



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

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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

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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

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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

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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

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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

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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

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.

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Question 1.9

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.

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Question 1.10

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.**

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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 applied when a creditor nets out a claim he holds against a debtor and an amount that he owes the debtor. It can have the effect of the said creditor receiving payment of his claim in full and he will therefore not receive only a dividend on his claim, which would be payable by the debtor in a bankruptcy scenario. He will therefore be in a better position than other unsecured creditors who is not owed any money by the debtor and who will only receive a dividend on their claim. As setoff therefore improves the position of a creditor in relation to the other creditors, it is not permitted in many circumstances.

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Question 2.2 [2 marks]

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

The following rules should be reviewed:

- 1. The Federal Rules of Bankruptcy Procedure (the Bankruptcy Rules);*
- 2. The Federal Rules of Civil Procedure;*
- 3. The local rules of the specific bankruptcy court;*
- 4. The personal practices as issued by the specific judge, which are updated regularly.*

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Question 2.3 [2 marks]

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

The absolute priority rule requires that each category of claims must be paid in full before the next category can receive anything. In a Chapter 11 plan, the absolute priority rule can be deviated from when affected creditors consent thereto, for example a more senior creditor can consent to receiving less than what the absolute priority rule would require. A senior creditor will consent as such if a distribution of funds to lower priority claimants is necessary to obtain their approval of the plan. In a Chapter 7 plan, deviation is not permitted and statutory priorities must be strictly followed.

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Question 2.4 [2 marks]

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

A priming lien is a lien granted on a property over which there are existing liens and the priming lien is senior or equal in priority to the existing liens. A priming lien will only be granted if financing cannot be obtained on any of the following terms:

1. where the debtor has substantial unencumbered assets, the debtor can incur unsecured debt or obtain unsecured credit, which will have administrative expense priority, in the ordinary course of business without court approval or outside the ordinary course of business with court approval;
2. where the debtor can show that he has been unable to obtain funding under either of the options in 1 above, the court can authorise an unsecured debt having priority ahead of all other administrative expenses; a secured debt with a lien on unencumbered estate property; or a secured debt with a junior lien on encumbered estate property.

Before the court will grant a priming lien, a debtor must therefore exhaust all the above mentioned options and DIP financing is available as a last resort.

Question 2.5 [3 marks]

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 a debtor's property in the 90-day period immediately preceding petition date. The recipient is preferred above the debtor's other creditors, because he receives more than he would have received if he was paid together with other creditors when the assets of the debtor were divided equally amongst all the creditors. The preference must be returned by the recipient if the transfer prefers him as such.

The elements that must be proved in a preference claim are the following:

1. The transfer was made of a debtor's interest in property - it may be funds, property or an interest therein (the property must belong to the debtor);
2. The transfer was made to or for the benefit of a creditor - the transfer is not a preference if the recipient is not a creditor of the debtor;
3. The transfer was made for or on account of an antecedent debt owed by the debtor before the transfer was made - the debtor must therefore pay the creditor for a pre-existing debt;
4. The transfer was made while the debtor was insolvent - there is an assumption of insolvency on and during the 90 day period prior to the petition date;
5. The transfer was made during the suspect period - during the 90 day period immediately preceding the petition date;
6. The transfer enables the creditor to receive more than it would have received in a Chapter 7 liquidation - he receives more than he would have received if he was paid together with other creditors when the assets of the debtor were divided equally amongst all the creditors.

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Commented [H(28): Correct, 1/2 mark, also the secured creditor being primed must be adequately protected

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

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

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The showing of fault by either the debtor or recipient (creditor) in connection with the payment / transfer is not required.

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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?

A bankruptcy court may enter a final order on core bankruptcy issues or when litigants consent to the entry of final orders.

Commented [H(37)]: Correct, 1/2 mark, or on certain core matters such as challenges to a petition

Appeals from bankruptcy court decisions are heard:

- 1. by the district court for the district in which they sit;*
- 2. in some circuits by a Bankruptcy Appellate Panel ("BAP"), which panel is convened from the judges of the bankruptcy court in the circuit*

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Non-final orders or a ruling in a non-core proceeding the district court or BAP reviews all findings of fact and conclusions of law to which an objection is filed afresh.

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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?

In terms of Section 1520 of the US Bankruptcy Code, the following provisions will automatically apply to the debtor's property within the jurisdiction of the US upon recognition of a foreign main proceeding:

- 1. with respect to the debtor and the debtor's property within the jurisdiction of the US:*
 - 1.1. Section 361 - provides protection to an entity with an interest in property if the application of Sections 362, 363 or 364 results in a decrease in the value of an entity's interest in the property;*
 - 1.2. Section 362 - automatic stay of petitions filed under Sections 301, 302 or 303 or Section 5(a)(3) of the Securities Investor Protection Act of 1970;*
- 2. With respect to a transfer of an interest of the debtor in property within the jurisdiction of the US:*
 - 2.1. Section 363 - the foreign representative may,*
 - 2.1.1. after notice and a hearing, sell, transfer, lease or use property of the estate outside the ordinary course of business and*

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

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2.1.2. without notice or a hearing, enter into transactions (operate the debtor's business), including the sale or lease of estate property in the ordinary course of business;

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2.2. Section 549 - avoidance of transfers of property that occurs after commencement of the petition for recognition; and

2.3. Section 552 - avoidance of perfection of security interest that occurs after commencement of the petition for recognition.

In terms of Section 1521 of the US Bankruptcy Code, the following relief may be granted on a discretionary basis of either a foreign main or non-main proceeding upon the request of a foreign representative:

1. Staying the commencement or continuation of actions or proceedings with regard to a debtor's assets, rights, liabilities or obligations;
2. Staying execution against a debtor's assets;
3. Suspending the right to transfer, encumber or dispose of any of the debtor's assets;
4. Providing for the examination of witnesses, taking of evidence or delivery of information with regard to a debtor's assets, rights, liabilities or obligations;
5. Entrusting the administration or realisation of the debtors' assets, or a part thereof, situated in the jurisdiction of the US to the foreign representative;
6. Extending relief granted in terms of Section 1519(a) upon the filing of the petition for recognition;
7. Any additional relief that may be available;
8. Entrusting the distribution of all or part of the debtor's assets situated in the jurisdiction of the US to the foreign representative, provided that the court is satisfied that the US creditors' interests are protected.

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

Question 3.3 [4 marks]

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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 the following duties to the corporation and its shareholders:

1. a fiduciary duty of loyalty to act in corporation's best interest;
2. a duty of care to make educated decisions.

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These duties are owed to the corporation and its shareholders even if the corporation is potentially insolvent and the shareholders might not receive anything in the bankruptcy. The duty is therefore still not to creditors.

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Directors are protected from liability for errors of judgment in terms of the business judgment rule. In terms of the said rule, there is a presumption that directors acted in good faith on the basis of reasonable information. The presumption can be refuted if it can be shown that the majority of the directors did not act based upon reasonable

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information, nor in good faith and that they were not convinced that their decision was in the corporation's best interest.

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 against an eligible debtor, a creditor must have a claim against the said debtor that is:

1. **Non-contingent:**
 - 1.1. **A contingent claim depends on the occurrence of some future event** - if the event does not occur, the claim does not exist. For example a claim under a guarantee is normally contingent on the occurrence of a default of the obligation that was guaranteed. If the default does not occur, there is no claim under the guarantee;
 - 1.2. A debt, where payment is due in the future, is not contingent if all the requirements for liability, other than the passing of time, have occurred.
2. **Undisputed with respect to liability or amount:**
 - 2.1. **A bona fide dispute as to liability or the amount of the claim exists if, objectively there are reasonable grounds for such a dispute;**
 - 2.2. If the debtor subjectively believes that the debt is not owed or the amount is incorrectly claimed, a bona fide dispute does not exist;
 - 2.3. If only a portion of the amount claimed is disputed, the creditor can only use the undisputed portion to determine whether the required threshold for a claim has been reached (refer to paragraph 3 below).
 - 2.4. If a creditor has more than one claim and one of those claims are disputed, he can still use the remaining claims to meet the requirements of a petitioning creditor.
3. **Unsecured or undersecured and separately (if he is the sole petitioning creditor) or in the aggregate with other petitioning creditors' (if any) claims be for the amount of at least USD 16,750.00**

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 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.

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

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

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

Commented [H(59)]: Correct, 1/2 mark, also the petitioners must assert that the debtor is not paying its debts or has had a custodian appointed over its assets

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

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?

(i) **Effect on the DOJ investigation:**

The worldwide automatic stay in terms of Section 362 is subject to certain exceptions, including, but not limited to criminal proceedings and regulatory investigations. The filing of the Chapter 11 petition will therefore have no effect on the DOJ investigation and they will be able to proceed with their criminal and/or regulatory investigations.

Commented [H(62): Specifically, the filing of the petition brings the stay into effect.

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(ii) **Effect on the default on the margin loan:**

The worldwide automatic stay in terms of Section 362 prohibits any attempts to collect pre-petition claims, even through a letter of demand or calls. It further prohibits the enforcement of a lien against property of the estate based on a pre-petition claim. Therefore, the broker will not be able to take any steps to collect the outstanding / arrear amount on the margin loan and he will not be able to enforce the lien he has on the shares in the form of collateral (he will not be able to attach or sell the shares).

Commented [H(64): Incorrect, the margin loan is a securities contract that is exempt from the automatic stay so the broker may liquidate the collateral

(iii) **Effect on the delinquent lease:**

The worldwide automatic stay in terms of Section 362 prohibits any attempts to collect pre-petition claims, even through a letter of demand or calls. It further prohibits any actions taken to obtain control of the property of the estate. The Landlord will therefore not be able to take any steps to collect the outstanding / arrear rental and he will not be able to attach the assets situated in his premises in order to sell same to cover the arrear amount.

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Of the lease has expired (the information was not provided), the stay as referred to above will be subject to an exception, as eviction orders of a debtor who is a tenant of a non-residential property which is the subject matter of an expired lease is an exception and the stay will not be applicable. The Landlord will therefore be able to evict Speculation Inc.

(iv) **Effect on the employment discrimination lawsuit:**

The worldwide automatic stay in terms of Section 362 prohibits litigation on pre-petition claims. The lawsuit will therefore not be able to continue.

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Question 4.2 [5 marks]

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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 proceeding is defined in Section 101(23) of the Bankruptcy Code as "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of 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."

In terms of the abovementioned definition, an English scheme of arrangement will be considered a foreign proceeding, as it meets all the requirements listed in the said definition and can therefore be recognised by a US bankruptcy court under Chapter 15.

To be recognised as under Chapter 15, the foreign representative of Stella must establish that:

- 1. A foreign court or administrative proceeding regarding Stella is pending - the pending English scheme of arrangement complies herewith; and*
- 2. That the foreign representative has the authority to act in terms of the said proceeding - an authorised official of Stella will meet these requirements.*

The English Scheme of arrangement is therefore capable of being recognised by a US bankruptcy court under Chapter 15.

The foreign proceeding shall be recognised as a foreign main proceeding if Stella has its COMI in the foreign state where the foreign proceedings were opened (England) and as a foreign non-main proceeding if the debtor only has an establishment (defined in Article 2 of the Model Law as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods and services") in the foreign state where the foreign proceedings were opened.

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The term COMI is not defined in the Bankruptcy Code, however in terms of Section 1516(c) thereof, it is presumed that, in the absence of proof to the contrary, a debtor's COMI is the debtor's registered office. The presumption may be opposed by interested parties and therefore the COMI of a debtor needs to be scrutinised by the courts before a foreign proceeding is recognised as a foreign main proceeding.

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There are relevant factors that must be considered when the COMI of a debtor is being determined:

1. *Location of Stella's headquarters - Paris, France;*
2. *Location of Stella's management - Paris, France;*
3. *Location of Stella's primary assets - France, Italy, England, Europe, Asia and North America;*
4. *Location of the majority of Stella's creditors or the majority of creditors that will be affected by the recognition - France, Italy, England, Europe, Asia and North America;*
5. *Jurisdiction whose law will apply to most of the disputes - France, as the headquarters, management and primary assets are situated there.*

The creditors should be able to ascertain the COMI based on objective evidence.

Based on all of the above, Stella's COMI is situated in Paris, France, however Stella has an establishment in England (retails stores, creditors) and therefore the proceeding will be recognised as a foreign non-main proceeding.

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

Question 4.3 [5 marks]

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

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

The license to manufacture Xblox is an executory contract as there are material unperformed obligations on both sides - the license has not expired and GameMart Inc must still manufacture Xblox and they are obliged to pay royalties to ToyCo.

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

*Consent is required where substantive non-bankruptcy law, such as intellectual property licensing law, provides that ToyCo cannot be compelled to consent to the sale. It was further held in terms of the decision in *In re Trump Entertainment Resorts, Inc*, 526 BR 116 that federal trademark law bans the assignment of trademark licenses when the licensor did not consent thereto, as the identity of the licensee can have a major impact on the quality of the products manufactured in terms of the patent bearing its name. The license to manufacture Xblox is a patent (intellectual property) owned by ToyCo and therefore the license may not be assigned or sold without the consent of the ToyCo.*

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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?

Consent is only required where the contract relates to a loan or other financial accommodation or where substantive non-bankruptcy law provides that the Land Corp cannot be compelled to consent. The interest in the lease agreement, which is required to operate the business from, can be assigned and transferred without Land Corp's consent even where the lease prohibits assignment, as a lease agreement is not an agreement with reference to a loan or subject to non-bankruptcy law.

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

* End of Assessment *