



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 41.25/50

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

Commented [H(2)]: Total marks 8/10

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)]: Incorrect, the correct response is (a)

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)]: Correct, 1 mark

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)]: Incorrect, the correct response is (c)

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 9.75/10

Question 2.1 (1 mark)

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

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

The setoff right is foreseen at chapter 11 § 553 of US Bankruptcy Code and gives the creditor the right to deduct the amount owed by the creditor to the debtor from the amount owed by the debtor to the creditor, in other word it arises from the existence of mutual debts/obligation owned by the creditor and the debtor.

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

It is important to say that, according to the US Code, the setoff is only permitted when both debts arise pre-petition ("that arose before the commencement of the case under this title against a claim")

However, this situation can improve the position of the creditor as compared to other unsecured creditor who does not have mutual debts against each other (debtor and creditor), since the setoff creditor will lower its obligation to the total estate rather than the amount the lessee would pay on the unsecured claim.

For this reason, the setoff is not allowed in many circumstances, such as the follow:

Commented [H(16)]: Correct, 1/2 mark

- When the creditor's claim against the estate is disallowed (11 § 553 (1));
- When the creditor's claim against the estate was transferred, by an entity other than the debtor, after the commencement of the case or in the 90 days prior to the filing of the petition, by the time the debtor was insolvent (11 § 553 (2));
- When the creditor's obligation was incurred in the 90 days prior to the filing of the petition, by the time the debtor was insolvent for the purpose of obtaining a right of setoff against the debtor (11 § 553 (3));
- When the creditor improves its position by setoff as compared to its position had setoff been exercised 90 days prior to the petition.

It is to be noticed that are some exceptions regarding the setoff described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, or 561.

The mentioned article also determines that, for the purpose of setoff, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of 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?

Once filling for a bankruptcy court it is important to review Bankruptcy Rules, Federal Rules of Civil Procedure, Local rules of the bankruptcy court and the judge's personal practices.

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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

Bankruptcy proceedings are regulated by the US Bankruptcy Code, which is a Federal Law and supersedes contrary law. However, law non related to bankruptcy law has also a substantial role in this proceeding, notable because each bankruptcy court will have particular local rule of procedure, and each judge issues personal practices.

The Bankruptcy rules also incorporate by reference the Federal Rules of Civil Procedure.

*It also to be notice that US is a common law jurisdiction, reason why different rules arise between circuits courts of appeal, which can be resolved only by a decision of the US Supreme Court or by one of the circuits courts changing position which requires *en banc* review consideration by all active judges of that court.*

Question 2.3 [2 marks]

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

The absolute priority rule deals with the right of preference to receive credits. In other words, the class of claims should be paid in a priority order, settle by the Bankruptcy Code, where a junior class cannot receive whilst the superior class has not been fully paid.

The rule establishes also that no creditor or class of creditor may receive less under a plan of reorganization that it would under a hypothetical chapter 7 liquidation proceeding.

However, in a chapter 11 proceeding, a more senior credit may consent of receiving less than the absolute priority rule would require if the distribution of the funds to lower priority claimants is necessary to approve the recovery plan. The deviation is allowed if the prejudiced creditor consents to such a fact.

On chapter 7 this deviation is not permitted.

Question 2.4 [2 marks]

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

On a chapter 11 proceeding, is not rare that the debtor will require financing post-petition in order to maximize the chances of a successful reorganization. From that perspective, the Bankruptcy Code provides incentives to lender and counterparties to extend credit to the debtor, named, commonly, as DIP financing. This institute is provided for in the USC § 364(c).

Commented [H(22)]: Total marks 2/2

Commented [H(23)]: Correct, 1 mark

Commented [H(24)]: Correct, 1/2 mark

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

Commented [H(26)]: Total marks 1.75/2

The priming lien is granted by the Court determining that the lien is senior or equal priority to a pre-petition lien on estate property. It is possible for the creditor to "roll up" your position by conceding post-petition financing. In this case, the Court must analyse if there will be any other source of funds available that does not contain such provisions and whether substantial additional credit is being made available to the debtor.

Commented [H(27)]: Correct, 1 mark

The USC § 364 determine some requirements in order to the Court grant a secure DIP Financing, such as: if the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) as an administrative expenses, and if there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

Commented [H(28)]: Partially correct, 1/4 mark, the debtor must not be able to obtain financing on an unsecured or junior lien basis

Commented [H(29)]: Correct, 1/2 mark

The priming lender guarantees priority in cash collateral over the pre-petition secured lenders, also a good faith DIP lender is protected from the effects of a reversal of a DIP financing order on appeal, in accordance with 11 USC §364 (f).

Question 2.5 [3 marks]

Commented [H(30)]: Total marks 3/3

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?

Preference is foreseen in USC 11 §547 aiming to avoid unfairness among the creditors, seeking to recovery transfers made by the debtor in a suspect period (90 days before the petition date).

Commented [H(31)]: Correct, 1/2 mark

The mentioned section provides that the trustee, after due diligence, may avoid transfer of an interest of the debtor in property:

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

(1) to or for the benefit of a creditor - that was already a creditor prior to the filing petition;

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

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

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

(3) made when the debtor was insolvent;

(4) made on or within 90 days prior to filling the petition or during the period of 90 days and 1 year prior to the filling the petition if the creditor was insider;

(5) in order to enable such creditor to receive more than it would receive if it was a chapter 7 proceeding, or the transfer has not been made or such creditor receive payment of such debt to the extent provided by the provision of the title (USC 11 §547).

Commented [H(35)]: Correct, 1/2 mark

It is important to highlight that preferences can only arise there the debtor is paying a creditor for a pre-existing debt and that there is no need to show any fault of either the debtor or the recipient in connection with the payment having been made. The creditor also suffers no penalty other than return of the transfer to the estate.

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

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

Commented [H(37)]: Total marks 12.5/15

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?

In this question it is important to highlight that US has special Federal Courts for Bankruptcy matters, created by legislation, and its judges are appointed by courts of appeal with no lifetime tenure and limited jurisdiction for final orders.

Besides that, it is also important to comprehend the distinction between a core¹ and non-core matters since the provision enacted to grant jurisdiction over bankruptcy proceeding to district courts has determined that bankruptcy judges can only hear and determine core proceedings, where they are legit to emit final orders (those that dispose of all issues, leaving nothing further to be decided). In case of non-core proceedings with sufficient connection between bankruptcies proceeding, the judge can hear but not make final determinations.

In case of non-core proceeding the judge has to submit proposed findings of fact and conclusion of law to the district court, to which interested parties may object, for the district court's final decision.

It is to be noticed that in 2011 the US Supreme Court on its decision on Stern v Marshall case, even in core proceedings, a bankruptcy court cannot issue final orders that invade Article III jurisdiction. The US Supreme Court has held that bankruptcy judges may determine a core proceeding over which they lack constitutional authority by issuing a report and recommendation for review by district court, the same procedure as in non-core proceedings, or, with the consent of the parties may issue final order.

Commented [H(39)]: Specifically, the bankruptcy court can enter final orders on issues created by the bankruptcy code, such as a challenge to the petition

Commented [H(40)]: Correct, 1/2 mark

Commented [H(41)]: Correct, 1/2 mark

The implementation of those rules were made by the Bankruptcy Rules, where litigants should state in their pleadings whether they consent to the entry of final orders or judgment by the bankruptcy court, and by permitting a district court that determines that a bankruptcy court did not have jurisdiction to enter a final order to treat that its order as proposed findings of fact and conclusion of law.

Final orders can be appealed as of right, whereas interlocutory orders can only be appealed only with leave the appellate court.

28 U.S. Code § 158 determines that "The district courts of the United States shall have jurisdiction to hear appeals (1)from final judgments, orders, and decrees; (2)from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and (3)with leave of the court, from other interlocutory orders and decrees; of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section

¹ 28 US § 157 (b) (2)

157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving."

Therefore, the district court for the district in which they sit is legit to review final judgments orders or interlocutory orders. In certain circuits, however, bankruptcy appeals are heard by a Bankruptcy appellate Panel ("BAP"), convened from judges of the bankruptcy courts within the circuit.

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

Commented [H(43)]: Correct, 1/2 mark

When Bankruptcy Court has is legit to issue a final order, the district court or BAP and court of appeals perform the same review.

From the district court or even BAP there is a further appeal of right to the circuit court of appeals.

Question 3.2 [3 marks]

Commented [H(44)]: 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?

According to 11 U.S. Code § 1520, upon the recognition of a foreign main proceeding by an US Court sections 361 and 362 are applied with respect to the debtor and its property that is located within the territorial jurisdiction in United States. Once the recognition is consolidated, the foreign representative is granted the right to intervene in any US State or Federal court proceedings to which the debtor is a party.

Therefore, there is automatically application to the debtor's property regarding the US territorial jurisdiction:

- Automatic stay;
- Operation of the debtor's business in the regular course by the foreign representative;
- Sale, transfer or use of property outside the ordinary course;
- Avoidance post-petition transfers and post-petition perfection security interests.

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

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

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

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

In order to be recognized, the foreign proceeding must be in harmony with US public policy and represent a collective proceeding under a law relating to insolvency in which the assets and affairs of the debtor are controlled and supervised by a foreign court.

On the other and, the court can grant different relief on a discretionary basis either for main or non-main proceedings, regarding the principle of comity, in order to seek the best interests of creditors and maximize the debtor assets:

- Authorisation of discovery regarding the debtor's assets to the foreign representative or other person;

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

- **Entrusting administration of the debtor's US asset to the foreign representative or other person;**
- **Extension of provisional relief and**
- **Any other relief "necessary to effectuate the purpose of chapter 15 and to protect the assets of the debtor or the interest of creditors"**

Commented [H(50)]: Correct, 1/2 mark

The reliefs listed above are not exhaustive.

In addition, in the case of non-main proceeding recognition, all of reliefs conceded automatically on the main proceeding recognition, can be granted on a discretionary basis.

Question 3.3 [4 marks]

Commented [H(51)]: Total marks 4/4

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?

Prima facie, it is important to say that Delaware is the pre-eminent US jurisdiction for corporate law and several US states have modelled their corporate law on Delaware's legislation.

According to the Delaware's corporate law, the directors owe the **fiduciary duty of loyalty to the corporate's best interest and a care in educated decision-making**, to the corporation and its shareholders, not their creditors, but are **protected from liability for errors of judgment by the business judgment rule**.

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

Commented [H(53)]: Correct, 1 mark

Commented [H(54)]: Correct, 1/2 mark

Commented [H(55)]: Correct, 1 mark

The business judgment rule aims to protect those directors who acted in good faith and with reasonable care over their decision, in order to protect the interests of the company and its shareholders, even if with the actions taken resulted in an unfortunate outcome. The mentioned rule assumes that the directors are well informed on situation and did their best based on the given circumstances.

The same director's duties apply even when the corporation is insolvent and therefore the shareholders stand to receive nothing in an eventual bankruptcy.

Commented [H(56)]: Correct, 1/2 mark

Question 3.4 [5 marks]

Commented [H(57)]: Total marks 3.5/5

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

Involuntary proceeding can only commence under chapters 11 and 7 and it cannot happen against a farmer, family farmer or non-profit corporation.

In order to commence an involuntary proceeding it is required a certain number of creditors and it will depends on its classification as *non-insider* or *non-contingent*. If the debtor has fewer than 12 of such creditors, only one is required to file the proceeding herein mentioned and, if it has more than 12 of such creditors, at least 3 qualifying creditors must join in the petition.

To qualify as a petitioning creditor in an involuntary proceeding, it must satisfy the following requirements:

- The creditor must have a claim against the debtor that is *non-contingent*, meaning its a due claim;
- Not subject of *bona fide* dispute, in other words, it is a good faith assertion of a claim, as to liability or amount, and
- Unsecured or undersecured that in amount at least USD 16,750 (The value may vary according to inflation). The amount can be owed to one creditor or be the result of the sum of the claims owed to the petitioners.

In addition to that, the creditors must alleged that the debtor is not paying its debts as they become due, unless they are subject of *bona fide* dispute as to liability or amount. The petition must be accompanied by a motion for the appointment of an interim trustee on a expedite basis.

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

Question 4.1 [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 been sued by a former employee alleging she was fired due to 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?

Once the chapter 11 petition is filed, an automatic stay comes into effects preventing the debtor from enforcement actions, meaning the pre-petition claims are prohibited to enforce their credits over the debtor's property and the estate will be created, consisting of all debtor's property interests as of the petition date.

Commented [H(58)]: Correct, 1 mark

Commented [H(59)]: It can be unmatured and not due yet, but it cannot depend on the occurrence of any event other than the passage of time.

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

Commented [H(61)]: The test is whether there is an objective basis in law or fact to dispute the claim or amount

Commented [H(62)]: Correct, 1/2 mark

Commented [H(63)]: Correct, 1/2 mark

Commented [H(64)]: Correct, 1/2 mark, or that a custodian has been appointed over its assets

Commented [H(65)]: This is not required, but is likely to be what the creditors want

Commented [H(66)]: Total marks 11/15

Commented [H(67)]: Total marks 3/5

Commented [H(68)]: Correct, 1 mark

The scope the stay is to prevent creditors or third parties to interfere with the property of the estate.

However, the relief automatically granted does not affect some particular situations. In the given scenario, the employment discrimination lawsuit and the regulatory investigations by DOJ will move forward even with the stay granted, representing a statutory exceptions since it will not have influence on the debtor's estate.

Commented [H(69)]: Incorrect, this is a private civil lawsuit that would be stayed.

Commented [H(70)]: Correct, 1 mark

The margin loan default and the delinquent lease cannot be enforced by creditors, being affected by the automatic stay relief.

Commented [H(71)]: Incorrect, this is a securities contract so it is subject to an exception to the stay.

Commented [H(72)]: Correct, 1 mark

Question 4.2 [5 marks]

Commented [H(73)]: Total marks 5/5

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?

A US Bankruptcy Court can recognize the English Scheme of Arrangement under chapter 15 if it represents a collective proceeding in a foreign country, ruled by insolvency related law, under the supervision of a foreign court for the purpose of reorganization or liquidation. It is to me notice that the English Scheme of Arrangement must be in harmony with US Public Policy.

The foreign representative may also proves that there is an existent proceeding under insolvency law pending and that the foreign representative is legit to exercise its powers under the foreign law, recognized by foreign court.

Nevertheless, the case above discriminated is clear to point out the company is incorporated in France and has its headquarters in Paris with manufacturing in Italy. However, its funding comes from a Bank Loan and Eurobonds, governed by English law.

According to the US Bankruptcy Code the commencement of insolvency proceeding will be determined if it will be recognized as a main or non-main proceeding.

If the proceeding commences where the debtor has its centre of main interest (COMI), it will be recognized as a main proceeding, while if the proceeding commences where the debtor has an establishment, it will be recognizes as a non-main proceeding. The 15 USC § 1516 (c) determines that the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor' main interests.

Commented [H(74)]: Correct, 1 mark

Commented [H(75)]: Correct, 1 mark

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

Despite the content of the commented article of law, the COMI can be rebuttable, being necessary to analyse of location of headquarters, management, primary assets, location of majority of creditors and even the jurisdiction whose law will apply to most disputes.

In the given scenario, considering that the Stella SA has business, non-transitory economic activity, prior to the commencement of chapter 15 proceedings in England, its headquarters is located in Paris and its place of incorporation is France, the English proceeding represents a non-main proceeding.

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

Commented [H(78)]: Correct, 1 mark

Question 4.3 [5 marks]

Commented [H(79)]: Total marks 3/5

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?

An executory contract is characterized by the existence of material unperformed obligations on both sides and, according to 11 USC § 365 (a), the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor, providing adequate assurances of future performance and cure defaults when needed.

The license to manufacture Xblox is an executory contract since it has unperformed obligations for both parties.

Commented [H(80)]: Correct, 1 mark

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

In the 363 sale the debtor can sell its property free and clear of liens, claims, or other encumbrances with court approval, demonstrating that the transaction is in the best interests of the estate.

By the 363 sale it is possible to transfer its interests in key contracts that are required to operate the business even where they contain contractual restrictions on assignment or purport to terminate upon a bankruptcy filing.

However, this hypothesis does not apply to the license of manufacturing. Since it is related to Intellectual Property rights, it cannot be transferred without ToyCo's consent, regarding the protection disposed on 11 USC § 365 (n), meaning, their

Commented [H(81)]: Correct, 1 mark, however section 365(n) does not apply because that only applies when the owner of the IP is the debtor

licenses may not be terminated in connection with the sale of the intellectual property without their consent.

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

According to the text, GameMart operates in California, where it leases Land Corp property with restriction to assign without Land Corp consent.

The contract here is also an executory contract but, under 11 USC § 363 (f) the contract can be transferred if (i) the trustee assumes such contract or lease in accordance with the provisions of a 363 sale and (b) provide adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

Commented [H(82): Correct, 1 mark, the contractual consent requirement is ineffective in bankruptcy

*** End of Assessment ***