



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 39.5/50

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

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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

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

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)

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

Setoff is where two parties both owe each other money simultaneously and use the debts to balance each other off, leaving a net position. Where one of the parties is a debtor in an insolvency proceeding and the other is a creditor, setoff is often not permitted because it can put the creditor in question in a better position compared to the other creditors in their class.

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

Question 2.2 [2 marks]

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

When preparing for a filing you should review the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, the local rules of procedure of the relevant bankruptcy court and the judge's personal practices issued on the bankruptcy court website. You may also wish to consult with a local practitioner on any unwritten local practices.

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

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

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

Question 2.3 [2 marks]

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

The absolute priority rule requires each category of creditor claim to be paid in the strict order of the statutory priorities. It also requires that each category be paid in full before the next category receives anything.

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This cannot be deviated from in a chapter 7 proceeding but can be deviated from in a chapter 11 reorganisation plan, where it is required for the success of the plan and the affected creditors consent to the deviation of their priority.

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

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 lien is a right granted to a lender to possess the property or asset until a debt is paid. A priming lien is where subsequent funding is secured against the same property and the second lender is given greater priority over the original lender. The original lender is said to have been primed.

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In a bankruptcy proceeding, it may be that the only way to obtain post-petition debtor-in-possession financing (DIP financing) so, after notice and a hearing, the court may grant a priming lien against already encumbered property of the estate. However the debtor must show that the pre-petition lien holder is provided with adequate protection. In some cases the original lender may be persuaded to extend the post-petition lending to avoid being primed.

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

Question 2.5 [3 marks]

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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 pre-petition transfer of money or assets by the debtor that improves a creditor's position within the post-petition body of creditors, to the detriment of other creditors.

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As per section 547 of the Bankruptcy Code there are 5 elements that need to be proved:

1. the transfer must be to the creditor's benefit
2. it must be for pre-petition debt due by debtor
3. the debtor must have been insolvent at the time of transfer (insolvency is assumed in the 90 days prior to filing the bankruptcy petition)
4. the transfer must have been made within the 90 days prior to the filing of the petition (or for an insider creditor, 1 year prior and ending 90 days prior)
5. the creditor must be in a better position than if payment had been made under the provisions of a chapter 7 liquidation

Commented [H(32)]: Correct, 1/2 mark, the transfer must be of the debtor's interest in property

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

The preference provisions are directed at promoting equality of treatment amongst creditors and to discourage aggressive debt collection by creditors as the debtor moved towards bankruptcy so there is no requirements to show fault and no specific penalty or fine for making or receiving a preference. Although the creditor will have to return the property if preference is proved.

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

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Question 3.1 [3 marks]

Commented [H(36)]: Total marks 2.5/3

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

A bankruptcy court may enter a final order in core proceedings. Section 157 of title 28 of the US Code provides a non-exhaustive list of proceedings that are core. They focus on matters that directly concern the estate; for example claims against it, claims of avoidance, use or sale of property and recognition of foreign proceedings.

The bankruptcy court may also enter a final order in non-core proceedings if the party bringing the proceeding to court provides positive and explicit consent to the entry of a final order by the bankruptcy judge.

Fundamentally, and established through case law, bankruptcy judges cannot enter a final order on matters that are covered by Article III of the Constitution, the Article that confers judicial power to the federal courts. Bankruptcy courts are not included in Article III judicial power and so may have a final order overturned, even if it is a core proceeding or a non-core proceeding consented to by the parties.

Who hears the appeal depends on which district the bankruptcy court is in. District Courts (94) are grouped into Court Circuits (12) five of which have elected Bankruptcy Appellate Panels (the "BAPs"). If there is no BAP in the Circuit where the order was made then the appeal is heard by the district court. If there is a BAP an appeal may be heard by the panel or a party to the appeal may request it be heard by the district court instead.

When a court issues an order to a higher court for appeal or consideration a standard of review will be applied depending on whether it was a final order, non-final order, appeal etc. A non-final order will be submitted to the district court or BAP as proposed findings of fact and conclusions of law. The court or BAP will review all findings and conclusions *de novo* (from the beginning) and will therefore be reviewing both questions of law and questions of fact.

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?

The provisions of the Bankruptcy Code that automatically apply upon recognition of main proceedings are:

- Adequate protection of an interest in the debtor's property may be provided if required as per s361;
- Automatic stay of debt collection actions against the debtor as per s361;
- Pre-petition security agreements do not apply to post-petition property acquired as per s552; and
- The foreign representative may
 - operate the debtor's business and exercise s363 and s552 rights & powers, unless the court orders otherwise; and
 - use, lease or sell the debtor's interest in property, after notice and a hearing as per s363

Commented [H(37)]: Correct, 1/2 mark, specifically the bankruptcy court can enter a final order on certain core proceedings established in the Bankruptcy Code, such as a challenge to a petition.

Commented [H(38)]: Incorrect, the parties' consent is sufficient to confer authority on the bankruptcy court to enter a final order.

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

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

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

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

For either main or non-main proceedings, and for the protection of the assets or the creditors' interests, the foreign representative may also apply to the court to:

- *stay individual actions*
- *stay execution against the assets*
- *suspend rights to dispose of assets not otherwise covered by the automatic stay above*
- *collect information about the debtor's affairs*
- *extend any urgent relief granted before recognition*
- *grant certain additional relief*

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Commented [H(48)]: 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?

The duties directors owe to a Delaware corporation are:

- **Loyalty**
This is a fiduciary duty to act in the best interest of the corporation and without conflicts of interest.
- **Care**
This requires directors to obtain and assess all reasonably available and relevant information before making a business decision. They must ensure the interests of the corporation and its stakeholders are protected.
- **Good Faith**
This requires performance of duties and furtherance of the corporation's interest within the law.
- **Confidentiality**
This refers to directors making sure they take care not to disclose corporate information for personal gain.
- **Disclosure**
Directors should disclose to shareholders all the material information used and background knowledge held that has been relevant to making a business decision.

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

As a company approaches insolvency the directors' duties remain to the corporation and its stakeholders. There is no specific duty to creditors in the Bankruptcy Code and no wrongful trading concept in US law.

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The Business Judgement Rule ("BJR") is a presumption that the board acted with the correct duty of care. It protects directors from liability unless the plaintiff can prove otherwise; for example, proof of gross negligence, bad faith or conflicts of interest. The BJR does not apply however where there has been self-dealing (directors being on both sides of a transaction or personally interested in the transaction) or where a

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

director or directors abdicate their responsibilities by not exercising the proper judgement of the information

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.

An involuntary proceeding can only be commenced by a creditor under chapters 7 or 11. The other chapters being 9 - for a municipality, 12 - for farmers or fishermen and 13 - for an individual debt arrangement scheme.

As per section 303 of the Code, the creditor's claim cannot be against a "farmer, family farmer or a corporation that is not a moneyed, business or commercial corporation". The Code does not define these types of corporation but it is thought to mean schools, churches and not-for-profits.

If the debtor has more than 12 creditors then the petition must be filed by three or more of them and their claims cannot be contingent (a debt of undefined amount that may only fall due upon a certain event or events) or disputed (a genuine dispute over liability or amount).

They must also be unsecured, or undersecured (the element of a claim that is greater than the security) and all together total at least \$18,600. This amount was adjusted upwards from \$16,750 by Notice in the Federal Register of 31 January 2022, page 6625.

If the debtor has less than 12 creditors, excluding employees, insider creditors or those involved in voidable transactions, then one creditor may petition but must still be owed at least \$18,600.

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 due to gender bias.

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

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

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

Commented [H(60)]: Correct, 1/2 mark, the creditors also must allege that the debtor is generally not paying its debts or has had a custodian appointed over its assets.

Commented [H(61)]: Total marks 6/15

Commented [H(62)]: Total marks 2/5

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) **The DOJ investigation will not be affected as it is exempt from the automatic stay under s362(b)(i) because insider trading is a criminal offence and criminal proceedings are exempt.**

Commented [H(63): Correct, 1 mark

(ii) **The margin loan is a secured debt and the automatic stay applies preventing the creditor from enforcing the lien. The lender can consider applying for a lift of stay if it feels the shares may lose value during the re-organisation and where the debtor has not provided adequate protection. The debtor would be able to sell the shares free and clear of any lien and again, the secured creditor will want adequate protection as the asset would no longer be available as collateral. The debtor would also need to carefully consider whether it would need further funding going forward before selling these assets and may want to see if its broker would consider such funding.**

Commented [H(64): Incorrect, the filing of the petition brings the automatic stay into effect but the margin loan is a securities contract that is exempt from the stay so the broker can liquidate the collateral.

(iii) **The lease is an executory contract so the debtor in possession ("DIP") must decide whether to assume the lease and cure defects, reject the lease and have the creditor claim for arrears and damages, or transfer the lease onto a third party. Whichever option the DIP decides on it must be made within 120 days of the filing of the petition and the decision must be based on the business judgement that the action will best facilitate the reorganisation plan.**

Commented [H(65): The landlord will be stayed from instituting proceedings for eviction or past-due rent.

(iv) **The employee lawsuit is automatically stayed and the employee cannot continue the case without court authority if the judgement has not yet been received, or enforce any judgement that has been received. If judgment has been received the debt is liquidated and, assuming not in dispute, would be an unsecured claim in the case. If no judgment has been received, the employee could consider applying to the bankruptcy court to lift the stay in order to allow judgment to be reached, and therefore solidify and quantify the claim.**

Commented [H(66): Correct, 1 mark

Question 4.2 [5 marks]

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Stella SA (Stella) is an international cosmetics company incorporated in France, with its headquarters in Paris. Stella's products are made in Italy and shipped to its retail stores in Europe (including England), Asia, and North America. Stella's funding comes from a bank loan and Eurobonds, both of which are governed by English law. Stella's retail sales have suffered due to pandemic-related closures and it is considering options to restructure its debt. One option is to use an English scheme of arrangement with respect to the Eurobonds. Could the English scheme of arrangement be recognized by a US bankruptcy court under Chapter 15, and would such recognition be as a foreign main or non-main proceeding?

Yes, the English Scheme of Arrangement (“SofA”) could be recognised under Chapter 15 because it is a foreign proceeding as described in the UNCITRAL Model Law on Cross Border Insolvency Law (“Model Law”), which has been adopted into the Bankruptcy Code almost exactly as written. In the Model Law a foreign proceeding is a judicial or administrative proceeding subject to a law that empowers the foreign representative (the Supervisor) to act and the case would be subject to control or supervision by a foreign court (English) for the purpose of the reorganisation or liquidation.

This adoption of the Model Law so entirely has resulted in the potential for confusion and debate as section 1502 defines the main proceeding being where the debtor has its COMI (centre of main interests) however US law does not recognise this term. Instead it uses place of incorporation, place where management make decisions and place of principle assets to determine where a company could consider its “main interests”.

Having said that, s1516(c) does state that “in the absence of evidence to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests.

For Stella, the place of incorporation is France, as are the headquarters, arguably where management make decisions. It also has factories in Italy and shops in the EU, the UK, Asia and North America so its primary assets could be considered to be worldwide.

If considering the country where the majority of the affected creditors are we would have to look at the Eurobonds as that will be the target of the SofA and if considering the jurisdiction of law that would apply to disputes, these both point towards England.

Wherever the COMI could be established, I do not believe it could be evidenced as the US and so the proceedings will be non-main.

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?**

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

Commented [H(69)]: Incorrect, the COMI analysis looks at all creditors and not just those affected by the scheme of arrangement and these facts are unlikely to overcome the presumption in favor of France as the COMI.

Commented [H(70)]: Incorrect, the relevant test is whether the jurisdiction of the foreign proceedings is the COMI or not—if England were the COMI, foreign main recognition is required. If England is not the COMI, the retail store in England will be the establishment necessary for foreign non-main recognition.

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An executory contract is one where there are obligations remaining from both parties of the contract. As the license is still current, then ToyCo has the obligation of allowing GameMart to manufacture and GameMart has the obligation to pay the royalties, so this is an executory contract.

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

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

The license is an intellectual property license and section 365(c) of the Code prohibits the assumption (adoption) or assignment of such contracts when non-bankruptcy law holds that the license agreement must expressly accept the assignment. It will depend on the type of intellectual property, license (patent or trademarks, etc.) and on the terms of the contract, but in general, case law tend to support the argument that intellectual property licenses cannot be adopted or assigned without consent.

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

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

S363(c) allows the sale or lease of property (among other things) in the ordinary course of business with out the court's approval and s363(b) allows these transactions outside the ordinary course of business with the courts approval.

It could be argued that the transfer or sale of a lease is not in this debtor's ordinary course of business and therefore s363(b) applies and the DIP can only exercise these rights after notice and a hearing.

When deciding on the ordinary course of business matter the courts apply two tests, the vertical test (the expectations of the creditor) and the horizontal test (comparison to similar businesses).

Furthermore, the lease is an executory contract and S365 allows the DIP to assume or reject the unexpired lease, "subject to the court's approval". The decision must be made on the basis of it being the best course of action for the success of the reorganisation and payment of creditors and the court can only deny approval if it is shown that the basis of the decision was not made in good faith & due care.

Commented [H(75)]: The assignment of the lease will require court approval, but the provision requiring landlord consent would not be effective.

* End of Assessment *