



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]

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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]

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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 permits a creditor, who simultaneously holds a claim against the debtor and owes money to the debtor, to net out the two (or more) obligations. Setoff is not permitted in many circumstances as it can improve the position of the creditor compared to other unsecured creditors. This is because the creditor's obligation to the estate is reduced by the full amount that the debtor owes, whereas the debtor may have ultimately paid less on the unsecured claim had setoff been prohibited.

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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?

The Federal Rules of Bankruptcy, the Federal Rules of Civil Procedure, the local rules of the bankruptcy court and the personal practices issued by the judge.

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Question 2.3 [2 marks]

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

In a Chapter 7 bankruptcy, the absolute priority rule requires that payment in full must be made to a more senior category of claims, before the next category receives anything. In the context of a Chapter 11 bankruptcy, the absolute priority rule requires that under a plan of reorganisation, no creditor or class of creditors may receive less than they would have under a Chapter 7 liquidation. In a Chapter 11 bankruptcy, the rule may be deviated from with the consent of affected creditors, but deviation is not permitted in a Chapter 7 bankruptcy and statutory priorities must be strictly followed.

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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 type of lien that may be granted to creditors who extend post-petition financing to a debtor in possession in a Chapter 11 bankruptcy. A priming lien is granted over encumbered estate property and is senior or equal to the pre-petition lien over the property. For a priming lien to be granted, the debtor must be unable to obtain post-petition financing on any other terms, and

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must demonstrate that the interest of the secured creditor being primed is adequately protected.

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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 period prior to the filing of the petition that must be returned to the estate if it exceeds the amount that the recipient would otherwise have received in a Chapter 7 liquidation had the transfer not been made: 11 USC §547(b).

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The elements of a preference claim are as follows:

- (a) There was a transfer of an interest in the debtor's property (eg, funds, real property or an interest in property).
- (b) The transfer was to, or for the benefit of a creditor. A recipient who was not a creditor cannot be said to have received a preferential transfer, but the transfer may be recoverable as a fraudulent conveyance.
- (c) The transfer was for or on account of an antecedent debt owed by the debtor before such transfer was made. A contemporaneous exchange of value does not constitute an antecedent debt; likewise, prepayment of goods and services are not transfers on account of an antecedent debt because the debt is only incurred upon receipt of the goods/services. Further, under the net result rule, a transfer cannot be avoided as a preference if subsequent to the transfer, the creditor advances new additional value to the debtor without receiving a perfected security interest or repayment from the debtor.
- (d) The transfer was made while the debtor was insolvent. The debtor is presumed to have been insolvent on or within 90 days before the filing of the petition: 11 USC §547(f). The ultimate burden of proving insolvency on a balance sheet basis is on the trustee or debtor.
- (e) The transfer was made during the suspect period. The relevant period for transfers to third parties is 90 days prior to the filing of the petition, while the period for insiders is between 90 days and 1 year before the filing of the petition if the creditor was an insider.
- (f) The transfer enables the creditor to receive more than it would have in a Chapter 7 liquidation.

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The transfer must also not occur as part of the ordinary course of the debtor's business, as that would constitute a defence to a preference claim. There is no requirement to show fault, either on the part of the debtor or creditor.

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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?

When a bankruptcy court may enter a final order

As a matter of constitutional authority, a bankruptcy court may enter a final order on core proceedings (within the meaning of 28 USC § 157(b)(2)), where the order does not invade the jurisdiction of federal courts under Article III of the Constitution: *Stern v Marshall* 564 US 462 (2011).

Alternatively, a bankruptcy court may issue final orders in a core proceeding with the consent of the parties: *Wellness Int'l Network, Ltd. v Sharif*, 135 S. Ct. 2165 (2014). Since district courts have exclusive jurisdiction to adjudicate a petition commencing bankruptcy proceedings, a bankruptcy court may also exercise a district court's delegated authority to enter a final order on a motion challenging the validity of a petition.

For the purposes of appeals, final orders are those that dispose of all issues, leaving nothing else to be decided.

Who reviews appeals from bankruptcy court orders

Appeals from bankruptcy court orders are generally heard by the district court for the district in which the bankruptcy court sits. In certain circuits, bankruptcy appeals may instead be heard by a Bankruptcy Appellate Panel ("BAP"), which is constituted from judges of the bankruptcy courts within the circuit.

From the district court or BAP, a party may further appeal to the circuit court of appeals. Occasionally, an appeal may go directly to the circuit court of appeals if the bankruptcy court or district court certifies that (a) the appeal raises a question of law for which there is no controlling decision of the circuit or the US Supreme Court, or requires resolving two conflicting controlling decisions; or (b) immediate appeal may materially advance the progress of the case.

How are non-final orders reviewed

Where a bankruptcy court is unable to enter a final order due to lack of constitutional authority, the bankruptcy court submits proposed findings of fact and conclusions of law to the district court. The parties may object to these proposed findings, and the district court will make the final decision.

Where the bankruptcy court makes interlocutory orders (ie, orders that are not final in the sense that they do not dispose of all issues to be decided), the order may only be appealed with leave of the appellate court.

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

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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, the provisions of the Bankruptcy Code that automatically apply are:

- (a) an automatic stay on actions that interfere with the debtor's property within the territorial jurisdiction of the US (11 USC §1520(a)(1));**
- (b) that the foreign representative may operate the debtor's business in the ordinary course unless the court otherwise orders (11 USC §1520(a)(3));**
- (c) that the foreign representative may sell, transfer or use the debtor's property outside the ordinary course (11 USC §1520(a)(2) and §1520(a)(3));**
- (d) that post-petition transfers and post-petition perfection of security interests may be avoided (11 USC §1520(a)(2), §1520(a)(3) and §1520(a)(4)).**

Any of the above reliefs may be granted on a discretionary basis in a foreign non-main proceeding. In both foreign main and non-main proceedings, additional discretionary reliefs that may be granted by the court are (11 USC §1521):

- (a) authorization of discovery regarding the debtor's assets and affairs;**
- (b) entrusting administration of the debtor's US assets to the foreign representative or other person;**
- (c) extension of provisional relief; and**
- (d) any other relief necessary to effectuate the purposes of Chapter 15 and to protect the assets of the debtor or the interests of creditors.**

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?

Directors owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision-making. These duties are owed to the corporation and its shareholders (and not to creditors), even if the corporation is potentially or actually insolvent.

The business judgment rule protects directors from liability for errors of judgment. This rule provides that the board of directors is presumed to have acted in good faith on the basis of reasonable information. The presumption can be rebutted by showing that the majority of the board were not reasonably informed, did not honestly believe that their decision was in the corporation's best interest, or were not acting in good faith. Unless the presumption is rebutted, directors will not be liable unless gross negligence is shown.

In relation to the duty of care to make educated decisions, directors may also be exculpated by a corporation's certificate of incorporation. The business

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judgment rule does not apply where a transaction is approved by a board majority that is not disinterested and independent, or a controlling shareholder is on both sides of the transaction. In such a scenario, the transaction is void unless the entire fairness standard is met.

Question 3.4 [5 marks]

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

First, the claim must be against a debtor who is not a farmer, family farmer or not-for-profit corporation: 11 USC § 303(a).

Second, there must be a sufficient number of petitioning creditors - if the debtor has fewer than 12 non-insider creditors, only one petitioning creditor is required. If the debtor has 12 or more non-insider creditors, at least three qualifying creditors must join in the petition: see 11 USC § 303(b)(1)-303(b)(2).

Third, the creditor must have a non-contingent claim against the debtor, ie, a claim that does not depend on the occurrence of a future event: 11 USC § 303(b)(1). That said, a debt that is unmatured is not a contingent claim if all the requirements for liability have occurred.

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Fourth, the claim must not be the subject of a bona fide dispute as to liability or amount: 11 USC § 303(b)(1). A bona fide dispute exists if there is an objectively reasonable basis for a dispute as a matter of fact or law.

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Fifth, the claim must be unsecured or undersecured, or in the aggregate with all other petitioning creditors' claims, in the amount of at least USD 18,600 (with effect from 1 April 2022): 11 USC § 303(b)(1)-303(b)(2) read with "Notice of Adjustment of Certain Dollar Amounts in the Bankruptcy Code" dated 4 February 2022.¹

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The petitioning creditor(s) must allege that the debtor is either (a) generally not paying its debts as they become due, unless they are the subject of a bona fide dispute as to liability or quantum; or (b) 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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¹ Available at <https://www.federalregister.gov/documents/2022/02/04/2022-02299/adjustment-of-certain-dollar-amounts-in-the-bankruptcy-code>

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?

Generally, the filing of a Chapter 11 petition triggers an automatic worldwide stay on any action that interferes with the debtor's estate: 11 USC §362(a).

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However, pursuant to 11 USC §362(b)(1), the commencement or continuation of a criminal action or proceeding against the debtor is exempt from this stay. The filing of a Chapter 11 petition against Speculation Inc therefore would not prevent the DOJ from bringing criminal charges against Speculation Inc. The stay also only prohibits affirmative acts that change the status quo of the estate's property: *City of Chicago v Fulton*, 529 US 140 (2021), thus the stay does not affect any property that may have been seized by the DOJ prior to the filing of the Chapter 11 petition.

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With regard to the margin loan default, the worldwide automatic stay also does not apply to an exercise by a stockbroker or financial institution of a contractual right under any security agreement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract: 11 USC §362(b)(6). The filing of a Chapter 11 petition therefore would not prevent Speculation Inc's broker from seizing the shares that were pledged as collateral, in order to recoup the amount owed to it. Speculation Inc's broker would also be entitled to exercise any other right(s) it has under the margin loan agreement.

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As for the delinquent lease, 11 USC §362(b)(10) provides that the stay does not extend to any act by a lessor to the debtor under a lease of nonresidential property that has terminated by the expiration of the stated term of the lease. While Speculation Inc has fallen behind on its rent, it appears that the lease of its office space has not yet expired. Thus, the filing of a Chapter 11 petition would prevent the landlord from taking any action to evict Speculation Inc from its office space.

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That said, pursuant to 11 USC §365(a) and §365(d)(4)(A), the debtor in possession in a Chapter 11 bankruptcy must assume or reject the unexpired lease by the date that is 210 days after the date of the order for relief, or the date of entry of an order confirming a plan, whichever is earlier. Given that Speculation Inc has defaulted on paying its rent, it can only assume the unexpired lease if it (a) cures the default by performance at and after the time of assumption in accordance with the unexpired lease; (b) compensates for pecuniary losses resulting from the default; and (c) provides adequate assurance of future performance under the lease: 11 USC §365(b)(1). The election to assume or reject the lease must be based on the

business judgment of the debtor in possession, that the reorganization of the debtor will be facilitated thereby.

If Speculation Inc chooses to reject the lease, it will be deemed to have breached the lease immediately before the petition date and its landlord will have an unsecured claim in damages: **11** USC §365(g)(1). If Speculation Inc assumes the lease and then rejects it, its landlord's claim for damages will be a post-petition administrative expense of the estate. Speculation Inc can also choose to assume the lease and assign it to a third party, but the landlord must be given adequate assurance of future performance: **11** USC §362(f)(2).

As for the employment discrimination lawsuit, the stay would prevent the former employee from continuing the lawsuit against Speculation Inc, and from taking any act to collect, assess or recover her claim against Speculation Inc: **11** USC §362(a)(1) and §362(a)(6). Any act taken in violation of the stay constitutes contempt of court and is void or voidable (depending on the circuit in which the bankruptcy is pending).

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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?

Whether the scheme of arrangement can be recognised

Yes, the English scheme of arrangement could be recognised by a US bankruptcy court under Chapter 15. The threshold for recognition under US bankruptcy law is not high; the foreign representative only needs to establish that there is a pending foreign court or administrative proceeding with respect to the debtor, and that the foreign representative is empowered to act by the proceeding: 11 USC §1515(b) read with 11 USC §1517(a). Per 11 USC §101(23), a foreign proceeding is defined as a "collective judicial or administrative proceeding in a foreign country, including an interim proceeding, 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 reorganization or liquidation".

In the present case, the applicable UK legislation governing a scheme of arrangement would likely be Part 26 of the UK Companies Act 2006 ("Companies Act"), or Part 26A of the Companies Act (which applies where the company has encountered or is likely to encounter financial difficulties that may affect its ability to carry on as a going concern, and the purpose of the scheme of arrangement is to reduce or prevent the said financial difficulties). Parts 26

and 26A are arguably laws relating to an adjustment of debt, since they permit the company to enter a compromise with its creditors or any class of them (ss 895(1)(a) and 901A(3)(a)(i) Companies Act). Further, Parts 26 and 26A both provide that court sanction must be obtained for the scheme of arrangement, and so the debtor's assets and affairs are arguably subject to control of the foreign court. An English scheme of arrangement is therefore likely to satisfy the definition of a foreign proceeding under 11 USC §101(23).

While a foreign proceeding may nonetheless be refused recognition if it is manifestly contrary to US public policy, this is rarely the case where mere recognition is sought: 11 USC §1506. There is also nothing on the facts to suggest that the English scheme of arrangement would be contrary to US public policy. The scheme of arrangement is therefore likely to be granted recognition in a Chapter 15 proceeding.

Recognition can be obtained by the foreign representative filing a petition for recognition in a US court (11 USC §1515(a)), accompanied by the documents stated in 11 USC §1515(b).

Whether the scheme of arrangement would be recognised as a foreign main or non-main proceeding

Whether a proceeding is recognized as a foreign main or non-main proceeding depends on whether the foreign proceeding is commenced at the debtor's center of main interests ("COMI"). A debtor's COMI is rebuttably presumed to be its place of incorporation: 11 USC §1516(c). In the present case, since Stella is incorporated in France, its COMI is presumed to be France.

That said, other factors relevant to determining the debtor's COMI include the location of headquarters, the location of management, the location of primary assets, the location of the majority of the debtor's creditors or creditors who will be affected by the relief requested, and the jurisdiction whose law would apply to most disputes. On one hand, the Eurobonds are governed by English law, which points in favor of the UK being the COMI. Stella also has some assets in the form of retail stores in the UK. That said, it is not clear that the majority of Stella's assets are located in the UK - Stella has retail stores in other parts of the world, and the majority of its assets may in fact be located in France (since its headquarters are there) or Italy (since its production occurs there). The location of management is also likely to be in France, since Stella's headquarters are there. Moreover, since the debt instrument in question is Eurobonds, Stella's creditors are not necessarily primarily located in the UK.

In my view, there are insufficient factors pointing to the UK as the COMI, and to rebut the presumption that France is Stella's COMI. A further requirement for a proceeding to be recognized as a foreign non-main proceeding is that the debtor has an establishment in the jurisdiction (11 USC §1502(2))- this is satisfied by the fact that Stella has retail stores in the UK. The English scheme of

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Commented [H(73)]: Correct, 1 mark, since COMI is not in England, foreign main recognition is not available

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arrangement will therefore be likely recognized as a foreign non-main proceeding.

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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, the license agreement to manufacture Xblox is an executory contract, as there remain material unperformed obligations on both sides. GameMart has the obligation to continue to pay ToyCo monthly royalties for the remainder of the licensing period, while ToyCo has the obligation to refrain from giving any other company the license to manufacture Xblox for the remainder of the 10-year exclusivity period.

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

No, it cannot. Under 11 USC §365(c), a trustee may not assume or assign an executory contract if applicable law excuses a party to such contract (other than the debtor) from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession. In *In re Trump Entertainment Resorts, Inc*, 526 BR 116 (Bankr D Del 2015), the court explained that trademark licenses generally cannot be assigned without the licensor's consent, as the trademark owner would have "picked his licensee because of confidence that he will not degrade the quality of the trademarked product" and the trademark owner has a duty to control the quality of goods sold under its mark (at paras 8-9). This reasoning arguably applies in the context of patents as well. ToyCo's consent is therefore required to assign the Xblox license to a third party.

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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?**

Yes, it can. The factory lease is an executory contract, since there remain material unperformed obligations on both sides (namely Land Corp's obligation to provide use of the factory space for the remainder of the lease, and GameMart's obligation to pay rental for the remainder of the lease). Under

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11 USC §365(f), a trustee/debtor in possession may assume and assign an unexpired lease of the debtor, notwithstanding a provision in the expired lease that prohibits such an assignment. The factory lease can thus be assigned to a third party without Land Corp's consent, notwithstanding the provision in the lease agreement.

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* End of Assessment *