



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 9/10

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

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

Which of the following entities does not satisfy the minimum presence requirement to be a debtor under any chapter of the Bankruptcy Code?

- (a) A foreign domiciled company that pays a US attorney a retainer.
- (b) A company with several US bank accounts, but no physical presence in the United States.
- (c) A company with US patents, but no physical presence in the United States.
- (d) **All of the above satisfy the minimum requirement for presence in the United States.**
- (e) None of the above satisfy the minimum requirement for presence in the United States.

Question 1.2

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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

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

Which of the following about cramdowns, is false?

- (a) *The plan of reorganization must be fair and equitable to all impaired classes.*
- (b) *Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.*
- (c) *Class definition is often a battleground when a debtor tries to cramdown classes.*
- (d) *Dissenting creditors are permitted to challenge the classification of a creditor supporting the cramdown.*
- (e) ***If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.***

Question 1.6

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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

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

When does an automatic stay come into effect?

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

Question 1.9

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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 occurs where a creditor with a claim against a debtor and who simultaneously owes money to the debtor nets out these two obligations. Setoff is not permitted in many circumstances because it is essentially an exception to the *pari passu* principle. Setoff can improve the position of the creditor relative to other unsecured creditors who are not owed money by the debtor by decreasing its obligation to the estate by the full amount owed by the debtor rather than the smaller 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?

*The following rules should be reviewed when preparing a filing for a bankruptcy court. First, the **Federal Rules of Bankruptcy Procedure** (the "Bankruptcy Rules"), which specify a number of schedules that must be filed with a voluntary petition, such as lists of assets and creditors. Second, the **Federal Rules of Civil Procedure**, which are frequently incorporated by reference into the Bankruptcy Rules, particularly with respect to the litigation of disputed issues in contested matters or adversary proceedings. Third, the forms for common bankruptcy filings, which are available at <http://www.uscourts.gov/forms/bankruptcy-forms>. Fourth, the **local rules of procedure applicable in each bankruptcy court**, which contain **preferred procedures of the judges** and can modify deadlines for filing and responding to pleadings. It is, of course, also necessary to review the **US Bankruptcy Code** (title 11 of United States Code) and **US state law**.*

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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?

Under the absolute priority rule, no creditor or class of creditors may receive less under a plan of reorganization than it would under a hypothetical chapter 7 liquidation unless they consent. The absolute priority rule requires that payment in full must be made to each category of claims before the next category in order of priority (as laid out in 11 USC § 726(a)(2)-(6)) receives anything.

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Apart from when the creditor consents, the absolute priority rule can also be deviated from when proceedings under Subchapter V of chapter 11 are underway. In such proceedings, the debtor will propose a plan of reorganization, which may cram down on dissenting creditors without an accepting impaired class - an exception to the

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absolute priority rule since the business owner is permitted to retain its equity in the reorganized business without paying all creditors in full.

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?

In the context of a debtor in possession (DIP) financing, a "priming lien" is a court-granted lien that is senior to or with the same priority as existing/pre-petition liens on the same property.

For a priming lien to be granted to secure DIP financing, the debtor must be shown to have been unable to secure sufficient funding by incurring unsecured debt or obtaining unsecured credit having administrative expense priority, such debt being incurred either in or outside the ordinary course of business. The debtor must also be shown to have been unable to secure (a) unsecured debt having priority ahead of all other administrative expenses; (b) secured debt with a lien on unencumbered estate property; and (c) secured debt with a junior lien on encumbered estate property. It is only after financing cannot be obtained on any other terms that the court may grant a priming lien that is senior or equal to a pre-petition lien on estate property to secure post-petition financing. For a priming lien to be granted, the debtor must also demonstrate that the interest of the secured creditor being primed is adequately protected.

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 the debtor's property that was made in a suspect period before the petition date. This transfer 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 occurred.

There is no need to show fault by either the debtor or creditor. The six elements of a preference claim that need to be proved are as follows:

- 1. A transfer of an interest of the debtor in property, which may be of funds, property or an interest in property (i.e., a lien);*
- 2. To or for the benefit of a creditor;*
- 3. For or on account of an antecedent debt owed by the debtor before the transfer was made;*
- 4. Made while the debtor was insolvent;*

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5. Made during the suspect period (90 days prior to the petition date for transfers to third parties and one year prior to the petition date for insiders); and
6. Which enables the creditor to receive more than it would have in a chapter 7 liquidation.

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?

A bankruptcy court may hear and enter a final order in respect of core and non-core proceedings (as set forth in the referral statute) by using a report and recommendation for review by the district court or with the consent of the parties. In the latter scenario, under the Federal Rules of Bankruptcy Procedure, litigants must state in their pleadings that they consent to the entry of final orders by the bankruptcy court.

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Appeals from bankruptcy court orders are generally heard by the district court for the district in which they sit. However, in certain circuits, bankruptcy appeals are heard by a Bankruptcy Appellate Panel ("BAP") convened from the judges of the bankruptcy courts within the circuit. In these 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 exceptional circumstances, an appeal from a bankruptcy court may go directly to the court of appeals if the bankruptcy or district court certifies that (a) the appeal raises a question of law as to which there is no controlling decision of the circuit or the US Supreme Court, or requires resolving conflicting controlling decisions; or (b) immediate appeal may materially advance the progress of the case. The court of appeals then has the discretion whether to hear the case.

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Non-final orders, *ie*, interlocutory orders, may be appealed only with leave of the appellate court. The distinction between interlocutory and final orders can be an elusive one; the US Supreme Court has held that a bankruptcy order resolving a discrete dispute is a final order for appeals purposes. This must be distinguished from the constitutional finality of an order. If the ruling / order below is constitutionally final in that the bankruptcy court had authority to enter it (whether by law or by party consent), the district court or BAP reviews conclusions of law *de novo* and reviews findings of fact for abuse of discretion, recognizing that the bankruptcy court had greater opportunity to weigh the evidence. If the order below was not constitutionally final in that the ruling was in a noncore proceeding or the bankruptcy court did not otherwise have authority to enter a final order, the district court or BAP reviews *de novo* all findings of fact and conclusions of law to which a party has objected.

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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?

The provisions of the Bankruptcy Code that automatically apply to the debtor's property within the territorial jurisdiction of the United States upon the recognition of a foreign main proceeding are laid out in 11 U.S. Code §1520(a) and are as follows:

1. Sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States. Accordingly, an automatic stay arises upon the petition for recognition of a foreign main proceeding being granted and is limited to the property of the debtor within the territorial jurisdiction of the United States.
2. Sections 363 (sale, transfer or use of property outside the ordinary course), along with sections 549 and 552 (avoidance of post-petition transactions and perfection of security interests) apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate.
3. Unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552.
4. Section 552 relating to the post-petition perfection of security interests applies to property of the debtor that is within the territorial jurisdiction of the United States.

Any of the above relief may also be granted on a discretionary basis upon recognition of a foreign non-main proceeding. Additionally, under 11 U.S. Code §1521, the following relief may also be granted on a discretionary basis for either foreign main or non-main proceedings:

1. authorization of discovery regarding the debtor's assets and affairs;
2. entrusting administration of the debtor's US assets to the foreign representative or other person;
3. extension of provisional relief;
4. any other relief "necessary to effectuate the purposes of [chapter 15] and to protect the assets of the debtor or the interests of creditors."

The above relief is not exhaustive. A court may provide additional assistance under the Bankruptcy Code or other US law consistent with the principle of comity and the values underlying the Bankruptcy Code (as laid out in 11 U.S. Code §1507(b)). However, such assistance is subject to the limitations in §1521(a)(7), which excludes from the rights granted to foreign representatives the use of avoidance powers provided by the Bankruptcy Code.

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 owe (a) a fiduciary duty of loyalty to act in the best interests of the Delaware corporation and (b) a duty of care in educated decision-making. The business judgment rule protects directors from liability for errors of judgment. Under the business judgment rule, 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 a majority of the board were in fact not reasonably informed, did not honestly believe that their decision was in the corporation's best interests, or were not acting in good faith.

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Directors owe these duties to the corporation and its shareholders, and not to creditors, even when the corporation is potentially insolvent such that the shareholders would likely receive nothing in bankruptcy. The Delaware Supreme Court has rejected the suggestion that directors owe duties to creditors when a company is actually insolvent or operating "in the zone of insolvency". Therefore, there is no US law equivalent of the "wrongful trading" or "deepening insolvency" concepts.

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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.

Creditors may commence an involuntary proceeding against an eligible debtor under either chapter 7 or chapter 11. Involuntary proceedings cannot be commenced under the other chapters or against a farmer, family farmer or not-for-profit corporation. The number of petitioning creditors required depends on how many non-contingent, non-insider creditors the debtor has: if the debtor has fewer than 12 such creditors, only one petitioning creditor is required to file an involuntary petition; if the debtor has 12 or more such creditors, at least three qualifying creditors must join in the petition.

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

1. **Non-contingent**, ie, not dependent on the occurrence of a future event. An unmatured debt is not contingent if all requirements for liability (other than the passage of time) have occurred.
2. **Not the subject of bona fide dispute as to liability or amount**. In other words, there is no objectively reasonable basis for a dispute as a matter of fact or law, and a debtor's subjective belief that the debt is not owed or the amount claimed is incorrect is insufficient. A dispute as to one claim does not disqualify the application of other undisputed claims held by the same creditor to meet petitioning creditor requirements.

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3. **Unsecured or undersecured**, separately or in the aggregate with all other petitioning creditors' claims, in the amount of at least **USD 16,750**, which amount is periodically increased because of inflation.

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The petitioning creditor must allege either:

1. that the debtor is generally not paying its debts as they become due unless they are the subject of a *bona fide* dispute as to liability or amount, or
2. that within 120 days before the filing of the petition, a custodian, other than a trustee, receiver or an agent appointed or authorized 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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A foreign representative of an estate in a foreign proceeding may commence an involuntary chapter 7 or chapter 11 petition against the debtor even if the foreign proceeding has not been the subject of a petition for recognition under chapter 15.

If the filing of the involuntary proceeding is intended at divesting management of control over the business, the petition should be accompanied by a motion for the appointment of an interim trustee on an expedited basis.

Following the filing, the involuntary debtor may seek dismissal of the bankruptcy proceedings by showing that the claims held by the petitioning creditors do not meet the above requirements. Even if the requirements are not met, the court can refuse to dismiss the proceedings if the debtor is not generally paying undisputed debts as they become due or has, within the preceding 120 days, had a trustee, agent or receiver be appointed or take possession of substantially all of the debtor's property. If the proceeding is not dismissed, the debtor must then file the required schedules disclosing its assets, including all property, executory contracts, unexpired leases of real and personal property and liabilities, including identifying its secured and 20 largest unsecured claims.

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?

Upon the filing of a Chapter 11 petition, an estate is created consisting of all of Speculation Inc's property interests as of the petition date. An automatic stay also becomes effective on the filing of the Chapter 11 petition. The scope of the automatic stay is very broad and applies to any interference with the property of Speculation Inc's estate anywhere in the world. In particular, the automatic stay will affect the delinquent lease and employment discrimination lawsuit in the following ways:

1. Speculation Inc's landlord will not be able to exercise its right to evict Speculation Inc as a result of the delinquent lease. The landlord will also not be able to attempt any collection of the rental arrears because the Bankruptcy Code prohibits any attempt to collect on pre-petition claims, including through demand letters or calls.
2. The employment discrimination lawsuit will be stayed pending the Chapter 11 proceedings. This is because the Bankruptcy Code prohibits litigation on pre-petition claims.

The DOJ investigation will not be affected by the stay because criminal proceedings and regulatory investigations are excluded from the scope of the stay under 11 USC § 362(b)(1). The exercise of rights under a commodity, forward or security contract is also excluded from the scope of the stay under 11 USC § 362(b)(6). Accordingly, assuming there is a security contract between Speculation Inc and its broker with regard to the margin loan default, Speculation Inc's broker will be able to enforce its right to loan repayments under the security contract by selling the shares held as collateral.

Question 4.2 [5 marks]

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?

Yes, the English scheme of arrangement could be recognised by a US bankruptcy court under Chapter 15. This is owing to the minimal requirements of recognition: the foreign representative must establish that a foreign court or administrative proceeding with respect to the debtor is pending and the foreign representative is empowered to act by the proceeding. A foreign proceeding need not resemble a US bankruptcy to be recognised. A "foreign proceeding" is defined in the Bankruptcy Code as "a collective

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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 reorganization or liquidation". Under this definition, English schemes of arrangement have been granted recognition.

The English scheme of arrangement would be recognized as a foreign non-main proceeding because England is not Stella's centre of main interests (COMI). There is a rebuttable presumption in 11 USC § 1516(c) that a debtor's COMI is its place of incorporation. To determine the COMI, the following factors are relevant: (a) location of headquarters, (b) location of management, (c) location of primary assets, (d) location of a majority of debtor's creditors or a majority of the creditors that will be affected by the relief requested by the foreign representative, and (e) jurisdiction whose law will apply to most disputes. Stella's place of incorporation is France, therefore the COMI is presumed to be France. This presumption is not rebutted on the facts. It is true that English law applies to disputes regarding Stella's funding, namely the bank loan and the Eurobonds. However, Stella's headquarters is in France - another factor in favour of finding that France is Stella's COMI. Moreover, Stella has operations throughout Europe, Asia and North America, with its manufacturing operations taking place in Italy. From this, it can be inferred that Stella's primary assets, such as its manufacturing equipment, are located in Italy. Based on the totality of the facts, the presumption that Stella's COMI is France is not rebutted. The fact that Stella's products are sold in England, however, shows that Stella has an establishment - a place where Stella carries out non-transitory economic activity - in England under 11 USC § 1502(2). Accordingly, the English scheme of arrangement would be recognized by a US bankruptcy court as a foreign non-main proceeding.

Commented [H(71)]: Correct, 1 mark, foreign main recognition would not be available as England is not Stella's COMI.

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

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 to manufacture Xblox is an executory contract. This is because, assuming that there are still years left on the 10-year exclusive license, there would be material unperformed obligations on both sides. These obligations are (a) ToyCo's obligation to grant GameMart exclusivity to manufacture Xblox; and (b) GameMart's obligation to pay ToyCo monthly royalties.

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

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

No, GameMart cannot transfer the Xbox license as part of 363 sale without ToyCo's consent. This is due to 11 USC § 365(c), which provides that counterparty consent is required where substantive non-bankruptcy law, such as intellectual property licensing law, provides that the counterparty cannot be compelled to accept performance from a transferee. Thus, a licensee of a third-party's intellectual property, in this case Gamemart, cannot assign the Xbox license without the licensor's consent, ie, ToyCo's consent.

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

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

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

No, GameMart cannot transfer the factory lease as part of 363 sale without Land Corp's consent. This is because the lease with Land Corp prohibits assignment without Land Corp's consent.

Commented [H(79)]: Incorrect, the contractual provision would be ineffective in bankruptcy.

* End of Assessment *