

TOTAL = 34.5/50
69%



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.***
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- 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.**

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.***^[FV2]
- (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.***^[FV3]
- (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.***

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.***^[FV4]
- (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.*

[FV5]

(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?

(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.*

[FV6]

(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.* [FV7]

(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.**
- [FV8] (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).**

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.****[FV9]**
- (d) Debtors must carry out a robust marketing process for the sale.**
- (e) A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.**

Question 1.10

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.*^[FV10]
- (d) *Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.*
- (e) *Authority for substantive consolidation comes from the Bankruptcy Code.*

QUESTION 2 (direct questions) [10 marks]

Question 2.1 (1 mark)

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

Setoff is a legal right that permits a creditor holding a claim against the debtor and simultaneously owing money to the debtor to net out the two (or more) obligations. Set off is not permitted in number of circumstances because setoff rights can improve the^[FV11] position of the creditor as compared to other unsecured creditors who are not owing money by the debtor and because it decreases its obligation to the estate by the full amount owed by the debtor rather than the lesser amount the debtor would pay to the unsecured claim.

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 the context of bankruptcy law a “Priming lien” refers to a senior or equal to pre-petition lien on estate property to secure post-petition financing. Following requirements must be met for such a lien to be granted to secure DIP financing in US Bankruptcy law:

1. *Necessity: The debtor must demonstrate the necessity of obtaining DIP financing to continue its operations during the bankruptcy proceedings and no other options is available to secure and obtain the required amount of DIP financing. This is the ^[FV12]last alternative for post petition financing commonly*

refer to as a debtor in possession (DIP) financing, where all three other available options are not workable.

- 2. Adequate protection: the debtor must also demonstrate that the interest of the secured creditor being primed is adequately protected.*
- 3. Good faith: the request for priming lien must be made in good faith, without any intent to unduly prejudice existing creditors.*
- 4. It should be of fair and equitable standard.*
- 5. Market test: Terms should be reasonable.*
- 6. Court approval: the bankruptcy court overseeing the case must approve the granting of priming lien.*

Question 2.3 [2 marks]

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

The worldwide automatic stay comes into effect immediately on the filing of any plenary petition and provides the debtor breathing room to formulate a restructuring plan, negotiate with creditors and realize the value of its assets in an orderly process culminating in the payment of creditor claims in accordance with the priorities set out in the Bankruptcy code.

An act in violation of the stay (even if taken without notice of filing of the petition) constitutes contempt of court and is void or voidable (depending on the circuit in which the bankruptcy is pending due to a circuit split in this issue). Parties in interest may, however, seek to lift the stay prospectively to permit or retroactively to validate an act that would otherwise be a stay violation. Failure to obtain relief from the stay may result in the following potential consequences:

- 1. Sanctions: imposition of contempt sanctions against the stay violator, which may^[FV13] include payment of the debtors' attorney's fees and requiring the violator to take affirmative acts to undo the effects of its violation. However, the US Supreme Court recently held that stay only prohibits affirmative acts that changes the status quo of the estate's property. The court may also impose coercive contempt sanctions, such as a daily fine to be paid to the court until the stay violation has been rectified.*
- 2. Damages and liabilities: In addition to the legal sanctions, a violator may be liable for damages resulting from the violation of automatic stay. This could include actual damage suffered by the debtor due to the violation, as well as any additional cost incurred. The violator may be required to compensate the debtor for financial harm or emotional distress caused by the violation.*

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?

As per US Bankruptcy Code, an unimpaired class of creditors is deemed to accept the plan.

A class that will receive nothing is deemed to reject the plan.

Hence, the impaired classes are only permitted to vote on the plan.

Following vote is necessary for a class of creditor to accept a plan:

A given class of creditors approves the plan if a simple majority of the creditors in the class, [FV14] holding at least two-thirds of the value of claims in the class, vote in favour or for equity interests, if two-thirds in amount in interest vote in favour.

Not all creditor constituencies must approve the plan for it to be confirmed, however, the US Bankruptcy Code provides for Cramdown of dissenting classes. To use cramdown , all other requirements of confirmation described above need to be met, and at least one impaired class (not counting insiders) must have voted to accept 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?***

Lets discuss the cause of action that The Bankruptcy Code provides to the trustee or debtor in possession to recover property for the estate from pre-petition transferees.

The cause of action that applies only to transfer made on account of antecedent debt in "Preferences". A preference is a transfer of the debtor's property made in a suspect period (90 days for transfer to third parties and one year for insiders) before the petition date that must be returned to the estate if it exceeds the amount the recipient would have received in a Chapter 7 liquidation had the transfer not been made.

The cause of action that requires the debtor to be presumed or proven to have been [FV15] insolvent at the time of the transfer is "Actual Fraudulent Conveyances" An actual fraudulent conveyance involves a transfer of assets within 2 years period prior to petition date with the actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted. Insolvency is a key factor in establishing this cause of action. However, intent may be proven circumstantially, by reference to "badge of fraud" developed in state fraudulent transfer law.

The cause of action that requires the debtor to be proven to have intended to frustrate creditor's recoveries is "constructive Fraudulent Conveyances". Constructive fraudulent conveyances focus on the effect of the transfer rather than the debtor's intent. It does not require a showing of actual fraudulent intent but examines whether the transfer was made without fair consideration (i.e the debtor received less than reasonably equivalent value in exchange for a transfer or incurrence of obligation) when the debtor was insolvent or because insolvent as a result. Beside insolvency following additional factors may also be present such as:

- *The debtor was unreasonably undercapitalized for the business or transactions it was engaged in or planned to engage in or*
- *The debtor intended to or believe it would incur debts beyond its liability to pay on maturity or*
- *The transfer was made to or for the benefit of insider, or the debtor incurred an obligation under an employment contract with an insider outside the ordinary course of business.*

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

Question 3.1^[1a17] [3 marks]

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

A. Circumstances in which a bankruptcy court may enter a final order:

Unusually, the US has special federal courts for bankruptcy matters. Because these courts were created by legislation, rather directly by Article III of the US Constitution, bankruptcy judges are appointed by courts of appeal, rather than the president, do not have lifetime tenure and have limited jurisdiction to enter final orders other than on core bankruptcy matters. It has been established now that bankruptcy courts may enter a final order on Core issues.

In Stern V Marshall, the US Supreme Court also held that even in core proceedings, a bankruptcy court cannot issue final orders that invade Article III jurisdiction. The US Supreme Court has held that bankruptcy judges may determine a core proceeding over which they lack constitutional authority by issuing a report and recommendation for review by the district court,^[1a18] or the same procedure as in non-core proceedings, or, with the consent of parties may issue final orders^[1a19]. The Bankruptcy Rules have implemented these rulings by requiring litigants to state in their proceeding whether they consent to entry of final orders or judgement by the bankruptcy court, and by permitting a district court that determines that a bankruptcy court did not have jurisdiction to enter a final order to treat that its order as proposed findings of facts and conclusions of law.

B. Who reviews appeals from bankruptcy court orders:

In general, appeals from bankruptcy court orders are heard by the district court^[1a20] for the district in which they sit. In certain circuits, however, bankruptcy appeals are heard by a bankruptcy Appellate panel (BAP),^[1a21] convened from the judges of the bankruptcy courts within the circuit. In these circuits, a party has the option to request that the appeal be heard by the district court instead.

C. How orders that are not constitutionally final are reviewed:

In an order is not constitutionally final, parties may seek permission to appeal directly to district court, bypassing the bankruptcy appellate panel.^[1a22] In some cases, a party may need to obtain certification from the bankruptcy court or the district court to pursue a direct appeal.

Interlocutory orders are generally not immediately appealable, instead parties can seek review after the bankruptcy court enters a final order or by requesting permission to appeal directly from the district court.

Bankruptcy appellate panels also exist in some jurisdictions as an intermediate appellate level between the bankruptcy court and the district court. Parties may choose to appeal to a BAP, and the BAP's decision can be further appealed to the district court.^[1a23]

In Core proceedings, where bankruptcy court had entered a final order, the district court reviews conclusions of law de novo and reviews findings of facts for abuse of discretion.

If the ruling was on non-core proceeding, the district court or BAP reviews de novo all findings of facts and conclusions of law.

The orders of a district court or BAP is reviewed by a circuit court of appeal de novo as to the conclusions of and for abuse of discretion for findings of facts.

Question 3.2^[1a24] [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 proceeding under the US Bankruptcy Code, a foreign representative may not involve certain provisions that are exclusive to domestic bankruptcy cases. Two key provisions that a foreign representative cannot invoke in a Chapter 15 cases are:

- 1. Automatic Stay (Section 362): The automatic stay, which halts most collection actions against the debtor, cannot be invoked directly by foreign representative in Chapter 15 case. The filing of the petition under chapter 15 does not automatically invoke a stay of creditor action. The stay arises only upon the petition for recognition of a foreign main proceeding being granted and is limited to the property of the debtor within the territorial jurisdiction of the United States. The bankruptcy court may grant a stay or other assistance on an interim basis pending recognition or following recognition of a non-main proceeding also.*

2. **Avoidance Powers**^[1a25] (Section 544-553): *The foreign representative generally does not have direct access to the avoidance powers granted to a trustee in a domestic bankruptcy case. These powers include avoiding certain pre-bankruptcy transfers and preferences. Instead, the foreign representative can seek assistance from the US bankruptcy court for similar relief.*

Two ways that a foreign representative can obtain equivalent relief^[1a26]:

1. **Recognition of foreign proceedings:** *The primary mechanism for a foreign representative to obtain relief in the US is through the recognition of foreign proceedings by the US Bankruptcy court. Once recognized, the foreign representative gains access to certain powers and relief available under chapter 15, including the ability to request a stay of proceeding and to participate in US bankruptcy proceedings.*
2. **Cooperation and assistance from US Courts:** *even though a foreign representative may not directly invoke certain provisions of the bankruptcy Code, they can seek cooperation and assistance from US courts. This involves working collaboratively with the US court and domestic stakeholders to achieve outcomes like those available under the Bankruptcy Code.*

Chapter 15 is designed to facilitate cooperation between US and foreign courts, recognizing foreign proceedings and providing a framework for dealing with cross-border insolvency cases. The foreign representative's ability to obtain relief is largely contingent on the US court's recognition of the foreign proceeding and the cooperation between the courts involved.

Question 3.3^[1a27] [4 marks]

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

When preparing a filing for a bankruptcy court, it is crucial to review and adhere to the rules and procedures governing bankruptcy cases. The specific rules can vary depending on the chapter of bankruptcy (e.g. Chapter 7, Chapter 11 Chapter 15 etc.) and the jurisdiction, but here are some general rules to consider:

1. **Local Rules of the Bankruptcy Court**^[1a28]: *Each bankruptcy court may have its own set of local rules that supplement the Federal Rules of Bankruptcy Procedures. These rules provide specific requirements and procedures applicable to that jurisdiction.*
2. **Federal Rules of Bankruptcy Procedure**^[1a29]: *The Federal Rules of Bankruptcy Procedures outline the procedural rules for bankruptcy cases. It covers various aspects, including initiating a case, filing documents, deadlines, hearings, and appeals. Familiarize yourself with the relevant rules based on specific filing you are preparing.*
3. **Bankruptcy Code:** *The Bankruptcy Code is the deferral law governing bankruptcy cases. It establishes the legal framework for bankruptcy proceedings, including eligibility, types of bankruptcy, and the rights and obligations of debtors, creditors, and other parties involved.*

4. **General Orders and Administrative Orders:** Some bankruptcy courts issue general or administrative orders that provide additional guidance or rules for specific matters. Check for such orders that may be applicable for a particular case.
5. **Local Forms and procedures:** Review any local forms provided by the bankruptcy court, as well as specific procedures that may have in place. Courts often have preferred format for certain documents.
6. **Electronic Filing Rules:** Many bankruptcy courts require electronic filing through specific systems. Familiarize yourself with the court's electronic filing rules, procedures, and any technical requirements.
7. **Notice Requirements:** One should understand the rules related to providing notice to creditors, interested parties and the court. Compliance with notice requirements is critical for due process and the integrity of the bankruptcy process.
8. **Court Orders and Case-Specific Instructions:** If there are existing court orders or specific instructions related to a particular case, a litigant should carefully review and follow them. Failure to comply with court orders can have serious consequences.
9. **Legal Practice and Customs:** Be aware of any local practices or customs that are not explicitly covered by the rules but are commonly followed in that jurisdiction.

Before filing any document with the bankruptcy court, it is advisable to consult with legal professionals to ensure compliance with the applicable rules, regulations, and procedures. This will help prevent delays, rejections, or other complications in the bankruptcy process.

Question 3.4 [1a30] [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?

Let's discuss Director's liability in the context of Delaware corporate law, which is highly influential in the US corporate law. In the United States, director liability is generally more limited than in other jurisdictions.

*Directors owe a fiduciary duty of **loyalty** [1a31] to the corporation's best interests and a duty of **care** [1a32] in making informed decisions or educated decision making. The business judgement rule shields directors from liability for errors of judgement, presuming that the board acted in good faith based on reasonable information. This presumption can only be rebutted by demonstrating a lack of reasonable information, absence of belief in the decision's best interest, or acting in bad faith. Directors can be exculpated from the duty of care (but not loyalty) by the corporation's certificate of incorporation.*

However, the business judgement rule does not apply in transactions approved by a non-disinterested majority or if a controlling shareholder is involved on both sides. In such cases, the entire fairness standard must be met, or the transaction may be void. Importantly, directors owe duties to the corporation and shareholders, not creditors, even in potentially insolvent scenarios.

The Delaware supreme Court has clarified that directors don't owe duties to creditors when a company is in the "zone of insolvency" or is actually insolvent. This distinction means there is no equivalent in US law to concept like "wrongful trading" or "deepening insolvency." Directors are shielded by the business judgement rule, reinforcing the emphasis on their obligations to their corporation and its shareholders.

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

Question 4.1 [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 US Bankruptcy Code provides certain protections to lessors of office space in case of bankruptcy proceedings of a lessee, such as iWork Ltd. Here are some key protections under the Bankruptcy Code:

- 1. Relief from Automatic Stay:** *When bankruptcy proceedings are started for iWorks limited whether under chapter 7 or 11, an automatic stay goes into effect, halting most collection actions, including eviction proceedings and efforts to recover unpaid rent. However, this automatic stay may be lifted on Lessor's request (through a lift-stay or relief from stay motion) to permit otherwise prohibited creditor action on the ground of lack of adequate protection of an interest in property of the estate, where the value of the property may decline during proceedings and result in the interested party making less than a full recovery. Therefore, if iWork Ltd continues to use the leased office space during bankruptcy proceedings, the lessors may seek "adequate protection" to ensure that its interests are safeguarded. This can include periodic payments or additional security to compensate for decrease in the value of the lessor's interest.*
- 2. Assumption or Rejection of Leases:** *The ability to assume, reject or assume and assign executory contracts is a debtor-friendly feature of the Bankruptcy Code. In a chapter 7 case, the trustee must make decisions about assumption and assignment or rejection of executory contracts within 60 days of petition date. In Chapter 11 case, the debtor can decide until the confirmation of its plan or reorganization, but a deadline can be imposed by the bankruptcy court on the request of a counterparty for cause. One exception is that decision about*

unexpired leases of non-residential property is required to be made within 120 days of the order for relief.^[1a39] Hence, iWork Ltd, as the debtor, has the option to assume or reject its office space leases. If the leases are assumed, iWork Ltd agrees to cure any outstanding defaults, including unpaid rent. If after assuming, the debtor subsequently decides to reject it, the damages due to counterparty are considered post-petition administrative expenses of the estate. If rejected, the lessor can pursue available remedies, including eviction. The court may deny approval of the election where the choice is not made in good faith or in a reasonable exercise of business judgement.

- 3. Priority Claims for Unpaid Rent:^[1a40] Unpaid rent for a certain period before bankruptcy filing may qualify as priority claim under the Bankruptcy Code. This means that the lessor's claim for unpaid rent has a higher priority for payment compared to other unsecured creditors.*

Its important to note that the Bankruptcy Code provides protections to lessors, the specifics can depend on the details of the case, the type of Bankruptcy filed 9 Chapter 7, Chapter 11 etc) and the action taken by the debtor.

Question 4.2^[1a41] [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 recognition of an English scheme of arrangement under Chapter 15 of the US Bankruptcy Code would depend on whether it qualifies as a foreign main or foreign non-main proceeding. Chapter 15 is designed to provide a framework for cooperation between US and foreign courts in cross-border insolvency cases.

- 1. Foreign Main Proceeding: Foreign main proceedings are those that commenced in the debtor's Center of Main Interest (COMI).^[1a42] For an English scheme of arrangement to be recognized as a foreign main proceeding, it must be the primary insolvency proceeding in the jurisdiction where Skin Luxe has its "center of main interest" (COMI). COMI is typically the place where the debtor's main business are located. A debtor's COMI is presumed to be a place of incorporation, but this is rebuttable.^[1a43] Relevant factors in the COMI analysis include*

- location of headquarters*
- location of management*
- location of primary assets*

- location of majority of debtor's creditors or a majority of the creditors that will be affected by the relief requested by the foreign representative and
- jurisdiction whose law will apply to most disputes.

Most likely the COMI of Skin Luxe shall be determined to be in France as it is having principal place of business in France where it develops and manufacture its products.^[1a44]

If Skin Luxe's COMI is determined to be in France, then an English scheme may not qualify as a foreign main proceeding.

2. **Foreign Non-Main Proceeding:** *If the English scheme is not considered a foreign main proceeding, it may be treated as foreign non-main proceeding.*^[1a45] *In this case, the English Court-appointed representative would need to seek recognition for the US Bankruptcy court, demonstrating the need for assistance in the US ancillary to the primary proceeding taking place in another jurisdiction.*

Key consideration for the US court includes whether the English scheme of arrangement is compatible with the US public policy and whether Skin Luxe has assets or creditors in the US that require protection.

In summary, the determination of whether an English scheme of arrangement by Skin Luxe could be granted recognition under Chapter 15 would involve assessing factors such as the location of Skin Luxe's COMI, the nature of scheme and need for US assistance.

Question 4.3^[1a46] [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 various effects on the ongoing matters:

- (i) DOJ Investigation:

Filing for Chapter 11 bankruptcy does not automatically halt or dismiss ongoing investigation by government authorities, including the US Department of Justice (DOJ).^[1a47] The bankruptcy process may, however, impact the timing and nature of the investigation. The DOJ may continue its enquiry, but its actions may be subject to the oversight and approval of the bankruptcy court.^[1a48] The bankruptcy filing could potentially affect the DOJ's ability to collect fines or penalties during the bankruptcy proceedings.^[1a49]

(ii) Margin Loan Default:

The default on the margin loan would be a significant factor in the bankruptcy case. The bankruptcy filing triggers an automatic stay^[1a50], which temporarily halts collection actions, including those related to the margin loan default.^[1a51] Speculation Inc would have the opportunity to negotiate with the lender, restructure its debts, and potentially continue its operations under the protection of the bankruptcy court.

(III) Delinquent lease:

The bankruptcy filing also triggers an automatic stay on actions to recover possession of property, including eviction for non-payment of rent^[1a52]. This stay provides Speculation Inc with a temporary reprieve, allowing it to negotiate with the landlord and potentially assume or reject the lease under the guidance of the bankruptcy court. The bankruptcy process may lead to the restructuring of lease obligations or the surrender of the lease.

(iv) Employment Discrimination Law Suit:

The bankruptcy filing will likely affect the civil lawsuit alleging gender bias^[1a53]. The automatic stay temporarily halts most litigation against the debtor, including employment related lawsuits. The former employee may need to seek permission from the bankruptcy court to proceed with the lawsuit. The claim may be treated as an unsecured creditor claim in the bankruptcy proceedings, and the ultimate resolution would depend on the outcome of negotiations or court decisions.

In summary, a Chapter 11 bankruptcy filing by Speculation Inc would trigger an automatic stay affecting ongoing matters, providing the company with an opportunity to restructure its affairs and negotiate with the various stakeholders under the supervision of the bankruptcy court. The ultimate impact on each matter would depend on the specific circumstances and how they are addressed within the bankruptcy process.

*** End of Assessment ***