



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

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

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by**

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Commented [H(2)]: Total marks 6/10

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

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.

Commented [H(3)]: Correct, 1 mark

Question 1.2

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.

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

Question 1.3

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.

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

Question 1.4

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.

Commented [H(6): Correct, 1 mark

Question 1.5

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.**

Commented [H(7): The correct answer is (e), but I cannot give you credit because you selected two options.

Question 1.6

Which of the following about 363 sales is **false**?

- (a) A good faith purchaser at a 363 sale may retain the property notwithstanding a subsequent reversal of court approval for the sale on appeal.
- (b) The debtor in possession must establish that the transaction is in the best interests of the estate as a whole.
- (c) In chapter 15 proceedings, a foreign court's approval alone suffices for a 363 sale.
- (d) Debtors must carry out a robust marketing process for the sale.
- (e) A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.**

Commented [H(8): Incorrect, the correct response is (c)

Question 1.7

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.

Commented [H(9)]: The correct answer is (d), but I cannot give you credit as you selected two answers.

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.

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

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.
 - a. Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.
- (d) Authority for substantive consolidation comes from the Bankruptcy Code.

Commented [H(11)]: The correct response is (c) but I cannot give you credit as you selected two responses.

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.

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(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]

Question 2.1 (1 mark)

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

[Setoff refers to the right of a creditor to cancel or reduce the amount of a debt owed to them by offsetting it against a debt owed to the debtor by the creditor. Setoff is generally not permitted in bankruptcy proceedings in the US because it would allow some creditors to receive preferential treatment over others, which goes against the principle of fair distribution of assets in bankruptcy. That's why it is not permitted in various circumstances.]

Question 2.2 [2 marks]

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

[It is important to familiarize oneself with the applicable rules and procedures when preparing a filing for a bankruptcy court in a particular jurisdiction. This involves reviewing the Bankruptcy Rules, the Federal Rules of Civil Procedure, and the local rules of the bankruptcy court. Furthermore, if a legal practitioner is not accustomed to practicing in a particular jurisdiction, it may be advisable to seek guidance from a local practitioner to obtain information on any unwritten local practices.]

Question 2.3 [2 marks]

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

[The absolute priority rule requires that a creditor or class of creditor cannot receive something under a plan of reorganization which is lesser than what is hypothetically receivable if the firm were to be liquidated under Chapter 7. The deviation from the rule is permitted by obtaining the consent of the affected creditor(s).]

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?

[A "priming lien" refers to a lien that is granted priority over existing liens or claims in the event of bankruptcy or insolvency. In other words, a priming lien takes precedence over other liens that may have been filed against the same asset or property. A priming lien can be granted in a number of ways, including through a court order, a debtor-in-possession financing agreement, or a reorganization plan. The purpose of a priming lien is to provide additional security for a lender or creditor. The requirements that must be met are as follows:

Commented [H(13)]: Total marks 7.5/10

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

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

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

Commented [H(17)]: Total marks 1.5/2

Commented [H(18)]: Correct, 1/2 mark

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

Commented [H(20)]: Correct, 1/2 mark, also the judge's personal practices

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Commented [H(22)]: A given class of creditors must be satisfied in full before a junior creditor can receive anything.

Commented [H(23)]: Correct, 1/2 mark, this can only happen in a chapter 11 plan

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

Commented [H(26)]: Incorrect, the lien must be approved by the court in any event.

1. **Approval by the bankruptcy court:** The bankruptcy court must approve the DIP financing and any priming lien that is granted to secure it. The court will typically consider whether the financing is necessary and whether the proposed terms are fair and reasonable.

2. **Adequate protection for existing creditors:** Existing creditors must be given "adequate protection" in exchange for the priming lien. This means that the value of their collateral must be preserved or that they must receive some other form of compensation in order to ensure that they are not unfairly disadvantaged by the priming lien.

3. **No negative impact on the debtor's ability to reorganize:** The priming lien must not negatively impact the debtor's ability to reorganize and emerge from bankruptcy. This means that the DIP financing must be structured in a way that allows the debtor to continue operating and to make progress towards a successful reorganization.

4. **Reasonable terms:** The terms of the priming lien must be reasonable and appropriate for the circumstances. This includes considerations such as interest rates, fees, and the priority of the lien.]

Commented [H(27): Correct, 1/2 mark, also financing must not be available without the priming lien

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?

[A preference is a transfer of a debtor's property that was made within a certain time frame prior to the petition date and that must be restored to the estate if it exceeds the amount that the beneficiary would have gotten in a chapter 7 liquidation had the transfer not been made. The avoidance is designed to treat all creditors equally and discourage creditors from racing to collect money from struggling debtors. The value of a preference that is returned to the estate is subject to an unsecured claim by the receiver. The receiving creditor incurs no penalties other than the return of the transfer for a preference, and neither the debtor nor the recipient need to demonstrate any fault in connection with the payment having been made.]

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Commented [H(29): Correct, 1 mark

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

The elements of a preference claim are that a transfer of an interest of the debtor in property must have been made to or for the benefit of a creditor for/or on account of an antecedent debt owed by the debtor before such transfer was made while the debtor was insolvent and during the suspect period which enables the creditor to receive more than it would have in a chapter 7 liquidation.]

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

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

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

Question 3.1 [3 marks]

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?

[A bankruptcy court may enter a final order in a number of circumstances, including:

1. Dismissing a bankruptcy case: If the court determines that a bankruptcy case should be dismissed, it may enter a final order to dismiss the case.
2. Granting or denying a discharge: After a debtor completes their bankruptcy case, the court may enter a final order granting or denying the discharge of the debtor's debts.
3. Confirming a Chapter 11 or Chapter 13 plan: If a debtor files for Chapter 11 or Chapter 13 bankruptcy, the court may enter a final order confirming their repayment plan.
4. Approving the sale of assets: If a debtor seeks to sell assets during the bankruptcy process, the court may enter a final order approving the sale.]

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Commented [H(35): Total marks 1.5/3

[Appeals from bankruptcy court orders are typically reviewed by a federal district court. The district court reviews the decision of the bankruptcy court to determine if there were any errors

Commented [H(36): Correct, 1/2 mark, or with the parties' consent. Where the bankruptcy court does not have authority to enter a final order, its order is treated as a report and recommendation.

Commented [H(37): Correct, 1/2 mark

of law or fact. The district court may affirm the bankruptcy court's decision, modify it, or reverse it. In certain circuits, however, bankruptcy appeals are heard by a Bankruptcy Appellate Panel (BAP), convened from the judges of the bankruptcy courts within the circuit.

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Non-final orders, such as orders granting or denying motions, are typically reviewed through the process of interlocutory appeal. To obtain an interlocutory appeal, a party must seek permission from the district court to appeal the non-final order before the case has been fully resolved. The district court will consider the request for interlocutory appeal and may grant or deny the request based on factors such as whether the appeal involves a controlling question of law or whether delaying the appeal would cause undue hardship. If the district court grants the request for interlocutory appeal, the appeals court will review the non-final order to determine if it was correct.]

Question 3.2 [3 marks]

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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 under Chapter 15 of the U.S. Bankruptcy Code, several provisions of the Code automatically apply to the debtor's property within the territorial jurisdiction of the United States. These provisions include:

1. **The automatic stay:** The automatic stay prevents creditors from taking action against the debtor or the debtor's property.
2. **The avoidance powers:** The trustee in a foreign main proceeding has the power to avoid certain pre-bankruptcy transactions under U.S. law, including preferences and fraudulent transfers.
3. **Use, sale or lease of property:** The trustee may use, sell or lease the debtor's property located in the United States.
4. **Turnover of property:** The trustee may seek turnover of property of the debtor located in the United States.
5. **Cross-border cooperation:** The recognition of a foreign main proceeding encourages cross-border cooperation and coordination between courts and administrators in different countries.

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

Commented [H(41)]: Incorrect, only post-petition transfers can be avoided; the power to avoid pre-petition transfers is not available in chapter 15.

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

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

In addition to the automatic provisions that apply upon recognition of a foreign main proceeding, relief may also be granted on a discretionary basis for both foreign main and non-main proceedings. Such discretionary relief may include:

1. **Extension of the automatic stay:** The bankruptcy court may extend the automatic stay to protect the debtor's property located outside the United States.
2. **Assistance in obtaining evidence:** The bankruptcy court may assist the foreign representative in obtaining evidence for use in the foreign proceeding.
3. **Orders to protect creditors:** The bankruptcy court may issue orders to protect creditors or to preserve the value of the debtor's assets.
4. **Coordination of proceedings:** The bankruptcy court may coordinate proceedings in the United States with proceedings in other countries to ensure that the debtor's assets are administered in an efficient and orderly manner.]

Commented [H(44)]: Incorrect.

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

Question 3.3 [4 marks]

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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?

[Directors of a Delaware corporation owe a duty of care and a duty of loyalty to the corporation and its shareholders in the ordinary course of business. The duty of care requires directors to act in an informed and reasonable manner, making informed decisions that are in the best interest of the corporation. This includes:

1. Attending board meetings and reviewing relevant information to make informed decisions;
2. Monitoring the corporation's financial performance and ensuring that it complies with applicable laws and regulations;
3. Appointing and monitoring the performance of officers and employees of the corporation;
4. Ensuring that the corporation has adequate policies and procedures to manage risks;
5. Maintaining appropriate records and ensuring compliance with corporate formalities.

The duty of loyalty requires directors to act in good faith and in the best interest of the corporation and its shareholders. This includes avoiding conflicts of interest and disclosing any potential conflicts to the board of directors and shareholders.

When a Delaware corporation is potentially or actually insolvent, the duties of the directors expand to include a duty to consider the interests of the corporation's creditors, in addition to its shareholders. This duty is known as the duty of care to creditors. The directors must ensure that the corporation does not engage in transactions that harm the interests of creditors or result in the depletion of the corporation's assets.

Directors are protected from liability for errors of judgment by the business judgment rule. The business judgment rule provides that as long as directors act in good faith, with due care, and in the best interest of the corporation, they will not be held liable for decisions that prove to be erroneous. This rule provides a strong presumption that directors have acted properly in making business decisions, unless it is shown that they acted in bad faith, with a conflict of interest, or without due care.]

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.

[In an involuntary bankruptcy proceeding, a creditor can file a petition to force a debtor into bankruptcy. However, not all creditors are eligible to file such a petition. To qualify as a petitioning creditor, a creditor's claim must fulfill the following requirements:

1. **The claim must be a valid and undisputed debt:** The creditor must have a valid and undisputed claim against the debtor for a debt that is owed. This means that the debt must be based on a legally enforceable obligation, such as a contract, a promissory note, or a court judgment. If the debt is disputed, the creditor cannot file an involuntary bankruptcy petition until the dispute is resolved.

2. **The debt must be non-contingent:** The debt must be fixed, matured, and non-contingent. This means that the amount owed must be certain and the debt must have become due and payable. A contingent debt is a debt that is based on an event that may or may not occur in the future, such as a lawsuit or an insurance claim. Contingent debts are not eligible for inclusion in an involuntary bankruptcy petition.

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

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

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

Commented [H(50)]: Incorrect, Gheewala made clear that this does not occur.

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

Commented [H(52)]: Total marks 2/5

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

Commented [H(54)]: Correct, 1/2 mark, though debts that are not yet due may be the basis of a petition if only the passage of time is required

3. **The debt must meet a minimum threshold:** The creditor's claim must meet a minimum threshold. The threshold is determined by the type of bankruptcy case and the amount of the debtor's debts. For example, in a Chapter 7 case, the creditor's claim must be for at least \$16,750. In a Chapter 11 case, the threshold is \$16,750 or 1% of the debtor's total debts, whichever is less.

Commented [H(55): Correct, 1/2 mark, the claim also must be unsecured or undersecured

4. **The debt must not be subject to a bona fide dispute:** The debt must not be subject to a bona fide dispute. A bona fide dispute exists when there is a genuine disagreement between the debtor and the creditor as to the validity or amount of the debt. If the debtor disputes the debt, the creditor cannot include it in an involuntary bankruptcy petition until the dispute is resolved.

Commented [H(56): Incorrect, the test is whether there is an objective basis in fact or law, not whether the parties subjectively disagree

5. **The debt must not be subject to a pending lawsuit or attachment:** The debt must not be subject to a pending lawsuit or attachment. If the creditor has already filed a lawsuit against the debtor for the same debt that is the subject of the involuntary bankruptcy proceeding, or if the creditor has already obtained a judgment or attachment against the debtor's property, the creditor cannot file an involuntary bankruptcy petition until the lawsuit or attachment is resolved.

[In addition to meeting these requirements, the creditor must also follow the proper procedures for filing an involuntary bankruptcy petition. This includes filing the petition in the proper court and serving notice on the debtor and other creditors. The debtor has the right to contest the petition and the court will hold a hearing to determine whether the debtor should be placed into bankruptcy. If the court finds that the debtor is eligible for bankruptcy and that the petitioning creditor has met all the requirements, the court will order the debtor into bankruptcy.]

Commented [H(57): The creditor must also allege that the debtor is not generally paying its debts or has had a custodian appointed over its assets.

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

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Question 4.1 [5 marks]

Commented [H(59): 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?

[If Speculation Inc files for Chapter 11 bankruptcy, it will have several effects on the ongoing DOJ investigation, margin loan default, delinquent lease, and employment discrimination lawsuit:

1. **DOJ Investigation:** Filing for Chapter 11 bankruptcy will not automatically stop the DOJ investigation into possible insider trading by Speculation Inc. However, the bankruptcy court may issue an automatic stay that temporarily stops any pending lawsuits or investigations against the debtor, including the DOJ investigation. The DOJ may seek relief from the stay if it believes it is necessary to continue its investigation.

Commented [H(60): Correct, 1 mark, because it benefits from an exception to the automatic stay

2. **Margin Loan Default:** Filing for Chapter 11 bankruptcy will have an immediate effect on the margin loan default. The automatic stay will prevent the broker from taking any further action to enforce the default, such as seizing the collateral shares. The bankruptcy court may allow Speculation Inc to continue trading and using the collateral shares to generate income, but under the court's supervision. Alternatively, the court may order the sale of the collateral shares to pay off the outstanding loan balance.

Commented [H(61): Incorrect, the margin loan is a securities contract that benefits from an exception to the automatic stay, so the broker may liquidate the collateral.

3. **Delinquent Lease:** Filing for Chapter 11 bankruptcy will also have an immediate effect on the delinquent lease. The automatic stay will prevent the landlord from taking any further action to evict Speculation Inc or collect unpaid rent. The bankruptcy court may allow Speculation Inc to continue operating from the leased office space and pay its rent under a court-approved plan. Alternatively, the court may order the rejection of the lease, which would allow Speculation Inc to move out of the leased space and discharge any remaining rent obligations.

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Commented [H(63): Correct, 1 mark

4. **Employment Discrimination Lawsuit:** Filing for Chapter 11 bankruptcy will also have an immediate effect on the employment discrimination lawsuit. The automatic stay will prevent the former employee from pursuing the lawsuit against Speculation Inc. The former employee may seek relief from the stay if she believes that the bankruptcy court should not interfere with her right to pursue her claim. The court may also allow the lawsuit to proceed if it determines that the former employee's claim is a priority claim that should not be stayed.

Commented [H(64): Correct, 1 mark

In summary, filing for Chapter 11 bankruptcy will have varying effects on the ongoing DOJ investigation, margin loan default, delinquent lease, and employment discrimination lawsuit. The bankruptcy court may issue an automatic stay that temporarily stops any pending lawsuits or investigations against the debtor, including the DOJ investigation and the employment discrimination lawsuit. The court may also allow Speculation Inc to continue trading and using its collateral shares to generate income, pay its rent under a court-approved plan, or reject its lease and move out of its leased space. The court will ultimately determine how the bankruptcy case will proceed and what relief will be granted to the debtor and its creditors.]

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?

[It is possible for an English scheme of arrangement to be recognized by a US bankruptcy court under Chapter 15 of the US Bankruptcy Code. Chapter 15 is designed to facilitate cooperation between US bankruptcy courts and foreign courts in cross-border insolvency cases.

To determine whether the English scheme of arrangement would be recognized as a foreign main or non-main proceeding, the bankruptcy court would need to consider the location of Stella's "center of main interests" (COMI). Under Chapter 15, a foreign proceeding is considered a "main proceeding" if it is taking place in the country where the debtor has its COMI, or if the foreign court has expressly determined that the proceeding is a main proceeding. If the foreign proceeding is not a main proceeding, it is considered a "non-main proceeding."

Commented [H(66): Correct, 1 mark

In this case, since Stella is incorporated in France and has its headquarters in Paris, it is possible that its COMI may be in France. However, the bankruptcy court would need to consider various factors to determine whether Stella's COMI is in France or another country. If Stella's COMI is in France, and the English scheme of arrangement is deemed to be a non-main proceeding, the recognition and enforcement of the scheme would be governed by Section 1521(a) of the Bankruptcy Code.

Commented [H(67)]: Its COMI is presumed to be France, and here the factors are unlikely to overcome that presumption.

Under Section 1521(a), a US bankruptcy court may grant recognition to a foreign non-main proceeding if it finds that the relief sought in the foreign proceeding is "comparable to relief available to creditors" under US bankruptcy law. The bankruptcy court would also need to be satisfied that the foreign proceeding is being conducted in a manner that is consistent with the principles of US bankruptcy law.

Commented [H(68)]: The retail store in England could satisfy the establishment requirement.

If, on the other hand, Stella's COMI is deemed to be in England, and the English scheme of arrangement is deemed to be a foreign main proceeding, the recognition and enforcement of the scheme would be governed by Section 1517 of the Bankruptcy Code. Under Section 1517, a US bankruptcy court must recognize a foreign main proceeding as a "foreign main proceeding" without the need for any additional findings or requirements.

In summary, it is possible for an English scheme of arrangement to be recognized by a US bankruptcy court under Chapter 15 of the US Bankruptcy Code. Whether the scheme would be recognized as a foreign main or non-main proceeding would depend on a variety of factors, including the location of Stella's COMI. If the scheme is recognized as a non-main proceeding, the bankruptcy court would need to determine whether the relief sought is comparable to relief available to creditors under US bankruptcy law and whether the foreign proceeding is being conducted in a manner consistent with US bankruptcy law.]

Question 4.3 [5 marks]

Commented [H(69)]: 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?

The license to manufacture Xblox is an executory contract because both parties have ongoing obligations that are not yet fully performed at the time of GameMart's Chapter 11 filing. Specifically, GameMart has an ongoing obligation to pay ToyCo royalties for the right to manufacture Xblox, while ToyCo has an ongoing obligation to allow GameMart to use its patents and to maintain its quality control standards.]

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

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

GameMart cannot transfer the Xblox license as part of a 363 sale without ToyCo's consent. The license is an intellectual property license, and under US bankruptcy law, the sale of intellectual property outside the ordinary course of business requires the consent of the licensor. Therefore, ToyCo has the right to approve or reject any proposed transfer of the Xblox license, including as part of a 363 sale. However, if the license is rejected, GameMart would no longer have the right to manufacture Xblox.]

Commented [H(71)]: Correct, 1 mark

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

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

[GameMart cannot transfer the factory lease as part of a 363 sale without Land Corp's consent. The lease prohibits assignment without Land Corp's consent, and a bankruptcy court cannot authorize a sale that violates a contractual provision. However, GameMart can assume and assign the lease to a third party as part of a 363 sale, as long as it obtains Land Corp's consent to the assignment. If Land Corp does not consent to the assignment, GameMart may have to reject the lease and vacate the premises. Top of Form]

Commented [H(73): Incorrect, the landlord consent requirement is not effective in bankruptcy.

*** End of Assessment ***