

TOTAL = 34/50  
68%



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 2024. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. 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 2024 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2024. If you elect to submit by 1 March 2024, you may not***

**submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).**

**7. Prior to being populated with your answers, this assessment consists of 9 pages.**

**ANSWER ALL THE QUESTIONS**

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

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

**Car Corp, incorporated and headquartered in Michigan, owes Parts Inc, incorporated and headquartered in Mexico, USD 10,000 on a past-due invoice for components used to build Car Corp vehicles. May Parts Inc file an involuntary petition to place Car Corp into chapter 11 bankruptcy proceedings?**

- (a) Yes, regardless of the circumstances.**
- (b) Yes, if Car Corp has fewer than 12 non-contingent, non-insider creditors.**
- (c) Yes, if other creditors owed at least USD 5,775 join in the petition. [FV1]**
- (d) No, because Parts Inc does not know whether Car Corp is insolvent.**
- (e) No, because Parts Inc is not a US company.**

**Question 1.2**

**Answer this question with reference to the set of facts set out in question 1.1 above: Which of the following is likely to be a party in interest in the bankruptcy of Car Corp?**

- (a) A shareholder in Parts Inc, to which Car Corp is indebted.**
- (b) A journalist writing about Car Corp's bankruptcy.**
- (c) A shareholder in Investment Corp, Car Corp's parent company. [FV2]**

- (d) A retired employee of Car Corp who receives payments from the company's pension plan.**
- (e) A non-profit organization that advocates for companies like Car Corp to be held responsible for climate change**

Question 1.3

**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) Options (a) to (c) above satisfy the minimum requirement for presence in the United States.**<sup>[FV3]</sup>
- (e) None of the above (options (a) to (d)) satisfy the minimum requirement for presence in the United States.**

Question 1.4

**Who may serve as a foreign representative to seek recognition of a foreign proceeding under chapter 15?**

- (a) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.**
- (b) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.**
- (c) An insolvency professional appointed by the court overseeing the foreign proceeding.**<sup>[FV4]</sup>
- (d) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.**
- (e) All of the above.**

Question 1.5

**Which of the following regarding executory contracts is false?**

(a) *A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.*

(b) ***Executory contracts are clearly defined by the Bankruptcy Code.*** [FV5]

(c) *In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.*

(d) *Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.*

(e) *Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.*

Question 1.6

*Which of the following is not a requirement to confirm a "cramdown" plan?*

(a) *That the plan is fair and equitable to dissenting classes of creditors.*

(b) *Acceptance of the plan by at least one class of impaired, non-insider creditors.*

(c) *Acceptance of the plan by all classes of secured creditors.*

(d) *That the plan does not discriminate unfairly against dissenting classes of creditors.*

(e) ***That the dissenting creditors receive no less than they would under a liquidation***[FV6] ***scenario.***

Question 1.7

*Which of the following statements about "pre-packs" is false?*

(a) ***A pre-pack cannot be used if the debtor wishes to reject executory contracts.***

(b) *Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.*

(c) *A pre-pack debtor may spend as little as a single day in bankruptcy.* |

[FV7]

(d) *The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.*

(e) *Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.*

Question 1.8

***If a debtor rejects an executory trademark license agreement under which the debtor licenses its trademark to a manufacturer, which of the following is true:***

- (a) The manufacturer has a claim for damages for breach of contract.***
- (b) The manufacturer must immediately stop using the trademark.***
- (c) The manufacturer can continue using the trademark for the remaining period of the license.***
- (d) Both options (a) and (b).***
- (e) Both options (a) and (c).***

[FV8]

Question 1.9

***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.***

[FV9]

Question 1.10

**Which of the following regarding substantive consolidation is true?**

- (a) **It respects the boundaries of corporate separateness.**
- (b) If a creditor can show it extended credit on the basis of corporate separateness, it has a valid objection to substantive consolidation.**
- (c) **It is the treatment of two or more creditors as a single creditor to simplify the claims process.**<sup>[FV10]</sup>
- (d) **Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.**
- (e) **Authority for substantive consolidation comes from the Bankruptcy Code.**

QUESTION 2 (direct questions) [10 marks]

Question 2.1 (1 mark)

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

*Setoff in the context of bankruptcy allows a creditor who also owes money to the debtor to offset its obligations with the claim it holds against the debtor, effectively netting out the two or more obligations. However, setoff is not permitted in many circumstances because it can unfairly advantage one creditor over others*<sup>[INS 111]</sup>.

Question 2.2 [2 marks]

**What is a "priming lien" and what requirements must be met for such a lien to be granted to secure DIP financing?**

*A "priming lien" is a type of lien granted during a Chapter 11 bankruptcy proceeding, allowing a debtor in possession (DIP) to obtain new financing by offering lenders a security interest that is senior or equal to existing pre-petition liens on the debtor's assets. This lien "primes" existing liens, meaning it takes precedence over them, ensuring the new lender's claims are paid out before those of earlier creditors.*<sup>[FV12]</sup>

*For a court to grant a priming lien for DIP financing, specific requirements must be satisfied. Firstly, the debtor must demonstrate that it is unable to secure adequate financing on any other terms. This implies that without such financing, the debtor's chances of a successful reorganization are significantly diminished. Secondly, the debtor must show that the secured creditor, whose interest is being primed, is adequately protected. This can involve providing the existing creditor with additional collateral, offering a new lien of equal value on unencumbered assets, or*

*demonstrating that the creditor will not be materially prejudiced by the priming lien. The intent behind these requirements is to balance the debtor's urgent need for liquidity to continue its operations and attempt a successful reorganization with the rights and interests of pre-existing creditors.*

Question 2.3 [2 marks]

**What are two potential consequences of a violation of the automatic stay?**

*Two potential consequences of a violation of the automatic stay are:*

- 1. Contempt of court: An act taken in violation of the automatic stay, even if done without knowledge of the bankruptcy filing, constitutes contempt of court. This is because the automatic stay is a court order, and violating it is treated as a violation of the court's authority. Contempt sanctions can be significant, reflecting the [FV13] seriousness with which the courts treat the protection afforded by the automatic stay.*
- 2. Void or voidable actions: Actions taken in violation of the automatic stay are either void or voidable, depending on the jurisdiction. This means any attempt to collect debts, enforce liens, or otherwise act against the debtor or the debtor's property without court permission can be undone, leaving the violator without recourse for the actions taken. Additionally, the violator may be required to compensate the debtor for any costs or damages incurred due to the violation, including attorney's fees, and may be subjected to punitive damages to deter future violations.*

Question 2.4 [2 marks]

***In voting on a plan of reorganization, which class(es) of creditors are (i) deemed to accept the plan, (ii) deemed to reject the plan and (iii) permitted to vote on the plan? What vote is necessary for a class of creditors to accept a plan?***

*In voting on a plan of reorganization:*

*(i) Classes deemed to accept the plan: An unimpaired class is deemed to accept the plan. This includes classes whose legal, equitable, and contractual rights are not altered by the plan, or where the plan reverses contractual acceleration by curing any monetary default and compensating the holder for damages. Essentially, if the plan does not impair a class by changing their rights or reducing the claim amounts, this class is considered to have automatically accepted the plan.*

*(ii) Classes deemed to reject the plan: A class that is not receiving any distribution under the plan (i.e., they are getting nothing) is deemed to reject the plan. This typically applies to [FV14] classes that are so far down the priority ladder that there are no assets left to distribute to them once higher priority claims have been satisfied.*



*(iii) Classes permitted to vote on the plan: Only impaired classes are permitted to vote on the plan. An impaired class is one for which the plan alters the pre-existing rights of the claimants. This means that for a creditor or equity holder to have a say in the approval of the plan, their class must be affected in some manner by the terms of the reorganization, such as receiving less than the full value of their claims or having the terms under which their claims are satisfied modified.*

*Vote necessary for acceptance by a class: For a class of creditors to accept the plan, a majority in number and at least two-thirds in the dollar amount of the claims within that class, who actually vote, must vote in favour of the plan. For equity holders, a two-thirds amount in interest of those voting is required. This ensures that the plan has substantial support within each class of creditors or shareholders that are allowed to vote, reflecting a collective consensus rather than the will of a few.*

Question 2.5 [3 marks]

**Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:**

- (a) Which cause of action applies only to transfers made on account of antecedent debt?**
- (b) Which cause of action requires that the debtor be presumed or proven to have been insolvent at the time of the transfer?**
- (c) Which cause of action requires that the debtor be proven to have intended to frustrate creditors' recoveries?**

*(a) Preferences apply specifically to transfers made on account of an antecedent debt. This legal mechanism addresses the scenario where a debtor, before filing for bankruptcy, pays off some debts to the detriment of other creditors. The Bankruptcy Code seeks to avoid these preferential transfers to ensure equitable treatment among all unsecured creditors by potentially clawing back payments made within 90 days prior to the bankruptcy filing (or one year if the transferee is considered an insider).*

*(b) Constructive fraudulent conveyances require that the debtor be presumed or proven to have been insolvent at the time of the transfer. This cause of action does not necessitate proving fraudulent intent on the part of the debtor; rather, it focuses on the effect of the the<sup>[FV15]</sup> transfer in diminishing the debtor's estate to the detriment of creditors. A constructive fraudulent conveyance is established if the debtor received less than a reasonably equivalent value in exchange for the transfer or incurrence of an obligation and was insolvent at the time or became insolvent as a result of the transaction.*

*(c) Actual fraudulent conveyances require proof that the debtor intended to frustrate creditors' recoveries. This involves showing that the debtor made a transfer or incurred*

*an obligation with the actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted. The intent to defraud can be inferred from various factors, such as the transfer being to an insider, the secrecy or haste of the transaction, or the retention of control over the property by the debtor after the transfer.*

**QUESTION 3** [1a16] (essay-type questions) [15 marks in total]

**Question 3.1** [1a17] [3 marks]

**Describe the circumstances in which a bankruptcy court may enter a final order consistent with the US Constitution, who reviews appeals from bankruptcy court orders and how orders that are not constitutionally final are reviewed.**

*In circumstances where a bankruptcy court can enter a final order consistent with the US Constitution, the order must address matters that are **core to the bankruptcy process** [1a18], which the court has the constitutional authority to decide upon finally. These include issues that directly affect the bankruptcy estate, such as claims resolution, estate administration, debtor discharge injunctions, and plan confirmation. However, for matters that are non-core or related to the bankruptcy case but not directly impacting the administration of the bankruptcy estate, the bankruptcy court can issue proposed findings of fact and conclusions of law, which are then subject to de novo review by the district court.*

*Appeals from bankruptcy court orders are initially reviewed by the **district court** [1a19] or, in some circuits, a **bankruptcy appellate panel** [1a20]. The circuit courts of appeals serve as the second level of appeal for decisions emanating from the district courts or bankruptcy appellate panels.*

*For orders that are not constitutionally final, such as those in non-core proceedings where the bankruptcy court lacks the authority to enter a final judgment without the parties' consent, the **bankruptcy court issues proposed findings and conclusions for the district court's review**. [1a21] The district court then conducts a de novo review of those matters to which any party has objected or, in some instances, may review the entire matter anew, regardless of any specific objections, before entering a final order.*

**Question 3.2** [1a22] [3 marks]

**What provisions of the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding? What are two ways that the foreign representative can obtain equivalent relief?**

*In a Chapter 15 proceeding, a foreign representative cannot invoke certain provisions of the Bankruptcy Code directly related to **avoidance** [1a23] powers, specifically those concerning the avoidance of preferences and fraudulent conveyances as provided by the Bankruptcy Code. This limitation is based on the interpretation of Article 23 of the*

*Model Law and the specific exclusions under Chapter 15, which, despite closely following the Model Law in many respects, restricts the use of avoidance powers that are otherwise available to domestic debtors or trustees within the U.S. bankruptcy framework.*

*However, two ways that a foreign representative can obtain equivalent relief include:*

- 1. Seeking to avoid pre-petition transactions under other applicable U.S. or foreign law [1a24]: Despite the restrictions under Chapter 15, foreign representatives are not barred from attempting to avoid pre-petition transactions that may be detrimental to creditors under laws other than the Bankruptcy Code. This approach allows for the utilization of avoidance actions that might be available through different legal avenues, not directly restricted by the provisions of Chapter 15.*
- 2. Commencing a plenary proceeding under the Bankruptcy Code [1a25]: A foreign representative has the option to initiate a plenary proceeding, such as under Chapter 7 or 11, after the recognition of the foreign proceeding under Chapter 15. This strategy is particularly useful in scenarios where the relief available under other laws is unsatisfactory, such as when statutes of limitations have expired or when the applicable law does not permit claims for constructive fraudulent conveyance. In these circumstances, the scope of the plenary proceeding is confined to the debtor's U.S. assets and is intended to be coordinated with the foreign proceeding*

**Question 3.3 [1a26][4 marks]**

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

*Four rules that one should review when preparing a filing include:*

- 1. The United States Bankruptcy Code (Title 11 of the United States Code): This foundational legal framework provides the statutory basis for all bankruptcy proceedings. It outlines eligibility requirements for debtors, types of bankruptcy filings (e.g., Chapters 7, 11, 13, and 15), the automatic stay provisions, the treatment of claims and interests, the debtor's duties, and the powers of the bankruptcy trustee, among other critical elements.*
- 2. The Federal Rules of Bankruptcy Procedure [1a27]: These rules govern the procedural aspects of bankruptcy proceedings and frequently incorporate by reference the Federal Rules of Civil Procedure [1a28], especially regarding litigation of disputed issues in contested matters or adversary proceedings. They cover everything from the filing of petitions to the conduct of meetings of creditors and the confirmation of reorganization plans.*

3. **Local Rules of the Bankruptcy Court**<sup>[1a29]</sup>: *Each bankruptcy court may have its own set of local rules that specify additional procedural requirements, filing protocols, and judge-specific preferences or practices. These local rules are designed to address procedural aspects not covered by the Federal Rules of Bankruptcy Procedure and can vary significantly from one jurisdiction to another.*
4. **Judicial Guidelines or Standing Orders**<sup>[1a30]</sup>: *Individual bankruptcy judges may issue their own guidelines or standing orders that apply to cases before them. These can include detailed instructions on case management procedures, submission of evidence, scheduling of hearings, and other aspects of the bankruptcy process specific to their courtroom.*

**Question 3.4**<sup>[1a31]</sup> [5 marks]

**What fiduciary duties do directors of Delaware corporations owe and to whom are the duties owed in the ordinary course of business? To whom are duties owed when the corporation is potentially or actually insolvent?**

*In the ordinary course of business, directors of Delaware corporations owe two primary fiduciary duties: the duty of **loyalty**<sup>[1a32]</sup> and the duty of **care**<sup>[1a33]</sup>. The duty of loyalty mandates that directors act in the best interests of the corporation and its shareholders, avoiding conflicts of interest and self-dealing. The duty of care requires directors to make decisions with a reasonable level of diligence and prudence, as would be expected from a similarly situated person under comparable circumstances. Directors are protected under the business judgment rule, which presumes decisions made in good faith, on an informed basis, and with the belief that the actions taken were in the corporation's best interest, are not subject to judicial second-guessing unless there is evidence of gross negligence or lack of good faith.*

*When the corporation is potentially or actually insolvent, the directors' duties expand to consider the interests of the corporation's creditors, reflecting a shift in fiduciary focus due to the changed financial circumstances. Despite this shift, the Delaware Supreme Court has clarified that **directors do not owe direct fiduciary duties to creditors, even in insolvency**<sup>[1a34]</sup>. However, the actions of directors in the vicinity of insolvency are closely scrutinized to ensure they do not preferentially transfer value away from the corporation, thereby harming creditors' prospects of recovery. Directors must navigate these duties carefully, as their decisions can impact the corporation's ability to reorganize or liquidate in a manner that maximizes value for all stakeholders*

**QUESTION 4**<sup>[1a35]</sup> (fact-based application-type question) [15 marks in total]

**Question 4.1**<sup>[1a36]</sup> [5 marks]

***iWork Ltd leases office space from office building owners and sublets the space to small businesses. Due to the increases in the numbers of businesses operating remotely, iWork Ltd has suffered a decline in revenues. As a result, it has failed to pay rent on some of its office space leases. What protections does the Bankruptcy Code provide to lessors of office space to iWork Ltd?***

*The protections provided by the Bankruptcy Code to lessors of office space in situations where a tenant like iWork Ltd fails to pay rent are primarily governed by sections related to the treatment of executory contracts and unexpired leases. While the specific sections detailing these protections were not directly located in the provided document, generally, the Bankruptcy Code offers several key protections to lessors, which can be inferred based on common practices within the US bankruptcy framework:*

- 1. Assumption or Rejection of Unexpired Leases:** *Under the Bankruptcy Code, a debtor in a Chapter 11 reorganization has the option to assume or reject unexpired leases of non-residential real property. If the lease is assumed, the debtor must cure any outstanding defaults and provide adequate assurance of future performance under the lease. If the lease is rejected, it is treated as a breach of contract, and the lessor can file a claim for damages, although this claim may be subject to certain caps.*
- 2. Adequate Protection Payments:** *During the bankruptcy proceedings, the debtor is typically required to continue making rent payments [1a37] to the lessor for the use of the property to ensure that the lessor receives adequate protection for their interest. This is to prevent the lessor from suffering a loss while the lease is being assumed or rejected.*
- 3. Timelines for Decision [1a38]:** *The Bankruptcy Code imposes specific deadlines by which the debtor must decide whether to assume or reject unexpired leases. This timeline helps protect lessors from prolonged periods of uncertainty regarding the status of the lease and the property.*
- 4. Cap on Damages:** *If a lease is rejected, the lessor's claim for future rent is capped. [1a39] The cap is designed to balance the interests of the lessor with those of other creditors by limiting the amount that can be claimed for rent due after the rejection of the lease.*
- 5. Priority Claim for Recent Rent Arrears: [1a40]** *Rent arrears that have accrued shortly before the bankruptcy filing may be treated as an administrative expense, which gives them a higher priority in payment from the bankruptcy estate.*

*These protections are designed to balance the rights and interests of the lessors with the needs of the debtor to reorganize and potentially continue business operations. They ensure that lessors receive some level of compensation and protection for their property rights while also providing a mechanism for debtors to restructure their lease obligations in a way that supports their overall reorganization efforts.*

**Question 4.2**<sup>[1a41]</sup> [5 marks]

***Skin Luxe is incorporated and has a principal place of business in France where it develops and manufactures high end skincare products. Skin Luxe sells its skin care products through its own boutiques in many international cities, including Paris, Las Vegas, London and Hong Kong. Skin Luxe's English law-governed bonds are due to mature in one year, but it is unable to repay or refinance them. Skin Luxe is considering using an English scheme of arrangement to restructure the bonds.***

***Discuss whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding.***

*An English scheme of arrangement can indeed be granted recognition under US Chapter 15 as either a foreign main or foreign non-main proceeding. Chapter 15 of the US Bankruptcy Code adopts the UNCITRAL Model Law on Cross-Border Insolvency, which allows for the recognition of foreign insolvency proceedings. The requirements for such recognition are minimal, focusing primarily on the existence of a collective judicial or administrative proceeding in a foreign country related to insolvency or adjustment of debt, where the debtor's assets and affairs are under the control or supervision of a foreign court for reorganization or liquidation purposes.*

*An English scheme of arrangement fits within the broad definition of a "foreign proceeding" under the Bankruptcy Code, as it is a court-supervised process under English law that allows a company to restructure its debt or obligations. For Skin Luxe, which is incorporated and has a principal place of business in France but is looking to restructure bonds governed by English law, the key to recognition in the US would hinge on establishing the scheme as either a main or non-main proceeding.*

- **Foreign Main Proceeding:** *To qualify as a foreign main proceeding, the scheme would need to be commenced in the country where the debtor has its center of main interests (COMI).*<sup>[1a42]</sup> *Given Skin Luxe's principal place of business is in France*<sup>[1a43]</sup>, *this could potentially be challenging unless the COMI can be argued to be closely tied to the English jurisdiction due to the governance of the bonds or other factors.*
- **Foreign Non-Main Proceeding:** *If the scheme does not meet the criteria for a foreign main proceeding, it could still be recognized as a foreign non-main proceeding if Skin Luxe has an "establishment" in England,*<sup>[1a44]</sup> *such as a place of operations where it carries out non-transitory economic activity.*

*Once recognized, Chapter 15 provides various forms of relief to assist the foreign proceeding, facilitating the reorganization or liquidation process and protecting the debtor's assets within the United States*

**Question 4.3**<sup>[1a45]</sup> [5 marks]

**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 has been sued in civil suit 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 (i) the DOJ investigation, (ii) margin loan default; (iii) the delinquent lease and (iv) the employment discrimination lawsuit?**

**The filing of a Chapter 11 petition<sup>[la46]</sup> by Speculation Inc would have varying effects on the different legal challenges it faces:**

- (i) DOJ Investigation:** *The automatic stay provision in Chapter 11 does not halt criminal investigations or proceedings, including those conducted by the DOJ. Therefore, the investigation into Speculation Inc for potentially trading on insider information would continue unaffected by the Chapter 11 filing.*<sup>[la47]</sup>
- (ii) Margin Loan Default:** *The automatic stay provision would immediately halt all collection efforts by the broker regarding the margin loan default.*<sup>[la48]</sup> *This means any action to seize the collateral (the shares held) or any other collection activity would be paused, providing Speculation Inc with a breathing space to negotiate a repayment plan or restructuring of the debt as part of its reorganization plan.*
- (iii) Delinquent Lease:** *The filing would also put a temporary stop to any eviction proceedings due to unpaid rent for the leased office space.*<sup>[la49]</sup> *Under Chapter 11, Speculation Inc might seek to renegotiate the lease terms or potentially reject the unexpired lease subject to court approval, offering a chance to adjust its financial obligations.*
- (iv) Employment Discrimination Lawsuit:** *The automatic stay applies to most civil litigation proceedings, including the employment discrimination lawsuit.*<sup>[la50]</sup> *This lawsuit would be halted, and its resolution would likely be incorporated into the Chapter 11 reorganization plan. The claimant might have to file a claim with the bankruptcy court to seek any monetary relief, which could be subject to the same restructuring as other unsecured claims.*

**Overall, the Chapter 11 filing provides a comprehensive shield against immediate adverse actions by creditors and litigants, allowing Speculation Inc to focus on restructuring its debts and obligations. However, it does not protect against ongoing criminal investigations, ensuring that legal scrutiny on potentially illegal activities continues unabated.**

**\* End of Assessment \***