



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 44.5/50

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

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?

Setoff happens when a creditor has a claim against the debtor but in the mean time also owes money to the debtor. In normal course of business, parties would setoff the obligations in order to have a net situation of how much is owed to who. However, in a insolvency situation, setoff is an advantage for the creditor because it can improve its situation without paying money to the estate and the application of legal priorities. And it is detrimental to other creditors because the estate is not increase by the money owed to the debtor. Setoff is contrary to the collective discipline implied by the commencement of an insolvency proceeding. That's why setoff is not permitted in some circumstances.

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?

A debtor who is preparing to filing for a bankruptcy court must of course review the Federal Rules of Bankruptcy Procedure (bankruptcy rules). But it must also review procedural rules (the Federal Rules of Civil Procedure). As US Law is based on common law and precedent principle, it is also recommended to look at the local rules of the bankruptcy court and finally the 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, though this is not related to the common law or precedent

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

Question 2.3 [2 marks]

Commented [H(22)]: Total marks 1.5/2

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

The absolute priority rule is a principle that applies to restructuring plan under chapter 11. This means that the proposition of payment of the plan to a creditor or a class of creditors cannot be less than what this class or this creditor would receive in a chapter 7 proceeding, according to its security interests and liens and priorities of distribution in a chapter 7. However, a creditor can always consent to a worst treatment under the plan, meaning that a junior class receives more than what it would have received in a chapter 7 if this secures the approval of the plan by more impaired classes.

Commented [H(23)]: Correct, 1/2 mark

Commented [H(24)]: Partially correct, 1/2 mark, also no payment may be made to a junior class of creditors unless all senior classes have been paid in full

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

Question 2.4 [2 marks]

Commented [H(26)]: Total marks 1.5/2

What is a "priming lien" and what requirements must be met for such a lien to be granted to secure DIP financing?

A chapter 11 costs a lot of fees for the debtor and it must also keep on paying its current debts on a daily business basis. To encourage creditors or funding organizations to grant to the debtor credits, the Bankruptcy code has set a framework of incentives. First, the debtor can obtain unsecured credit with or without the court's approval, and this new credit will benefit from the administrative expense priority.

If the debtor fails to find credit this way, the court can authorize more securities to creditors who accept to finance post commencement period of time: unsecured debt having priority over all the other administrative expenses, or secured debt other unencumbered assets or a secured debt with a junior lien on an encumbered asset.

If neither of these hypotheses cannot permit the debtor to obtain post-commencement financing, then the court can grant "priming lien". This means that the creditor that benefits from this lien has a senior or equal lien on the estate property than pre-petition lien. These creditors can be considered as super senior.

Commented [H(27)]: Correct, 1/2 mark, also the interest of the creditor being primed must be adequately protected

Commented [H(28)]: Correct, 1 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 is a transfer of the debtor's property prior to petition during a suspect period that would end up the recipient of the transfer to receive more than what it would have under a chapter 7 liquidation proceeding, if the transfer has not been made. The property transferred must be returned to the estate to re-establish equality of treatment between creditors.

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

The showing of fault by the debtor or the creditor is not required.

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

However, for a preference claim to be granted, it must be proved six elements.

1) A transfer of interest of the debtor in property

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

The debtor can transfer funds, property or grant a lien to a creditor. However, if the transfer doesn't concern a property in which the debtors has interest, it does not fall in the scope of the preference.

2) To or for the benefit of a creditor

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

The recipient of the transfer must have been a creditor before the transfer.

3) For or on account of a previous debt owed by the debtor

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

A preference must be about the payment of a previously owned debt.

4) Made while the debtor was insolvent

There is a presumption that the debtor was insolvent during a 90-day period prior to filing for bankruptcy. It can be rebutted by the creditor.

5) Made during the suspect period

The suspect period for a transfer to third parties is 90 days before the petition date. And it is 1 year before for a transfer to an insider.

6) The creditor received more than it would have in a chapter 7 liquidation proceeding.

A preference claim aims to void an improvement of one creditor's situation compared to a chapter 7 liquidation. In order to assess this element, the court must assess what value would have been received and how much money would have been distributed to the recipient. This simulation of a chapter 7 liquidation

must take into account all the priority administrative expenses that would have incurred since the petition date.

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?

Bankruptcy courts' jurisdiction is based on article III of the US Constitution. Because bankruptcy courts are related to one district court and are not properly part of the federal system, the US Supreme Court held in 1982 (Northern Pipeline Construction Co v. Marathon Pipe Line Co) that jurisdictional provisions of the Bankruptcy Code of 1978 were unconstitutional.

In the new provisions enacted after this decision of the Supreme Court, there is a distinction between "core" and "non-core" matters that allows bankruptcy judges to make final decision only on core proceedings (28 USC, §157).

For example, a core-proceeding is a proceeding about the administration of the estate. Litigant parties or persons who are affected by the bankruptcy order can appeal the bankruptcy court ruling. The order will be reviewed by the district court related to the bankruptcy court. However, in some circuits, bankruptcy court orders are reviewed by a Bankruptcy Appellate Panel (BAP) which composed by judges from bankruptcy courts of the same circuit.

Non final orders are orders on non-core matters where the bankruptcy courts hears litigants and submits its opinion in facts and in law to the district court, in order for the district court to make a final decision. Then, the district court's decision can be review by the court of appeal (circuit courts)

Question 3.2 [3 marks]

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**?

After recognition of a foreign main proceeding is granted, some Bankruptcy code provisions will automatically apply to assets and interests located in territorial jurisdiction of the USA. (11 USC §1520)

Upon recognition, provisions about (i) the automatic stay of creditor's actions (USC 11 §362), (ii) the manner can the debtor and/or the foreign representative can run its business on a ordinary basis, with or without a trustee (11 USC §363 and §552), all the provisions about sale, (iii) transfer and use of property outside the ordinary course of business such as 363 sale (11 USC §363), (iv) avoidance of post-petition transfer in property or post-petition perfection of interests (11 USC §349), will automatically apply.

Commented [H(35): Total marks 14/15

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

Commented [H(37): Incorrect, the district courts are established by Article III, but the bankruptcy courts are established by Congress under Article I of the Constitution

Commented [H(38): Incorrect, the bankruptcy court cannot enter final orders on core matters that also fall in Article III jurisdiction. However, the bankruptcy court can enter final orders on core matters created by the Bankruptcy Code, like a challenge to a petition or with the consent of the parties.

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

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

Commented [H(41): Correct, 1 mark

Commented [H(42): Total marks 3/3

Commented [H(43): Correct, 1/2 mark

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

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

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

When a foreign non-main proceeding is recognized in the US, the court can discretionary grant any of the relief provisions that automatically apply to foreign main-proceeding.

Moreover, on a discretionary basis, the US court can grant other relief measures, no matter the foreign proceeding is a main-proceeding or a non-main proceeding. The court can order the communication of documents about the debtor's assets and its affairs (discovery). It can also entrust the administration of the debtor's assets located in the US to the foreign representative. The foreign representative must prove that by doing so the interests of US creditors are sufficiently protected. And the foreign representative cannot use the price of a sale of a US assets in the distribution of the main foreign proceeding. Upon recognition and if the interests of interest parties are adequately protected, the court may also extend provisional relief and order any other relief measure that are "necessary to effectuate the purposes of chapter 15 and to protect the assets of the debtor or the interests of creditors".

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

Commented [H(48)]: Correct, 1/2 mark

Question 3.3 [4 marks]

Commented [H(49)]: 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 duties come under the competence of state law.

For a corporation incorporated under the laws of Delaware, directors have a fiduciary duty of loyalty towards the corporation and its shareholders and a duty of care. This means that directors have to act in the best interests of the corporation and make educated decision.

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

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

When the corporation is potentially or actually insolvent, these duties are also owed to the corporation and its shareholders and not to the creditors. In the *Trenwick Am Litig Trust v. Ernst & Young LLP* case, the Delaware Supreme court held that there was no obligation for the board of directors to file for insolvency or to cease activity when the company can no longer meet its obligations. Therefore, directors of a Delaware corporation don't owe any duty of care directly to creditors.

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

In the normal course of business, directors are protected from liability for errors of judgment by the business judgment rule. It is a presumption that directors acted in good faith and on the basis of reasonable information. This presumption is rebuttable. It must be proved that a majority of the board of directors were not in fact reasonably informed, or that they didn't believe that their actions were in the best interests of the corporation, or that the directors did not act in good faith. Directors can also be charged if they committed gross negligence. The business judgement rule doesn't apply when it is proved that a majority of the board was not disinterested or independent, or that one of the controlling shareholder also benefits of the operation.

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.

A petitioning creditor is a creditor that is filing for commencement of a chapter 7 or chapter 11 proceeding which will be an involuntary proceeding, as opposed to a voluntary proceeding.

The number of petitioning creditors required to properly file for an insolvency proceeding depends on the number of non-contingent and non-insiders creditors the debtor has. If the debtor has less than 12 non-contingent and non-insider creditors, then the petition of one creditor can provoke the commencement of an involuntary proceeding. If the debtor has more 12 or more non-contingent and non-insider creditors, then there must be 3 qualifying creditors to join the petition.

The creditor's claim must fulfil 4 elements.

- 1) *Non-contingent. This means that the creditor's claim cannot depend on the realisation of a future event. It cannot be a potential debt owed by the debtor in case a event occurs.*
- 2) *Not subject to a bona fide dispute. This means that the claim's existence is not disputed in fact or in law by the debtor. If the claim is subject to an objectively good faith dispute with the debt, that it cannot be used to file for an involuntary proceeding. The creditor can use the undisputed portion of the claim if there is one.*
- 3) *The creditor's claim must be unsecured, or undersecured (this means that the asset's value is smaller than the claim's one), or that the total amount of the creditors' claims reaches a certain threshold which is set to USD 16.750 today.*
- 4) *It must be proved that the debtor is insolvent, either because it is not paying claims as they become due, or because a custodian was appointed, other than an authorized agent that would enforce a lien against a property of the estate.*

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

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

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

Commented [H(62)]: Total marks 11.5/15

Question 4.1 [5 marks]

Commented [H(63)]: Total marks 3.5/5

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 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?

The fact that a Chapter 11 was filed by the company means that the automatic stay will automatically apply and that all actions against the estate will be stopped at the date of the petition.

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

- i) However, there are some exclusions from the scope of the stay. For instance, criminal investigations are not subjected to the stay. In this case, this means that the investigation of the DOJ will continue and the criminal proceeding could end up with Speculation Inc. sentenced to a penal sanction.
- ii) The automatic stay prohibits any enforcement or realization of liens against the estate. In this case, the company's goods (its stocks) served as guaranty of the margin loan. However, they were not cash collateral. Therefore, the automatic stay will prevent the broker to take possession of the collateral. However, it doesn't mean that it will lose its security, it will still be a secured creditor.
- iii) The stay also prevents actions pre-petition creditors who would try to collect their claims. In this case, this means that the leaser can only file its proof of claim in order to be paid under the reorganization plan's provisions.
- iv) 11 USC §362 (a) (1) also prohibits the continuation of any judicial proceeding that was commenced before the commencement of the insolvency proceeding. Therefore, in this case, the law suit that was started by the former employee can't continue until the case is closed. In the context of a reorganization plan under chapter 11, until the substantial consummation of the plan.

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

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

Commented [H(67)]: Correct, 1/2 mark, specifically the landlord is barred from pursuing eviction or an action for unpaid rent

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?

A foreign insolvency representative can file for recognition of a foreign insolvency proceeding in the USA under chapter 15. This chapter of the US Bankruptcy code is the American implementation of the Model Law.

According to its provisions (USC 11 §1517), in order to qualify for recognition in the USA, the foreign insolvency proceeding must be commenced in a State where the COMI (center of main interests) is located or where the debtor has an establishment before the commencement of the foreign proceeding.

The location of the COMI under the USC relies on the same presumption as in the Model Law: the location of the registered office. (11 USC §1516) The definition of an "establishment" under US law is inspired from the European Regulation and almost

the same than the Model Law “any place of operations where the debtor carries out a non transitory economic activity”(11 USC §1502).

According to UNCITRAL Working Group recommendation the location of the COMI or an establishment must be analysed at the time of the opening of the foreign proceeding, in order to avoid change of location by the debtor or the foreign representative after the commencement.

In this case, Stella’s registered office and headquarters are in Paris. Therefore, its COMI is presumed to be located in Paris.

Stella also has retail stores in England, before the commencement of the English proceeding. A store can be qualified as an “establishment” withing the meaning of 11 USC §1502.

Therefore, according to 11 USC §1517, an English scheme of arrangement of Stella could be recognized in the USA under chapter 15. And it will be recognized as a foreign non-main proceeding.

Commented [H(70)]: Correct, 1 mark, the other factors would be unlikely to overcome this protection

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

Commented [H(72)]: Correct, 1 mark, this appropriate because COMI not being in England means that foreign main recognition would not be appropriate.

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?

According to the “Countryman test” an executory contract is a contract where both of the parties didn’t finish to perform their material obligations at the petition date. The exclusive license to manufacture Xblox is an intellectual property contract where the obligations of the licensor is to provide to the licensee the patterns, authorize it to use them in order to manufacture the product and guaranty to the licensee that it is the only one to benefit from these rights. In exchange, the licensee pays royalties. In this case, the license contract is a ten-year term contract that is still on going. Therefore, the license to manufacture Xlbox is an executory contract.

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

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

A 363 sale is a sale of all or part of the debtor’s assets under a chapter 11 proceeding, as an ongoing business, with the courts approval. The assets sold under this provision will be free from creditors interests.

A 363 sale is used to sell a business unit as a going concern, with its assets and executory contracts. In the context of a 363 sale, it is also useful to transfer some contracts that are vital for the continuation of the business.

Provisions about executory contracts exclude the application of contractual clauses that would prohibit or restrict the transfer of contracts. (USC 11 §365 (f))

However, USC 11 §365 (c) provides that an executory contract cannot be assumed and assigned if the applicable law to the contract allows the counterparty to refuse the transfer of the contract to a third-party. Intellectual property licensing law is one these laws. Therefore, without the consent of ToyCo, the license cannot be sold in a 363 sale.

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

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

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

According to the Countryman Test, the factory lease in an executory contract. The lease of a factory is essential to the business of manufacturing.

According to USC 11 §365(c) and (f), a lease contract is an assignable executory contract, which means that it can be transferred to a third-party that will perform the debtors previous obligations, without the counterparty's agreement.

Therefore, the factory lease can be transferred as part of a 363 sale by Game Mart without its landlord's consent.

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

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

* End of Assessment *