



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

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

Commented [H(2)]: Total marks 7/10

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

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

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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

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.

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Question 1.9

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.

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Question 1.10

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.

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QUESTION 2 (direct questions) [10 marks]

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Question 2.1 (1 mark)

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

Setoff is the concept whereby a creditor holding a claim against a debtor - and simultaneously owing money to the debtor - nets out the two (or more) obligations. The US Bankruptcy Code exempts the exercise of rights of setoff arising under non-bankruptcy law from avoidance as preferences in many circumstances.

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Setoff is not permitted in many such circumstances - including for example, where a creditor's claim is disallowed, or its claim against a debtor's estate was acquired post-petition or in the 90 days prior to the petition at a time when the debtor was insolvent - because such rights can improve the position of a creditor to the detriment of other unsecured creditors who are not owed money by the debtor since it decreases its obligation to the estate by the full amount owed by the debtor rather than the lesser amount the debtor would pay on the unsecured claim.

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Question 2.2 [2 marks]

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

Procedures in bankruptcy proceedings in the US are governed by the Federal Rules of Bankruptcy Procedure, which frequently incorporate by reference the Federal Rules of Civil Procedure, particularly in respect to litigation of disputed issues in contested matters or adversary proceedings. Forms for common bankruptcy filings are required to be used where they apply.

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

Further, each bankruptcy court will have local rules of procedure, and each judge issues personal practices, which are periodically updated and available on the relevant bankruptcy court website. The local rules and practices contain preferred working procedures and can also modify deadlines for filing and responding to pleadings.

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Question 2.3 [2 marks]

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What does the absolute priority rule require and when can it be deviated from? The Absolute Priority Rule ("APR") establishes the prioritisation of claims and placement of creditors into different classifications and sets out the order of such claims in which recoveries are distributed to creditors. The US Bankruptcy Code mandates compliance to the strict hierarchy of claim payouts for the fair and equitable distribution of recovery proceeds. Compliance with the APR is mandatory in both Chapter 7 and 11 bankruptcies.

Commented [H(23)]: Incorrect, in a chapter 11 plan, senior creditors can consent to junior creditors' recovery notwithstanding the APR

Under the APR, recoveries received from the insolvent estate are structured to ensure the classes comprised of higher priority creditor claims are paid first. Therefore, lower priority claim holders are not entitled to any recovery unless each class of higher ranking has received full recovery - the remaining creditors receive either partial or no recoveries.

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However, in *Re CHL, LLC (2018)* - a Chapter 11 case filed in the US Bankruptcy Court for the Eastern District of North Carolina - the Court held that a common law exception to the APR exists, namely the "new value" doctrine. The basic concept behind "new value" is that equity holders may retain their interest in a debtor when they provide contribution, often in the form of capital, to the reorganisation. This brings into question what constitutes a sufficient amount of contribution that equity holders should have to provide to maintain their interests. Generally, for the "new value" exception to apply, the value provided must be substantial, necessary, and reasonably equivalent to the value of the interest received in exchange.

Question 2.4 [2 marks]

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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 lien on property senior to, or with the same priority as, existing liens on the same property.

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A priming DIP financing is only available as a last resort when the debtor is unable to obtain any other type of financing (unsecured loans on an administrative priority basis or non-priming DIPs) and either the holders of existing liens (the primed lenders) consent, or the debtor can demonstrate such secured creditors are adequately protected from the diminution in value of their collateral as a result of the priming lien.

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Question 2.5 [3 marks]

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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?

A "preference" is a transfer of the debtor's property made in a suspect period before the petition date that must be returned to the estate if it exceeds the amount the recipient would have received in a Chapter 7 liquidation had the transfer not been made.

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The elements of a "preference" claim are:

- 1. A transfer of an interest of the debtor in property (i.e., funds, property or an interest in property);**
- 2. To or for the benefit of a creditor;**

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3. For or on account of an antecedent debt owed by the debtor before such transfer was made;

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4. Made while the debtor was insolvent;

5. Made during the suspect period; and

6. That enables the creditor to receive more than it would have in a Chapter 11 liquidation.

There is no requirement to show any fault of either the debtor or the recipient in connection with the payment having been made, and the recipient creditor suffers no penalty other than return of the transfer (and, potentially, pre-judgment interest from the date of the transfer).

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

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Question 3.1 [3 marks]

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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 *Stern -v- Marshall* 564 US 462 (2011), the US Supreme Court held that, even in core proceedings, a bankruptcy court's issuance of a final order over a state law claim was unconstitutional under Article III of the US Constitution. Subsequent US Supreme Court decisions and amendments to the Bankruptcy Rules have provided more guidance on what was a decision in *Stern* that threw the area of bankruptcy court jurisdiction into a new degree of turmoil in what was already a complicated area.

In *Executive Benefits Ins Agency -v- Arkinson* 134 S. Ct. 2165 (2014), the Supreme Court held that bankruptcy judges may determine a core proceeding over which they lack constitutional authority by issuing a report and recommendation for review by the district court, the same procedure as in non-core proceedings. Further, in *Wellness International Network Ltd -v- Sharif* 135 S. Ct. 1932 (2015), it was held that where the parties so consent, a bankruptcy court may issue final orders in the proceedings.

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Commented [H(38)]: Correct, 1/2 mark, the bankruptcy court can also enter a final order on certain core matters under the Bankruptcy Code, such as a challenge to a petition

The Bankruptcy Rules have implemented the *Executive Benefits* and *Wellness International* judgments by requiring litigants to plead whether they consent to the entry of final orders by the bankruptcy court, and by permitting a district judge 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 conclusions of law.

Generally, appeals from bankruptcy court decisions are heard by the district court for the district in which they sit. In certain circuits, however, bankruptcy appeals are heard by a Bankruptcy Appeal Panel ("BAP") convened from the judges of the bankruptcy

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courts within the circuit. In those circuits, a party may request that the appeal be heard by the district court instead. From the district court or BAP, there is a further right of appeal to the circuit court of appeals. In rare circumstances, an appeal from a bankruptcy court may go directly to the court of appeals.

Non-final orders are reviewed *de novo* by the district court or BAP on all findings of fact and conclusions of law to which a party has objected. The order of the district court or BAP is reviewed *de novo* by a circuit court of appeal as to conclusions of law and for abuse of discretion for findings of fact.

Question 3.2 [3 marks]

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?

Upon recognition of a foreign main proceeding, certain provisions of the Bankruptcy Code automatically apply:

- **automatic stay (subject to a carveout to permit the filing of a plenary US bankruptcy proceeding even after recognition of a foreign proceeding);**
- **operation of the debtor's business in the ordinary course by a foreign representative;**
- **sale, transfer or use of property outside the ordinary course;**
- **avoidance of post-petition transfers and post-petition perfection of security interests;**

Upon recognition of a foreign non-main proceeding, any of the above relief measures may be granted on a discretionary basis. Further, following recognition as either a foreign main, or foreign non-main proceeding, the following relief may also be granted on a discretionary basis:

- **authorisation of discovery regarding the debtor's assets and affairs;**
- **entrusting administration of the debtor's US assets to the foreign representative or other person;**
- **extension of provisional relief;**
- **any other relief "necessary to effectuate the purposes of [Chapter 15] and to protect the assets of the debtor or the interests of creditors", per Chapter 11, US Bankruptcy Code § 1521(a).**

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Question 3.3 [4 marks]

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?

Delaware is the pre-eminent US jurisdiction for corporate law. Directors owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision-making. Directors' duties are owed to the corporation and its shareholders - not to creditors - even in circumstances where the corporation is potentially insolvent and the shareholders, therefore, stand to receive nothing in bankruptcy.

In *North Am Catholic Educational Programming Foundation Inc. -v- Gheewalla (2007)*, the Delaware Supreme Court confirmed that directors do not owe duties to creditors when a company is operating "in the zone of insolvency", or indeed, is actually insolvent by holding that "individual creditors of an insolvent corporation have no right to assert direct claims for breach of fiduciary duty against corporate directors. Creditors may nonetheless protect their interest by bringing derivative claims on behalf of the insolvent corporation..."

Directors are protected from liability for errors of judgment by the "business judgment rule", under which the board of directors is presumed to have acted in good faith based on reasonable information. The presumption is rebuttable by showing that a majority of the board was not, in fact, reasonably informed, did not honestly believe their decision was in the corporation's best interest, or were not acting in good faith. Unless the presumption can be rebutted, the directors will not be liable in the absence of a showing of gross negligence.

Question 3.4 [5 marks]

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

To qualify as a petitioning creditor in an involuntary proceeding, the creditor must have a claim against the debtor that is:

- **Non-contingent**
 - **A contingent claim is one which depends on the occurrence of a future event i.e., a claim under a guarantee is typically contingent on the occurrence of a default under the guaranteed obligation.**

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- **A debt that is unmatured (because the payment is due in the future) is not contingent if all requirements for liability, other than the passage of time, have occurred.**

- Not the subject of a *bona fide* dispute as to liability or amount

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- **A bona fide dispute exists if there is an objectively reasonable basis for a dispute as a matter of fact or law; the debtor's subjective belief that the debt is not owed or the amount claimed is incorrect is not sufficient.**

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- **If a portion of the amount claimed is disputed, the creditor cannot use the undisputed portion to reach the monetary threshold required, but a dispute as to one claim does not disqualify application of other undisputed claims held by the same creditor to meet petitioning creditor requirements.**

- Unsecured or under secured, separately or in the aggregate with all other petitioning creditors' claims in the amount of at least USD 16,750 (which is periodically adjusted for inflation).

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

The involuntary petition form requires the petitioning creditor to allege either that the debtor is generally not paying its debts as they fall due, unless they are the subject of a bona fide dispute as to liability or amount, or that "within 120 days before the filing of the petition, a custodian, other than a trustee, receiver, or an agent appointed or authorised to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession."

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

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Question 4.1 [5 marks]

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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?

- (i) DOJ Investigation

This would continue unabated. Ordinarily, upon the filing of a plenary bankruptcy proceeding, an automatic stay comes into effect immediately and, whilst the scope of the stay is extremely broad, criminal proceedings are specifically excepted under s.362(b)(1), which excludes from a stay "the commencement or continuation of a criminal action or proceeding against the debtor."

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

(ii) Margin Loan Default

A stay of creditor actions against Speculation Inc. automatically comes into effect when the Chapter 11 petition is filed. The filing of a petition, however, does not operate as a stay for certain types of actions listed under 11 U.S.C. § 362(b). The stay provides breathing space for Speculation Inc., during which negotiations can take place to try to resolve the difficulties in its financial situation.

The broker is a secured creditor as the shares purchased are held as collateral against the margin loan provided to Speculation Inc. It is possible, therefore, for the broker to make a relief from stay motion pleading lack of adequate protection of an interest in property of the estate of Speculation Inc. to obtain an order from the court granting relief from the automatic stay since the value of the shares held may decline during the bankruptcy proceedings. If such relief is granted, it would permit the broker to foreclose on the shares held as collateral, sell them, and apply the proceeds to the debt incurred under the loan, per Chapter 11 § 362(d).

Commented [H(65)]: Incorrect, the margin loan is a securities contract exempt from the automatic stay, so the broker is permitted to liquidate the collateral

(iii) Delinquent Lease

In Chapter 11 proceedings, unexpired leases become property of the bankruptcy estate. This allows Speculation Inc. to decide whether to assume or reject the lease. If assumed, the lease remains in effect. If rejected, Speculation Inc. is automatically deemed in breach of the agreement which allows the landlord to terminate the lease. Speculation Inc. must make its election within 120 days of the Chapter 11 petition filing, although a 90-day extension may be granted upon request. If no election is made within the allotted time, the lease is deemed rejected.

If the lease is assumed, Speculation Inc. must promptly remedy all outstanding defaults owed to landlord. Speculation Inc.'s election to assume the lease will have the effect of continuing the lease in full and any subsequent defaults are given administrative priority over all interests outside of secured creditors and will not be subject to a statutory cap on damages.

If the lease is rejected, Speculation Inc. will be in breach of the lease as of the date of rejection, which may be retroactive to the date of the Chapter 11 bankruptcy filing. Upon rejection, the landlord can no longer reinstate the lease

Commented [H(66)]: The stay prevents an action for past-due rent or eviction

but is entitled to 3 possible remedies: (i) administrative claims; (ii) outstanding rent incurred by Speculation Inc. prior to bankruptcy; or (iii) damages for breach of the lease.

If Speculation Inc. fails to vacate after rejection or post-assumption, and does not pay rent, the landlord may seek a stay of proceedings from the bankruptcy court allowing the landlord to pursue an unlawful detainer action to regain possession of the leased premises.

(iv) Employment Discrimination Lawsuit

Upon the automatic stay coming into effect upon the filing of the Chapter 11 petition, litigation on pre-petition claims is expressly prohibited under the US Bankruptcy Code. As such, the former employee's claim against Speculation Inc. would constitute an unsecured creditor claim and joins the pool of other unsecured creditor claims in the order of priority in the Chapter 11 proceedings.

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Question 4.2 [5 marks]

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Stella SA (Stella) is 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?

Chapter 15 of the US Bankruptcy Code created an ancillary (as opposed to a plenary) proceeding whereby the US provides assistance to foreign proceedings in respect of the debtor - here, Stella SA. There is no reciprocity of treatment required - US courts will recognize proceedings in countries which do not recognize US proceedings.

The requirements for recognition are minimal. The foreign representative of Stella SA must first establish that a foreign court or administrative proceeding is pending and that the foreign representative is empowered to act by the proceeding. A foreign proceeding is defined by the US Bankruptcy Code as "a collective judicial or administrative proceeding in a foreign country ... under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation." As such, Stella SA's scheme of arrangement will be recognised by a US bankruptcy court under Chapter 15.

In terms of determining the scope of relief available to Stella SA following recognition, the proceedings will be characterised as foreign non-main proceedings. The foreign

Commented [H(69)]: Correct, 1 mark, the retail store in England is the necessary establishment

proceeding will be an English scheme of arrangement, but England is not Stella SA's centre of main interests ("COMI") and none of the relevant factors to be analysed when determining Stella SA's COMI would support the view that England is its COMI:

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- (i) It is a company incorporated in France;
- (ii) Its headquarters is in Paris;
- (iii) Its primary assets are predominantly based in Italy;
- (iv) The majority of the company's creditors would be based outside of England in the other jurisdictions (collectively) to which its products are shipped;
- (v) France would be the jurisdiction whose law would apply to most disputes given that is where the company is incorporated and its headquarters based.

Commented [H(71)]: Correct, 1 mark, these factors do not overcome the presumption that France is the COMI

Whilst COMI is a foreign concept to US law, the concepts of domicile, principal place of business and location of assets would be relevant factors in characterising the nature of the foreign proceedings, which would almost certainly be foreign non-main proceedings here.

Question 4.3 [5 marks]

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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?

Yes - both ToyCo and GameMart have material obligations to maintain under the license agreement.

Commented [H(73)]: Correct, 1 mark

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

No - whilst the Bankruptcy Code abrogates contractual restrictions on assignment to enable debtors to achieve a higher value for its assets than if such provisions were enforced, counterparty consent is required where the relevant contract is one to make a loan or other financial accommodation, or where substantive non-bankruptcy law (such as intellectual property licensing law) provides that the counterparty (ToyCo) cannot be compelled to accept performance from a transferee.

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

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

Yes - GameMart can assume and assign the factory lease. Assumption and assignment may occur under the Bankruptcy Code even if the factory lease includes a clause preventing assignment.

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

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

* End of Assessment *