



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 28.5/50

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

Commented [H(2)]: Total marks 7/10

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

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.*

Commented [H(5)]: Incorrect, the correct response is (a)

Question 1.4

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.*

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

Question 1.5

Which of the following about cramdowns, is false?

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

- (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

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.*

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

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.*

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

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.**

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

QUESTION 2 (direct questions) [10 marks]

Commented [H(13)]: Total marks 6/10

Question 2.1 (1 mark)

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

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

Under section 553(a) of the Bankruptcy Code, a setoff is a right possessed by a creditor to off set their owed debt with the debt that they owe the debtor. In essence, both creditor and debtor owe money to each other, and they agree to settle both debts using what they owe each other.¹ An effect of a setoff may potentially place a creditor in a better position than they would have been following the normal procedure where there are unsecured creditors than do not owe a debt to the debtor in question.²

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?

The individual must review the following:

- the **Bankruptcy Rules**
- the **Federal Rules of Civil Procedure**
- the **local rules of the bankruptcy court and 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

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

Additionally consult local practitioners for other consideration such as unwritten local practices.

Question 2.3 [2 marks]

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

The effect of absolute priority rule are claims of dissenting class of creditors to be paid before other creditors.³ However, no creditor or

Commented [H(23)]: Incorrect, a given class of creditors must be paid in full before a junior class of creditors receives anything. This may be deviated from only in a chapter 11 plan (not in chapter 7) and only with consent of the affected senior creditor.

Question 2.4 [2 marks]

Commented [H(24)]: Total marks 1/2

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

¹ Matt Ochs, 'Exercising Rights to Setoff and Recoupment in Bankruptcy' (2015) Holland & Hart < <https://www.hollandhart.com/exercising-rights-to-setoff-and-recoupment-in-bankruptcy> > accessed 3 February 2023.

² Matt Ochs, 'Exercising Rights to Setoff and Recoupment in Bankruptcy' (2015) Holland & Hart < <https://www.hollandhart.com/exercising-rights-to-setoff-and-recoupment-in-bankruptcy> > accessed 3 February 2023.

³ Bankruptcy Code, § 1129(b)(2).

A priming lien is where a post-bankruptcy creditor is places in a higher or equal priority than a pre-bankruptcy creditor by the court.⁴ The requirement is that the debtor must demonstrate that that the secured creditor being primed is adequately protected.

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 the payment of the debtor's assets paid to a creditor before the bankruptcy proceedings.⁵ Normally the payments are made within 90 days before filing for bankruptcy (or 1 year if the creditors is termed as an insider).⁶ The requirements are: that the debtor received something of value that belongs to the debtor; the debtor was not obliged to give the asset to the creditor but was intended to benefit that creditor; the payment is done to cover an outstanding amount; the payment was made when the debtor was insolvent; and the effect is that the creditor due to the payment will be in a better position than they would have been through the bankruptcy process.⁷

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

Question 3.1 [3 marks]

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

Final orders in bankruptcy courts are orders where all the issues brought to the courts regarding the debtor are dealt with.⁸ The bankruptcy courts will hence have no more issues to resolve on the matter brought forth before it. Once a final bankruptcy order is made by the court, the parties are free to appeal the decision in district courts or Bankruptcy Appellant Panel.⁹ If there are still pending matters, the order given cannot be appealed. In a case where the creditors of the debtor still have unresolved matters in the bankruptcy court, all matters must be settled and that the court does not have

⁴ Michael L. Cook and Adam C. Harris, 'Priming DIPs: The New Normal' (2014) Schulte Roth & Zabel <<https://www.srz.com/resources/priming-dips-the-new-normal.html>> accessed 4 February 2023.

⁵ Bankruptcy Code, § 547.

⁶ Unknown, 'Preference Claims in Bankruptcy' (unknown) Romano Law <<https://www.romanolaw.com/business-disputes/preference-claims-in-bankruptcy/>> accessed 28 February 2023.

⁷ Bankruptcy Code, § 547 and Unknown, 'Preference Claims in Bankruptcy' (unknown) Romano Law <<https://www.romanolaw.com/business-disputes/preference-claims-in-bankruptcy/>> accessed 28 February 2023.

⁸ Jarrad Wright, 'When Does and Order Qualify as a Final Order? How Does This Affect Bankruptcies?' (Unknown) <<https://www.dimuro.com/when-does-an-order-qualify-as-a-final-order/>> accessed 28 February 2023.

⁹ Richard B Levin, 'Bankruptcy Appeals Symposium The Bankruptcy Reform Act of 1978 Part II' (1979-1980) 58 North Carolina Law Review 967.

Commented [H(25)]: Partially correct, 1/2 mark, specifically it is a lien on estate property that is of equal or senior priority to a pre-petition lien.

Commented [H(26)]: Correct, 1/2 mark, also the debtor must show that financing is not available without the priming lien

Commented [H(27)]: Total marks 2/3

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

Commented [H(29)]: Incorrect, the creditor is the recipient

Commented [H(30)]: Incorrect, even payments that are due and required can be recovered as a preference

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

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

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

Commented [H(34)]: Total marks 9.5/15

Commented [H(35)]: Total marks 2/3

Commented [H(36)]: A constitutionally final order may be entered by a bankruptcy court only on certain core matters such as a challenge to a petition or with the consent of the parties.

Commented [H(37)]: Correct, 1/2 mark

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

anything else to decide on, hence a final order is made. Conversely, an interlocutory order gives judgements on some of the issues presented to the court.¹⁰

On appeal non-final orders are reviewed by the district court or BAP. The aim of the review is to access the matter in a manner a new as if the bankruptcy court had not made the decision looking specifically at all the findings of facts and conclusions of law to which any of the parties has objected to. This is contrast of the reviews of appeals of final orders. In final orders the district court and BAP access the matter anew looking at the conclusions of the law and whether on the facts there has been an abuse of discretion by the lower courts.

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Question 3.2 [3 marks]

Commented [H(40)]: Total marks 0/3

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

Chapter 15.

Commented [H(41)]: Incorrect, I was looking for the relief available under section 1520 and 1521 of the Bankruptcy Code

Question 3.3 [4 marks]

Commented [H(42)]: Total marks 3.5/4

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 are owed to the Delaware corporation and not any of its stakeholders when the company is solvent.¹¹ The duties that are owed are fiduciary in a nature.¹² This means that directors must act in manner that they honestly believe to be in the best interest of the Delaware corporation. The fiduciary duties are divided into two main categories: duty of care and duty of loyalty.¹³ The Delaware corporation directors in exercising their duty of care must be informed and deliberative in their decision making. On the other hand, duty of loyalty ensures that they act in what they believe to be in the best interest of the company and the shareholders.¹⁴

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

The directors may make decisions thinking that they suppose to the best interest of the company but turnout the opposite. In this type of situations, the directors may

¹⁰ Richard B Levin, 'Bankruptcy Appeals Symposium The Bankruptcy Reform Act of 1978 Part II' (1979-1980) 58 North Carolina Law Review 967.

¹¹ Norman E Veasey, 'Counseling the Board of Directors of a Delaware Corporation in Distress' (June 2008) 27(5) American Bankruptcy Institute Journal 61.

¹² Norman E Veasey, 'Counseling the Board of Directors of a Delaware Corporation in Distress' (June 2008) 27(5) American Bankruptcy Institute Journal 61.

¹³ Craig W Palm and Mark A Kearney, 'A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game (Part I)' (1995) 40(5) VILLANOVA LAW REVIEW 1298.

¹⁴ Craig W Palm and Mark A Kearney, 'A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game (Part I)' (1995) 40(5) VILLANOVA LAW REVIEW 1298.

potentially be able to rely on the **business judgement rules whose effect is to protect them from liability**.¹⁵ The business judgment rule prevents the courts from questioning the decisions of the directors who exercised their fiduciary duties. The courts will instead look at the procedure employed by the directors to make the decision whether the directors informed themselves before making the decision and acted rationally.¹⁶

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

In the event that the Delaware corporation being in the zone of insolvency or insolvency the duties of the directors remain owed to the company.¹⁷ The reason highlighted in the case of *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla* was that creditors are able to enforce their rights via other means such as a derivative claim among others.¹⁸

Commented [H(46)]: Partially correct, 1/2 mark, the duties are also owed to the shareholders

Question 3.4 [5 marks]

Commented [H(47)]: Total marks 4/5

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

There are three requirements that must be fulfilled to qualify as a petitioning creditor:¹⁹

- The claim must be considered as **non-contingent**, meaning that the claim is not dependent on a future event occurring to commence. **Non-contingent claim does not require a future conditions to trigger their payments.**²⁰
- The claim is not subject to dispute as to the liability owed to the creditor or the amount that is owed.
- The amount that is owed separately to the creditor or together with the other unsecured creditor or under-secured creditors amounts to **USD 16,750**.

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

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

Commented [H(50)]: Correct, 1 mark, the test for the existence of a bona fide dispute is an objective basis in fact or law

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

Commented [H(52)]: Correct, 1/2 mark, also the creditors must allege that the debtor is not paying debts as they come due or has had a custodian appointed over its assets

Commented [H(53)]: Total marks 6/15

Commented [H(54)]: Total marks 2/5

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

¹⁵ Irwin H Warren and Bradley R Aronstam, 'Delaware's Business Judgment Rule and Varying Standards of Judicial Review for Assessing Director Conduct in M&A Transactions' (2007) The Canadian Institute <http://www.ramlp.com/media/article/12_Canadian%20Institute%20Article.pdf> accessed 28 February 2023.

¹⁶ Irwin H Warren and Bradley R Aronstam, 'Delaware's Business Judgment Rule and Varying Standards of Judicial Review for Assessing Director Conduct in M&A Transactions' (2007) The Canadian Institute <http://www.ramlp.com/media/article/12_Canadian%20Institute%20Article.pdf> accessed 28 February 2023.

¹⁷ *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla* - 930 A.2d 92 (Del. 2007).

¹⁸ *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla* - 930 A.2d 92 (Del. 2007).

¹⁹ Eric J Snyder, 'Involuntary Bankruptcy Petition: A Power Tool for Creditors' (2016) Wilk Auslander <<https://www.wilkuslander.com/news-and-insights/insights/Involuntary-Bankruptcy-Petition-A-Powerful-Tool-for-Creditors>> accessed 20 February 2023.

²⁰ Rosenberg, Musso & Weiner, 'What is a Contingent Claim and What are They Worth' (2016) New York Bankruptcy Lawyer <<https://nybankruptcy.net/main/contingent-claim-worth/>> accessed 23 February 2023.

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?

Speculation Inc will use the Chapter 11 application to restructure either its business or finance or both. The DOJ investigation: **there will be no effect on the investigation.** Margin loan default: **the loan repayment will be posed due to the stay of execution.**

Delinquent lease: **This is an executory contract because the obligation under the lease contract to pay has not been met by Speculation Inc. The rent will still be due and that Speculation Inc will still need to pay for the rent. Once the reorganisation plan is confirmed, the trustee of Speculation Inc will have 120 days from the date of the relief to decide whether to assume, assign or reject the commercial lease.**²¹

Employment discrimination lawsuit: **The lawsuit will be posed until the restructuring plan will be completed and once it is confirmed the company will not be liable for the discrimination lawsuit.**

Question 4.2 [5 marks]

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?

For the English schemes of arrangement to be recognised it must fulfil the requirements in ss. 101(23). The representative of the schemes of arrangement, a foreign representative, will be able to prove that the scheme is a foreign proceeding. This is because the scheme will deal with the assets and affairs of Stella.²² **The US recognition will be foreign non-main proceedings because Stella's COMI is not in the US.**²³ **The headquarter and place of incorporation of Stella are in France. The only**

²¹ US Bankruptcy Code, ss 356 (g)1, (b)(1) and (f).

²² US Bankruptcy Code, ss 101(23).

²³ US Bankruptcy Code, ss 1516(c).

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

Commented [H(56)]: Although the automatic stay comes into effect on the filing of the petition, the margin loan is a securities contract that is exempt from the automatic stay and therefore the broker can liquidate the collateral.

Commented [H(57)]: The landlord will be stayed from pursuing eviction or past-due rent.

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

Commented [H(59)]: Total marks 1/5

Commented [H(60)]: Incorrect, the relevant test is whether the COMI is in the jurisdiction of the foreign proceedings--England.

Commented [H(61)]: Correct, 1 mark, the other facts given are unlikely to rebut the presumption in favor of France. As COMI is not in England, foreign main recognition is not available. The retail establishment in England would satisfy the requirement for an establishment in the jurisdiction of the foreign proceedings.

activities that are occurring in US is the goods are shipped there, therefore there is not enough evidence to rebut the presumption that the head office and place of incorporation are in the US for there to be COMI.

Question 4.3 [5 marks]

Commented [H(62)]: Total marks 3/5

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?**

It is an executory contract because both parties have an ongoing obligation under the contract, for Toyco is to provide the licence and for GameMart is to manufacture the toys and monthly royalties payment to Toyco.

Commented [H(63)]: Correct, 1 mark

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

No. a 363 sale of Xblox licence requires permission from Toyco to go ahead.²⁴

Commented [H(64)]: Correct, 1 mark, but section 365(n) only applies when the IP owner is the debtor, whereas here the debtor is a licensor. Instead, substantive IP law is the source of the consent requirement.

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

Yes because it will be in the ordinary course of business of GameMart.

Commented [H(65)]: Correct, 1 mark, because the landlord consent provision is inapplicable in bankruptcy.

* End of Assessment *

²⁴ US Bankruptcy Code, ss 365(n).