

TOTAL = 33.25/50
66.5%
Rounded up = 67%



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.
- (d) A retired employee of Car Corp who receives payments from the company's pension plan.**

Commented [FV2]: 1, correct

(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.**

Commented [FV4]: 1, correct

(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.

Commented [FV6]: 1, correct

(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.

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

Commented [FV7]: 0, correct answer is A

(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]: 1, correct

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. P.31*
- (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?

The term "setoff" typically refers to the practice of reducing or canceling out one debt or claim against another. In other words, if Party A owes money to Party B, and Party B also owes money to Party A, they might agree to offset those amounts, so that Party A pays only the net balance. This can simplify transactions and reduce the amount of actual cash exchanged.

Setoff rights allow a creditor to offset debts it owes to the debtor against debts owed to it by the debtor, therefore it can enhance the creditor's position relative to other unsecured creditors. This is because setoff reduces the creditor's obligation to the debtor's estate by the entire amount owed by the debtor, rather than the potentially lesser amount the debtor might pay on the unsecured claim. However, due to its potential to alter the distribution of assets in a bankruptcy proceeding, setoff is restricted in several circumstances.

Commented [FV11]: .5 Full credit not given because did not clearly explain that setoff is not permitted in many circumstances because it can improve the position of a creditor as compared to others.

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" refers to a type of lien that is granted to a lender who provides financing to a debtor in possession (DIP) during bankruptcy proceedings. The purpose of this lien is to ensure that the lender's claim on the debtor's assets is prioritized above existing liens or claims held by other creditors. In essence, it allows the lender to move ahead of other creditors in terms of repayment priority.

For a priming lien to be granted to secure DIP financing:

- 1. Court Approval: The bankruptcy court overseeing the case must approve the granting of the priming lien. This is typically done through a motion filed by the debtor seeking authorization for the financing and the priming lien.*
- 2. Adequate Protection: The lender must demonstrate that the priming lien will provide adequate protection for existing creditors' interests. This means showing that the financing and the priming lien will not unduly harm the rights of existing lienholders or unsecured creditors.*
- 3. Good Faith and Fairness: The court will assess whether the financing arrangement and the priming lien are entered into in good faith and are fair and equitable to all parties involved, including existing creditors.*
- 4. Best Interests of the Estate: The financing and the priming lien must be in the best interests of the bankruptcy estate. This involves considering factors such as the debtor's ability to reorganize successfully, the preservation of assets, and the maximization of value for creditors.*

Commented [FV12]: 1.5. Full credit not given because answer fails to note that priming will not be granted unless other financing is otherwise unavailable.

Question 2.3 [2 marks]

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

Violating the automatic stay, which is a fundamental protection granted to debtors upon filing for bankruptcy, can have serious consequences for creditors. Here are two potential consequences of violating the automatic stay:

- a) Contempt of Court: If a creditor willfully violates the automatic stay by attempting to collect a debt, such as by continuing with foreclosure proceedings, repossessing property, or harassing the debtor for payment, the bankruptcy court may hold the creditor in contempt. Contempt of court can result in penalties, including fines or sanctions imposed by the court. In severe cases, the court may even issue an injunction against the creditor or take other punitive measures.*

Commented [FV13]: 1. Full credit not given because answer did not note that act may be void or voidable depending on the Circuit.

Damages: Violating the automatic stay can also expose the creditor to liability for damages suffered by the debtor as a result of the violation. This could include financial losses, emotional distress, or other harm caused by the creditor's actions.

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 bankruptcy proceedings, the voting on a plan of reorganization involves different classes of creditors, each with specific rights and requirements. Here's how it typically works:

- (i) Deemed to Accept the Plan: A class of creditors is deemed to accept the plan if the plan is accepted by creditors that hold at least two-thirds in amount and more than one-half in number*

of the allowed claims in that class, provided that at least one impaired class votes to accept the plan.

(ii) **Deemed to Reject the Plan:** If a class of creditors does not meet the acceptance criteria mentioned above, it is deemed to reject the plan.

(iii) **Permitted to Vote on the Plan:** Generally, classes of creditors that are impaired under the proposed plan have the right to vote on the plan. An impaired class is one where the legal, contractual, or substantive rights of the creditors are altered by the proposed plan.

As for the vote necessary for a class of creditors to accept a plan, under the Bankruptcy Code (Chapter 11), at least two-thirds in amount and more than one-half in number of the allowed claims in a particular class must vote in favor of the plan for that class to accept it. This is a significant threshold designed to ensure that a majority of the affected creditors within that class support the plan.

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?**

Certainly, let's break down preferences, actual fraudulent conveyances, and constructive fraudulent conveyances, and address your questions:

(a) **Cause of Action Applying only to Transfers made on Account of Antecedent Debt:**

- This cause of action specifically applies to preferences. Preferences occur when a debtor transfers property to a creditor on account of an antecedent debt (a debt owed before the transfer was made) within a certain period before the filing of bankruptcy. The aim is to prevent creditors from favoring certain creditors over others shortly before declaring bankruptcy.

(b) **Cause of Action Requiring Proof of Insolvency at the Time of Transfer:**

- This cause of action applies to both actual fraudulent conveyances and constructive fraudulent conveyances. Both types of conveyances involve the transfer of assets with the intent to hinder, delay, or defraud creditors. However, to establish an actual fraudulent conveyance, it's necessary to prove fraudulent intent, whereas constructive fraudulent conveyances don't require proof of fraudulent intent but do require proof of insolvency at the time of the transfer.

(c) **Cause of Action Requiring Proof of Intent to Frustrate Creditors' Recoveries:**

- This cause of action specifically applies to actual fraudulent conveyances. An actual fraudulent conveyance involves a transfer of assets made with the actual intent to hinder, delay, or defraud creditors. Therefore, to establish an actual fraudulent

Commented [FV14]: 1.5. Full credit not given because the answer fails to note that an unimpaired class is deemed to have accepted the plan.

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

conveyance, it's necessary to prove that the debtor had the intent to frustrate creditors' recoveries through the transfer.

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

Commented [la16]: 8.25/15 marks

Question 3.1 [3 marks]

Commented [la17]: 1.75/3 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 the United States, bankruptcy courts have limited authority to enter final orders due to constitutional constraints outlined in Article III of the U.S. Constitution, which establishes the judicial branch. Bankruptcy courts are Article I courts, which are legislative courts established by Congress. As such, they do not have the full judicial power granted to Article III courts, such as district courts and appellate courts.

Bankruptcy courts may enter final orders in certain circumstances, primarily those involving core proceedings. Core proceedings are those integral to the bankruptcy process, such as determining the dischargeability of debts, confirming a reorganization plan, or granting relief from the automatic stay. In these core proceedings, bankruptcy judges can issue final orders consistent with the U.S. Constitution because they are considered to be acting as adjuncts to Article III district courts.

Commented [la18]: Partially correct, 1/4 mark, bankruptcy courts cannot enter final orders on all core proceedings, but rather only those exclusive to the Bankruptcy Code (e.g., a challenge to a petition). Also, the Bankruptcy Court can enter final orders with the consent of the parties.

However, in non-core proceedings or matters where the bankruptcy court lacks constitutional authority to enter a final order, it must issue proposed findings of fact and conclusions of law to the district court. The district court then reviews these proposals de novo (anew) and enters a final order based on its review.

Commented [la19]: Correct, 1 mark

As for appeals from bankruptcy court orders:

- Appeals from final orders of bankruptcy courts are generally heard by the United States District Court in the district where the bankruptcy court is located. District courts have the authority to review these final orders and issue rulings.

Commented [la20]: Correct, 1/2 mark. In some circuits, a Bankruptcy Appellate Panel may hear appeals from bankruptcy court

- Appeals from district court decisions may be made to the United States Court of Appeals for the circuit in which the district court is located. Each circuit court reviews appeals from its respective district courts.

- Ultimately, appeals from circuit court decisions may be made to the United States Supreme Court, though the Supreme Court has discretion over which cases it chooses to hear.

Question 3.2 [3 marks]

Commented [la21]: 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?

In a Chapter 15 proceeding under the United States Bankruptcy Code, certain provisions may not be invoked by a foreign representative. Specifically, Sections 362 (automatic stay) and 547 (preferences) of the Bankruptcy Code are not available to foreign representatives in Chapter 15 cases.

Commented [la22]: Partially correct, 1/2 mark, in addition the foreign representative can not bring avoidance claims for fraudulent transfers in chapter 15.

However, despite these limitations, a foreign representative can obtain equivalent relief through alternative means. Two common ways for a foreign representative to seek equivalent relief include:

- a) **Recognition of Foreign Proceedings:** The foreign representative can seek recognition of the foreign insolvency proceeding in the U.S. bankruptcy court. Once recognized, the foreign representative gains access to the protections and remedies available under Chapter 15, including the automatic stay and avoidance powers similar to those in Sections 362 and 547 of the Bankruptcy Code.
- b) **Direct Application for Relief:** Instead of invoking specific provisions of the Bankruptcy Code, the foreign representative may directly apply to the U.S. bankruptcy court for appropriate relief. This could involve seeking injunctive relief, such as a temporary restraining order or preliminary injunction, to protect the foreign debtor's assets or interests in the United States.

By pursuing recognition of the foreign proceeding or seeking alternative relief directly from the U.S. bankruptcy court, the foreign representative can effectively address the needs of the foreign debtor and its stakeholders in the United States within the framework of Chapter 15 of the Bankruptcy Code.

Question 3.3 [4 marks]

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

When preparing a filing for a bankruptcy court in the USA in cases of cross-border insolvency, it's essential to review several rules and guidelines to ensure compliance and effectiveness. Here are some key rules and considerations to review:

- a) **Chapter 15 of the US Bankruptcy Code:** Chapter 15 specifically deals with cross-border insolvency cases in the United States. It provides the framework for the recognition of foreign proceedings, cooperation with foreign courts and representatives, and the protection of creditors' interests in cross-border insolvency cases.
- b) **Local Bankruptcy Rules:** Each bankruptcy court in the United States may have its own set of local rules that supplement the Federal Rules of Bankruptcy Procedure. These local rules may include specific requirements or procedures for filings in cross-border insolvency cases.
- c) **Federal Rules of Bankruptcy Procedure:** These rules govern the procedural aspects of bankruptcy cases in federal courts, including the filing of petitions, motions, and other pleadings. It's crucial to adhere to these rules when preparing and filing documents with the bankruptcy court.
- d) **International Treaties and Conventions:** The United States is a party to several international treaties and conventions related to cross-border insolvency, such as the UNCITRAL Model Law on Cross-Border Insolvency and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).
- e) **Case Law:** Reviewing relevant case law can provide insights into how courts have interpreted and applied bankruptcy laws and principles in cross-border insolvency

Commented [la23]: Incorrect. These are available only if the foreign representative commences a plenary proceeding under chapter 7, or 11.

Commented [la24]: Incorrect. The foreign representative could commence a claim for recovery of preferences or fraudulent transfers under other applicable US or foreign law.

Commented [la25]: 2/4 marks

Commented [la26]: Correct, 1 mark. You should also review the assigned judge's personal practices.

Commented [la27]: Correct, 1 mark. You should also review the Federal Rules of Civil Procedure, which are referenced but not set out in full in the Federal Bankruptcy Rules.

cases. Understanding precedent can help anticipate potential challenges and arguments in the case.

- f) *Communication and Cooperation with Foreign Representatives: In cross-border insolvency cases, effective communication and cooperation with foreign representatives, courts, and stakeholders are essential.*

Question 3.4 [5 marks]

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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?

Directors of Delaware corporations owe fiduciary duties, primarily consisting of the duty of care and the duty of loyalty, to the corporation and its shareholders. These duties guide directors in their decision-making processes and actions to ensure they act in the best interests of the corporation and its stakeholders. The duties are owed both in the ordinary course of business and when the corporation is potentially or actually insolvent, but the focus may shift based on the company's financial condition.

Ordinary Course of Business

Commented [la29]: Correct, 1 mark

Commented [la30]: Correct, 1 mark

Commented [la31]: Correct, 1 mark

Commented [la32]: Correct, 1 mark

Duty of Care: Directors are required to act with the same level of care and diligence that a reasonably prudent person would exercise in similar circumstances. This duty involves making informed decisions, conducting due diligence, and actively participating in corporate governance.

Duty of Loyalty: Directors are required to act in good faith and with undivided loyalty to the corporation's interests. Directors must avoid conflicts of interest, self-dealing, and personal gain at the expense of the corporation.

When Potentially or Actually Insolvent

Duty to Creditors: In such circumstances, directors must consider the interests of creditors alongside those of shareholders. The duty to creditors typically arises when the corporation is in the zone of insolvency, meaning it is nearing insolvency or on the brink of financial distress.

Commented [la33]: Incorrect, the duties of directors remain owed to the corporation and shareholders.

Preservation of Assets: Directors have a heightened duty to preserve the corporation's assets and maximize value for creditors when the company is insolvent or approaching insolvency. This may involve refraining from actions that could harm creditors' interests, such as preferential transfers or fraudulent conveyances.

It's important to note that while the duty of care and duty of loyalty remain constant, the emphasis on preserving shareholder versus creditor interests may vary depending on the corporation's financial condition. Directors must carefully navigate these duties and consider the broader implications of their decisions, particularly in times of financial distress or insolvency, to fulfill their obligations to the corporation and its stakeholders.

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

Commented [la34]: 10.5/15

Question 4.1 [5 marks]

Commented [la35]: 1.5/5 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 Bankruptcy Code provides certain protections to lessors of office space when a lessee like iWork Ltd files for bankruptcy. These protections primarily revolve around the lessor's ability to take action to protect their interests in the leased property. Here are some key protections provided by the Bankruptcy Code:

- **Automatic Stay:** Upon the filing of a bankruptcy petition by iWork Ltd, an automatic stay goes into effect, which halts most collection actions, including eviction proceedings, against the debtor. This gives the debtor and the bankruptcy court time to assess the situation and determine the appropriate course of action.
- **Assumption or Rejection of Lease:** iWork Ltd, as the debtor, has the option to assume or reject its unexpired leases of office space. If iWork Ltd assumes the lease, it agrees to continue performing under the lease terms and must cure any defaults, including unpaid rent. If it rejects the lease, the lessor can treat the lease as terminated and may pursue remedies for breach of lease, including eviction.
- **Payment of Pre-Petition and Post-Petition Rent:** The Bankruptcy Code requires the debtor to pay pre-petition and post-petition rent for the period during which it occupies the leased property. The lessor has a claim for unpaid pre-petition rent as an administrative expense, which receives priority in payment over most other claims.
- **Limitations on Assumption of Lease:** The Bankruptcy Code imposes certain conditions on the assumption of leases, including the requirement that the debtor cure any monetary defaults (such as unpaid rent) and provide adequate assurance of future performance under the lease.

Ability to Seek Relief: If iWork Ltd fails to assume or reject the lease within a certain time frame set by the bankruptcy court, or if it fails to cure defaults as required, the lessor can seek relief from the automatic stay to pursue remedies outside of the bankruptcy process, such as eviction or repossessing the leased property.

Question 4.2 [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.

Commented [la36]: Partially correct, 1/2 mark, only post-petition rent is owed following the petition and is an administrative claim.

Commented [la37]: Incorrect, the claim for unpaid pre-petition rent is a general unsecured claims.

Commented [la38]: Correct, 1 mark. The debtor has 120 days to assume or reject, with a maximum 90 day extension for cause, following which extension requires landlord consent. If the debtor assumes and then rejects the lease, it owes 2 years' rent as a administrative priority claim.

Commented [la39]: 5/5 marks

To determine whether the English scheme of arrangement could be granted recognition under US Chapter 15 as a foreign main or foreign non-main proceeding, we need to consider the criteria laid out in Chapter 15 of the US Bankruptcy Code.

1. A foreign main proceeding is typically where the debtor's center of main interests (COMI) is located. The COMI is presumed to be the debtor's registered office or habitual residence, but it can be rebutted by evidence showing that the debtor's main interests are located elsewhere.

- In the case of Skin Luxe, since it is incorporated and has its principal place of business in France, it's likely that its COMI is in France. However, if Skin Luxe's main interests are found to be in England due to its significant business operations there, it could potentially be considered a foreign main proceeding under US Chapter 15.

2. A foreign non-main proceeding is typically any foreign proceeding other than a foreign main proceeding. This could include proceedings where the debtor has an establishment, but not its COMI.

- Skin Luxe's operations in England, where it is considering using the English scheme of arrangement to restructure its bonds, could potentially constitute an establishment. If the English scheme of arrangement is being pursued in connection with Skin Luxe's operations in England, it could be considered a foreign non-main proceeding.

3. The US bankruptcy court will consider various factors to determine whether to grant recognition, including whether the foreign proceeding is collective in nature, whether it involves the debtor's assets and liabilities, and whether it provides for the distribution of assets to creditors.

- The English scheme of arrangement, if it meets these criteria and is recognized as a legitimate restructuring proceeding under English law, could potentially be granted recognition under US Chapter 15.

Ultimately, whether the English scheme of arrangement is recognized as a foreign main or foreign non-main proceeding under US Chapter 15 will depend on the specific circumstances of Skin Luxe's case, including the location of its COMI, its significant business operations, and the nature of the restructuring proceedings in England.

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, 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?

Filing for Chapter 11 bankruptcy by Speculation Inc would have different effects on each of the mentioned situations:

- (i) DOJ investigation: Filing for Chapter 11 bankruptcy would not automatically halt or affect the DOJ investigation. Criminal investigations by government agencies, such as the Department of Justice, typically continue independently of the

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Commented [la42]: Correct, 1 mark

Commented [la43]: Correct, 1 mark

Commented [la44]: Correct, 1 mark, the boutique in London is an establishment.

Commented [la45]: 4/5 marks

Commented [la46]: Correct, 1 mark

bankruptcy process. The bankruptcy filing may, however, impact the company's ability to defend itself or resolve any potential legal issues related to the investigation.

- (ii) **Margin loan default:** Filing for Chapter 11 bankruptcy would trigger an automatic stay, which halts most collection actions against the debtor, including actions by creditors to enforce their claims. This would temporarily halt any actions by the broker to enforce the default on the margin loan. Speculation Inc could then use the Chapter 11 process to negotiate with the broker and potentially restructure its debts, including the margin loan.
- (iii) **Delinquent lease:** Similar to the margin loan default, filing for Chapter 11 bankruptcy would trigger an automatic stay, which would temporarily halt any eviction proceedings or collection actions related to the delinquent lease. Speculation Inc could use the Chapter 11 process to negotiate with the landlord and potentially restructure its lease obligations as part of its overall restructuring plan.
- (iv) **Employment discrimination lawsuit:** Filing for Chapter 11 bankruptcy would trigger an automatic stay, which would temporarily halt any litigation or collection actions related to the employment discrimination lawsuit. The former employee alleging gender bias would become a creditor in the bankruptcy case, and her claim would be subject to the claims resolution process in bankruptcy. The bankruptcy court would oversee the resolution of such claims as part of the overall restructuring process.]

Commented [la47]: The margin loan is a securities contract that is exempt from the automatic stay so the broker can sell the shares even after the petition is filed

Commented [la48]: Correct, 1 mark

Commented [la49]: Correct, 1 mark

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* End of Assessment *