the general protections of the bankruptcy code, as well as circumstances that gives the lessor an advantageous position.

Indeed, the debtor in Chapter 11 proceedings has an option to assume, assume and assign, or reject the lease / leases. Firstly, unlike the general regime for executory contracts, there is a specific maximal delay for a debtor to decide on what they wish to do with the lease contract (120 days). In the case at hand, the main activity of the debtor is leasing and subletting the

Commented [A&O71]: Correct, 1 mark, this may be extended by 90 days for cause shown or further extended only with the consent of the lessor

lease agreements. Therefore, it seems nearly sure that the debtor will assume the lease agreements (or assume and assign).

If the debtor assumes the lease agreements, a first point to consider is stub rent and post-petition rent.

Stub rent refers to unpaid rent applicable to the period after a debtor files for bankruptcy and before the first date when rent comes due post-petition. Under Section 365(d)(3) of the Bankruptcy Code, the retailer is required to pay all amounts that come due post-petition under a commercial real estate lease, without the landlord having to first demonstrate that such amounts constitute “actual necessary costs and expenses of preserving the estate” as is required for the payment of an administrative claim under Section 503(b)(1).

Some bankruptcy courts use a “proration” rule that requires the retailer to pay the pro-rated portion of any rent that falls due post-petition, even if the retailer filed in the middle of the month and the rent was due on the 1st of the month.

Other courts follow a “billing date” approach, where the obligation arises when it becomes payable under the lease. If the payment date falls after the petition date, payment is required, but if it falls before the petition date, it is not. Therefore, under the “billing date” approach, the retailer does not have to pay post-petition stub rent when the petition date falls after the date that the rent is due. The amount owed simply becomes part of the landlord’s prepetition claim.

Concerning post-petition rent, the debtor must honour every payment, risking, if they do not, a default and the possibility for the landlord to terminate the lease if the terms of the lease provide for it.

Also, the debtor must catch up all the sums unpaid.

Furthermore, the Bankruptcy Code allows for some attorney’s fees of the landlord to be paid for by the debtor if the lease is assumed.

If the debtor decides to assume and assign, there are certain restrictions on the assignment of the lease : the provisions on the lease are applicable to the assignment (notably the financial capacity of the person assigned to continue the lease, that the usage be conform to the usage described in the lease, etc.). The debtor tenant is however in this case discharged / does not remain liable once the lease has been assigned over.

If the debtor was to reject the lease (which in the case at hand seems unlikely, or likely to compromise reorganisation) the tenant must immediately surrender the premises.

Question 4.3 [maximum 5 marks]

Paint Corporation formulates house paint according to proprietary and patented recipes at its factory in the United States, which it sells to home improvement stores under a number of distribution contracts. The US Environmental Protection Agency is investigating whether Paint Corporation’s operations are causing harmful chemicals to contaminate a nearby river. Paint Corporation is concerned it cannot afford the clean-up that may be required and is seeking to sell its business. Home Corporation is interested in buying the business, but does not want the potentially contaminated property (it can manufacture paint at its own factory) and is concerned about obtaining consent from all the home improvement stores to assign the distribution contracts. How would a sale under section 363 of the Bankruptcy Code address these issues?

Commented [A&O72]: Post-petition rent will also be due on an administrative priority basis in the period between the petition date and the decision to assume or reject the lease. The lessor will also have an unsecured for unpaid pre-petition rent (unless it has cured because it has decided to assume the lease). If the debtor assumes and then rejects the contract, it will have to pay 2 years rent as an administrative expense.

Commented [A&O73]: Total marks 3/5

Section 363(b) authorizes a bankruptcy trustee or chapter 11 debtor-in-possession to use, sell, or lease estate property other than in the ordinary course of business only after court approval. To obtain approval, a trustee or DIP must first provide notice to stakeholders and an opportunity for a hearing. The court will generally approve a sale of estate property under section 363(b) if the trustee or DIP offers a "good business reason" for the sale. See *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983); accord *Matter of VCR I, L.L.C.*, 922 F.3d 323, 326 (5th Cir. 2019); *In re Nine W. Holdings, Inc.*, 588 B.R. 678, 686 (Bankr. S.D.N.Y. 2018), which seems to be the case at present.

A 363 sale permits cherry picking of contracts and property as long as the business as a whole is sold, so could decide to not take on a lease contract or property in the sale. A buyer can therefore purchase a distressed business free of liabilities including legacy liabilities and burdensome contracts.

This sale could deal with the following aspects:

- Contaminated property: the assets that are to be taken over can be cherry-picked, so can be excluded from the 363 sale if necessary. One of the advantages of a 363 sale, is that an asset may be sold free and clear of any lien in certain conditions:
 - o with creditor consent,
 - o where the creditor interest is disputed,
 - o or where the value of the property exceeds the value of the interest.

The creditor's interest will attach the proceeds of the sale and the creditor will receive a priority rank for distribution.

- The investigation by the US Environmental Protection Agency: the automatic stay could interrupt this investigation, or at least permit the clean up fine to be a pre-petition claim. The assets that are sold are sold free of litigation or liabilities.
- The distribution contracts: The debtor has the possibility to assume and assign executory contracts. Even though distribution rights can be found in an agreement that provides a licence for intellectual or industrial property, distribution rights are not considered widely as being IP rights protected by the Bankruptcy Code and can therefore be sold on in a 363 sale securely for both seller and buyer, without the consent or authorisation of the distributor.

Commented [A&O74]: Correct, 1 mark, though note that the whole business need not be sold to qualify for 363 sale treatment—the debtor could sell a single asset under 363. It may also get a better price for its assets by excluding certain associated with liabilities.

Commented [A&O75]: Correct, 1 mark

Commented [A&O76]: Correct, 1 mark

*** End of Assessment ***