



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

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

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

**Commented [la5]:** Incorrect, the correct response is (a) because the software license would include a copyright that cannot be assigned without consent

Question 1.4

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

- (a) *Have a possibility of success, even if it relies on speculative or improbable events to be capable of execution.*
- (b) *The plan is not likely to be followed by liquidation.*
- (c) *All impaired classes must accept the plan.*
- (d) *All of the above.*
- (e) *None of the above.*

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Question 1.5

*Which of the following about cramdowns, is false?*

**Commented [la7]:** Incorrect, the correct response is (e)

- (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?**

A situation of setoff arises when the debtor owes monies to the creditor, and also in turn the creditor owes monies to the debtor. So, when in such circumstances, the times comes for the creditor to file its claim in the bankruptcy proceedings of the debtor, the creditor reduces its claim amount to the extent it owes the debtor monies. The same is not permitted as its deemed unfair to the other unsecured creditors. This is because it in a way guarantees almost full payment of a part of such creditors claim and reduces its commitment to the bankruptcy estate, whilst the other unsecured creditors may be then entitled to a much lower amount form the estate vis a vis their claims.

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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 are required to be review whilst preparing for a bankruptcy court filing:

1. The Federal Rules of Bankruptcy Procedure, which are and have been influenced by the Federal Rules of Civil Procedure, which in turn govern the most basic and fundamental procedural rules of common civil proceedings and litigation;
2. Bankruptcy Forms, which incorporate the different formats of the various filings envisaged under the law;
3. Rules of procedures of each bankruptcy court, as they all have their own;
4. Personal Practices of Judges, of the bankruptcy court, which are periodically updated on the website of each respective court.

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Commented [la19]: Correct, 1/2 mark

Commented [la20]: Correct, 1/2 mark, generally called the Local Rules

Commented [la21]: Correct, 1/2 mark

**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 essentially requires that that claims in a single class must be paid in full before moving on to the next category as per the waterfall and that in a chapter 11 reorganization, no class/creditor should be paid less than what they would be entitled to in a hypothetical chapter 7 liquidation. Deviation from the absolute priority rule is only permitted under chapter 11 reorganization with the consent of the affected creditors/class, while no such deviation is permitted under chapter 7.

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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?**

The court in chapter 11 proceedings may grant approval for a priming lien, which shall grant a primed creditor a higher priority or an equal priority with other secured creditors from the estate property. The debtor when resorting to such modes of debtor-in-possession financing, have to demonstrate that the claims or the monies of such a primed lender are sufficiently protected and secured by the estate property. Priming lien is the last resort post-admission financing which the court resorts to as it requires encumbering the estate property. Such priming lien then has priority on the estate over the other secured lenders even under a chapter 7 liquidation.

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 the transfer of an interest of the debtor in the property to a creditor for a debt owed (or a related party as the case may be) in the suspect period, which exceeds the value the said creditor would have received in the event the creditor would have stood in the waterfall under a chapter 7 liquidation, which ought to be avoided by the trustee<sup>1</sup>. The elements of the same are:

1. That the property or the interest in the property ought to be for the benefit of a creditor<sup>2</sup>;
2. The same should be on account of an antecedent or a pre-petition debt owed by the debtor before such a transfer was made<sup>3</sup>;
3. Which transfer was made when the debtor was insolvent<sup>4</sup>, which is almost in all cases proved vide the balance sheet test;
4. Which transfer ought to have been made to a third party (financial creditors) within 90 days from the date of the petition, and to the insiders and related parties within one year from the date of the petition, which period is known as the ‘suspect period’<sup>5</sup>;
5. That enables such a creditor or a related party/insider to receive more than what they would have received under a chapter 7 liquidation, or if such a transfer would not have been made<sup>6</sup>.

The element of *mens rea*, or showing of fault, is not required in proving preferential transaction, as the same operated as a deeming fiction.

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

<sup>1</sup> USC Title 11, Section 547(b)

<sup>2</sup> *Idem*, Section 547(b)(1)

<sup>3</sup> *Idem*, Section 547(b)(2)

<sup>4</sup> *Idem*, Section 547(b)(3)

<sup>5</sup> *Idem*, Section 547(b)(4)

<sup>6</sup> *Idem*, Section 547(b)(5)

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**Question 3.1** [3 marks]

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

The bankruptcy court may render a final order if the same pertains to a core matter related to bankruptcy which does not invade the jurisdiction of Article III<sup>7</sup>. Core matters may include matter pertaining to the administration of the estate, of preferences, of treatment of claims, of obtaining credit, for setting aside of stays and injunctions, for determination of priority of claims, etc. Appeals from all final judgments, orders and decrees of a bankruptcy court, as well as discretionary interlocutory appeals, are heard in the district court, 28 U.S.C. § 158(a) or in a bankruptcy appellate panel, 28 U.S.C. § 158(b), unless otherwise provided by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")<sup>8</sup>. In the Ninth Circuit, appeals from the bankruptcy courts may also go to a Bankruptcy Appellate Panel ("BAP"), consisting of three bankruptcy judges from another district within the circuit<sup>9</sup>. Interlocutory orders can only be appealed with the leave/permission of the appellate court. Hence district courts can hear an appeal from any interlocutory order, as long as they are willing<sup>10</sup>.

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Commented [la38]: Partially correct, 1/4 mark, specifically this leaves matters specific to the Bankruptcy Code such as a challenge to a petition. Also a bankruptcy court may enter a final order on any core processing with the consent of the parties. A district court reviews a constitutionally non-final order as a report and recommendation.

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**Question 3.2** [3 marks]

**What provisions of the Bankruptcy Code automatically apply to the debtor's property within the territorial jurisdiction of the United States upon recognition of a foreign main proceeding? What relief may be granted on a discretionary basis for either foreign main or non-main proceedings?**

The following provisions of the Bankruptcy Code automatically apply upon the recognition of a foreign main proceedings:

1. Section 362- 'Automatic Stay' is applicable in its entirety but mainly the stay qua the property of the debtor is on the commencement or the continuation of, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor<sup>11</sup>, the enforcement, against the debtor or against property of the estate<sup>12</sup>, any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate<sup>13</sup>, any act to create, perfect, or enforce any lien against

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<sup>7</sup> Stern v Marshal 564 US 462(2011)

<sup>8</sup> The United States Department of Justice- "The Who, What, When, Where, When and How of Appeals in Bankruptcy Proceedings-Generally", <<https://www.justice.gov/jm/civil-resource-manual-96-who-what-when-where-why-and-how-appeals-bankruptcy-proceedings>>>, accessed on July 23, 2023.

<sup>9</sup> 28 U.S.C. § 158(c)(1)

<sup>10</sup> Idem, Section 158(a)(3), (c)

<sup>11</sup> Idem, Section 362(a), (1)

<sup>12</sup> Idem, Section 362(a), (2)

<sup>13</sup> Idem, Section 362(a), (3)

*property of the estate<sup>14</sup>, any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of Chapter 15 proceedings<sup>15</sup>, any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case<sup>16</sup>, setoff of any claim<sup>17</sup>, commencement or continuation of any tax proceedings<sup>18</sup>.*

2. Section 361- *"Adequate Protection", are the acts which are needed to be provide certain additional comfort or the protection to the events envisaged in Section 362 (Automatic Stay), Section 363 (Use, sale, or lease of property) & Section 364 (Obtaining credit). Under this section, qua the property of the debtor located in the US jurisdiction, the trustee can be asked to make payments to any entity, making good their loss qua their interest in any such property which has been hit by the aforementioned sections<sup>19</sup>, providing additional or replacement lien to such an entity<sup>20</sup>, or granting of such other relief or compensation<sup>21</sup>*
3. Sections 363 (*Use, sale, or lease of property*), 549 (*avoidance of post-petition transactions*), and 552 (*avoidance of post-petition effect of security interest*) *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<sup>22</sup>;*

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*Further, upon recognition of a foreign proceeding under Chapter 15b, whether main or non-main proceedings, at the request of the foreign representative, to protect the asserts of the debtor, the court may at its discretion, also (in addition to the reliefs listed above), grant the following:*

1. *Stay any commencement or continuation of any individual rights to the extent they have not been stayed under Section 1520<sup>23</sup>;*
2. *Stay execution of the debtors' assets to the extent they have not been stayed under Section 1520<sup>24</sup>;*
3. *Suspend any right to transfer, alienate or dispose of any asset to the extend not stayed by Section 1520<sup>25</sup>;*
4. *Provide for examination of witness, taking of evidence, delivery of information regarding the debtor's assets, liabilities, obligations etc.<sup>26</sup>;*

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<sup>14</sup> Idem, Section 362(a), (4)

<sup>15</sup> Idem, Section 362(a), (5)

<sup>16</sup> Idem, Section 362(a), (6)

<sup>17</sup> Idem, Section 362(a), (7)

<sup>18</sup> Idem, Section 362(a), (8)

<sup>19</sup> Idem, Section 361(1)

<sup>20</sup> Idem, Section 361(2)

<sup>21</sup> Idem, Section 361(2)

<sup>22</sup> Idem, Section 1520 (a), (2)

<sup>23</sup> Idem, Section 1521 (a), (1)

<sup>24</sup> Idem, Section 1521 (a), (2)

<sup>25</sup> Idem, Section 1521 (a), (3)

<sup>26</sup> Idem, Section 1521 (a), (4)

5. Entrusting the responsibility of the management/realization of the debtors' assets within the US to the foreign representative or a receiver etc.<sup>27</sup>;
6. Entrust distribution of the all or ant part of the assets of the debtor located in the US to the foreign representative<sup>28</sup>;
7. Grant or extend any relief under sections 1519(a), 522, 544, 545, 547, 548, 550, and 724(a)<sup>29</sup>

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### Question 3.3 [4 marks]

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**What duties do directors owe to a Delaware corporation in the ordinary course of business? To whom are these duties owed when the corporation is potentially or actually insolvent? What rule protects directors from liability for errors of judgment?**

Directors of a Delaware Corporation, in the ordinary course of business, owe duties of care and loyalty. Duty of care requires informed and deliberate decision making in the light of reasonably available facts. Hence directors are not required to review all information in making their decisions—only the information that is material to the decision before them. Nevertheless, in evaluating information provided to them by management, directors are expected to review the information critically and not accept it blindly<sup>30</sup>. While the Duty of Royalty entails acting in good faith, whilst being disinterested and independent with a reasonable belief that the actions and decision taken are in the best interest of the shareholders of the corporation. Broadly stated, the duty of loyalty requires directors to act in good faith to advance the best interests of the corporation and, similarly, to refrain from conduct that injures the corporation<sup>31</sup>.

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The duties of care and loyalty are owed to the corporation and its shareholders even when the corporation is insolvent or insolvency is imminent. Hence unlike many other jurisdictions, these duties are not owed to the creditors of the corporation even when insolvency is imminent or a very real possibility. The same has also been confirmed by the US Supreme Court in the matter of *North Am Catholic Educational Programming Foundation, Inc v Gheewala*<sup>32</sup>.

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The courts that are evaluating the board decisions in Delaware will first and foremost apply the Business Judgement Rule ("BJR"). BJR is essentially a broad spectrum of presumptions that the directors are allowed to function within the contours of whilst making business decisions and so long there is no conflict of interest, their decisions will not be second-guessed unless found to be not rational. The burden of proof of

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<sup>27</sup> Idem, Section 1521 (a), (5)

<sup>28</sup> Idem, Section 1521 (b)

<sup>29</sup> Idem, Section 1521 (a), (6) & (7)

<sup>30</sup> The Delaware Way: Deference to the Business Judgement of Directors who act Carefully and Loyally, << <https://corplaw.delaware.gov/delaware-way-business-judgment/>>>, accessed on July 26.07.2023

<sup>31</sup> *Ibid*

<sup>32</sup> 930 A.2d 92, 103 (Del 2007)

someone claiming otherwise is on the plaintiff itself to prove that the acts were grossly negligent and that the directors were motivated by bad faith<sup>33</sup>.

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.

Firstly, in accordance with Section 303(b)(1) of the Bankruptcy Code, the requisite number of petitioning creditors holding non-contingent debt, undisputed, unsecured claims must hold an aggregate debt of \$16,750. A qualifying debt from the perspective of a petitioning creditor is the one which is:

1. Non-contingent- The debt should be distinct, clear and non-contingent. A claim is contingent if the same is set to become due in the future on the happening of a certain event/s. For example, a contract of suretyship is contingent qua the surety, to the extent that the default of the principal debtor is the trigger event.
2. Not disputed- the debt should not be disputed. Though the Bankruptcy Code does not define the term 'disputed', courts generally have a more objective outlook to such matters. For instance, in one matter, a bankruptcy court found a bona fide dispute existed as to the enforceability of the contract the debt was based upon, and therefore the creditor was not eligible to be a petitioning creditor in the involuntary bankruptcy proceeding<sup>34</sup>.
3. Any Person- Person is defined to mean both individuals and corporates<sup>35</sup>. Hence any person who can be a voluntary petitioner can be an involuntary petitioner.
4. Number of creditors- If the putative debtor has twelve or more creditors, at least three qualifying creditors must join as petitioning creditors to collectively file the involuntary petition. However, the Bankruptcy Code requires only one petitioning qualifying creditor in instances where the putative debtor has less than twelve creditors<sup>36</sup>.
5. Grounds of Relief- In accordance with Section 303(h) of the Bankruptcy Code, the involuntary petition, should demonstrate that the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount or that within 120 days before the filing of the involuntary 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. Proving of either of

<sup>33</sup> Directors Fiduciary Duties: Back to Delaware Law Basics, <<https://www.skadden.com/-/media/files/publications/2020/02/directorsfiduciarydutiesbacktodelawrelawbasics.pdf>>, accessed on 26.07.2023

<sup>34</sup> *Re Biogenetic Techs., Inc.*, 248 B.R. 852, 856–57 (Bankr. M.D. Fla. 1999)

<sup>35</sup> 11 U.S.C. § 101(41).

<sup>36</sup> United States: Requirements And Risks In Petitioning For An Involuntary Bankruptcy Case, <<https://www.mondaq.com/unitedstates/insolvencybankruptcy/1346022/requirements-and-risks-in-petitioning-for-an-involuntary-bankruptcy-case>>, accessed on 26.07.2023

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Commented [la58]: Correct, 1 mark, specifically the claim must be free of bona fide dispute, which is characterized by an objective basis in law or fact to dispute the liability or quantum of the debt

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the aforementioned two requirements signify major financial duress qua the debtor.

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 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?**

*In accordance with Section 303 of the Bankruptcy Code:*

1. **DOJ investigation: Regulatory investigations are not stayed as a result of the automatic stay on filing of a chapter 11 proceeding;**
2. **Margin loan default: any action by the creditor/holder of the margin loan claim, or any enforcement against the debtor or against its property for recovery of claim or enforcement of such a claim is stayed;**
3. **Delinquent lease: The fact set states that Speculation Inc. was dealing with overdue rent and not that the lease had expired. Hence in this case, any claim of the landlord qua the overdue rent will be stayed and be treated as an unsecured claim in the chapter 11 proceedings.**
4. **Employment discrimination lawsuit: the filing of a wrongful termination suit (civil) is an employment suit against the corporation. The filing of a bankruptcy petition by a defendant triggers an automatic stay of all litigation against the defendant/debtor. A plaintiff in an ongoing employment case is a creditor of the defendant employer, because under the Bankruptcy Code, a creditor includes any person who has a claim that arose against the debtor at the time of or before the filing of the bankruptcy petition<sup>37</sup>.**

Commented [la62]: Correct, 1 mark

Commented [la63]: Correct, 1 mark

Commented [la64]: Incorrect, the margin loan is a securities contract that is exempt from the automatic stay so the broker may liquidate the collateral and apply the proceeds to the balance of the loan

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Commented [la66]: Correct, 1 mark

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**

<sup>37</sup> Employer Bankruptcy and Lawsuits, <<https://gitteslaw.com/employee-rights/employer-bankruptcy-lawsuits/>>>, accessed on 26.07.2023

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?

According to Section 101 (23) of the Bankruptcy Code, a 'foreign proceeding' means 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.

Hence by its definition, the scope of Chapter 15, does cover an English Scheme of Arrangement.

Whether the foreign proceedings will be recognised and main or non-main, depends on its Centre of Main Interest ("COMI"), on the date of the US petition. The COMI is ascertainable by various factors, such as its headquarters, the location of its management, the place which is objectively perceived by its creditors as its COMI, location of registered office, main assets etc. From the fact set its clear that it had an establishment in England in the nature of a retail store, and had financial relationships with monetary institutions there, while rest of all management/headquarters/other contracts, were not primarily based in the England. Hence the scheme of English arrangement can be recognised a foreign non-main proceeding under Chapter 15.

Commented [la68]: The COMI is presumed to be the jurisdiction of incorporation and on these facts, where headquarters are in the same jurisdiction, that presumption is unlikely to be rebutted.

Commented [la69]: Correct, 1 mark

Commented [la70]: Correct, 1 mark

Commented [la71]: Correct, 1 mark

#### Question 4.3 [5 marks]

Commented [la72]: Total marks 3/5

ToyCo is an American toy company that has created a popular line of folding robot toys called Xblox. The toys are covered by several US patents. Currently, GameMart Inc (GameMart) has a 10-year exclusive license to manufacture Xblox and pays ToyCo monthly royalties. GameMart operates a factory in California that it leases from Land Corp on a longer-term lease with seven years to go; the lease prohibits assignment without Land Corp's consent. The Xblox toys are selling well, but GameMart's other toy lines are doing poorly, so it is considering a Chapter 11 bankruptcy. Answer the following questions:

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

Yes

Commented [la73]: Correct, 1 mark

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

**No**, because as is followed in the many circuits, the licensee of a third part intellectual property cannot assign the same without the consent of the intellectual property holder.

Commented [la74]: Correct, 1 mark

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

Commented [la75]: Correct, 1 mark, this is the law nationwide

**No**, the factory lease cannot be transferred without Land Corp's consent as the lease prohibits any transfer/assignment in general without the landlord's consent.

Commented [la76]: Incorrect, the Bankruptcy Code abrogates contractual restrictions on assignment

\* End of Assessment \*