



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 [la1]: Total marks 40/50

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

Commented [la2]: 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 [la3]: 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 [la4]: 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 [la5]: 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 [la6]: Incorrect, the correct response is (b)

Question 1.5

*Which of the following about cramdowns, is false?*

Commented [la7]: Incorrect, the correct response is (e)

- (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 [la8]: 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 [la9]: Correct, 1 mark

Which of the following is true of both an actual fraudulent conveyance and a constructive fraudulent conveyance?

- (a) The debtor must have had an actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted.
- (b) Both require at least circumstantial evidence of the fraudulent intent.
- (c) The debtor must have been insolvent at the time of transaction.
- (d) **In addition to provisions in the Bankruptcy Code, the debtor or the trustee may invoke applicable state or foreign fraudulent conveyance laws.**
- (e) All of the above are true.

Question 1.8

Commented [la10]: Correct, 1 mark

*When does an automatic stay come into effect?*

- (a) Immediately on the filing of any plenary petition.**
- (b) *On the filing of a voluntary petition but not on the filing of an involuntary petition.*
- (c) *Once the court reviews the petition and grants the stay.*
- (d) *Once the petitioner announces their intention to file for bankruptcy publicly.*
- (e) *Once a plan of reorganization is confirmed.*

Question 1.9

Commented [la11]: Correct, 1 mark

*Which of the following regarding substantive consolidation is true?*

- (a) *It respects the boundaries of corporate separateness.*
- (b) *It is the treatment of two or more creditors as a single creditor to simplify the claims process.*
- (c) If a creditor can show it extended credit on the basis of corporate separateness, it has a valid objection to substantive consolidation.**
- (d) *Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.*
- (e) *Authority for substantive consolidation comes from the Bankruptcy Code.*

Question 1.10

Commented [la12]: Correct, 1 mark

*Which of the following are relevant factors in determining a debtor's center of main interests (COMI) in the recognition stage of a Chapter 15 bankruptcy case?*

- (a) *The location of the headquarters.*
- (b) *The location of primary assets.*
- (c) *The location of the majority of the affected creditors in the request for relief.*
- (d) *The jurisdiction whose law will apply to most disputes.*
- (e) All of the above.**

**QUESTION 2** (direct questions) [10 marks]

Commented [la13]: Total marks 9.5/10

**Question 2.1** (1 mark)

Commented [la14]: Total marks 1/1

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

*Setoff is where there are cross obligations by both the creditor and debtor to pay amounts to each other and a creditor can seek to have the amounts cancel each other out 'setting off' one amount owed against the other amount owed.*

Commented [la15]: Correct, 1/2 mark

*The reason that there are not many circumstances when setoff is permitted is due to the fact that, if permitted, it will place a creditor in a more advantageous position to other unsecured creditors who may not have the possibility of benefiting from setoff at all. Whilst setoff is permitted in certain circumstances such as in master netting contract and others they are mainly not permitted. Some examples of when setoff is not permitted include, but are not limited to, when a creditor's claim against an estate is not allowed or within 90 days of the date of the petition.*

Commented [la16]: Correct, 1/2 mark

**Question 2.2** [2 marks]

Commented [la17]: Total marks 2/2

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

*When preparing a filing for bankruptcy court the following rules should be considered:*

- *Bankruptcy Rules*
- *Federal Rules of Civil procedure*
- *Local rules of that bankruptcy court (as well as the judge's personal practices*

Commented [la18]: Correct, 1/2 mark

Commented [la19]: Correct, 1/2 mark

Commented [la20]: Correct, 1/2 mark

Commented [la21]: Correct, 1/2 mark

**Question 2.3** [2 marks]

Commented [la22]: Total marks 2/2

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

*This rule generally applies in both Chapter 7 and Chapter 11 proceedings. It is designed to ensure that each claim starting with the highest ranking gets paid in full before payments cascade downwards. In the former it ensures that no creditor is disadvantaged, receiving less, in a reorganisation than in a Chapter 7 and deviation is not allowed. In relation to the latter, there can be deviation. In order to gain approval of other lower ranking creditors for a plan to reorganise, a higher ranking creditor can accept less, if they agree to, than what would ordinarily be due if the absolute priority rules was followed - deviation is allowed.*

Commented [la23]: Correct, 1 mark

Commented [la24]: Correct, 1/2 mark, assuming you are referring to Chapter 11 as the second type of proceeding in the first sentence

Commented [la25]: Correct, 1/2 mark

**Question 2.4** [2 marks]

Commented [la26]: Total marks 1.5/2

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

A priming lien is a lien on property which ranks higher or with equal priority as liens that currently exist. During Chapter 11 proceedings creditors may lend to a debtor-in-possession in order to finance, post-petition. Prior to obtaining a priming lien to secure DIP financing, a debtor must demonstrate that they have been unable to:

- In the ordinary course of business get unsecured debt or credit (payment of the former ranking higher than administrative expenses);
- Exterior to the ordinary course of business and with the approval of the court, get unsecured debt or creditor (payment of the former ranking higher than administrative expenses);
- Failing the above, a court can grant any of the following i) unsecured debt enjoying the ranking already mentioned in the first two options ii) secured debt on property which has no other burden iii) secured debt on already burdened property.

Only once the above prove unavailable or not viable options will the court grant a priming lien.

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 where a transfer of some form of property has been made from the debtor to another, prior to when a petition is commenced. The elements to be proved include, that the transfer took place, to/for benefit of the creditor for an existing debt owed while the company was insolvent<sup>1</sup>. If the amount is more than what they would have been able to receive in chapter 7 proceedings<sup>2</sup> then it must be returned in order to preserve the equaliser dealings as between creditors. A finding of fault is not a requirement, only that the transfer occurred.

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?**

The bankruptcy court<sup>3</sup>, which is a special federal court, has limited ability to make final orders as these are mainly confined to core bankruptcy matters as opposed to non-

<sup>1</sup> 11 USC, § 547(f) presumed insolvent 90days prior to the date of the petition

<sup>2</sup> 11 USC, § 547

<sup>3</sup> Formed under the Bankruptcy Code 1978

Commented [la27]: Correct, 1 mark

Commented [la28]: Correct, 1/2 mark, also the interested of the secured creditor being primed must be adequately protected

Commented [la29]: Total marks 3/3

Commented [la30]: Correct, 1/2 mark

Commented [la31]: Correct, 1/2 mark

Commented [la32]: Correct, 1/2 mark

Commented [la33]: Correct, 1/2 mark

Commented [la34]: Correct, 1/2 mark

Commented [la35]: Correct, 1/2 mark

Commented [la36]: Total marks 12.5/15

Commented [la37]: Total marks 2.5/3



core matters<sup>4</sup> in relation to which final orders cannot generally be made. Core matters<sup>5</sup> are detailed in the statute and are non-exhaustive. However, in more recent times the Supreme Court has confined the bankruptcy court's powers to presenting their finding in the form of a report within which a recommendation is made which a district court can review<sup>6</sup>. Parties can also consent to the bankruptcy court issuing a final order<sup>7</sup>.

There is a difference between a final order regarding an appeal and that of a final order derived from constitutional authority.

Review of appeals from the bankruptcy court's final orders is done by a district court (or bankruptcy appellate panel) and court of appeals, who both undertake the same review. Although this process protracts the appeals process it enables the appeal court to ensure that district courts are used where possible before the matter is elevated to the court of appeal.

Non-final or interlocutors orders are reviewed by the appeal court only as they cannot be appealed as of right. It has been determined by the Supreme Court that where there has been a dispute on a discrete aspect in the bankruptcy court that this would be a final order in relation to the appeals process<sup>8</sup>. If however from a constitutional perspective the order was considered to be a final order it does not follow that it is also deemed to be final for the purpose of appeal - the reverse is also true.

#### 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 which apply automatically when there has been recognition of foreign main proceedings<sup>9</sup> include, an automatic stay, the foreign representative has the right to intervene where the debtor is involved in other proceedings in the US<sup>10</sup>, the foreign representative can continue the debtor's ordinary business affairs, there can be a sale, transfer or use of property outside the ordinary business affairs (including in 363 sales<sup>11</sup>) and avoidance of post petition transfers and perfection of security measures. In relation to non-main proceedings the aforementioned can be granted upon the court exercising its discretion as appropriate.

<sup>4</sup> Although non-core proceedings may be heard by the bankruptcy court if the a 'sufficiently related to the bankruptcy proceedings' if they are not then state court will hear the matter

<sup>5</sup> 28 USC, § 157

<sup>6</sup> *Executive Benefits Ins Agency v Atkinson* 134 S. Ct.2165 (2014)

<sup>7</sup> Fed R Bankr P 7008; example, Delaware Bankruptcy Local Rule 7008-1

<sup>8</sup> *Bullard v Blue Hills Bank*, 135 S Ct 1686 (2015)

<sup>9</sup> 11 USC, § 1520

<sup>10</sup> 11 USC, § 1524

<sup>11</sup> Chapter 15

Commented [la38]: Incorrect, bankruptcy courts can enter final orders on the validity of a petition and other issues specific to the Bankruptcy Code

Commented [la39]: Correct, 1 mark

Commented [la40]: Correct, 1/2 mark

Commented [la41]: Correct, 1/2 mark

Commented [la42]: Correct, 1/2 mark

Commented [la43]: Total mark 3/3

Commented [la44]: Correct, 1/2 mark

Commented [la45]: Correct, 1/2 mark

Commented [la46]: Correct, 1/2 mark

The relief that can be granted for foreign main and foreign non-main proceedings, on a discretionary basis<sup>12</sup> include the following, discovery relating to the debtors assets and affairs, granting the foreign representative administrative powers over the debtor's assets, provisional relief can be extended and any other protective relief which may be necessary to protect assets of the debtor or interest of the creditors<sup>13</sup>. Further relief may also be granted where appropriate or demonstrated as necessary, however, there are limits in relation to for example use of avoidance powers<sup>14</sup>. Although the application of this limitation may not be completely restrictive<sup>15</sup> and if a foreign representative brings plenary proceedings, in the form of Chapter 7 or 11, then the avoidance powers may be possible to engage.

Commented [la47]: Correct, 1/2 mark

Commented [la48]: Correct, 1/2 mark

Commented [la49]: Correct, 1/2 mark

#### Question 3.3 [4 marks]

Commented [la50]: Total marks 4/4

**What duties do directors owe to a Delaware corporation in the ordinary course of business? To whom are these duties owed when the corporation is potentially or actually insolvent? What rule protects directors from liability for errors of judgment?**

The liabilities of directors depend on the state law where a company is incorporated. Directors to a Delaware corporation owe the following duties to it in the ordinary course of business:

- Fiduciary duty of loyalty to the company, which includes acting in good faith
- Duty of care in making well informed decisions

Commented [la51]: Correct, 1 mark

Commented [la52]: Correct, 1 mark

If a director makes an error in judgment, then they may be afforded some protection. The business judgment rules afford directors protection where they have made an error in judgment. There is a presumption that the board of directors have acted in good faith, which can be rebutted - if it cannot then the directors will escape liability under this rule. This rule does not apply where a board is considered far from independent or has some personal interest.

Commented [la53]: Correct, 1 mark

These duties are owed to the corporation and shareholders when the corporation is potentially or actually insolvent<sup>16</sup>. Other jurisdictions outside of the US do not take the same approach<sup>17</sup>.

Commented [la54]: Correct, 1 mark

#### Question 3.4 [5 marks]

Commented [la55]: Total marks 3/5

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

<sup>12</sup> 11 USC, § 1521

<sup>13</sup> 11 USC, § 1521(a)

<sup>14</sup> 11 USC, § 1521(a)(7)

<sup>15</sup> *In re Condor Ins Ltd*, 601 F3b 319, 329 (5<sup>th</sup> Cir 2010)

<sup>16</sup> *North Am Catholic Educational Programming Foundation, Inc v Gheewalla*, 930 A.2d 92, 103 (Del 2007)

<sup>17</sup> UK Supreme Court in *BTI 2014 LLC v Sequana SA and others* [2022 UKSC 25]

Generally, Chapters 7 and 11 are open to a creditor who is looking to commence involuntary proceedings (including a foreign representative of an estate)<sup>18</sup>. In an involuntary proceedings context, in order for a petitioning creditor to qualify as such certain requirements must be satisfied.

If there are less and 12 creditors (not contingent and not insider creditors) then only one creditor is needed to bring a petition. If there are more than 12 creditors (not contingent and not insider creditors) then there needs to a at least 3 creditors bringing the petition.

The claim by a petitioning creditor has must be non-contingent against the debtor. An example of a contingent claim would be in relation to a guarantee is contingent on a further default occurring.

The claim against the debtor must not be subject to a dispute regarding liability or quantum (fact or law). If the claim is partially admitted and therefore undisputed this part can be used.

In total the creditors claims must exceed USD 16,750 and the creditors allege that the debts owed to them are not paid as they are due<sup>19</sup>.

#### 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.**

**What would be the effect of a Chapter 11 petition being filed by Speculation Inc on each of the (i) DOJ investigation, (ii) margin loan default; (iii) delinquent lease and (iv) employment discrimination lawsuit?**

The effect of Chapter 11 proceedings being filed by Speculation Inc ("SI") on each of the below would be as follows. One main advantage that SI would have is that of the automatic stay protection.

<sup>18</sup> 11 USC, § 303

<sup>19</sup> Form B205 at 2

Commented [la56]: Correct, 1 mark

Commented [la57]: Correct, 1/2 mark

Commented [la58]: Correct, 1 mark, specifically there must not be an objectively reasonable dispute; also the claim must be unsecured or undersecured in the requisite amount

Commented [la59]: Correct, 1/2 mark

Commented [la60]: Incorrect, they must allege that the debtor is failing to pay its debts in general, not only to the petitioning creditors

Commented [la61]: Total marks 11/15

Commented [la62]: Total marks 2/5

Commented [la63]: Correct, 1 mark

### DOJ Investigation

The Department of Justice ("DOJ") has a program which is the US Trustee program. This allows the DOJ to appoint trustees to ensure there is oversight of bankruptcy cases giving them a right to inject or comments on bankruptcy filings. However, in Chapter 11 proceedings no trustee is generally appointed as this mechanism is a debtor-in-possession process and any powers under the Bankruptcy Code is utilised by the debtor<sup>20</sup>. Although under sub chapter V of the Bankruptcy Code a trustee can be appointed over a small business debtor reorganisation and SI may fall within this bracket. If the DOJ wanted to displace the debtor-in-possession then it would have to meet a high threshold to show good cause for doing so.

**Commented [la64]:** This mixes two different kinds of trustees. The US Trustee is involved in every bankruptcy case to ensure compliance with the Bankruptcy Code. In some cases, a third party may be appointed as a trustee for a debtor's property, and the DOJ might seek such an appointment in cases of fraud. However, the debtor would not be protected from the investigation by the automatic stay because of the exception for criminal proceedings.

### Default on margin loan

Chapter 11 is a mechanism to afford debtors the ability to save the company. The debtor remains in possession in order to continue with daily operations. The broker would become a creditor as the holder of collateral over the shares bought by SI with the marginal loan. The broker may seek to get a valuation<sup>21</sup>, which the court would likely be involved in, of the shares in order to determine whether they are fully secured for the loan amounts and /or whether there will be an attachment of a lien. It is unclear from the facts about whether there could be recharacterized due to the loan being made by the broker as a capital contribution earning the status of equity interests.

**Commented [la65]:** Incorrect, the margin loan is exempt from the automatic stay and the broker could liquidate the collateral.

### Delinquent lease

Upon the filing of a plenary petition an automatic stay comes into effect which is designed to be debtor friendly providing room for restructuring. The stay will in this case prevent the landlord of SI bringing a claim for debts outstanding from SI for non-payment of rent. The landlord may be able to explore on of the statutory exceptions to the automatic stay in order to take back possession of the property if the lease has expired<sup>22</sup>

**Commented [la66]:** Correct, 1 mark, the lease must have expired pre-petition for this to be applicable.

### Employment discrimination lawsuit

In relation to the discrimination dispute by the former employee, the contract is non-executory as all obligations were completed upon termination of the contract.

**Commented [la67]:** In the US, there is usually not an employment contract. The discrimination litigation would be stayed by the automatic stay.

### Question 4.2 [5 marks]

**Commented [la68]:** Total marks 5/5

***Stella SA (Stella) is a an international cosmetics company incorporated in France, with its headquarters in Paris. Stella's products are made in Italy and shipped to its retail stores in Europe (including England), Asia, and North America. Stella's funding comes from a bank loan and Eurobonds, both of which are governed by English law. Stella's retail sales have suffered due to pandemic-related closures and it is considering***

<sup>20</sup> 11 USC, § 1107

<sup>21</sup> 11 USC, § 506(a)(1)

<sup>22</sup> 11 USC, § 362

**options to restructure its debt. One option is to use an English scheme of arrangement with respect to the Eurobonds. Could the English scheme of arrangement be recognized by a US bankruptcy court under Chapter 15, and would such recognition be as a foreign main or non-main proceeding?**

Chapter 15 of the Bankruptcy Code<sup>23</sup>, which is modelled on the UNCITRAL Model law<sup>24</sup> ("Model Law"), provides a mechanism for the recognition of foreign proceedings and enables the coordination of both foreign and any US proceedings. No estate is formed under the Chapter 15 proceedings which is designed to provide assistance. For recognition any foreign representative would have to show that the English court regarding the debtor is pending and that they have power to act under those English proceedings. The US Bankruptcy Code requires that the foreign proceedings be collectively judicial or administrative and under the supervision of the foreign court in order to reorganise or liquidate<sup>25</sup>. English Schemes of Arrangement fall within this ambit for the purpose of recognition.

At the recognition stage the issue of whether the proceedings are in fact foreign main or foreign non-main proceedings is dealt with, which become important later in relation to relief sought.

The centre of main interest ("COMI") of the debtor is generally presumed to be where it is incorporated. In this case France if the place of incorporation but this is a rebuttable presumption<sup>26</sup>. Other factors<sup>27</sup> can be considered such as the location of the headquarters - which are in France, the location of assets - which are in Italy, the location of management - which appear to be France, location of creditors - this is not apparent from the fact and the law applicable - which appears to be English as regards funding sources. In this context merely having the financial contracts governed by English law may not be sufficient to establish any English Scheme of Arrangement as foreign main proceedings in the US. France may appear to be the more likely place of COMI given the headquarters, likely the management, potentially some creditors and possibly some assets are all in France.

If the above assumption are borne out than there is still potential that the English Scheme of Arrangement may still be classed as foreign non-main proceedings. The foreign representative would need to demonstrate that the debtor has an establishment<sup>28</sup> in England and at this point that is unclear.

Question 4.3 [5 marks]

<sup>23</sup> 11 USC, § 1501

<sup>24</sup> On Cross-Border Insolvency in a near identical manner

<sup>25</sup> 11 USC, § 101(23)

<sup>26</sup> 11 USC, § 1516(c)

<sup>27</sup> In SPinx, Ltd 351 BR 103 (Bankr SDNY 2006) which detailed factors to be considered regarding COMI

<sup>28</sup> 11 USC, § 1502(2)

Commented [la69]: Correct, 1 mark

Commented [la70]: Correct, 1 mark

Commented [la71]: Correct, 1 mark

Commented [la72]: Correct, 1 mark

Commented [la73]: Correct, 1 mark, note in the facts that there is a retail store in England that would qualify

Commented [la74]: Total marks 4/5

**ToyCo is an American toy company that has created a popular line of folding robot toys called Xbox. The toys are covered by several US patents. Currently, GameMart Inc (GameMart) has a 10-year exclusive license to manufacture Xbox 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 Xbox 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 Xbox an executory contract?**

Considering the most common test about whether a contract is executory<sup>29</sup>, the license to manufacture Xbox is likely to be an executory contract if it can be shown that there are unperformed obligations on the side of ToyCo and GameArt Inc. If the licence is for a period of 10 years and GameMart continues to pay monthly royalties to ToyCo and there are further unperformed obligations then it is likely to be considered an executory contract.

**Commented [la75]:** Correct, 1 mark, the obligation not to sue for infringement is an ongoing obligation on the side of ToyCo

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

No, they cannot transfer without the consent of ToyCo in the context of a Chapter 11 proceeding because, although the Bankruptcy Code allows for abrogation of restrictions regarding assignment within contract that allows compulsion of, for example, a transfer of performance of a contract, in certain types of contracts consent is still required. Intellectual property licensing law is one of these areas where consent is required<sup>30</sup>.

**Commented [la76]:** Correct, 1 mark

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

GameMart can transfer the lease as part of the 363 sale without permission from the landlord, as it will likely be deemed to be one of the contracts required to operate the company. Under Chapter 11 the debtor-in-possession must make a decision about assumption and assignment or rejection of the executory contract by the time confirmation of the reorganisation is made, unless a counter party requests a sooner deadline. However, in particular, in relation to pre-existing leases of commercial property a decision is required to be made within 120 days of the order for relief<sup>31</sup>. This imposes a time period which should be closely watched to ensure the deadline is not missed.

**Commented [la77]:** Correct, 1 mark, specifically because anti-assignment provisions of contracts are not enforceable

<sup>29</sup> Countryman test

<sup>30</sup> 11 USC, § 365(c)(n)

<sup>31</sup> 11 USC, § 365(d)(4) – this can be extended by 90 days

**\* End of Assessment \***