

TOTAL = 36.5/50
73%



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]: 0, correct answer is C

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.**
- (e) **None of the above (options (a) to (d)) satisfy the minimum requirement for presence in the United States.**

Commented [FV3]: 1, correct

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.**
- (d) **An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.**
- (e) **All of the above.**

Commented [FV4]: 1, correct

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.

Commented [FV5]: 1, correct

(b) Executory contracts are clearly defined by the Bankruptcy Code.

(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?

Commented [FV6]: 0, correct answer is C

(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 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.

Commented [FV7]: 1, correct

(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.

(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?

In principle, setoff permits a creditor holding a claim against the debtor whilst simultaneously owing money to the debtor to net out the two (or more) obligations. However, creditors who may otherwise be able to setoff their obligations to the debtor are not permitted to do so because the exercise of setoff rights can improve the position of the creditor (i.e., the creditor with the right to setoff) as compared to other unsecured creditors who are not owed money by the debtor. This because it decreases the creditor's (with the right to setoff) obligation to the estate by the full amount owed by the debtor rather than the lesser amount that the debtor would have to pay on the unsecured claim.

Commented [FV11]: 1, correct

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 method by which a debtor can finance its post-petition business following a US chapter 11 bankruptcy and it is one of the debtor in possession (DIP) financing options. A priming lien is secured against assets of the debtor's estate - ranking either alongside or senior to existing security. Priming liens are available if the debtor has exhausted its options in seeking unsecured debt (with or without the Court's approval). If the debtor cannot obtain financing through an alternative route, the court may grant a priming lien if the debtor can demonstrate that the interest of the secured creditor being primed is adequately protected.

Commented [FV12]: 2, correct

Question 2.3 [2 marks]

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

If an act is taken in violation of the worldwide automatic stay, the act in question constitutes contempt of court and is void or voidable (depending on the circuit in which the bankruptcy is pending due to a circuit split on the issue). These consequences bite even if taken without the notice of the filing of the petition (i.e., even if the party was unaware of the automatic stay).

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?

The class(es) of creditors that are (i) deemed to accept the reorganization plan are: any class that is unimpaired (see ss. 1126(f) and (g) of the Bankruptcy Code).

The class(es) of creditors that are (ii) deemed to reject the plan are: any class that will receive nothing (see ss. 1126(f) and (g) of the Bankruptcy Code).

Commented [FV14]: 1.5. Full credit not given because the answer did not note that impaired creditors that receive something under the Plan are entitled to vote.

The class(es) of creditors that are (iii) permitted to vote on the plan are: (a) creditors secured by real property, (b) creditors secured by personal property, (c) unsecured creditors and (d) shareholders.

The vote necessary for a class of creditors to accept a plan is: a simple majority of the creditors in the class holding at least two-thirds of the value of claims in the class or, for equity interests, if two thirds in amount of interests vote in favour.

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) A preference claim.

Commented [FV15]: 2, answer to b is also preference

- (b) A constructive fraudulent conveyance.
- (c) An actual fraudulent conveyance.

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

Commented [la16]: 12/15 marks

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.

A bankruptcy court may enter a final order consistent with the US Constitution in circumstances where the said order disposes of all the issues in the litigation proceedings, leaving nothing further to be decided and where the parties have consented to the jurisdiction of the bankruptcy court (i.e., so that the order is constitutionally final). In *Bullard v. Blue Hills Bank*, 135 S Ct 1686 (2015), the US Supreme Court recognized the unique nature of bankruptcy proceedings as an "aggregation of individual controversies" and, as such, held that a bankruptcy order resolving a discrete dispute is final for appeals purposes.

Commented [la18]: This is finality for purposes of appeal, not constitutional finality.

Commented [la19]: Correct, 1/2 mark. Also the bankruptcy court has authority to enter a final order on a core proceeding that is exclusive to the Bankruptcy Code (e.g., a challenge to a petition)

Appeals from bankruptcy court orders are reviewed, in general, by the district court for the district in which they sit. However, in certain circuits, bankruptcy appeals are heard by a Bankruptcy Appellate Panel (the "BAP") which is a panel convened from the judges of the bankruptcy courts within the circuit. In those circuits, a party has the option to request that the appeal is heard by the district court instead of the BAP.

Commented [la20]: Correct, 1/2 mark

Commented [la21]: Correct, 1/2 mark

In the case of orders made by the Bankruptcy Court that are not constitutionally final, the district court or the BAP (as the case may be) will review de novo all findings of fact and conclusions of law to which a party (i.e., the Appellant) has objected.

Commented [la22]: Correct, 1 mark

Question 3.2 [3 marks]

Commented [la23]: 0.5/3 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?

The automatic stay which is a feature of chapter 7 and chapter 11 proceedings under the Bankruptcy Code does not automatically apply on the presentation of a chapter 15 proceedings. Further, the presentation of the chapter 15 proceedings does not automatically allow (a) the operation of the debtor's business in the ordinary course, (b) the sale, transfer or use of property outside of the ordinary course or (c) the avoidance of post-petition transfers and post-petition perfection of security interests.

Commented [la24]: Partially correct, 1/2 mark, note that the other things are available in a chapter 15 under certain circumstances, whereas the foreign representative cannot invoke the avoidance provisions of the Bankruptcy Code. A foreign representative can obtain equivalent relief under applicable US or foreign law or by commencing a plenary proceeding under chapter 7 or 11.

However, equivalent relief can be obtained by the foreign representative in two ways. The first is by obtaining the recognition of the chapter 15 proceedings as a foreign main proceeding by way of an order from the US bankruptcy court. In this case, the

relief mentioned above applies automatically on recognition. In order to have the chapter 15 proceedings recognized as a foreign main proceeding, the foreign representative would need to demonstrate that the proceedings have been commenced in the debtor's centre of main interests (COMI). Alternatively, if the COMI test cannot be passed, the US bankruptcy court can recognize the chapter 15 proceedings as a foreign non-main proceeding (i.e. acknowledging that the proceedings are in a jurisdiction other than the debtor's COMI) if the debtor has an establishment in the jurisdiction. If the proceedings are determined to be a foreign non-main proceeding then the reliefs mentioned above are available at the discretion of the US bankruptcy court.

Commented [la25]: Incorrect with respect to avoidance powers.

Question 3.3 [4 marks]

Commented [la26]: Incorrect with respect to avoidance powers.

Commented [la27]: 4/4 marks

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

You should review the Bankruptcy Rules, the Federal Rules of Civil Procedure, the local rules of the bankruptcy court and the assigned judge's personal practices. If the proceedings are taking place before a bankruptcy court in a jurisdiction in which you do not regularly practice, you should also consult with a local practitioner.

Commented [la28]: Correct, 1 mark

Commented [la29]: Correct, 1 mark

Commented [la30]: Correct, 1 mark

Commented [la31]: Correct, 1 mark

Question 3.4 [5 marks]

Commented [la32]: 5/5 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 general, director liability law in the US (which is a matter of the law of the state of incorporation) is more limited than that elsewhere and, particularly, more limited to that of common law jurisdictions such as England and Wales. Under Delaware law, directors owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision-making. Directors are protected from liability for errors of judgment by the business judgment rule. By application of this rule, directors are presumed to have acted in good faith on the basis of reasonable information. That presumption is rebuttable only by showing that a majority of the board of directors was not reasonably informed, did not honestly believe that their decision was in the corporation's best interest or were not acting in good faith. Unless that presumption is rebutted on those limited grounds, the corporation's directors will not be liable unless it can be proven that they were grossly negligent. One carveout to the business judgment rule is that it doesn't apply where a transaction is approved by a board majority that is not disinterested and independent or a controlling shareholder is on both sides of a transaction. In those circumstances the impugned transaction will be void unless the entire fairness standard (i.e. a higher standard) is satisfied.

Commented [la33]: Correct, 1 mark

Commented [la34]: Correct, 1 mark

Directors owe their duties to the corporation and to its shareholders. They do not owe duties to creditors of the corporation even in circumstances where the corporation is potentially insolvent and the shareholders stand to receive nothing in the bankruptcy.

Commented [la35]: Correct, 1 mark

Commented [la36]: Correct, 1 mark

Commented [la37]: Correct, 1 mark

Whilst this may seem at odds, particularly, with English law which provides that when a company is insolvent (or potentially insolvent), the directors' duties shift to become owed to the company's creditors, that is not the case under Delaware law. There is also no equivalent under US law of concept of "wrongful trading" or "deepening insolvency." Notably, in *North Am Catholic Educational Programming, Inc v. Gheewalla*, 930 A.2d 92, 103 (Del 2007), the Delaware Supreme Court put to rest any suggestion that directors owe duties to creditors when a company is operating "in the zone of insolvency" or indeed is actually insolvent. The Delaware Supreme Court's approach is in stark contrast to the United Kingdom's Supreme Court's decision in *BT/2014 LLC v. Sequana SA and others* [2022] UKSC 25 ("Sequana") which was made by reference to the United Kingdom's Companies Act 2006. In *Sequana*, the Supreme Court held that a director's duty to act in the interests of creditors has a coherent and principled justification since creditors always have an economic interest in the company's assets and that the relative importance of that economic interest increases where the company is either insolvent or nearing insolvency. In those circumstances, it was held that company directors should consider the company's creditors' interests and seek to avoid prejudicing them. A similar creditor duty arises in other common law jurisdiction and since *Sequana* is a decision of the United Kingdom's Supreme Court, it would be highly influential in offshore jurisdictions such as the Cayman Islands, the BVI and Hong Kong e.g.

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

Commented [1a38]: 9/15 marks

Question 4.1 [5 marks]

Commented [1a39]: 4/5 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?

If iWork Ltd ("iWork") were to file for a plenary petition then the worldwide automatic stay (the "Stay") would come into effect immediately on filing (see s.11 USC, ss. 362). That would provide the debtor with breathing space to formulate a restructuring plan, to negotiate with creditors and to realise assets culminating in the payment of creditor claims in order of priority set out in the Bankruptcy Code.

The Stay is extremely broad in scope. It applies to any interference with the property of iWork's estate anywhere in the world. It would prohibit (*inter alia*) any act to obtain possession or control of the property of iWork's estate. This would be unhelpful to the lessors of iWork's office space (the "Landlord") because, presumably, the Landlord would want to take possession of the office space (and, indeed, the lease agreement between the parties may give the Landlord the right to do so in certain circumstances). The Landlord would have standing to apply to lift the Stay (in its capacity as a creditor)

through a lift-stay or relief from stay motion (see s.11 USC, ss 362(d)) if it can show that one of the following grounds are satisfied, namely:

Commented [la40]: Correct, 1 mark

- (1) Lack of adequate protection of an interest in property of the estate where the value of the property may decline during the course of proceedings and result in the Landlord making less than a full recovery.
- (2) That iWork has no equity in the property and it is not necessary for re-organization.
- (3) The sole asset of iWork is a single piece of real property encumbered by an interest of the moving party and iWork has not (i) filed a plan within 90 days or (ii) made monthly payments on a non-default contract rate of interest, the stay should be lifted to permit the Landlord to foreclose or pursue other non-bankruptcy remedies.
- (4) Where the Landlord is secured by real property and the court finds that iWork's filing for bankruptcy "was part of a scheme to delay, hinder, or defraud creditors that involved either (a) transfer of all or part of ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or (b) multiple bankruptcy filings affecting real property."

Additionally, the Court has additional discretion to terminate the Stay pursuant to 11, USC ss. 362(d).

In addition, the lease between the Landlord and iWork is likely to be considered to be an executory contract in the sense that it may not be considered to be fully complete (i.e., because monthly/quarterly rent may not have been paid in consideration for the occupation of the premises). In the case of a Chapter 11 bankruptcy, the trustee must make a decision about whether to assume, reject or assume and assign an unexpired lease of non-residential property within 120 days of the order for relief (see 11 USC, 365(d)(4)). Whilst the period can be extended to up to 90 days for cause, any such extension requires the consent of the lessor so it would place the Landlord in a good commercial negotiating position.

Commented [la41]: Post-petition rent must be paid as administrative priority claim.

Commented [la42]: Correct, 1 mark

Commented [la43]: Correct, 1 mark

Finally, the Landlord would also be entitled to file a claim in respect of any pre-petition rent owed as part of iWork's bankruptcy.

Commented [la44]: Correct, 1 mark

Question 4.2 [5 marks]

Commented [la45]: 3/5 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.

The Bankruptcy Code adopted the UNICTRAL Model Law on Cross-Border Insolvency (the "Model Law") which, inter alia, is intended to facilitate co-operation between courts and parties to insolvency proceedings in the United States and in foreign countries. The Model Law has also been adopted by the United Kingdom and forms part of English law.

We are told that Skin Luxe's principal place of business is in France where, it appears, its manufacturing operations take place. We are also told that it has a physical presence in other international cities including in the United States (Las Vegas).

We are told that there is an order for an English scheme of arrangement (the "English Scheme"), although we do not have details of what that scheme of arrangement involves. Provided that the English Scheme has not been solely commenced for the purposes of investigation (see *In re. Global Cord Blood Corp.*), it prima facie can be granted recognition under Chapter 15. Based on the information that we are given, it appears that the English Scheme would be for the adjustment of Skin Luxe's debts and, therefore, capable of recognition under the Bankruptcy Code.

As to whether the Chapter 15 bankruptcy would be recognized as a foreign main or foreign non-main proceeding, this will come down to the determination of where Skin Luxe's COMI is. The conclusion of most US courts is that COMI is to be assessed as of the date of the US petition, not the commencement of the foreign proceedings (i.e., the English Scheme, in this instance). Skin Luxe's COMI is presumed to be its place of incorporation; in this case that is France (where its principal place of business is also located). The presumption, based on the information that we have, is that its COMI is in France. Whilst that presumption is rebuttable based on factors such as (a) location of headquarters, (b) location of management, (c) location of primary assets, (d) location of the majority of the debtor's creditors or a majority of the creditors that will be affected by the relief requested by the foreign representative and (e) the jurisdiction whose law will apply to most disputes, there is nothing in what we are told that would indicate that the presumption could be rebutted.

So, it appears that the Chapter 15 proceedings would proceed as a foreign non-main proceeding. This test would appear to be satisfied because we are told that Skin Luxe has an establishment in the jurisdiction (i.e., a physical presence in Las Vegas in which it conducted a non-transitory economic activity prior to the commencement of the chapter 15 proceedings).

Question 4.3 [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,

Commented [la46]: Correct, 1 mark

Commented [la47]: Correct, 1 mark

Commented [la48]: Correct, 1 mark, because foreign main proceedings are in the jurisdiction of the debtor's COMI.

Commented [la49]: Incorrect, the relevant establishment is in the jurisdiction of the foreign proceeding--the London boutique

Commented [la50]: 2/5 marks

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?

Taking these issues in turn:

- (i) The DOJ investigation: - The US Department of Justice (the "DOJ") would be a party in interest under the Bankruptcy Code as its interest in Speculation Inc. would be legal. As a party in interest, the DOJ would have the right to seek relief in the chapter 11 proceedings or, alternatively, to object to the relief sought by other parties in interest. Since the purpose of a chapter 11 petition is to create breathing space to allow the debtor to continue operating in the ordinary course of business, the DOJ could, as a party in interest, object to Speculation Inc.'s plan of reorganization if, for example, it concluded that Speculation Inc' had been unlawfully trading on insider information. The DOJ would not need to apply to lift the automatic stay because it does not apply to either regulatory investigations or criminal proceedings.**
- (ii) The margin loan default: - the lender would become a creditor in the estate and have the right to vote in relation to Speculation Inc.'s reorganization plan.**
- (iii) The delinquent lease: - If Speculation Inc. is the debtor in possession in the chapter 11 proceedings then it has the ability to reject burdensome contracts such as, potentially, its delinquent lease. The landlord's interest in Speculation Inc.'s estate would have to be declared by Speculation Inc. when filing its accompanying schedules to the voluntary chapter 11 proceeding.**
- (iv) The employment discrimination lawsuit: - The automatic stay that would apply on the filing of the chapter 11 proceedings would mean that no further step in the employment discrimination lawsuit could be taken without an application for relief being granted by the bankruptcy court.**

Commented [la51]: Upon filing the petition, the automatic stay would come into effect.

Commented [la52]: Correct, 1 mark

Commented [la53]: Incorrect, the margin loan is a securities contract that is exempt from the automatic stay, so the lender can sell the collateral.

Commented [la54]: The landlord is barred from pursuing eviction proceedings by the automatic stay.

Commented [la55]: Correct, 1 mark

* End of Assessment *