

TOTAL = 39.5/50  
79%



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.
- (d) No, because Parts Inc does not know whether Car Corp is insolvent.
- (e) No, because Parts Inc is not a US company.

Commented [FV1]: 1, correct

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.

Commented [FV2]: 1, correct

**(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.**

Commented [FV3]: 1, correct

**(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.**

Commented [FV4]: 1, correct

**(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.

Commented [FV5]: 1, correct

(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.

Commented [FV6]: 1, correct

(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 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.

Commented [FV7]: 1, correct

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

(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).**

Commented [FV8]: 0, correct answer is E

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.**

Commented [FV9]: 1, correct

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.
- (d) Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.
- (e) Authority for substantive consolidation comes from the Bankruptcy Code.

Commented [FV10]: 1, correct

QUESTION 2 (direct questions) [10 marks]

Question 2.1 (1 mark)

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

A bankruptcy setoff allows a creditor to offset what it owes a debtor against what the debtor owes them. However, this practice is limited in cases where it could give the creditor an advantage over other creditors who are not in a similar situation. This is because it reduces the amount the creditor owes to the estate by the debt owed by the debtor, rather than just a portion that would normally be paid to unsecured creditors. A set-off may not be allowed if any of the following conditions apply;

Commented [FV11]: 1, correct

1. The creditor's claim against the estate is disallowed.
2. The creditor's claim against the estate was obtained after the bankruptcy petition was filed or within 90 days before the petition was filed if the debtor was insolvent.
3. The creditor's claim against the debtor was incurred within 90 days prior to the filing of the bankruptcy petition when the debtor was insolvent with the intent to set it off.
4. The creditor obtains an advantage through the set-off as compared to its position if it had executed the set-off 90 days prior to the bankruptcy filing.

In order to maintain fairness among all creditors and to preserve the integrity of the bankruptcy process, restrictions on set-off may be implemented.

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?

*In a Chapter 11 bankruptcy case, a "priming lien" is a type of lien granted when a debtor-in-possession (DIP) secures financing that is senior to or equal to existing liens on the debtor's assets. This type of lien is critical to providing the debtor with the support it needs to operate and reorganize smoothly. To obtain a priming lien, certain conditions must be met;*

- 1. The court must approve the priming lien after notice and a hearing.*
- 2. The debtor must show that it couldn't obtain financing on favorable terms, including showing its inability to obtain unsecured debt with priority over administrative expenses or secured debt with a lien on unencumbered property of the estate or with a junior lien on encumbered property of the estate.*
- 3. In addition, the debtor must demonstrate that the interests of the secured creditor receiving priority will be adequately protected.*

Commented [FV12]: 2, correct

*By meeting these requirements, this process ensures that the debtor has access to funds while protecting the rights and interests of existing secured creditors.*

Question 2.3 [2 marks]

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

*There are two outcomes when the automatic stay is violated;*

- 1. Violations of the stay could be considered contempt of court. May be deemed void or voidable based on jurisdiction. This means that any actions taken in violation of the stay could be unwound by the court, making any transactions or collection efforts appear as if they never occurred.*
- 2. Parties with an interest in the matter may seek relief from the stay, either in advance to allow certain actions to proceed or retroactively to legitimize actions that would otherwise be considered violations. Failure to obtain relief from the stay could result in contempt penalties being imposed on the violator. These penalties may include paying the debtor's fees and requiring the violator to take steps to remedy the violation, such as disgorging ill-gotten assets. In addition, the court may impose coercive contempt sanctions, such as a fine, until compliance is achieved.*

Commented [FV13]: 2, correct

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?**

*When voting on a plan of reorganization:*

- Classes deemed to have accepted the plan: A class is considered to have accepted the plan if it isn't impaired. Its rights remain unimpaired unless the plan reverses any contractual acceleration by resolving any monetary defaults and providing for damages. Alternatively, if the acceleration is paid in full after the effective date of the plan, the class may be deemed unimpaired.*



*Unimpaired classes typically accept the plan because their rights are not materially impaired.*

- *Classes Presumed to Reject the Plan: Any class that receives nothing under the plan automatically rejects the plan. This is often the case with equity holders or subordinated debt holders when the debtor's assets are insufficient to cover secured claims.*
- *Classes entitled to vote on the plan: Only impaired classes may vote on the plan. An impaired class includes those whose claims or interests are altered in some way by the plan, such as a reduction in the amount owed, a change in the terms of the debt, or the issuance of securities.*

*For a class of creditors to accept a plan, a majority of creditors and two-thirds of the total amount of claims in that class must vote in favor of the plan. This rule is intended to ensure that the plan is broadly supported by the affected creditors, taking into account both the number of creditors and the aggregate value of their claims.*

Question 2.5 [3 marks]

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

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

*With respect to preferences, actual fraudulent conveyances, and constructive fraudulent conveyances:*

- Preferences specifically refer to transfers made on account of an existing debt. This involves a scenario where the debtor pays or provides security to a creditor for a debt already owed, potentially showing favoritism to that creditor by paying them from others before declaring bankruptcy.*
- Constructive fraudulent transfers involve the debtor being presumed or proven insolvent at the time of the transfer. In cases where a transfer. An obligation is assumed without receiving fair value in return, resulting in insolvency either at the time of the transfer or because of the transfer.*
- Actual fraudulent transfers require proof that the debtor intended to hinder the recovery of creditors. This requires proof that the debtor made transfers or incurred obligations with the intent to hinder, delay or defraud entities to whom he was indebted.*

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

Commented [FV14]: 2, correct

Commented [FV15]: 2. Correct answer for b is also preference.

Commented [la16]: 13.5/15

**Question 3.1** [3 marks]

Commented [la17]: 2.5/3 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.**

*Bankruptcy cases in the United States follow a system designed to balance the rights of debtors and creditors. A crucial aspect is how bankruptcy courts can make decisions and how those decisions are reviewed. The U.S. Constitution, Article III, is important in outlining the powers of bankruptcy courts. How their decisions are reviewed on appeal.*

*The Supreme Court's decision in Stern v. Marshall emphasized the limits of bankruptcy courts in making decisions in core cases that touch on Article III jurisdiction. This important decision indicated that bankruptcy courts, which are not Article III courts, have limited authority to rule on matters normally handled by Article III courts. This distinction between "core" and "non-core" cases is critical in defining a bankruptcy court's ability to issue judgments.*

*For a bankruptcy court to issue a decision that is consistent with the U.S. Constitution, the issue must fall within its **core jurisdiction**. In non-core matters, with the **express consent of all parties** involved.*

Commented [la18]: Incorrect, even within the scope of core proceedings, a Bankruptcy Court can only enter a final order if the core proceedings are specific to the Bankruptcy Code, like a challenge to a petition.

Commented [la19]: Correct, 1/2 mark

*In cases where the matter involves rights and interests typically handled by Article III courts, the bankruptcy court must provide proposed findings of fact and legal conclusions for evaluation by the district court. This careful approach ensures that the bankruptcy court's actions remain within the bounds established by Article III.*

Commented [la20]: Correct, 1 mark

*Appeals from bankruptcy court decisions are heard primarily by the **district court** in the region where the bankruptcy case originated. In some circuits, a **Bankruptcy Appellate Panel (BAP)**, composed of bankruptcy judges, may also hear appeals. The appellate process includes a review of interpretations and a more deferential review of factual determinations, recognizing the bankruptcy court's proximity to the evidence and proceedings.*

Commented [la21]: Correct, 1/2 mark

Commented [la22]: Correct, 1/2 mark

*In cases where orders are not yet final, either the district court or the BAP serves as an intermediary to evaluate the bankruptcy court's proposed findings and conclusions. This additional level of review ensures that the final decision conforms to mandates and legal standards that protect the rights of the parties.*

*The interplay between the principles of the U.S. Constitution and the ability of bankruptcy courts to make decisions underscores the judiciary's commitment to maintaining an impartial judicial system.*

*The Stern v. Marshall decision and subsequent decisions have helped to define the limits of this authority, ensuring that the rights of the individuals involved are*

respected. The appellate process adds a layer of protection by allowing for review of bankruptcy court decisions. By implementing these safeguards, the U.S. bankruptcy system aims to uphold both the handling of bankruptcy matters and the constitutional rights of those involved.

**Question 3.2 [3 marks]**

Commented [la23]: 3/3 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 Chapter 15 of the U.S. Bankruptcy Code, which deals with insolvency cases having an understanding of the constraints, on foreign representatives and the option for achieving similar relief is essential. This article delves into the rules of the Bankruptcy Code that foreign representatives cannot access in Chapter 15 cases and explores how they can still achieve their goals despite these obstacles.*

*Chapter 15 acts as a framework to facilitate collaboration between U.S. Courts and parties in domestic bankruptcy matters and their counterparts in foreign insolvency proceedings. It aims to provide a way to handle insolvency cases involving assets, debtors and creditors across jurisdictions ensuring certainty for trade and investment fairness for all parties involved and efficient management of international insolvencies. However, to balance respecting systems sovereignty with safeguarding U.S. Creditors and debtors' interests Chapter 15 places restrictions on certain powers typically available, in domestic bankruptcy cases.*

*One significant limitation is that foreign representatives are restricted from using avoidance powers.*

*Avoidance measures play a role, in bankruptcy cases by helping to recover assets that were transferred before the bankruptcy filing in a way that may unfairly favor creditors or involve fraudulent transactions. The rules regarding preferences and suspicious transfers outlined in sections of the Bankruptcy Code are not applicable to representatives involved in Chapter 15 cases. This exclusion is based on the idea that using powers could disrupt how a debtor's assets are distributed, potentially conflicting with the insolvency laws of the debtor's home country.*

Commented [la24]: Correct, 1 mark

*Despite these limitations foreign representatives have options to them. They can pursue their objectives like avoidance actions through two approaches. Firstly, a foreign representative can start a proceeding under another chapter of the Bankruptcy Code like Chapter 7 (liquidation) or Chapter 11 (reorganization) if there is a significant connection to the United States, such as having assets located within its jurisdiction. This method allows foreign representatives to make use of all tools and authorities provided by U.S. Bankruptcy laws, including avoidance actions specifically targeted at the debtors' assets, in the U.S.*

Commented [la25]: Correct, 1 mark

The range of processes is often confined to assets, within the United States and is carried out in collaboration with the foreign legal process to ensure a smooth resolution across different jurisdictions.

Furthermore, foreign representatives may turn to laws outside of the Bankruptcy Code whether foreign, to reverse transactions or recover assets that might have been improperly transferred or burdened. This approach recognizes that even though the specific avoidance powers of the Bankruptcy Code may not be directly invoked the objectives of those powers can still be pursued through avenues. This approach may be especially important in situations where relief under laws is more advantageous or where limitations within the Bankruptcy Code such as statutes of limitations or absence of claims for constructive fraudulent conveyance make its provisions inadequate.

To sum up while Chapter 15 of the U.S. Bankruptcy Code imposes restrictions on the authority of representatives particularly concerning avoidance actions it also provides ways to achieve similar relief. By permitting the commencement of proceedings under chapters of the Bankruptcy Code or utilizing alternative legal frameworks Chapter 15 strikes a balance between international cooperation in bankruptcy cases and safeguarding creditor and debtor rights, within the U.S. Legal system.

The systems, in place guarantee that international delegates can adequately safeguard the rights of lenders and the assets of the debtor emphasizing the dedication of the bankruptcy system to equity and effectiveness within insolvency cases.

Question 3.3 [4 marks]

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

Bankruptcy filings follow a framework to ensure a fair and orderly process. Before filing in bankruptcy court, it's essential to understand rules, such as the Federal Rules of Bankruptcy Procedure, local court regulations and relevant sections of the U.S. Bankruptcy Code. This comprehensive approach guarantees that the filing is thorough, accurate and meets all court requirements making the bankruptcy process smoother.

The Federal Rules of Bankruptcy Procedure (FRBP) act as a resource for navigating bankruptcy procedures. They incorporate elements from the Federal Rules of Civil Procedure especially regarding proceedings. These rules cover aspects like filing deadlines, formatting requirements and contested case procedures. Practitioners need to familiarize themselves with these rules to effectively maneuver through the bankruptcy process.

Local bankruptcy court rules play a role too. Each court may have its set of regulations that could alter standard procedures including deadlines for filing and responding. Practitioners should review these rules on the courts website to ensure adherence, to specific court requirements. Moreover, personal practices set by judges offer guidance on preferred procedures and courtroom practices.

Commented [la26]: Correct, 1 mark

Commented [la27]: 3/4 marks

Commented [la28]: Correct, 1 mark

Commented [la29]: You should also consult this as the relevant rules aren't set out in full in the Rules of Bankruptcy Procedure

Commented [la30]: Correct, 1 mark

Commented [la31]: Correct, 1 mark

Understanding the U.S. Bankruptcy Code is crucial, for grasping the aspects of bankruptcy. Various sections of the Code cover topics such as who can file for bankruptcy the pause on collection actions handling types of debts and the steps involved in creating a reorganization plan. Knowing these rules is essential for advising clients on the consequences of bankruptcy filings and ensuring that all necessary documents comply with requirements.

Before filing for bankruptcy, it's important to review the Federal Rules of Bankruptcy Procedure, local court regulations and the U.S. Bankruptcy Code. These resources establish a foundation for bankruptcy cases. By understanding and following these guidelines professionals can make sure their submissions are accurate, lawful, and positioned for an outcome. The intricate nature of bankruptcy law emphasizes the need for preparation. Underscores how legal experts play a vital role, in helping individuals navigate challenging financial situations.

Question 3.4 [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 realm of Delaware corporations' directors have responsibilities of care and loyalty, towards the corporation and its shareholders in business operations. The duty of care entails that directors make decisions akin to a careful individual in similar situations. On the hand the duty of loyalty necessitates that directors prioritize the corporations interests free from any conflicts of interest. The safeguard provided by the business judgment rule assumes that directors act in faith based on information and believing their choices serve the corporations interests best. This protection shields them from liability unless proven otherwise.

When a corporation is financially stable these fiduciary duties are owed to both the corporation and its shareholders aligning directors' decision making with those who stand to gain from the corporation's prosperity. Notably as highlighted by the Delaware Supreme Court these duties do not extend to creditors in cases of insolvency or near insolvency. The underlying principle is that directors should strive to enhance the corporations value indirectly benefiting creditors since any value preserved or recovered during insolvency proceedings would initially address creditors' claims before benefiting shareholders.

However, there is a shift, in dynamics when a corporation becomes insolvent. Despite what many people believe Delaware law does not shift responsibilities from shareholders to creditors during insolvency situations. In the case of North American Catholic Educational Programming Foundation, Inc. V. Gheewalla it was established that directors' duties are still tied to the corporation itself. Creditors have the right to take action, against directors for breaching these duties on behalf of the corporation indirectly safeguarding their interests. This approach ensures that the focus remains

Commented [la32]: 5/5 marks

Commented [la33]: Correct, 1 mark

Commented [la34]: Correct, 1 mark

Commented [la35]: Correct, 1 mark

Commented [la36]: Correct, 1 mark

Commented [la37]: Correct, 1 mark

on what's best for the corporation in challenging times and keeps directors accountable to their fiduciary obligations without directly owing duties to creditors.

This detailed framework highlights how crucial directorial decisions are for the health and stability of a corporation irrespective of its condition. It also provides a way for creditors to seek recourse maintaining a balance, between the stakeholders involved in insolvency scenarios.

**QUESTION 4** (fact-based application-type question) [15 marks in total]

Commented [la38]: 8/15 marks

**Question 4.1** [5 marks]

Commented [la39]: 2/5 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 U.S. Bankruptcy Code provides a structured approach to addressing the financial distress of businesses and offers protections not only to debtors, but also to creditors, including office space lessors. When a company such as iWork Ltd. faces financial challenges, understanding these protections is critical for both the debtor and the lessor to effectively navigate the bankruptcy process.

For lessors, the Bankruptcy Code contains specific provisions designed to protect their interests when a tenant files for bankruptcy. One important protection is the requirement that the debtor make a timely determination whether to assume or reject unexpired leases, as set forth in Section 365. This decision must be made by the debtor in a timely manner, generally within 120 days of the bankruptcy filing. The purpose is to avoid prolonged uncertainty as to the status of the lease.

Commented [la40]: Correct, 1 mark. This can be extended for a maximum of 90 days for cause and no further without consent of the lessor.

Assuming the lease means that the debtor intends to continue to use the leased property under the existing terms, including making up any arrears. This may provide some comfort to lessors that their lease will continue to generate income. On the other hand, if the lease is rejected, the lessor can regain possession of the property, allowing him to seek new tenants. However, the lessor would also have a claim against the bankruptcy estate for damages resulting from the rejection of the lease, subject to certain limits set forth in the Bankruptcy Code.

Commented [la41]: Correct, 1 mark. The debtor must pay rent as an administrative priority claim and if the debtor assumes and then rejects a lease, it must pay 2 years' rent as an administrative priority claim

In addition, the automatic stay, a fundamental component of the Bankruptcy Code under Section 362, temporarily halts all collection efforts and legal actions against the debtor upon the filing of a bankruptcy petition. While this stay provides the debtor with breathing room to reorganize its affairs without the immediate threat of eviction, lessors are entitled to seek relief from the stay to regain possession of their property if the tenant-debtor fails to perform its obligations under the lease or if the property is not necessary to the debtor's reorganization.

*For landlords of office space to iWork Ltd, the Bankruptcy Code provides specific protections and procedures to balance the interests of debtors and creditors during the bankruptcy process. By requiring timely decisions to assume or reject leases and providing mechanisms for lessors to seek relief from the automatic stay, the Code aims to mitigate the financial impact on lessors while providing debtor companies with an opportunity to restructure. As iWork Ltd. navigates its financial challenges, understanding these provisions will be critical for both the company and its lessors to make informed decisions and protect their respective interests.*

*For lessors, the Bankruptcy Code contains specific provisions designed to protect their interests when a tenant files for bankruptcy. One important protection is the requirement that the debtor make a timely determination whether to assume or reject unexpired leases, as set forth in Section 365. This decision must be made by the debtor in a timely manner, generally within 120 days of the bankruptcy filing. The purpose is to avoid prolonged uncertainty as to the status of the lease.*

*Assuming the lease means that the debtor intends to continue to use the leased property under the existing terms, including making up any arrears. This may provide some comfort to lessors that their lease will continue to generate income. On the other hand, if the lease is rejected, the lessor can regain possession of the property, allowing him to seek new tenants. However, the lessor would also have a claim against the bankruptcy estate for damages resulting from the rejection of the lease, subject to certain limits set forth in the Bankruptcy Code.*

*In addition, the automatic stay, a fundamental component of the Bankruptcy Code under Section 362, temporarily halts all collection efforts and legal actions against the debtor upon the filing of a bankruptcy petition. While this stay provides the debtor with breathing room to reorganize its affairs without the immediate threat of eviction, lessors are entitled to seek relief from the stay to regain possession of their property if the tenant-debtor fails to perform its obligations under the lease or if the property is not necessary to the debtor's reorganization.*

*For landlords of office space to iWork Ltd, the Bankruptcy Code provides specific protections and procedures to balance the interests of debtors and creditors during the bankruptcy process. By requiring timely decisions to assume or reject leases and providing mechanisms for lessors to seek relief from the automatic stay, the Code aims to mitigate the financial impact on lessors while providing debtor companies with an opportunity to restructure. As iWork Ltd. navigates its financial challenges, understanding these provisions will be critical for both the company and its lessors to make informed decisions and protect their respective interests.*

**Question 4.2** [5 marks]

**Commented [la42]:** 2/5 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.**

*Under Chapter 15 of the U.S. Bankruptcy Code, which follows the guidelines of the UNCITRAL Model Law on Cross-Border Insolvency, an English plan of arrangement could be recognized as a secondary proceeding based on certain criteria relating to the debtor's links with the jurisdiction in which the proceeding is commenced.*

*Chapter 15 is designed to promote cooperation between U.S. courts and their international counterparts in handling cross-border insolvency cases. It establishes a structure for the recognition of U.S. insolvency proceedings that allows foreign debtors to seek relief within U.S. borders. This system is designed to provide clarity, streamline cross-border insolvencies, and protect the interests of all creditors and parties in interest.*

*To be recognized as a proceeding under U.S. Chapter 15, it must be established that the proceeding is being conducted at the debtor's center of interest (COMI). Typically, a debtor's COMI is presumed to be its place of incorporation; however, this presumption can be challenged. Factors considered in determining a debtor's COMI include where the debtor's headquarters are located, where the debtor's principal business activities and assets are located, and which jurisdictions' laws govern disputes involving the debtor.*

**Commented [la43]:** Incorrect, this is only required for recognition as a foreign main proceeding.

**Commented [la44]:** Correct, 1 mark

*If the debtor's place of business is not its center of main interests (COMI), but it does have a place of business, it could be recognized as a secondary proceeding in that jurisdiction. Recognition as a primary or secondary foreign proceeding grants the specific rights and powers under the U.S. Bankruptcy Code, such as implementing an automatic stay on legal actions against the debtor's U.S. assets.*

**Commented [la45]:** Correct, 1 mark.

*In Skin Luxe's scenario, if it can be demonstrated that the English plan of arrangement falls under a law governing insolvency or debt restructuring and is considered a collective judicial or administrative proceeding, and Skin Luxe's COMI or branch is in England, then the plan could be confirmed under Chapter 15. This would allow Skin Luxe to reorganize its debts in a manner that is recognized and enforceable in America.*

**Commented [la46]:** On these facts, COMI is in France and the London boutique is the establishment necessary to recognize the English scheme of arrangement as a foreign non-main proceeding.

*The possibility of recognizing a scheme of arrangement for Skin Luxe under U.S. Chapter 15 depends on whether the proceeding is classified as a primary or secondary foreign proceeding based on COMI or having an establishment in England. This recognition would allow Skin Luxe to take advantage of the benefits of the U.S. Bankruptcy Code and efficiently streamline its financial restructuring efforts across jurisdictions.*



*The adaptability of Chapter 15 to accommodate insolvency proceedings underscores the United States' commitment to supporting global insolvency resolution regimes that promote fairness and protect the interests of both creditors and debtors in today's highly interconnected global economy.*

**Question 4.3** [5 marks]

**Commented [la47]:** 4/5 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?***

*Speculation Inc. Filing for Chapter 11 would have an impact on the challenges it is currently facing:*

*Regarding the DOJ investigation: The Chapter 11 filing would not stop any criminal investigation or proceeding. Therefore, the DOJ's investigation of Speculation Inc. for insider trading would not be directly affected by the bankruptcy filing. Criminal activity is specifically exempted from the stay provisions of the Bankruptcy Code, allowing government agencies to continue their investigations and any related criminal actions against the debtor.*

**Commented [la48]:** Correct, 1 mark

*Regarding Margin Loan Default: The automatic stay triggered by a Chapter 11 filing would prevent creditors from pursuing debts or seizing the debtor's assets. This means that actions related to the broker's declaration of default on the margin loan and any subsequent attempts to collect on that loan or seize collateral would be immediately halted. This gives Speculation Inc. an opportunity to negotiate with its creditors and possibly restructure its debt under the supervision of the bankruptcy court.*

**Commented [la49]:** Correct, 1 mark

**Commented [la50]:** Incorrect, the margin loan is a securities contract that is exempt from the automatic stay so the broker can sell the collateral.

*Regarding the Delinquent Lease: The automatic stay would also extend to enforcement actions regarding the lease, including any attempts by the landlord to evict Speculation Inc. from its office space.*

**Commented [la51]:** Correct, 1 mark

*Speculation Inc. now has the opportunity to renegotiate the terms of the lease, consider rejecting the lease as a contract, or manage the lease obligations in a manner that effectively supports its reorganization efforts.*

*Regarding Employment Discrimination Claims: The automatic stay would also cover the employment discrimination claim brought by an employee. While this stay stops the lawsuit, against Speculation Inc. it doesn't end the lawsuit altogether. Instead, it temporarily halts the case. Allows Speculation Inc. to address this claim within the bankruptcy process, potentially qualifying it as a claim for resolution under the claim's treatment provisions of the Bankruptcy Code.*

*By filing for Chapter 11, Speculation Inc. effectively suspends lawsuits and collection activities, giving itself protection while it works to reorganize its affairs. However, it is critical for the Company to carefully navigate this shield in negotiating with creditors and dealing with DOJ investigations to take full advantage of Chapter 11 while complying with legal requirements to achieve the best possible outcome in its reorganization efforts.*

**\* End of Assessment \***

Commented [la52]: Correct, 1 mark