



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 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. 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 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

submit the assessment again by 31 July 2023 (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**

Commented [H(1): Total marks 32/50

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

Commented [H(2): Total marks 6/10

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**

Commented [H(3): Correct, 1 mark

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) All of the above satisfy the minimum requirement for presence in the United States.**
- (e) None of the above satisfy the minimum requirement for presence in the United States.

**Question 1.2**

Commented [H(4): Correct, 1 mark

ABC Corp is an industrial manufacturing company that is filing for bankruptcy. Which of the following could not be considered a party in interest?

- (a) A neighboring landowner to ABC Corp's manufacturing plant.
- (b) An environmental advocacy group that opposes ABC Corp's operations.**
- (c) The landlord of ABC Corp's corporate office.

- (d) *People who live several miles downstream from ABC Corp's manufacturing plant and have been exposed to the plant's toxic waste.*
- (e) *The US Internal Revenue Service.*

Question 1.3

Commented [H(5)]: Correct, 1 mark

*Which of the following contracts to which ABC Corp is a party is executory and may be assigned without counterparty consent?*

- (a) A lease on a manufacturing plant that contains a provision that requires landlord approval of any assignment.**
- (b) *An employment contract between ABC Corp and a former employee, requiring the company to provide health insurance through the end of the current year.*
- (c) *A 10-year software licensing agreement with XYZ Corp that is three years into performance.*
- (d) *A lease on office space that ended the prior year, but for which ABC Corp still owes past rent.*
- (e) *None of the above are executory and may be assigned without counterparty consent.*

Question 1.4

Commented [H(6)]: Incorrect, the correct response is (b)

*Which of the following conditions must be true about a reorganization plan for a court to confirm it under Chapter 11 proceedings?*

- (a) *Have a possibility of success, even if it relies on speculative or improbable events to be capable of execution.*
- (b) *The plan is not likely to be followed by liquidation.*
- (c) *All impaired classes must accept the plan.*
- (d) All of the above.**
- (e) *None of the above.*

Question 1.5

Commented [H(7)]: Correct, 1 mark

*Which of the following about cramdowns, is false?*

- (a) *The plan of reorganization must be fair and equitable to all impaired classes.*
- (b) *Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.*
- (c) *Class definition is often a battleground when a debtor tries to cramdown classes.*
- (d) *Dissenting creditors are permitted to challenge the classification of a creditor supporting the cramdown.*
- (e) **If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.**

Question 1.6

Commented [H(8)]: Incorrect, the correct response is (c)

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.**

Question 1.7

Commented [H(9)]: Incorrect, the correct response is (d)

Which of the following is true of both an actual fraudulent conveyance and a constructive fraudulent conveyance?

- (a) **The debtor must have had an actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted.**
- (b) *Both require at least circumstantial evidence of the fraudulent intent.*
- (c) *The debtor must have been insolvent at the time of transaction.*
- (d) *In addition to provisions in the Bankruptcy Code, the debtor or the trustee may invoke applicable state or foreign fraudulent conveyance laws.*
- (e) *All of the above are true.*

Question 1.8

Commented [H(10)]: Correct, 1 mark

When does an automatic stay come into effect?

- (a) Immediately on the filing of any plenary petition.
- (b) On the filing of a voluntary petition but not on the filing of an involuntary petition.
- (c) Once the court reviews the petition and grants the stay.
- (d) Once the petitioner announces their intention to file for bankruptcy publicly.
- (e) Once a plan of reorganization is confirmed.

Question 1.9

Commented [H(11)]: Incorrect, the correct response is (c)

Which of the following regarding substantive consolidation is true?

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

Question 1.10

Commented [H(12)]: Correct, 1 mark

Which of the following are relevant factors in determining a debtor's center of main interests (COMI) in the recognition stage of a Chapter 15 bankruptcy case?

- (a) The location of the headquarters.
- (b) The location of primary assets.
- (c) The location of the majority of the affected creditors in the request for relief.
- (d) The jurisdiction whose law will apply to most disputes.
- (e) All of the above.

**QUESTION 2 (direct questions) [10 marks]**

**Commented [H(13):** Total marks 9/10

**Question 2.1 (1 mark)**

**Commented [H(14):** Total marks 1/1

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

2.1. [Set off is a situation where a creditor holding a claim against the debtor and simultaneously owing money to the debtor to net out the two (or more) obligations.]

**Commented [H(15):** Correct, 1/2 mark

Set is not permitted in the underlisted circumstances:

- The creditor's claim against the estate is disallowed.
- The creditor's claim against the estate was acquired post-petition or in the 90 days prior to the petition at a time when the debtor was insolvent;
- The creditor's obligation to the debtor was incurred in the 90 days prior to the petition at a time when the debtor was insolvent for the purposes of exercising setoff rights;

The creditor improves its position by set off as compared to its position had set off been exercised 90 days prior to the petition *Type your answer here]*

**Commented [H(16):** Correct, 1/2 mark

**Question 2.2 [2 marks]**

**Commented [H(17):** Total marks 2/2

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

[Rules to be reviewed when preparing a filing for a bankruptcy court are:

- Federal Rules of Bankruptcy Procedure (the Bankruptcy Rules)
- The Federal Rules of Civil Procedure
- Local rules of procedure of the bankruptcy Court
- Judge's personal practices

**Commented [H(18):** Correct, 1/2 mark

**Commented [H(19):** Correct, 1/2 mark

**Commented [H(20):** Correct, 1/2 mark

**Commented [H(21):** Correct, 1/2 mark

*Type your answer here]*

**Question 2.3 [2 marks]**

**Commented [H(22):** Total marks 1/2

**What does the absolute priority rule require and when can it be deviated from?**

[Section 1129(b)(2) of the Bankruptcy Code codifies a principle known as the "absolute priority rule". The absolute rule requires that Creditors receive payment in full before holders of equity can receive or retain any property under a plan of reorganization certain employee expenses, primarily for unpaid salaries and contributions to employee benefits

**Commented [H(23):** Partially correct, 1/2 mark, this rule applies to each category of claims, not just equity

plans for. Certain employee expenses, primarily for unpaid salaries and contributions to employee benefits plans for the 180 days prior to the petition date or cessation of business, are given administrative priority under chapter 7 and, under the absolute priority rule can receive in a chapter 7 liquidation unless they consent.

**Commented [H(24):** Correct, 1/2 mark, though this can only happen in chapter 11, not chapter 7

The debtor must take a proposal to an employee representative that is based on all the information available at the time and is “necessary to permit the reorganization of the debtor.” The proposal also must treat all affected parties “fairly and equitably” so that the reorganization does not come at disproportionate cost to particular group.

*Type your answer here]*

**Question 2.4 [2 marks]**

**Commented [H(25):** Total marks 2/2

**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 senior or equal to a pre-petition lien on estate property to secure a post-petition financing. Requirements to be met for such a lien to be granted to secure DIP are:

**Commented [H(26):** Correct, 1 mark

1. The debtor must demonstrate that the interest of the secured creditor being primed is adequately protected.
2. The risk to a secured creditor of being primed, notwithstanding any adequate protection payments being offered, often incentivizes existing creditors to extend further credit to the debtor.
3. Pre-petition creditors also may be able to improve their position by “rolling up” – refinancing pre-petition debt that was unsecured or under-secured into the facility granted the priming lien.
4. The Court’s approval of a roll-up will depend on whether any other source of funds is available that does not contain provisions and whether substantial additional credit is being made available to the debtor.

**Commented [H(27):** Correct, 1/2 mark

*Type your answer here]*

**Commented [H(28):** Correct, 1/2 mark

**Question 2.5 [3 marks]**

**Commented [H(29):** Total marks 3/3



**What is a preference? What are the elements of a preference claim that need to be proved? Is a showing of fault, by either the debtor or creditor, required?**

### **What is Preference**

A preference is a transfer of the debtor's property made in a suspect period 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. There is no need to show any fault of either the debtor or the recipient in connection with the payment have been made, and the recipient creditor suffers no penalty other than return of the transfer (and, potentially, prejudgment interest from the date of the transfer).

Commented [H(30)]: Correct, 1 mark

Commented [H(31)]: Correct, 1/2 mark

The elements of a preference claim are:

- (1) A transfer of an interest of the debtor in property.

Commented [H(32)]: Correct, 1/2 mark

The transfer may be of funds, property or an interest in property – that is, the granting of a lien. Transfer of property in which the debtor does not have an interest, such as property held as agent for another, cannot be a preference.

- (2) To or for the benefit of a creditor.

Commented [H(33)]: Correct, 1/2 mark

If the recipient was not a creditor of the debtor prior to the transfer, the transfer cannot be a preference, but may be recoverable as a fraudulent conveyance.

- (3) For or on account of an antecedent debt owed by the debtor before such transfer was made.

Commented [H(34)]: Correct, 1/2 mark

Preference only arise where the debtor is paying a creditor for a pre-existing debt. In addition, a prepayment for goods and services cannot a preference because debt, if any, is not incurred until the debtor receives the product and owes more than it has paid.

- (4) Made while the debtor was insolvent

The debtor is presumed to have been insolvent on and during the 90 days prior to the petition date for purposes of determining preference claims.

- (5) Made during the suspect period.

The suspect period for transfers to third parties is 90 days prior to the petition date, and the suspect period for insiders is one year prior to the petition date. With respect to a corporate debtor, insiders are the debtor's officers, directors, controlling persons, general partner, partnerships of which the debtor is a general partner, affiliates and insiders of affiliates.<sup>158</sup> The longer preference period for insiders prevents those with the greatest knowledge of the debtor's financial condition from benefiting from asset-stripping transactions prior to the 90 day preference period, even if there was nothing improper about the transactions. However, for transfers between 91 days and one year prior to the petition date, there is no presumption of insolvency.

(6) That enables the creditor to receive more than it would have in a chapter 7 liquidation.

A transfer is only an avoidable preference if it resulted in the creditor improving its position as compared to the result of a liquidation had the transfer not occurred. Where the transfer is, for example, foreclosure by a secured creditor on a portion of its collateral, there is no preference because the secured creditor would have been entitled to recover first from that collateral in a liquidation *Type your answer here*

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

#### Question 3.1 [3 marks]

**Describe the circumstances in which a bankruptcy court may enter a final order, who reviews appeals from bankruptcy court orders and how are non-final orders reviewed?**

Final orders are those that dispose of all issues, leaving nothing further to be decided.

The US Supreme Court has held that a bankruptcy order resolving a discrete dispute is a final order for appeals purposes

An order that is constitutionally final because the bankruptcy court had authority to enter it is not final for purposes of appeal if it does not resolve the entire issue in dispute. Conversely, an order that resolves an entire dispute and therefore would be final for purposes of appeal may not be final in the constitutional sense if the parties have not consented to the bankruptcy court's jurisdiction.

#### Who reviews Appeal?

In general, appeals from bankruptcy court decisions are heard by the district court for the district in which they sit. In certain circuits, however, bankruptcy appeals are heard by a Bankruptcy Appellate Panel (BAP), convened from the judges of the bankruptcy courts within the circuit. In those circuits, a party has the option to request that the appeal be heard by the district court instead. From the district court or BAP, there is a further appeal of right (assuming the initial order was one from which an appeal of right was available) to the circuit court of

Commented [H(35)]: Total marks 13.5/15

Commented [H(36)]: Total marks 2/3

Commented [H(37)]: The bankruptcy court has authority to enter a constitutionally final order on certain core proceedings such as a challenge to a petition or when the parties consent.

Commented [H(38)]: Correct, 1/2 mark

Commented [H(39)]: Correct, 1/2 mark

appeals. In rare circumstances, an appeal from a bankruptcy court may go directly to the court of appeals, where the bankruptcy court or district court certifies that either that (i) the appeal raises a question of law as to which there is no controlling decision of the circuit or the US Supreme Court, or requires resolving conflicting controlling decisions, or (ii) immediate appeal may materially advance the progress of the case. The court of appeals has discretion whether to accept a case so certified

If the ruling was in a noncore proceeding or the bankruptcy court otherwise did not have authority to enter a final order, the district court or BAP reviews de nova all findings of fact and conclusions of law to which a party has objected. The order of a district court or BAP is reviewed by a circuit J court of appeal de nova as to conclusions of law and for abuse of discretion for findings of fact

Non- Final Orders

Interlocutory orders may be appealed only with leave of the appellate court.

Commented [H(40)]: Correct, 1 mark

### Question 3.2 [3 marks]

Commented [H(41)]: Total marks 2.5/3

**What provisions of the Bankruptcy Code automatically apply to the debtor's property within the territorial jurisdiction of the United States upon recognition of a foreign main proceeding? What relief may be granted on a discretionary basis for either foreign main or non-main proceedings?**

In 2005, as part of the Bankruptcy Abuse and Consumer Protection Act, the US adopted the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") nearly verbatim, as chapter 15 of the Bankruptcy Code. Section 1 of the Model Law became section 1501 of the Bankruptcy Code, setting out the purpose of Chapter 15.

A case under Chapter 15 is commenced only by the filing of a petition by the foreign representative of the debtor- the debtor cannot be placed in Chapter 15 involuntarily by a creditor filing - **S1515**.

Section 1520 provides for 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 [Interlocutory orders may be appealed only with leave of the appellate court.

Commented [H(42)]: Correct, 1/2 mark

**Relief available upon recognition**

Upon recognition of a foreign main proceeding, certain provisions of the Bankruptcy Code automatically apply to the debtor's property within the territorial jurisdiction of the United States.

Commented [H(43)]: Was looking for you to list these

The following relief also may be granted on a discretionary basis:

- 1) Authorization of discovery regarding the debtor's assets and affairs;
- 2) Entrusting administration of the debtor's US assets to the foreign representative or other person
- 3) Extension of provisional relief
- 4) Any other relief "necessary to effectuate the purposes of (chapter 15) and to protect the assets of the debtor or the interests of creditors.

Commented [H(44)]: Correct, 1/2 mark

Commented [H(45)]: Correct, 1/2 mark

Commented [H(46)]: Correct, 1/2 mark

Commented [H(47)]: Correct, 1/2 mark

Where discretionary is sought in a foreign non-main proceeding, the bankruptcy court must be satisfied that it is appropriate under US law for the asset in question to be administered in the foreign non-main proceeding. Moreover, the ability of the bankruptcy court to condition relief on sufficient protection of interested parties and to discontinue discretionarily granted relief on the application of a party in interest makes recognition as a foreign non-main law protective than recognition as a foreign main proceeding.

*Type your answer here]*

**Question 3.3 [4 marks]**

Commented [H(48)]: Total marks 4/4

**What duties do directors owe to a Delaware corporation in the ordinary course of business? To whom are these duties owed when the corporation is potentially or actually insolvent? What rule protects directors from liability for errors of judgment?**

[Directors owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision making]

Commented [H(49)]: Correct, 1 mark

Commented [H(50)]: Correct, 1 mark

Directors' duties are owed to the corporation and its shareholders, not to creditors, even in circumstances where the corporation is potentially insolvent and therefore the shareholders stand to receive nothing in bankruptcy.

Commented [H(51)]: Correct, 1 mark

Directors are protected from liability for errors of judgment by the business judgment by the business judgment rule, the board of directors is presumed to have acted in good faith on the

basis of reasonable information. This presumption can be rebutted only by showing that a majority of the board in fact were 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 the presumption is rebutted, the directors will not be liable in the absence of a showing of gross negligence. In addition, directors may be exculpated by a corporation's certificate of incorporation from liability for breach of the duty of care (but not for breach of the duty of loyalty). The business judgment rule does not 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 the transaction. In such circumstances, the transaction will be void unless the entire fairness standard is satisfied.

*Type your answer here]*

**Question 3.4 [5 marks]**

**List and describe the requirements that a creditor's claim must fulfill in order to qualify as a petitioning creditor in an involuntary proceeding.**

[Creditors may commence an involuntary proceeding against an eligible debtor under either chapter 7 or chapter 11. Involuntary proceedings cannot be commenced under the other chapters or against a farmer, family farmer or not-for-profit corporation. The number of petitioning creditors required depends on how many non-contingent, non-insider creditors the debtor has - if it has fewer than 12 such creditors, only one is required to file an involuntary petition; if it has 12 or more such creditors, at least three qualifying creditors must join in the petition.

To qualify as a petitioning creditor, the creditor must have a claim against the debtor that is:

- **Non-contingent**
  - A contingent claim is one that depends on the occurrence of a future event. For example, a claim under a guarantee is typically contingent on the occurrence of a default under the guaranteed obligation.
  - A debt that is unmatured (because the payment is due in the future) is not contingent if all requirements for liability, other than the passage of time, have occurred.
- **Not the subject of bona fide dispute as to liability or amount**

Commented [H(52)]: Correct, 1 mark

Commented [H(53)]: Total marks 5/5

Commented [H(54)]: Correct, 1 mark

Commented [H(55)]: Correct, 1/2 mark

Commented [H(56)]: Correct, 1 mark

➤ A bona fide dispute exists if there is an objectively reasonable basis for a dispute as a matter of fact or law; the debtor's subjective belief that the debt is not owed, or the amount claimed is incorrect is not sufficient.

Commented [H(57)]: Correct, 1/2 mark

➤ If a portion of the amount claimed is disputed, the creditor cannot use the undisputed portion to reach the monetary threshold required in the next bullet, but a dispute as to one claim does not disqualify application of other, undisputed claims held by the same creditor to meet petitioning creditor requirements.

Unsecured or under secured, separately or in the aggregate with all other petitioning creditors' claims, in the amount of at least USD 16,750 (this amount is periodically increased due to inflation)

Commented [H(58)]: Correct, 1 mark

Commented [H(59)]: Correct, 1/2 mark

Unlike the voluntary petition, which requires no allegation of insolvency, the involuntary petition form requires the petitioning creditors to allege either that the debtor is generally not a in its debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount or that, "within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or an agent appointed or authorized to take change of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession." *Type your answer here*

Commented [H(60)]: Correct, 1/2 mark

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

Commented [H(61)]: Total marks 3.5/15

##### Question 4.1 [5 marks]

Commented [H(62)]: Total marks 0/5

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

4.1. The effect of Chapter 11 petition being filed by speculation Inc on:

(i) **DOJ Investigation**

An insider trading may be as a result of buying and selling of securities in breach of fiduciary duty and loyalty.

Commented [H(63)]: True, but the relevant point is that the automatic stay comes into effect on filing the petition but it's a regulatory or criminal investigation that is exempt from the automatic stay

This may be taken, if proven to be actual fraudulent conveyance which is proven by showing that the debtor made a transfer or incurred an obligation “with actual intent to hinder delay or defraud any entity to which the debtor was or became indebted.

(ii) **Margin Loan Default**

Due to the certainty and finality in the operation of the financial markets, margin loan default cannot be avoided as preference or fraudulent conveyance unless it is proved that transfers were made with the intent to defraud creditors.

**Commented [H(64):** For this reason, margin loans are exempted from the automatic stay

(iii) **Delinquent Lease**

The lease of office is assignable without consent, the lessor is entitled to file a claim

**Commented [H(65):** The automatic stay bars the landlord from pursuing unpaid rent or eviction

(iv) **Employment discrimination lawsuit**

This would not have any effect on the petition since it did not relate to unpaid salaries. The employment contract is not executory. The company was sued based on alleged dismissal due to gender bias *Type your answer here]*

**Commented [H(66):** The automatic stay would stay this litigation

**Question 4.2** [5 marks]

**Commented [H(67):** Total marks 0/5

***Stella SA (Stella) is a an international cosmetics company incorporated in France, with its headquarters in Paris. Stella’s products are made in Italy and shipped to its retail stores in Europe (including England), Asia, and North America. Stella’s funding comes from a bank loan and Eurobonds, both of which are governed by English law. Stella’s retail sales have suffered due to pandemic-related closures and it is considering options to restructure its debt. One option is to use an English scheme of arrangement with respect to the Eurobonds. Could the English scheme of arrangement be recognized by a US bankruptcy court under Chapter 15, and would such recognition be as a foreign main or non-main proceeding?***

*[T* The English Scheme of Arrangement be recognised by a US bankruptcy court under Chapter 15

Chapter 15 created a new type of US bankruptcy proceeding – an ancillary as opposed to plenary proceeding, where the US does not exercise jurisdiction on authority over the entire estate (indeed, no estate is created under chapter 15) but rather provides assistance to the foreign proceedings concerning the debtor. There is no reciprocity of treatment required; US courts will recognise proceedings in countries that would not recognise US proceedings.

- (i) The requirements of recognition are minimal; the foreign representative must establish that a foreign court or administrative proceeding with respect to the debtor is pending and that the foreign representative is empowered to act by the proceeding. A foreign proceeding need not resemble a US Bankruptcy case to be recognised. A foreign proceeding is defined by the Bankruptcy Code as “a collective judicial or administrative proceeding in a foreign country...under a law relating to insolvency or adjustment of debt in which proceeding the asset and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation. Under this definition, proceedings are diverse as English schemes of arrangement have been granted recognition.
- (ii) The recognition would be a foreign main proceeding.

Foreign main proceedings are those that are commenced in the debtor’s Center Of Main Interest (COMI). A debtor’s COMI is presumed to be its place of incorporation, but this is rebuttable. Relevant factors in the COMI analysis include:

- Location of headquarters;
- Location of management;
- Location of primary assets;
- Location of a majority of debtor’s 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

A debtor COMI should be ascertainable by its creditors or other third parties on the basis of objective evidence.

- Stella is being funded from a bank loan and Eurobonds, both of which are governed by English Law.
- This mean that the location of a majority of debtors creditors or majority of the creditors that will be affected by the relief requested by the foreign representative, and jurisdiction whose law will apply to most dispute.

The above factors in respect of the COMI fulfil the requirements of the recognition.

*ype your answer here]*

**Commented [H(68):** Because Stella has operations in many places and its headquarters in France, it is unlikely these contacts will rebut the presumption that its COMI is in France where it is incorporated. Because it’s COMI is not in England, the scheme cannot be recognized as a foreign main proceeding. It can be recognized as a foreign non-main proceeding because the retail store in England satisfies the requirement for an establishment



Question 4.3 [5 marks]

**ToyCo is an American toy company that has created a popular line of folding robot toys called Xblox. The toys are covered by several US patents. Currently, GameMart Inc (GameMart) has a 10-year exclusive license to manufacture Xblox and pays ToyCo monthly royalties. GameMart operates a factory in California that it leases from Land Corp on a longer term lease with seven years to go; the lease prohibits assignment without Land Corp's consent. The Xblox toys are selling well, but GameMart's other toy lines are doing poorly, so it is considering a Chapter 11 bankruptcy. Answer the following questions:**

**(i) Is the license to manufacture Xblox an executory contract?**

The license to manufacture Xblox is an executory contract because it is not assignable without Toyco's consent *Type your answer here*

**(ii) Can GameMart transfer the Xblox license as part of 363 sale without ToyCo's consent? Why or why not?**

GameMart cannot transfer the Xblox license as part of 363 sale without Toyco's consent

The reason being that license owned by Xblox license are protected such that their licenses may not be terminated in connection with the sale without Toyco's consent.

*Type your answer here*

**(iii) Can GameMart transfer the factory lease as part of 363 sale without Land Corp's consent? Why or why not?**

GameMart can transfer the factory lease as part of 363 sale without Land Corp's consent.

This is possible because it is assignable without consent notwithstanding the landlord approval is required *Type your answer here*

\* End of Assessment \*

Commented [H(69)]: Total marks 3.5/5

Commented [H(70)]: Partially correct, 1/2 mark, it is executory because both parties have continuing obligations (to pay royalties and not to license the IP to others)

Commented [H(71)]: Correct, 1 mark

Commented [H(72)]: Incorrect, this refers to protection of licensees when the patent owner is in bankruptcy. Here, the licensee is in bankruptcy. Consent is required as a matter of non-bankruptcy IP law.

Commented [H(73)]: Correct, 1 mark

Commented [H(74)]: Correct, 1 mark