



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.**
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- 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 10/10

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

Question 1.1

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

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

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

Question 1.2

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

ABC Corp is an industrial manufacturing company that is filing for bankruptcy. Which of the following could not be considered a party in interest?

- (a) A neighboring landowner to ABC Corp's manufacturing plant.
- (b) An environmental advocacy group that opposes ABC Corp's operations.**
- (c) The landlord of ABC Corp's corporate office.
- (d) People who live several miles downstream from ABC Corp's manufacturing plant and have been exposed to the plant's toxic waste.
- (e) The US Internal Revenue Service.

Question 1.3

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

Which of the following contracts to which ABC Corp is a party is executory and may be assigned without counterparty consent?

- (a) A lease on a manufacturing plant that contains a provision that requires landlord approval of any assignment.**
- (b) An employment contract between ABC Corp and a former employee, requiring the company to provide health insurance through the end of the current year.
- (c) A 10-year software licensing agreement with XYZ Corp that is three years into performance.
- (d) A lease on office space that ended the prior year, but for which ABC Corp still owes past rent.
- (e) None of the above are executory and may be assigned without counterparty consent.

Question 1.4

Commented [H(6)]: Correct, 1 mark

Which of the following conditions must be true about a reorganization plan for a court to confirm it under Chapter 11 proceedings?

- (a) Have a possibility of success, even if it relies on speculative or improbable events to be capable of execution.
- (b) The plan is not likely to be followed by liquidation.**
- (c) All impaired classes must accept the plan.

(d) *All of the above.*

(e) *None of the above.*

Question 1.5

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

Which of the following about cramdowns, is false?

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

Question 1.6

Commented [H(8)]: Correct, 1 mark

Which of the following about 363 sales is false?

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

Question 1.7

Commented [H(9)]: Correct, 1 mark

Which of the following is true of both an actual fraudulent conveyance and a constructive fraudulent conveyance?

- (a) *The debtor must have had an actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted.*

- (b) Both require at least circumstantial evidence of the fraudulent intent.**
- (c) The debtor must have been insolvent at the time of transaction.**
- (d) In addition to provisions in the Bankruptcy Code, the debtor or the trustee may invoke applicable state or foreign fraudulent conveyance laws.**
- (e) All of the above are true.**

Question 1.8

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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

Which of the following are relevant factors in determining a debtor's center of main interests (COMI) in the recognition stage of a Chapter 15 bankruptcy case?

- (a) The location of the headquarters.
- (b) The location of primary assets.
- (c) The location of the majority of the affected creditors in the request for relief.
- (d) The jurisdiction whose law will apply to most disputes.
- (e) All of the above.

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QUESTION 2 (direct questions) [10 marks]

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Question 2.1 (1 mark)

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

In regard to bankruptcy, a setoff can be defined as the right of a creditor to reduce or deduct a debt owed to the debtor from a claim it has against the debtor's estate to offset two (or more) separate transactions.

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Setoff is not permitted in many circumstances, e.g., when the creditor's claim against the estate was acquired post-petition or in the 90 days prior to the petition at the time of the debtor's insolvency. This is due to the fact that the rights which it can provide certain creditors disrupts the equal and fair distribution among of creditors established by the pari passu principle. Furthermore, setoff decreases the full amount owed from the estate by the debtor granted that the setoff amount surpasses the debtor's claim against the creditor.

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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?

There are several resources available that set forth the rules one should review when preparing a filing for a bankruptcy court. The information obtained from these resources should be used in tandem for the best outcome. The first to review should be The Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), followed by The Federal Rules of Civil Procedure which is often referenced in the Bankruptcy Rules.

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

Furthermore, bankruptcy courts in the US are separated by circuits which are then divided into districts, each with their own local rules and procedures. The rules and procedures can be found online along with the personal practices provided by each judge. Differing from the aforementioned local rules, the bankruptcy courts in Delaware, the Southern District of New York and the Southern District of Florida adopted The Judicial Insolvency Network's Modalities on Court-to-Court Communication to alter their local rules which is an additional resource to review.

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Question 2.3 [2 marks]

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

The absolute priority rule requires that creditors are to be paid in full in each category of claims as according to the priority of payment prior to next category being paid. It ensures that a plan will not be used to allow a creditor or class of creditors to be unfairly prioritized. Compliance with the absolute priority rule is specified in the Bankruptcy Code to be included in a chapter 7 or chapter 11 plan, however, there are certain circumstances where one can deviate from this.

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A chapter 7 proceeding does not permit any deviation from the absolute priority rule as accordance with statutory priorities is essential to its distribution of the liquidated assets of the estate. On the other hand, in chapter 11 bankruptcy proceedings, a creditor ranked higher in the claim's waterfall can consent to receive a lessened distribution than the absolute priority rule dictates if it's deemed necessary to gain approval of the plan of reorganization.

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

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 debtor in possession ("DIP") financing tool that distributes a credit to aid in the post-petition costs of bankruptcy proceedings in an effort to maximize the success of the plan. It acts as a last resort for post-petition financing of a chapter 11 proceeding where the court grants approval for the priming lien to be treated as superior or equal to a pre-petition lien on estate property.

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In order to secure a priming lien DIP financing, the debtor must exhaust a number of different avenues in an attempt to gain the creditor-incurred debt; these options can be achieved both in and out of court. During the ordinary course of business, without the need of court approval, the debtor can acquire unsecured debt or unsecured credit which is then categorized as an administrative priority expense. Whereas outside of the ordinary course of business, the debtor can acquire unsecured debt or unsecured credit which is categorized as an

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administrative priority expense only after notice and a hearing for official court approval.

If the debtor can display that it has been unable to secure financing with the aforementioned options, the court can be asked to give approval for the following:

- "Unsecured debt to be granted priority before all other administrative expenses;
- secured debt with a lien on unencumbered estate property; and
- secured debt with a junior lien on encumbered estate property."

Lastly, a primary lien is secured through affirmation from the debtor that the secured creditor providing its protected.

Commented [H(29): Incorrect, the adequate protection is for the creditor who had the pre-petition lien that is being primed by the new lien

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 transaction in which a transfer of the debtor's estate has been made in a period of time pre-petition where certain transactions may be subject to avoidance as a result of the commencement of bankruptcy proceedings. The recipient creditor of a transaction that has been voided not holds an unsecured claim against the estate. The Bankruptcy Code takes direction from relevant non-bankruptcy laws to decide the inception of the debt and transfer.

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A preference claim is a made up of the following elements: a transfer of an interest of the debtor's estate made to or for the benefit of the creditor and for or on account of a pre-petition debt owed by the debtor. If the transfer is pertaining to property, it must be one that the debtor holds interest in and if this is not the case it is not a preference e.g., exclusion would be property held for another. Additionally, If the recipient was not a creditor, the transfer is not a preference, yet it can be recoverable as a fraudulent conveyance.

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

Moreover, fault on behalf of either the debtor or creditor of the transfer is not necessary to be proven and thereafter creditor faces no repercussion other than the need to return the payment. This creditor now holds an unsecured claim in the proceedings as a result.

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

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Question 3.1 [3 marks]

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Describe the circumstances in which a bankruptcy court may enter a final order, who reviews appeals from bankruptcy court orders and how are non-final orders reviewed?

*In order to delve deeper into the nuances of bankruptcy proceedings and judgements, one must demonstrate a clear contrast between core and non-core matters and proceedings which is needed to determine which court can provide a final order or judgement. A **core proceeding** includes matters pertaining to the administration of the estate, orders related to realizing assets, proceedings to determine, avoid, or realize fraudulent conveyance and preference, objection to discharges, motions related to the automatic stay and so forth. While an example of a non-core matter would be a creditor's claim against an affiliate of the debtor which holds a guarantee of the debtors' obligation to the creditor.*

Commented [H(38): A bankruptcy court can enter a final order on certain core proceedings established by the Bankruptcy Code, such as a challenge to a petition, or with consent of the parties.

*Amendments made to the Bankruptcy Code led to the creation of the referral statute, under title 11 of the United States Code ("U.S. Code"), that allows the bankruptcy court to hear core proceedings and enter a final order. On the other hand, a non-core proceeding can be heard by the bankruptcy court if it is related to a bankruptcy proceeding, however, a final order or judgment cannot be made in this circumstance. **The bankruptcy judge would be permitted to submit the proposed findings to the district court, for a district judge to then determine a final decision.***

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*Appeals from bankruptcy court findings are typically heard by the district court yet in certain circumstances, **bankruptcy appeals are heard by a Bankruptcy Appellate Panel ("BAP").** According to title 28 U.S. Code section 158, BAP is a joint group of district bankruptcy judges within the circuits elected to approve or oppose appeals from final judgements. In addition, an interlocutory order, which do not resolve all issues with a final determination, can only be appealed with leave of the Bankruptcy Appellate Panel.*

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

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?

*As stated in title 11 U.S. Code section 1520, upon recognition of a foreign main proceeding, there are various provisions of the Bankruptcy Code's chapter 15 that automatically apply to the bankruptcy estate within the territorial jurisdiction of the United States. The **automatic stay** in proceedings is a provision that halts all acts that can be carried out against the debtor or the debtor's estate with regard to a bankruptcy proceeding. A key provision is the suspension of the sale, transfer or use of the debtor's property outside of the ordinary course of business, meaning current operations that are consistent*

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with that pre-petition and prior to recognition. Avoidance of post-petition transfers and perfection of security interests in another provision that protects the debtor's estate and creditor's interests. Lastly, foreign representatives automatically assume operation of the debtor's business and gain the right to intervene in any US proceedings that involve the relevant debtor.

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

At the discretion of the court of the foreign main and non-main proceedings, the following types of appropriate relief can be granted at the request of the foreign representative:

- Entrust distribution of the debtor's US assets to foreign representatives or another person with the caveat that interest of the creditors is guarded.
- Extension of provisional relief where needed to protect debtor's assets and interest of the creditors.
- Any other relief to vital to the protection of the assets of the debtor or the interests of creditors.

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

Commented [H(48)]: 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?

The District of Delaware has become a favoured place of incorporation and consequently a venue of choice for large group corporate bankruptcies; it has a more streamlined approach to corporate law when compared to other districts. A director has a fiduciary duty to act *bone fide*, a duty of care in educated decision-making, and a duty to act in the best interest of the company. According to the Delaware Supreme Court, the aforementioned duties are concerning the company and its shareholders rather than the creditors when a company is potentially or actually insolvent. The individual creditors of the insolvent company, therefore, do not have rights to claim breach of duty against the directors.

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

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

Furthermore, the US director liability, which is a matter of state law derived from the state of incorporation, is not as extensive in Delaware as that in other states and for that reason it favours directors. In Delaware, director liability protects directors from errors of judgement as laid out in the business judgement rule. The business judgement rule presumes that the directors of a company have acted *bone fide* with a rationale behind decisions. However, this presumption can be challenged through evidence provided showing that the majority of board of directors were not reasonably informed, that they did not act in the best interest of the company or that they did not act *bone fide*.

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If the business judgement rule can no longer be applied e.g., when a transaction has been approved by the majority of the board and is not independent, the entire fairness standard is applied to determine the fairness of the transaction within the context that the company is insolvent.

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.

A petitioning creditor can be simply defined as a creditor that has successfully filed an involuntary petition. In order to qualify as such, a creditor's claim against the debtor or the debtor's estate is subject to review as it must fulfil specific requirements. The requirements are distinguished by three conditions:

Non-contingent

- *A contingent claim is one that's realization is dependent on an event that has not occurred and may never occur. E.g.,*
- *The claim of the proposed petitioning creditor must be a non-contingent claim that readily available to be liquidated. E.g., a mortgage*

Bone fide dispute

- *The claim of the proposed petitioning creditor must be subject to bone fide dispute. If the debtor has reason to believe that it has been acting in good faith and can contest to the existence or amount of the claim, it cannot be used*
- *If only a portion of the claim is disputed, the creditor can only use that amount to fulfil the monetary constraints required to qualify as a petitioning creditor.*
- *If not subject to a bone fide dispute, the petitioning creditors must declare that the debtor cannot pay its debts as they fall due.*

Claim amount

- *Whether an unsecured claim or secured claim, the petitioning creditors can chose to submit the amount separately or in conjunction but in any case it must meet the required monetary constraint.*
- *The petitioning creditor(s) claim(s) when combined must total to at least USD \$16,750.*

Lastly, there is a threshold that must be met by the petitioning creditors to successfully submit a petition to put a company into an involuntary proceeding either under

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Commented [H(57): Correct, 1 mark

Commented [H(58): Incorrect, the test is whether there is an objective basis in fact or law for the dispute.

Commented [H(59): Incorrect, the claim must be unsecured or undersecured

Commented [H(60): Correct, 1/2 mark, also the creditor must allege the debtor is not paying its debts generally or has had a custodian appointed over its assets.

chapter 7 or chapter 11. If the debtor in question has less than 12 qualifying creditors then only one is required to file an involuntary petition, whereas, if there are more than 12 qualifying creditors, three or more petitioning creditors are required.

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?

Chapter 11 is often referred as a "reorganization" or a "reorganization" bankruptcy due to the fact that a bankruptcy plan in the form of a plan or reorganization is proposed and must be approved by the creditor and ratified by the court in order for this type of bankruptcy proceeding to go ahead.

A Chapter 11 proceeding is preferred in this case as the continued operation more or less in the ordinary course of business would enable the realization of the maximum value of assets of the Speculation Inc's estate. Although the US Bankruptcy Code tends to be debtor-friendly, the chapter 11 proceeding provides creditors the ability to negotiate terms of the plan of reorganization prior to the filing of the petition. In an effort to provide creditors assistance in determining how to vote on the proposed plan a disclosure statement, which is subject to court approval, must be provided to the creditors. Accordingly, the creditors that hold claims in relation to the margin loan default and delinquent lease can assess their standing and make an informed opinion of how their debt owed from the Speculation Inc's estate will be treated in the proceedings.

On the other hand, upon filing of the chapter 11 petition, a worldwide automatic stay of proceedings (moratorium) is put in place. The stay protects the assets of the bankruptcy estate by prohibiting any litigation to be carried out on pre-petition claims, securing control of property of the estate, the termination of a contract with the debtor, and suspends judicial, administrative or individual actions against the debtor's assets. It also provides time for the debtor to focus

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simultaneously on the continued operation of the business and the negotiation of the plan or reorganization.

The moratorium prevents the landlord on the delinquent lease and the lawsuit filed by the former employee from being pursued during the chapter 11 proceedings. However, the automatic stay is subject to certain exceptions including regulatory investigation. Therefore, the DOJ's investigation to determine if Speculation Inc was illegally trading on insider information is permitted to continue regardless of the stay. Additionally, costs associated with a chapter 11 proceeding are significant but there are options for lenders to extend credit to the debtor which available in the form of debtor in possession ("DIP") financing.

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?

The US adopted the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") which is compatible with Title 11 of the U.S. Code, Chapter 15. Chapter 15 incorporates the Model Law into the US court system to help provide a more efficient structure to protect the interests of creditors, and an overall more cooperative approach between courts and to the process of foreign representatives attempting to seek recognition in the US.

If an English scheme of arrangement is chosen to implement with respect to the Eurobonds, it is possible to submit a successful application of recognition, as a foreign proceeding does not need to perfectly parallel a US bankruptcy case to be recognized.

Question 4.3 [5 marks]

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:

Commented [H(64)]: Correct, 1/2 mark, specifically it cannot seek eviction or past-due rent

Commented [H(65)]: Correct, 1 mark

Commented [H(66)]: Correct, 1 mark, also the margin loan is a securities contract that is exempt from the automatic stay so the broker can liquidate the collateral.

Commented [H(67)]: Total marks 0/5

Commented [H(68)]: I was looking for you to analyze Stella's COMI, which is presumed to be in France due to incorporation there, and the factors here would be unlikely to overcome it. Recognition as foreign non-main is available because the retail store in England provides the necessary establishment.

Commented [H(69)]: Total marks 4/5

(i) **Is the license to manufacture Xbox an executory contract?**

An executory contract can be defined as a contract between the debtor and another party that has not been executed by either party. A contract can be considered executory if there are material unperformed obligations on both sides, therefore in the case above the license to manufacture Xbox, as at the petition date of Chapter 11 proceedings, is an executory contract. The licensing fee would have been paid upfront to in relation to the 10-year period, therefore there would be an ongoing obligation.

Commented [H(70)]: Correct, 1 mark, though generally royalties are paid on an ongoing basis, often as a percentage of revenue or per unit sold

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

GameMart cannot transfer the Xbox license as part of a 363 sale without Toyco's consent because under a Chapter 11 proceeding where the court has approved a 363 sale, a license of a patent owned by the debtor cannot be terminated within the sale without their consent.

Commented [H(71)]: Correct, 1 mark, however 363(n) is inapplicable because the patent owner is not the debtor. Instead, this is the case of non-bankruptcy substantive law requiring consent.

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

A debtor in possession ("DIP"), within the scope set out by the chapter 11, is free to use, sell or lease estate property in the ordinary course of business without court approval. According to title 11 of the U.S. Code, section 365, a DIP can assign an executory contract regardless of provisions that restrict this assignment. As the lease of the factory is an executory contract and is assignable without consent, GameMart can transfer the factory lease as part of a 363 sale without Land Corp's consent.

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

* End of Assessment *