



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 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. 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 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

submit the assessment again by 31 July 2023 (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

Commented [H(1)]: Total marks 36.75/50

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

Commented [H(2)]: Total marks 9/10

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 [H(3)]: Correct, 1 mark

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) All of the above satisfy the minimum requirement for presence in the United States.**
- (e) None of the above satisfy the minimum requirement for presence in the United States.

Question 1.2

Commented [H(4)]: Correct, 1 mark

ABC Corp is an industrial manufacturing company that is filing for bankruptcy. Which of the following could not be considered a party in interest?

- (a) A neighboring landowner to ABC Corp's manufacturing plant.
- (b) An environmental advocacy group that opposes ABC Corp's operations.**
- (c) The landlord of ABC Corp's corporate office.

- (d) *People who live several miles downstream from ABC Corp's manufacturing plant and have been exposed to the plant's toxic waste.*
- (e) *The US Internal Revenue Service.*

Question 1.3

Commented [H(5)]: Correct, 1 mark

Which of the following contracts to which ABC Corp is a party is executory and may be assigned without counterparty consent?

- (a) A lease on a manufacturing plant that contains a provision that requires landlord approval of any assignment.***
- (b) *An employment contract between ABC Corp and a former employee, requiring the company to provide health insurance through the end of the current year.*
- (c) *A 10-year software licensing agreement with XYZ Corp that is three years into performance.*
- (d) *A lease on office space that ended the prior year, but for which ABC Corp still owes past rent.*
- (e) *None of the above are executory and may be assigned without counterparty consent.*

Question 1.4

Commented [H(6)]: Incorrect, the correct response is (b)

Which of the following conditions must be true about a reorganization plan for a court to confirm it under Chapter 11 proceedings?

- (a) Have a possibility of success, even if it relies on speculative or improbable events to be capable of execution.***
- (b) *The plan is not likely to be followed by liquidation.*
- (c) *All impaired classes must accept the plan.*
- (d) *All of the above.*
- (e) *None of the above.*

Question 1.5

Commented [H(7)]: Correct, 1 mark

Which of the following about cramdowns, is false?

- (a) *The plan of reorganization must be fair and equitable to all impaired classes.*

(b) Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.

(c) Class definition is often a battleground when a debtor tries to cramdown classes.

(d) Dissenting creditors are permitted to challenge the classification of a creditor supporting the cramdown.

(e) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.

Question 1.6

Commented [H(8)]: Correct, 1 mark

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.

Question 1.7

Commented [H(9)]: Correct, 1 mark

Which of the following is true of both an actual fraudulent conveyance and a constructive fraudulent conveyance?

(a) The debtor must have had an actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted.

(b) Both require at least circumstantial evidence of the fraudulent intent.

(c) The debtor must have been insolvent at the time of transaction.

(d) In addition to provisions in the Bankruptcy Code, the debtor or the trustee may invoke applicable state or foreign fraudulent conveyance laws.

(e) All of the above are true.

Question 1.8

Commented [H(10)]: Correct, 1 mark

When does an automatic stay come into effect?

- (a) **Immediately on the filing of any plenary petition.**
- (b) *On the filing of a voluntary petition but not on the filing of an involuntary petition.*
- (c) *Once the court reviews the petition and grants the stay.*
- (d) *Once the petitioner announces their intention to file for bankruptcy publicly.*
- (e) *Once a plan of reorganization is confirmed.*

Question 1.9

Commented [H(11)]: Correct, 1 mark

Which of the following regarding substantive consolidation is true?

- (a) *It respects the boundaries of corporate separateness.*
- (b) *It is the treatment of two or more creditors as a single creditor to simplify the claims process.*
- (c) **If a creditor can show it extended credit on the basis of corporate separateness, it has a valid objection to substantive consolidation.**
- (d) *Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.*
- (e) *Authority for substantive consolidation comes from the Bankruptcy Code.*

Question 1.10

Commented [H(12)]: Correct, 1 mark

Which of the following are relevant factors in determining a debtor's center of main interests (COMI) in the recognition stage of a Chapter 15 bankruptcy case?

- (a) *The location of the headquarters.*
- (b) *The location of primary assets.*
- (c) *The location of the majority of the affected creditors in the request for relief.*
- (d) *The jurisdiction whose law will apply to most disputes.*
- (e) **All of the above.**

QUESTION 2 (direct questions) [10 marks]

Commented [H(13)]: Total marks 8.75/10

Question 2.1 (1 mark)

Commented [H(14)]: Total marks 0.5/1

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

Setoff is the right of a creditor to a bankruptcy to "net off" the mutual debits and credits in order to reduce the creditor's claim in the bankruptcy.

Commented [H(15)]: Correct, 1/2 mark

Setoff is not permitted, pursuant to Section 553 of the Bankruptcy Code, where:

Commented [H(16)]: The policy reason is that it permits the creditor to improve its position compared to other creditors

- *the creditor's claim against the debtor is disallowed;*
- *the creditor's claim was such acquired post-petition or in the 90 day period leading up to the petition during which time the debtor was insolvent;*
- *the creditor's obligation to the debtor was incurred in the 90 day period leading up to the petition during which time the debtor was insolvent;*
- *the creditor improves its position by applying setoff in comparison to if it had applied setoff in the 90 days period leading up to the petition.*

Question 2.2 [2 marks]

Commented [H(17)]: Total marks 2/2

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

In preparing a filing for a bankruptcy court, practitioners should look to:

- *The Federal Rules of Bankruptcy Procedure;*
- *The Federal Rules of Civil Procedure;*
- *The local rules of the relevant bankruptcy court; and*
- *The relevant local practices or preferences of the relevant judge overseeing the case. This will require speaking to local practitioners to gain their insights on local custom.*

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Commented [H(19)]: Correct, 1/2 mark

Commented [H(20)]: Correct, 1/2 mark

Commented [H(21)]: Correct, 1/2 mark

Commented [H(22)]: Actually the personal practices are generally posted online, but consulting local counsel is also good

Question 2.3 [2 marks]

Commented [H(23)]: Total marks 1.25/2

What does the absolute priority rule require and when can it be deviated from?

The absolute priority rule under Section 1129(b) of the Bankruptcy Code provides that a creditor or class of creditors cannot receive less under a Chapter 11 plan of reorganisation than it would have under a Chapter 7 liquidation. Section 507 of the Bankruptcy Code sets out the hierarchy of priorities for each class of creditors. A plan of reorganisation under Chapter 11 can only deviate from the rule of absolute priority if the creditor consents under Section 1129(a)(9) of the Bankruptcy Code.

Commented [H(24)]: Partially correct, 1/2 mark, specifically the creditors of a given class must be repaid in full before creditors of a lower class can receive anything.

Commented [H(25)]: Correct, 1/2 mark

Commented [H(26)]: Partially correct, 1/4 mark, specifically the consenting creditor must be the senior creditor that is not paid in full

Question 2.4 [2 marks]

Commented [H(27)]: 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 priming lien is a Court granted security equal or senior to any pre-petition lien(s) on estate property to secure the financing received post-petition pursuant to Section 364(c) of the Bankruptcy Code. The financing is typically used to continue operating the business as a going concern and thereby preserve enterprise value. During the hearing, the debtor must demonstrate under Section 364(d) of the Bankruptcy Code that:

- It was unable to obtain unsecured financing; and
- The interest of the secured creditor being primed is "adequately protected". Adequate protection is outlined in Section 361 of the Bankruptcy Code and provides for the following to support the secured creditor's position:
 - Requiring the trustee to make cash payments periodically to the secured creditor;
 - Providing additional or replacement collateral to the secured creditor; and/or
 - Providing other compensation to the secured creditor as compensation for its lien being at risk of dilution.

Question 2.5 [3 marks]

What is a preference? What are the elements of a preference claim that need to be proved? Is a showing of fault, by either the debtor or creditor, required?

Pursuant to Section 547(b) of the Bankruptcy Code a preference is:

- A transfer of interest by a debtor (payment, transfer of asset or granting of lien);
- To the benefit of a creditor (if the recipient is not a creditor, it cannot be a preference);
- For the payment of a debt (prepayment of goods or services cannot be a preference);
- Made when the debtor was insolvent. There is a rebuttable presumption of insolvency during the 90 days prior to the petition date;
- Made during the suspect period which is:
 - 90 days prior to the petition date for third parties; and
 - One year prior to the petition date for insiders;
- Results in the creditor receiving more than it would have in a Chapter 7 liquidation.

It is for the Trustee or debtor to demonstrate the above factors are met to avoid the preference however there is no requirement to demonstrate "fault" on behalf of the debtor or creditor. Section 547(c) of the Bankruptcy Code provides defences to a preference claim which include:

Commented [H(28)]: Correct, 1 mark

Commented [H(29)]: Correct, 1/2 mark, or secured by a junior lien

Commented [H(30)]: Correct, 1/2 mark

Commented [H(31)]: Total marks 3/3

Commented [H(32)]: Correct, 1/2 mark

Commented [H(33)]: Correct, 1/2 mark

Commented [H(34)]: Correct, 1/2 mark

Commented [H(35)]: Correct, 1 mark

Commented [H(36)]: Correct, 1/2 mark

- The transfer represents “contemporaneous new value” meaning that the creditor must give money, goods services or new credit rather than substitute an obligation for an existing obligation under Section 547(a)(2) of the Bankruptcy Code;
- The payment is made in the ordinary course of business i.e. consistent with the ordinary terms of the debtor and the creditor or within the industry;
- The granting of a security interest or lien is over new property purchased by the debtor and financed by the creditor;
- The creditor was ultimately worse off having extended more credit than it recovered;
- After-acquired accounts and inventory under the charge of a secured creditor;
- Statutory liens created by state law;
- Reclamation rights where the creditors has the right to repossess its goods within 45 days of the petition date;
- Certain financial securities and derivatives transactions which are excluded from the regime.

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

Commented [H(37)]: Total marks 11/15

Question 3.1 [3 marks]

Commented [H(38)]: 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 are non-final orders reviewed?

Final orders / Core

Section 157(b) of the Judiciary and Judicial Procedure Code provides that a bankruptcy court may enter a final order when the issues are limited to core bankruptcy issues. Core bankruptcy issues include but are not limited to:

Commented [H(39)]: Incorrect, the bankruptcy court can only enter a final order on a core matter if it is a challenge to a petition or the parties consent

- Matters concerning the administration of the estate;
- Allowance, disallowance, counterclaims and quantification of creditor claims against the estate (with certain exceptions);
- Orders in respect to obtaining credit;
- Orders to turn over property of the estate;
- Proceedings to determine, avoid, or recover preferences and fraudulent conveyances;
- Motions to terminate, annul, or modify the automatic stay;
- Determinations as to the ability to discharge particular debts and objections thereto;
- Determinations of the validity, extent, or priority of liens;
- Confirmations of reorganisation and liquidation plans;
- Orders approving the use or lease of property, including the use of cash collateral;

- Orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
- Other proceedings affecting the liquidation of the assets of the estate (with certain exceptions); and
- Recognition of foreign proceedings and other matters under Chapter 15 of the Bankruptcy Code.

Non-final / Non-core

Pursuant to Section 157(c) of the Judiciary and Judicial Procedure Code, the bankruptcy court may hear non-core proceedings where the issues "sufficiently relate to" the bankruptcy proceedings but the bankruptcy court cannot make a final determination. The bankruptcy court's findings are presented to the district court, with interested parties able to make submissions, and any final order or judgement is entered by the district judge. If it is found that the issues do not sufficiently relate to the bankruptcy proceedings, the relevant jurisdiction will be the federal court if the nature of the issues meet the scope of a federal court, otherwise the relevant state court.

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Appeals

Pursuant to Section 158 of the Judiciary and Judicial Procedure Code, appeals of bankruptcy court orders are heard by either:

- The district court; or
- In certain circuits, a Bankruptcy Appellate Panel ("BAP"). The BAP is comprised of typically three judges of the bankruptcy courts within the same circuit.

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Commented [H(42)]: Correct, 1/2 mark

Further appeals are able to be made to the circuit court of appeals and in some cases, an initial appeal may go directly to the court of appeals under Section 158(d) of the Judiciary and Judicial Procedure Code.

Question 3.2 [3 marks]

Commented [H(43)]: Total marks 3/3

What provisions of the Bankruptcy Code automatically apply to the debtor's property within the territorial jurisdiction of the United States upon recognition of a foreign main proceeding? What relief may be granted on a discretionary basis for either foreign main or non-main proceedings?

Pursuant to Section 1520 of the Bankruptcy Code, upon recognition of a foreign main proceeding:

- The automatic protection and stay comes into affect in the same way it does in domestic proceedings under Section 361 and 362 of the Bankruptcy Code;

Commented [H(44)]: Correct, 1/2 mark

- Section 363 of the Bankruptcy Code is invoked allowing the sale of assets, unencumbered;
- The foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee;
- Post-petition transfers and perfection of security interests may be voided.

Commented [H(45)]: Correct, 1/2 mark

Commented [H(46)]: Correct, 1/2 mark

Commented [H(47)]: Correct, 1/2 mark

Pursuant to Section 1521 of the Bankruptcy Code, upon recognition of a foreign proceeding, whether main or non-main, a Court may provide the following relief:

- Providing for a stay of the commencement or continuation of an individual action to the extent they have not already been stayed;
- Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not already been suspended;
- Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- Vesting the administration or realization of the debtor's assets to the foreign representative;
- Extending provisional relief previously granted;
- Any other relief deemed necessary protect the assets of the debtor or the interests of creditors.

Commented [H(48)]: Correct, 1/2 mark

Commented [H(49)]: Correct, 1/2 mark

Question 3.3 [4 marks]

Commented [H(50)]: Total marks 3/4

What duties do directors owe to a Delaware corporation in the ordinary course of business? To whom are these duties owed when the corporation is potentially or actually insolvent? What rule protects directors from liability for errors of judgment?

In Delaware, the duties and responsibilities of directors are largely limited to (i) fiduciary duties of care and (ii) loyalty to the corporation and are expected to carry out their obligations in good faith to shareholders.

Commented [H(51)]: Correct, 1 mark

Commented [H(52)]: Correct, 1 mark

As a company approaches insolvency the position of who the directors owe a duty to changes. In *North American Catholic Educational Programming Foundation Inc v Gheewalla* the Supreme Court of the State of Delaware provided that "The creditors of a Delaware corporation that is either insolvent or in the zone of insolvency have no right, as a matter of law, to assert direct claims for breach of fiduciary duty against its directors." It confirms that creditors can "...protect their interest by bringing derivative claims on behalf of the insolvent corporation or any other direct nonfiduciary claim, as discussed earlier in this opinion, that may be available for individual creditors."

Commented [H(53)]: Incorrect, the duty remains owed to the shareholders and corporation, though in some circumstances creditors may be able to assert claims derivatively on behalf of the corporation

The decision in *Gantler v. Stephens*, 965 A.2d 695, 705-06 (Del. 2006) gives directors protection from liability where their decisions may be considered breaches of their director's duties. The "business judgement rule" provides that if those decisions were made independently, on an informed basis, in good faith, with due care and with the honest belief that the action taken was in the company's best interest, there is a

defence to civil liability. *The business judgement rule does not protect directors who have made an “unintelligent or unadvised” judgment and will not apply where a director has been inactive or made a conscious decision not to act (In re Walt Disney Co. Derivative Litig (Del. 2006)).*

Commented [H(54)]: Correct, 1 mark

Question 3.4 [5 marks]

Commented [H(55)]: Total marks 3/5

List and describe the requirements that a creditor’s claim must fulfill in order to qualify as a petitioning creditor in an involuntary proceeding.

Pursuant to Section 303(b) of the Bankruptcy Code, an involuntary proceeding (under Chapter 7 or 11 of the Bankruptcy Code) against a debtor must be commenced by filing a petition by either:

- **If the debtor has more than 12 creditors, 3 qualifying creditors; or**
- **If the debtor has less than 12 creditors, 1 qualifying creditor.**

A qualifying creditor for the purposes of this Section 303 of the Bankruptcy Code, is a creditor with:

- **A claim that is not contingent or yet to crystallise;**
- **A claim that is not subject to a bona fide dispute;**
- **A claim or claims aggregating USD16,750 or more.**

Commented [H(56)]: The claim also must be unsecured or undersecured

Commented [H(57)]: Correct, 1 mark, specifically they cannot be dependent on the occurrence of a future event

Commented [H(58)]: Correct, 1 mark, specifically that there is no objective basis in fact or law to dispute the debtor’s liability or amount

Commented [H(59)]: Correct, 1/2 mark

The involuntary petition form requires the petitioning creditor(s) to allege that the debtor is not paying its debts as and when they fall due within the preceding 120 days (Form B205).

Commented [H(60)]: Correct, 1/2 mark

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

Commented [H(61)]: Total marks 8/15

Question 4.1 [5 marks]

Commented [H(62)]: Total marks 4/5

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 been sued 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 the (i) DOJ investigation, (ii) margin loan default; (iii) delinquent lease and (iv) employment discrimination lawsuit?

Upon the filing of a Chapter 11 petition, Speculation Inc will be placed into an automatic stay under Section 362 of the Bankruptcy Code. This will have various impacts as described below:

Commented [H(63)]: Correct, 1 mark

(i) DOJ investigation: *The DOJ investigation is seeking to determine whether Speculation Inc undertook illegal trading on insider information. This action would not appear to fall within the scope of Section 362(a) of the Bankruptcy Code to provide for a stay of proceedings. Furthermore, Section 362(b)(25) of the Bankruptcy Code provides that the automatic stay does not operate in relation to regulatory investigations which would seem to encompass the DOJ's insider trading investigation.*

Commented [H(64)]: Correct, 1 mark

(ii) Margin loan default: *Whilst the automatic stay comes into effect upon the filing of the petition, the margin lender may still resolve to apply any collateral it holds to cure the margin loan default. Whilst a trustee would usually seek to avoid a post-petition transaction of this kind as a preference payment, the repayment of margin loans (and other securities and derivatives transactions) are specifically excluded from avoidance by a trustee pursuant to Section 546(e) of the Bankruptcy Code to support certainty and finality in these financial markets.*

Commented [H(65)]: Correct, 1 mark

(iii) Delinquent lease: *The delinquent lease is considered to be an executory contract meaning there are unperformed obligations on both sides (i.e. the payment of rent by Speculation Inc and the occupation of the ongoing provision of the leasehold by the landlord to Speculation Inc). The filing of the Chapter 11 petition invokes the automatic stay and provides the debtor with the opportunity to assume, assign or reject the lease within the earlier of 120 days or the date of confirmation of the plan of reorganisation. The 120 day deadline can be extended by 90 days however this requires the lessor's consent (Section 365(d) of the Bankruptcy Code).*

Commented [H(66)]: Specifically, the landlord cannot bring a non-bankruptcy action for rent or eviction

Speculation Inc needs to be careful, should it resolve to reject the lease, but continue to occupy the leasehold which can result in a deemed assumption of the lease.

(iv) Employment discrimination law suit: *The law suit appears to be ongoing with a judgement yet to be entered. The former employee is a "party in interest" which means, amongst other things, they could apply for relief from the Court from the automatic stay pursuant to Section 362(d) of the Bankruptcy Code. The quantification of the claim for the purposes of a Chapter 11 reorganisation plan appears to be a matter the Bankruptcy Court would classify as a core proceeding as the contingent claim does not appear to relate to personal injury tort claim which otherwise is specifically excluded from core proceedings.*

Commented [H(67)]: Correct, 1 mark, the automatic stay would otherwise bar prosecution of the litigation

Question 4.2 [5 marks]

Commented [H(68)]: Total marks 1/5

Stella SA (Stella) is a an international cosmetics company incorporated in France, with its headquarters in Paris. Stella's products are made in Italy and shipped to its retail stores in Europe (including England), Asia, and North America. Stella's funding comes from a bank loan and Eurobonds, both of which are governed by English law. Stella's retail sales have suffered due to pandemic-related closures and it is considering options to restructure its debt. One option is to use an English scheme of arrangement with respect to the Eurobonds. Could the English scheme of arrangement be recognized by a US bankruptcy court under Chapter 15, and would such recognition be as a foreign main or non-main proceeding?

In order the obtain Chapter 15 recognition of the English scheme of arrangement, the following would need to occur:

- ***The foreign representative is to file an application for recognition of the foreign proceeding under Section 1515(a) of the Bankruptcy Code. For Stella, this would be the English administrator, scheme administrator or similar (depending on the sequencing). Whilst there is no stated US connection in the background, the payment of a retainer to the US counsel provides sufficient eligibility to make the application.***
- ***The application will need to demonstrate that the foreign proceeding is subject to a foreign judicial or administrative proceeding which is collective in nature. Stella's application will need to explain the English law of insolvency and scheme of arrangement and demonstrate how the foreign proceeding impacts on Stella's assets and creditors.***
- ***The application will need to provide sufficient information to determine Stella's centre of main interest ("COMI"). Determination of COMI will enable determination of whether the foreign proceedings are classified as foreign main or foreign non-main proceedings and the scope of relief available. Pursuant to Section 1516(c) of the Bankruptcy Code, COMI is presumed to debtor's registered office in the absence of evidence to the contrary. For Stella its place of incorporation is France however some of the other factors established in *In re Spinx, Ltd* which could be used to determine COMI include:***

- ***Location of headquarters which is also France for Stella;***
- ***Location of management which is likely France but possibly also Italy being where Stella's products are manufactured;***
- ***Location of primary assets which is difficult to identify given the background but likely France, Italy and the location of Stella's retail stores across Europe, Asia and North America;***
- ***Location of the majority of creditors which would appear to be England where its Eurobond and bank debt;***
- ***Jurisdiction whose law will apply to most disputes which is difficult to identify given the facts but also possible England the laws under which its debt is governed.***

Commented [H(69)]: Correct, 1 mark

Commented [H(70)]: The consideration of these factors is unlikely to rebut the presumption in favor of COMI in France.

Given the background, it would appear that Stella's application for foreign recognition would more than likely be one for foreign non-main given COMI is clearly not in the USA. Pursuant to Section 1521(c) of the Bankruptcy Code, in granting relief to the representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign non-main proceeding or concerns information required in that proceeding. More information regarding Stella's US based assets and obligations is required to determine how Stella's foreign recognition application would be assessed in the regard. Notwithstanding, relief under Section 1521(a) of the Bankruptcy Code can include:

- Staying proceedings against Stella's assets, rights, obligations or liabilities;
- Continuation of operations;
- Sanction the transfer or sale of assets and other property;
- Providing for the examination of witnesses.

Question 4.3 [5 marks]

ToyCo is an American toy company that has created a popular line of folding robot toys called Xblox. The toys are covered by several US patents. Currently, GameMart Inc (GameMart) has a 10-year exclusive license to manufacture Xblox and pays ToyCo monthly royalties. GameMart operates a factory in California that it leases from Land Corp on a longer term lease with seven years to go; the lease prohibits assignment without Land Corp's consent. The Xblox toys are selling well, but GameMart's other toy lines are doing poorly, so it is considering a Chapter 11 bankruptcy. Answer the following questions:

(i) Is the license to manufacture Xblox an executory contract?

A contract is considered to be executory where there are unperformed obligations by both parties to the contract. GameMart's 10-year exclusive license to manufacture Xblox under Toyco's patent for monthly royalties paid by GameMart. Given the contract has been performed by Toyco's and its really only GameMart's monthly royalty required to continue to the contract, it would appear that the contractor is not executory. Furthermore, it would be likely that the contract could be assigned without Toyco's consent under a pre-petition scenario which also indicates that the contract is not executory. The decision in *In re Trump Entertainment Resorts Inc* which provided that trademark law generally banks assignment of licenses absent of the licensor's consent would likely apply.

(ii) Can GameMart transfer the Xblox license as part of 363 sale without ToyCo's consent? Why or why not?

GameMart will require the consent of Toyco in order to transfer the Xblox license which is specifically required under Section 365(n) of the Bankruptcy Code.

Commented [H(71): Incorrect, the relevant analysis is whether COMI is in England where the foreign proceeding is pending, not the US. Because COMI is not in England and there is an establishment in England (the retail store), recognition as foreign non-main is appropriate.

Commented [H(72): Total marks 3/5

Commented [H(73): Incorrect, because the license is exclusive, ToyCo has an ongoing obligation not to license the patents to others and the contract is executory.

Commented [H(74): Correct, 1 mark

Commented [H(75): Incorrect, this provision applies when the owner of the patent is the debtor, not when the licensee is the debtor. Consent is required under non-bankruptcy IP law.

(iii) Can GameMart transfer the factory lease as part of 363 sale without Land Corp's consent? Why or why not?

The factory lease in California with 7 years to run is an executory contract between GameMart and LandCorp. Despite the clause requiring consent of any assignment, the sale of the lease under a sale pursuant to Section 363 of the Bankruptcy Code would not require Land Corp's consent despite the clause in the lease.

Commented [H(76)]: Correct, 1 mark

Commented [H(77)]: Correct, 1 mark

* End of Assessment *