



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**

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

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

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)]: Correct, 1 mark

*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)]: Correct, 1 mark

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

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*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]

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**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 a creditor who has a claim against a debtor and also owes money to that same debtor can net off the two (or possibly more) obligations. It is not permitted in many circumstances because it can improve one creditor's position at the expense of the other unsecured creditors seeing as the obligation to the estate is reduced.*

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

**Question 2.2** [2 marks]

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

*You should review the Bankruptcy Rules, as well as the Federal Rules of Civil Procedure, the judge's personal practices and the bankruptcy court's local rules. You should consult with a local practitioner for unwritten local practices advice if you do not regularly practice in that jurisdiction.*

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

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

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

**Question 2.3** [2 marks]

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

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

*The absolute priority rule means that a creditor or class of creditors cannot receive worse treatment in a Chapter 11 reorganisation than they would in a Chapter 7 liquidation and requires payment in full to be made to each claim category before the next category can receive any payment.*

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*This can be deviated from in a Chapter 11 if the creditor or class of creditors consent to receive less than required for the absolute priority rule, for example in the instance that a distribution of funds to a lower class is required to achieve approval of the plan. It cannot be deviated from in a Chapter 7 which must strictly follow the statutory priorities.*

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Commented [H(25)]: Correct, 1/2 mark

**Question 2.4** [2 marks]

Commented [H(26)]: 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?**

*When a Debtor is trying to obtain credit or incur debt for post-petition funding a priming lien may be granted by the court. The priming lien is a lien granted on estate property that is higher ranking in priority or equal priority to a pre-petition lien on estate property.*

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A priming lien will only be granted providing the debtor cannot raise unsecured credit or incur unsecured debt in the ordinary course of business without court approval, outside the ordinary course of business with court approval, or raise secured debt with a lien on unencumbered estate property or with a junior lien on encumbered estate property. The debtor will need to show that the interest of the priming lien secured creditor is protected adequately.

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Commented [H(29)]: Correct, 1/2 mark

Question 2.5 [3 marks]

Commented [H(30)]: 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 is when there has been a transfer of a debtor's property made in a certain suspect period prior to the petition date. It must be returned to the estate if it is more than the party would have received in a Chapter 7 liquidation if the transfer hadn't taken place.

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There are six elements that need to be proved for a preference claim:

- 1) There was a transfer of the debtor's funds, property or an interest in property.
- 2) It was to or for the benefit of a creditor.
- 3) The debt pre-exists the transfer of the interest.
- 4) The transfer was made whilst the debtor was insolvent (presumed to be 90 days prior to the petition date).
- 5) The transfer was made during the suspect period of 90 days prior to the petition date.
- 6) The transfer meant the creditor received more than it would in a Chapter 7 liquidation.

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

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

There is no requirement to show fault on either the debtor or the recipient creditor side. There is no penalty attached, the recipient creditor need only return the transfer and possibly prejudgment interest from the transfer date in some cases.

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

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Question 3.1 [3 marks]

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**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?**

Bankruptcy court has limited jurisdiction to enter final orders due to it being established as supplementary to the district courts and not part of the original federal court system as per Article III of the US Constitution. This means that bankruptcy courts do not have jurisdiction to determine matters subject to Article III. Instead, bankruptcy



courts can only hear and determine core proceedings such as (but not limited to) matters concerning administration of the estate and orders in respect of claiming credit. Non-core proceedings can be heard by bankruptcy courts but the final determination must be by the district court.

Commented [H(38)]: Correct, 1/2 mark, they can also enter final orders with the consent of the parties

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

Bankruptcy court orders can be appealed by the parties involved in the liquidation as well as other people who have been adversely affected by the determination. Appeals from bankruptcy court decisions are mostly heard by the district courts but, in some cases, can be heard by a Bankruptcy Appellate Panel ("BAP") which is made up of bankruptcy judges from that circuit.

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Commented [H(41)]: Correct, 1/2 mark

Non-final orders, also known as interlocutory orders, are given in instances where only some of the issues or claims have been resolved or if the court does not have the jurisdiction to give a final order. For core proceeding final orders the district court or BAP will review conclusions of law anew, referred to as de novo, and reviews the findings of fact for abuse of discretion. For non-core proceedings or non-final orders the BAP or district court reviewed de novo the findings of fact and conclusions of law which have been objected. The BAP or district court order is reviewed by a circuit court of appeal de novo as to the conclusion of law and reviews the findings of fact for abuse of discretion.

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### Question 3.2 [3 marks]

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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?

Recognition of a foreign main proceeding provides for the following relief which automatically applies to the debtor's property within the US territorial jurisdiction:

- Automatic stay;
- Ordinary course operation of the debtor's business by the foreign representative;
- Sale, transfer or use of the property outside of the ordinary course; and
- Avoidance of post-petition transfers and post-petition perfection of security interests.

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

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

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

The above relief may be granted on a discretionary basis to a foreign non-main proceeding. In addition, the following may be granted on a discretionary basis following recognition of a foreign main or a foreign non-main proceeding:

- Extension of provisional relief;
- Authorisation of discovery in relation to the debtor's assets and affairs;

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Commented [H(49)]: Correct, 1/2 mark

- *Entrusting administration of the debtor's US assets to the foreign representative; and*
- *Any other relief necessary to effectuate the purposes of Chapter 15 and protect the interests of the creditors or the assets of the debtor.*

**Question 3.3** [4 marks]

**Commented [H(50):** 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?**

*Director liability is a state law matter in the state of incorporation of the entity and is generally more limited in the US than elsewhere. Under Delaware law directors owe a fiduciary duty not to creditors but to shareholders only in both solvent and insolvent situations, even when the shareholders stand to reclaim nothing. Directors have a duty to act in the company's best interest and to take care in making educated decisions.*

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

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

*The business judgement rule assumes that directors have acted i) whilst being sufficiently informed, ii) in good faith and iii) in their honest belief they have acted in the best interest of the company and its shareholders. Unless this assumption is rebutted the directors will not be liable. Therefore, there is no equivalent of the wrongful trading or deepening insolvency concepts in US law.*

**Commented [H(53):** Correct, 1 mark

**Question 3.4** [5 marks]

**Commented [H(54):** Total marks 5/5

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

*An involuntary proceeding can only be brought under Chapter 7 or Chapter 11 and cannot be brought against a not for profit organisation, farmer or family farmer.*

**To qualify as a petitioning creditor the claim against the debtor must be:**

- non contingent - meaning it does not depend on a future event occurring. If all requirements of a liability have occurred other than passage of time then an unmatured debt is considered not contingent;*
- not subject to a bone fide dispute - meaning there is an objectively reasonable basis as a matter of fact or law for the dispute; and*
- unsecured or under secured for more than USD 16,750 (in aggregate if there are multiple petitioning creditor's claims).*

**Commented [H(55):** Correct, 1 mark

**Commented [H(56):** Correct, 1/2 mark

**Commented [H(57):** Correct, 1 mark

**Commented [H(58):** Correct, 1/2 mark

**Commented [H(59):** Correct, 1 mark

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

*The petitioning creditor must also allege that the debtor is insolvent on the basis that the debtor is not paying its debts as they become due (providing the debts are not*

subject to a bone fide dispute) or that a custodian other than a trustee or receiver was appointed or took possession within 120 days before filing the petition.

Commented [H(61)]: Correct, 1/2 mark

An involuntary Chapter 7 or Chapter 11 petition can be brought against a debtor by the foreign representative of an estate in a foreign proceeding even if it has not been recognised under a Chapter 15 proceeding.

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

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**Question 4.1** [5 marks]

Commented [H(63)]: Total marks 3/5

**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?**

**Chapter 11 of the Bankruptcy Code provides for a reorganisation of a debtor. The court need not appoint a trustee to control the debtor and instead Speculation Inc ("Spec") would remain in control of the business.**

**An automatic worldwide stay is given meaning that any proceeding against the debtor (subject to some exceptions) or its property, including judgments or collection activities, are suspended. This gives the debtor breathing space to propose a plan to reorganise its debts whilst continuing to operate in the ordinary course of business.**

Commented [H(64)]: Correct, 1 mark

**A debtor in possession also has the ability to reject some burdensome contracts as well as sell assets free and clear of lines.**

**If Spec filed for a Chapter 11 proceeding it would have the following effects on the above mentioned events:**

i) **An investigation into possible insider trading by the DOJ is considered criminal proceedings. The automatic stay does not extend to criminal proceedings and therefore the DOJ investigation would not be affected by the Chapter 11 proceedings.**

Commented [H(65)]: Correct, 1 mark

ii) **The margin loan is secured by the shares purchased. This would mean the loan broker would become a secured creditor of Spec and would rank higher**

Commented [H(66)]: Incorrect, the margin loan is a securities contract exempt from the automatic stay, so the broker can liquidate the collateral.

*in the distribution queue than unsecured creditors. If sufficient assets are available, the loan broker may receive 100% of their claim amount meaning their claim would not be impaired. In this instance the loan broker would not be entitled to vote on the reorganization plan.*

- iii) **The office space lease** would constitute an executory contract and under a Chapter 11 proceeding Spec could choose to reject the contract. This would mean that any monies owed under the lease pre-petition would constitute an unsecured claim against Spec. Alternatively Spec could choose to assume the lease in which case Spec must cure defaults and provide sufficient assurances of its future performance to the landlord.
- iv) **If the employment discrimination lawsuit was brought before the filing of the Chapter 11 proceeding then the employment lawsuit will be affected by the stay and the lawsuit would essentially be paused. If a judgement was reached prior to the Chapter 11 filing then any funds owed to the former employee would constitute an unsecured claim against the debtor.**

**Commented [H(67):** The landlord would be barred by the automatic stay from commencing proceedings for rent or eviction.

**Commented [H(68):** Correct, 1 mark

**Question 4.2** [5 marks]

**Commented [H(69):** Total marks 3/5

***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?***

*Chapter 15 was created in 2005 when the US adopted the UNCITRAL Model Law on Cross-Border Insolvency. Part of its purpose is to facilitate the rescue of financially troubled businesses protecting investment and preserving employment, which is relevant for Stella. A Chapter 15 proceeding is ancillary in nature rather than plenary. This means that the US does not exercise authority or jurisdiction over the full estate but instead provides assistance to the debtor's foreign proceedings.*

*A foreign main proceeding is commenced in the debtor's centre of main interests ("COMI") which is not a concept typically used in US law who instead use terminology such as domicile and principal place of business. **The COMI is assumed to be the place of incorporation which will be France in Stella's case. A proceeding brought in a jurisdiction other than the COMI can be recognised as a foreign non-main proceeding if the debtor had an establishment in that jurisdiction before the Chapter 15 proceeding commenced. In Stella's case, an English scheme of arrangement could be***

**Commented [H(70):** Correct, 1 mark

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

recognised as a foreign non-main proceeding due to the fact that Stella has retail stores in England.

Commented [H(72)]: Correct, 1 mark

However, a debtor's COMI can be rebutted concerning relevant factors such as the location of its headquarters, location of management, location of primary assets, location of the majority of the creditors that will be affected by the requested relief and the jurisdiction whose law will apply to most disputes. Stella's products are made in Italy so there could be an argument that Italy is where the primary assets are held. Alternatively, due to the Eurobonds being governed by English law, and it is the Eurobonds that Stella wants to restructure, there could be an argument that the COMI should be England seeing as that is the law applicable to most disputes. If the COMI is determined to be England, this would mean that the English scheme of arrangement would be recognised as a foreign main proceeding. The debtor's COMI should be ascertainable by third parties or creditors per objective evidence.

Commented [H(73)]: On these facts, the presumption is unlikely to be rebutted, as Stella is likely to have a large number of non-financial creditors under other laws. As COMI is not in England, foreign main recognition is not appropriate.

If Stella's proceedings are determined to be foreign main proceedings then relief such as an automatic stay and sale, transfer or use of property outside of the ordinary course would be available upon recognition limited to Stella's property within the United States. If Stella's proceedings are determined to be foreign non-proceeding then these reliefs may be granted on a discretionary basis.

Question 4.3 [5 marks]

Commented [H(74)]: Total marks 5/5

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?

An executory contract is not defined by statute but instead is given meaning through case law. Typically a contract can be considered executory if there are material unperformed obligations on both sides. GameMart has a 10 year obligation to manufacture the Xblox and Toyco has an obligation to pay monthly royalties. Providing the license has not expired then it is considered an executory contract.

Commented [H(75)]: Correct, 1 mark, though you have the parties' roles backward-ToyCo is the licensor who must maintain exclusivity and GameMart must pay royalties

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

*If a contract is considered executory then a debtor can elect to either reject the contract, which would give rise to a breach and an unsecured pre-petition claim, assume the contract, or assume and assign the contract which transfers the debtor's rights to a third party.*

*Intellectual property licensing law is subject to non-bankruptcy law and this provides that the counterparty cannot be compelled to accept performance from a transferee, and so a counterparty consent is required. For this reason, whilst the Xbox licence is considered an executory contract, GameMart could not transfer the Xbox licence without ToyCo's consent as part of a 363 sale.*

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

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

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

*The Bankruptcy Code section 365 overwrites contractual restrictions on assignment to allow a debtor to gain a higher value for its assets. It is a debtor friendly provision to incentivise a sale of a going concern over a liquidation.*

Commented [H(78)]: Correct, 1 mark

*There are currently 7 years remaining on the long term lease from Land Corp meaning that there are unperformed obligations on both sides. This means the lease can be considered an executory contract and therefore, as per section 365 of the Bankruptcy Code, GameMart can transfer the factory lease as part of the 363 sale without Land Corp's consent.*

Commented [H(79)]: Correct, 1 mark

\* End of Assessment \*