



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 36.25/50

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

Commented [H(2)]: Total marks 8/10

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)]: Correct, 1 mark

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)]: Correct, 1 mark

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 8.5/10

Question 2.1 [1 mark]

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

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

Setoff is when the law allows a creditor who is both owed money by the debtor and to the debtor to net out the two opposing debts. It is not permitted in many circumstance because it can unfairly prefer one creditor of another, due to a portion of their debt effectively being recovered in preference of other creditors. This is likely to represent a recovery at a higher % than the general pool of unsecured creditors will receive.

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

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?

When preparing a filing for a bankruptcy court, you should review the judge's personal practices, the Federal Rules of Civil procedure, the Bankruptcy Rules, and the local rules of the bankruptcy court.

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

Commented [H(22)]: Total marks 0.5/2

Question 2.3 [2 marks]

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

The absolute priority rule is designed to protect employees and apply to specific employee expenses, mainly relating to unpaid salaries and contributions to employee benefits plans for the 180 days prior to the petition date or cessation of business. Under the rule, employees cannot be treated worse through the implementation of a reorganization plan than they would have received under a chapter 7 liquidation (unless they consent). If the employees' consent, then the representative may deviate.

Commented [H(23)]: Incorrect, the absolute priority rule applies to all classes of creditors, providing that a given class must be paid in full before a junior creditor receives anything. It may be deviated from only in a chapter 11 plan.

Commented [H(24)]: Correct, 1/2 mark, this applies to all classes, which may consent to a junior class receiving a recovery.

To be able to deviate, the debtor must make a proposal to an employee representative which outlines the reasons for the need to reorganise the debtor and is based on the available information at the time. It must be designed to be fair and equitable and provide the employee representative with all of the appropriate information.

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 used by the court when post-petition financing cannot be obtained through unsecured finance, despite the court ranking the new debt above certain other unsecured creditors such as those without a lien over any property. Other forms of finance must be first sought, including unsecured additional debt. It is used by the court as a last resort to attempt to secure additional funding for a struggling business

Commented [H(26)]: Correct, 1/2 mark

and it provides senior or equal rank to a pre-petition lien level of security for additional new financing.

Commented [H(27)]: Correct, 1 mark

To be able to obtain this financing, the court must be convinced by the debtor that the interest of the secured creditor in question (being primed) is adequately protected. This will typically apply to existing creditors, who are incentivised to provide additional funding to improve their position by adding additional priority to their previously unsecured debt. It helps the business continue with additional funding and adds protection to a previously unsecured creditor.

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?

A preference represents the transfer of property owned by the debtor to a creditor in period leading up to a winding up petition whereby a higher priority is given to one or more creditors over another. This applies to any transfer of assets to a recipient in a suspect period before the petition date and must be returned should the value exceed the amount the recipient would have received had the transfer not have been made.

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

To prove a preference claim, the claimant must prove that there was a transfer of an interest in property owned by the debtor. This does not necessarily mean the transfer of a title but could be the granting of security in the form of a lien.

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

Next, the claimant must prove that the transfer was for the benefit of a creditor prior to the transfer. This applies even if the recipient is no longer a creditor and if this test cannot be successfully passed, may mean that a fraudulent conveyance claim is more appropriate.

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

Commented [H(33)]: Correct, 1/2 mark, assuming you mean on account of an antecedent debt

The claimant must also prove that the transfer was made when the debtor was insolvent. This can be assumed to be from the date of the petition and the 90 days prior to the petition. However, it is worth noting that the debtor can attempt to rebut this presumption through evidence. This also is known as the suspect period and the transaction can have occurred within a year of the petition if the transfer was to an insider. This period over 90 days to 1 year must be proved by the claimant that the company was insolvent and the recipient was an insider.

Finally, the claimant must prove that the recipient received more than they would have under a chapter 7 liquidation. This is particularly applicable to secured creditors, where they would have received their full debt under the registered lien.

In conclusion, there is no need to show fault of the debtor or the recipient in relation to the payment.

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

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

Commented [H(35): Total marks 10.75/15

Question 3.1 [3 marks]

Commented [H(36): Total marks 1/3

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?

A final order is one that disposes all issues brought to the court, leaving nothing to be decided after the decision has been made. There will likely be an opportunity to appeal a final order with right, whereas a non-final order will have additional stages of decision process and therefore a party would need to appeal to be able to lodge a formal appeal. To identify when a court may enter a final order will be determined by if the decision on the case will have broad applicability which is not applicable only to the dispute claimed at the time. This broad applicability will be determined by the court and can be difficult to differentiate.

Commented [H(37): A bankruptcy court may enter a constitutionally final order on certain core proceedings such as a challenge to a petition or when the parties consent. An order that is not constitutionally final is treated by the district court as a report and recommendation.

It should also be noted that there may be a constitutionally final decision made by the bankruptcy court as the decision cannot be appealed, but if the entire matter has not been decided then it would not be categorized as a final order. Conversely, should a final order under the rules be made but the parties do not consent to the jurisdiction, it may be appealable.

Commented [H(38): Incorrect, you are mixing the concepts of constitutional finality and finality for purposes of appeal. The parties' consent is not relevant to finality for appeals.

Where there is a final order from the bankruptcy court and an appeal is made, this is heard by the district court relevant to the matter. Alternatively, appeals may be heard by a Bankruptcy Appellate Panel (BAP) which is made up from judges of the bankruptcy Court. However, this can be appealed by the appellant and instead the appeal would revert to be heard by the district court. Finally, there are some rare circumstances whereby the appeal would go straight to the court of appeal where the appeal raises a question of law where there is no controlling decision of the circuit or the US Supreme Court, requires resolving conflicting controlling decisions or the occurrence of an immediate appeal would materially advance the cases' progress.

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

Commented [H(40): Correct, 1/2 mark

Finally, non-final orders are reviewed by the appellate court first and foremost. Should they deem it to be the correct decision, they can then grant leave for the right to appeal and the case would be heard at the court of appeal.

Question 3.2 [3 marks]

Commented [H(41): Total marks 1.5/3

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?

Upon recognition of a foreign main proceeding, a case under chapter 15 is commenced. This is the point in time whereby there is an automatic stay on creditor actions, which protects the insolvency process. This stay is only limited to the property

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

that is held within the US and applies on recognition. There is also a stay on the operation of the debtor's business in the ordinary court, a stay on the sale, transfer or use of property outside of the ordinary court of business and finally, avoidance of post-petition transfers and perfection of security interests.

Commented [H(43): Incorrect, the foreign representative is automatically granted the ability to operate the debtor's business in the ordinary course

Whilst the automatic stays listed above are only subject to main proceedings, both main and non-main proceedings have several discretionary reliefs. These include the court granting discovery powers to the foreign representative into the debtor's assets and affairs. This can particularly be useful for foreign representatives.

Commented [H(44): Incorrect, the foreign representative is automatically granted the ability to transfer assets out of the ordinary course

Commented [H(45): Incorrect, the foreign representative is automatically granted the ability to avoid post-petition transfers and perfection of security interests.

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

There is also the discretionary powers to entrust administration of the debtor's assets located in the US to be given to the foreign representative (or another person). This allows the foreign representative to retain value in the debtor's assets.

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

Furthermore there is the discretionary power to extend the provisional relief and to provide relief necessary to effectuate the purpose of chapter 15, to protect the interests of creditors and the debtor's assets.

Finally, it is worth noting that the list above is not conclusive and the court may grant additional assistance under the Bankruptcy Code or other US law.

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, which means that they must have the company's best interests in mind and a duty of care in educated decision-making. This can be expanded to outline that the duty of care whilst the company is solvent is firstly and foremost to the best interests of the corporation, rather than other parties such as the creditors.

Commented [H(49): Correct, 1 mark

Commented [H(50): Correct, 1 mark

Should a Delaware corporation fall be potentially or actually insolvent, the director's duties remain to the corporation and its shareholders as opposed to the creditors, which differs to other systems such as the UK. This means that there is no form of 'wrongful trading' claims, as you would get in other systems.

Commented [H(51): Correct, 1 mark

Directors are protected should there be liability caused by error of judgment, under the business judgment rule. This seeks to protect the directors in the event they acted in good faith and whilst being well informed, made an error of judgment. This protection can be rebutted by showing that the majority of the board were not well informed and did not truly believe that decisions were made in the company's best interest.

Commented [H(52): Correct, 1 mark

It is worth noting that directors may also be protected from a breach of the duty of care under a corporation's certificate of incorporation, but that this does not provide protection to a breach of the duty of loyalty.

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.

In order to qualify as a petitioning creditor in an involuntary proceeding, the claimant must have a non-contingent claim. This means that the debt is confirmed and does not rely on another action or event to make the debt due. Forms of contingent debt can be one reliant on a future event or a debt that will be due after the passing of a period of time. Should the debt be contingent, the debt is not currently owed and therefore by definition, the company is not yet (cashflow) insolvent.

The creditor's claim must also not be subject to a bona fide dispute, either over the amount or that the liability is valid. The bona fide part of this definition focusses on whether an objectively reasonable third party would deem there to be an active dispute. These disputes can either be for the total value of the debt, which must be appropriately adjudicated before a petition is made. Alternatively, it could be the fact that the debt is due is in dispute. Should a dispute be active, this must be concluded before a petition is made.

Finally, a petitioning creditor must have an aggregate debt worth at least USD 16,750 to be able to petition for bankruptcy. This can be aggregated with other valid creditors. Should there be a debt under dispute, the undisputed portion would not contribute to reaching this threshold. However, an undisputed separate claim would contribute to reaching the threshold.

Once these conditions are met, the creditor's claim for involuntary proceedings must prove that the debtor is not paying their debts as they become due (unless they are subject to a bona fide dispute).

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

Question 4.1 [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

Commented [H(53): Total marks 4.25/5

Commented [H(54): Correct, 1 mark

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

Commented [H(56): Correct, 1 mark

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

Commented [H(58): Correct, 1/2 mark, also the claims must be unsecured or undersecured

Commented [H(59): Correct, 1/4 mark, or that a custodian has been appointed over the debtor's assets

Commented [H(60): Total marks 9/15

Commented [H(61): Total marks 3/5

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?

Chapter 11 allows the reorganization of a business in the US. There are automatic powers on the filing of a Chapter 11 petition, being an automatic stay, powers to sell assets free and clear, debt adjustments through reorganization and relinquishing unprofitable contracts.

Commented [H(62)]: Correct, 1 mark

There is an automatic stay in effect once the petition is filed. This would be effective against the margin loan default and delinquent lease. No action would be available by these parties against the company whilst the stay remained in place. This applies for 120 days from the date of the petition, which allows the debtor to put together a reorganization plan, and a further 60 days for the creditors to review the plan.

Commented [H(63)]: Incorrect, the margin loan is a securities contract that is exempt from the automatic stay.

Commented [H(64)]: Correct, 1 mark, an action for past due rent or eviction would be barred

Commented [H(65)]: In practice, this is likely to be extended

The margin loan default would be a creditor of the Company and would have voting rights against a Chapter 11 proposal. However, they would not be able to bring actions during the stay and would be bound by any Chapter 11 agreement.

Turning to the delinquent lease, chapter 11 allows the debtor to relinquish lease as part of the reorganization plan. This would have to be decided in the proposal, but would allow the Company to end the lease early if beneficial to the Company. However, already accrued rent arrears would need to be included in the body of creditors and reimbursed on par with the other creditors. If the landlord is dissenting to the chapter 11 proposal, they could be included in a cramdown to ensure the proposal is effective.

However, the DOJ investigation would continue. This is a criminal investigation that would fall outside the commercial remit of the chapter 11 legislation. This investigation would continue, and the company would have to continue cooperating with the DOJ. Should there be fines or criminal penalties, these would remain outside of any reorganization plan.

Commented [H(66)]: Correct, 1 mark

Looking at the employment discrimination lawsuit, employees under the absolute priority rule cannot receive less in a chapter 11 agreement than they would have received under a chapter 7 liquidation. However, this applies to wages and benefits, as opposed to a discrimination lawsuit. As the claim appears to have been filed, this is allowed and will continue.

Commented [H(67)]: Incorrect, this would constitute pre-petition litigation that would be stayed

Question 4.2 [5 marks]

Commented [H(68)]: Total marks 1/5

Stella SA (Stella) is 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?

The US adopted the UNCITRAL Model Law largely through the chapter 15 provisions. The requirements to have a foreign main or non-main proceeding recognised are minimal, but must be brought by the debtor's representative in another jurisdiction (rather than a creditor). The requirements to be a foreign proceeding are, "a collective judicial or administrative proceeding in a foreign country under a law relating to insolvency or adjustment or debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation". The foreign representative must establish that a foreign court or administrative proceeding (being England here) relating to the debtor is in motion and allows the representative to act. Under this definition, the scheme of arrangement described above would likely qualify to be recognised under chapter 15. There may be difficulties in obtaining additional powers, but recognition is unlikely to be challenging.

Now turning to whether the proceeding would be main or non-main, this has a substantial impact as it determines the reliefs available to the foreign representative. A main proceeding is defined as one that "commenced in the debtor's center of main interest (COMI)". COMI is initially presumed to be the company's place of incorporation, but this is rebuttable. In this case, the company is both incorporated and headquartered in France, which leads to being its initial COMI. Italy appears to be only relevant for the production of its products, and the location of the main creditors appears to be in the eurozone. Therefore, the COMI is not in the US and it can only be a non-main proceeding.

There is a question whether the lack of establishment in the US (only appears to be a customer base) means that the chapter 15 recognition is overturned on inspection. More information would be needed to understand the benefit of having the order recognised in the US.

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

Commented [H(69): Correct, 1 mark

Commented [H(70): Incorrect, the question is whether COMI is in the jurisdiction where the foreign proceedings are pending-- England. The factors here are unlikely to overcome the presumption in favor of France.

Commented [H(71): Incorrect, the establishment requirement refers to an establishment in England, not in the US. The retail store in England would qualify.

Commented [H(72): Total marks 5/5

Corp on a longer term lease with seven years to go; the lease prohibits assignment without Land Corp's consent. The Xbox 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 Xbox an executory contract?

What is determined to be an executory contract is determined by case law, rather than statute. However, there are general parameters that if there are, "material unperformed obligations on both sides", then the contract is executory.

In this case, the obligation of ToyCo is to provide exclusivity to GameMart to be able to manufacture and sell the Xbox. In return, GameMart provides royalties for Xbox's sold throughout the 10-year period. On these facts, this contract appears to be an executory contract. ToyCo has not provided exclusivity for the remainder of the contract and GameMart will not be selling the toys any longer, so no further royalties will be provided. As there are material unperformed obligations on both sides, this is an executory contract.

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

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

The license represents an executory contract that is not assignable without consent. This is because executory contracts that are not transferrable without consent are typically only those where the contract is to make a loan or other financial accommodation, or in a situation whereby existing non-bankruptcy law stipulates that the counterparty cannot be compelled to accept performance from a transferee. This case law includes intellectual licensing law, which applies here. Under this separate law, transfers are not allowable without consent and therefore this applies in bankruptcy.

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

Commented [H(75)]: Correct, 1 mark

(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 the sale without Land Corp's consent. There are material unperformed obligations on both sides which makes this an executory contract. Furthermore, the lack of consent necessary is due to the Bankruptcy code abrogating contractual restrictions on assignment which allows GameMart to achieve higher value for its assets in bankruptcy. GameMart should be able to gain value from selling the lease. There are no restrictions as it does not relate to a loan or other financial accommodation, or in a situation whereby existing non-bankruptcy law stipulates that the counterparty cannot be compelled to accept performance from a transferee.

Commented [H(76)]: Correct, 1 mark

Commented [H(77)]: Correct, 1 mark

*** End of Assessment ***