



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**<sup>[la1]</sup>

**QUESTION 1**<sup>[la2]</sup>(multiple-choice questions) [10 marks in total]

*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**<sup>[la3]</sup>

*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**<sup>[la4]</sup>

*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**<sup>[1a5]</sup>

**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**<sup>[1a6]</sup>

**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**<sup>[1a7]</sup>

**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**<sup>[1a8]</sup>

**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**<sup>[1a9]</sup>

**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<sup>[1a10]</sup>

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<sup>[1a11]</sup>

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<sup>[1a12]</sup>

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** [1a13] (direct questions) [10 marks]

**Question 2.1** [1a14] (1 mark)

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

*Setoff refers to the ability of a creditor to offset or deduct the amount owed to the debtor from the amount the debtor owes to the creditor. This process allows the creditor to net out the two or more obligations, thereby reducing the overall outstanding debt owed to the creditor.* [1a15]

*However, in many circumstances, the practice of setoff is not permitted. The Bankruptcy Code includes provisions that exempt the exercise of setoff rights arising under non-bankruptcy law from being avoided as preferences under certain conditions.*

*The prohibition of setoff in certain circumstances is based on the premise that it can confer an advantageous position upon the creditor compared to other unsecured creditors who are not owed money by the debtor.* [1a16] *By employing setoff, the creditor reduces its obligation to the debtor's estate by the full amount owed by the debtor, rather than the lesser amount that the debtor would typically pay on the unsecured claim. This preferential treatment of the creditor may create inequities among other creditors and undermine the bankruptcy process's fairness.*

*To address this concern, specific limitations have been established regarding when setoff is permissible. For the purposes of these limitations, the debtor is generally considered insolvent during the 90 days preceding the date of the bankruptcy petition. However, it is essential to note that this presumption of insolvency can be challenged and rebutted by the creditor if they can demonstrate evidence to the contrary.*

**Question 2.2** [1a17] [2 marks]

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

*When preparing a filing for a bankruptcy court, you should review and have regard to:*

- *The Bankruptcy Rules* [1a18];
- *The Federal Rules of Civil Procedure* [1a19];
- *Local rules of the bankruptcy court* [1a20];
- *The judge's personal practices* [1a21].

*If you do not practice regularly in a jurisdiction, consult with a local practitioner for advice on unwritten local practices.*

**Question 2.3** [1a22] [2 marks]

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

Compliance with the absolute priority rule entails that no creditor or class of creditors should receive a lesser amount under a plan of reorganization than they would have received under a hypothetical Chapter 7 liquidation, where claims are paid according to the statutorily required priorities<sup>[la23]</sup>, without the consent of the affected creditor.

However, in a Chapter 11 plan, a deviation from the absolute priority rule may be accepted<sup>[la24]</sup> if a senior creditor consents to receiving a lesser amount<sup>[la25]</sup> than what the rule would normally demand. This deviation becomes acceptable when it becomes necessary to allocate funds to lower priority claimants in order to obtain their approval for the reorganization plan. In this scenario, the consent of the more senior creditor allows for a departure from the strict application of the absolute priority rule.

**Question 2.4**<sup>[la26]</sup> [2 marks]

**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” refers to a type of lien that is granted priority over existing liens and claims on a debtor's assets during the course of a bankruptcy proceeding, particularly in the context of debtor-in-possession (DIP) financing<sup>[la27]</sup>. It allows a lender or creditor providing DIP financing to have a higher-ranking security interest than the pre-existing liens held by other creditors.

For such a priming lien to be granted and given priority over existing liens, certain requirements must be met in accordance with the United States Bankruptcy Code. These requirements include:

**Court Approval:** The DIP financing arrangement and the granting of a priming lien must be approved by the bankruptcy court overseeing the case. The court will evaluate the terms of the financing, including the priority and extent of the priming lien, to ensure it is fair and reasonable.<sup>[la28]</sup>

**Adequate Protection:** The debtor-in-possession lender must provide “adequate protection” to existing lienholders whose security interests may be impaired or diminished by the granting of the priming lien<sup>[la29]</sup>. Adequate protection typically involves providing substitute collateral or making cash payments to compensate for any potential loss of value to the existing lienholders.

**Fair and Equitable:** The proposed priming lien must be shown to be fair and equitable to all parties involved. This means that the benefits of the DIP financing, including the granting of the priming lien, must outweigh any potential adverse effects on other creditors and parties with existing interests in the debtor's assets.



**Good Faith:** The debtor and the DIP lender must demonstrate that the DIP financing and the request for a priming lien are made in good faith and are not intended to unduly prejudice the rights of existing creditors.

**Compliance with the Bankruptcy Code:** The proposed priming lien must comply with all relevant provisions of the United States Bankruptcy Code, including the specific requirements outlined in Chapter 11, which governs reorganization bankruptcies and often includes provisions related to DIP financing and priming liens.

**Question 2.5** [1a30][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" in the context of bankruptcy law pertains to the transfer of the debtor's property that occurs within a specified period before the date of filing the bankruptcy petition, which is subject to scrutiny. If this transfer results in the recipient creditor receiving a greater amount than they would have obtained through a chapter 7 liquidation process had the transfer not been effected, it is required to be returned to the debtor's estate. [1a31]

It is essential to highlight that proving any fault or misconduct on the part of either the debtor or the recipient in connection with the payment made is not necessary [1a32]. Therefore, the absence of fault on either side does not exempt the transfer from being considered a preference and subject to the remedy of returning the transferred amount to the debtor's estate.

It is pertinent to note that the recipient creditor does not suffer any further penalty apart from the requirement to return the transferred amount. This provision is intended to ensure equitable treatment among creditors and to prevent certain creditors from receiving preferential treatment over others during the bankruptcy process.

**Elements of a preference claim that need to be proved:**

- A transfer of an interest of the debtor in property [1a33];
- To or for the benefit of a creditor [1a34];
- For or on amount of an antecedent debt owed by the debtor before such transfer was made [1a35];
- Made while the debtor was insolvent;
- Made during the suspect period (i.e. for the transfer to third parties is 90 days prior to the petition date, and for insiders is one year prior to the petition date);
- That enables the creditor to receive more than it would have in a chapter 7 liquidation

**QUESTION 3** [1a36] (essay-type questions) [15 marks in total]

**Question 3.1** [1a37][3 marks]

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

*Bankruptcy judges have limited jurisdiction to enter final orders other than on core bankruptcy issues. Particularly, a bankruptcy court cannot issue final orders that invade Article II jurisdiction, even in core proceedings* [1a38].

*A final order is a decision or ruling that disposes of the entire case or a significant aspect of the case. The circumstances in which a bankruptcy court may enter a final order include:*

*Discharge of Debts: When a bankruptcy court grants a debtor a discharge of their debts, it means the debtor is no longer personally liable for those debts. This typically happens in Chapter 7 and Chapter 13 bankruptcy cases.*

*Confirmation of a Chapter 11 Plan: In a Chapter 11 bankruptcy, which is often used by businesses reorganizing their debts, the court may enter a final order confirming the debtor's reorganization plan* [1a39], *which outlines how the debtor will repay creditors and continue its operations.*

*Asset Sales: In Chapter 7 and Chapter 11 cases, the court may enter a final order approving the sale of assets to generate funds for repaying creditors.*

*Dismissal of the Bankruptcy Case: The court may enter a final order dismissing the bankruptcy case if it determines that the debtor is ineligible for bankruptcy relief or has not met the necessary requirements.*

*Generally, appeals arising from a bankruptcy court is heard by the district court* [1a40] *for the district in which the bankruptcy court sits, or in certain circuits, the Bankruptcy Appellate Court* [1a41].

*Non-final orders, which are rulings on specific issues within a bankruptcy case that do not fully resolve the entire case, are usually reviewed through the process of "interlocutory" or "permissive" appeals. This means that parties must seek permission from the district court or the BAP (where available) to appeal these non-final orders.*

**Question 3.2** [1a42][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?**

*When a foreign main proceeding is recognized under the United States Bankruptcy Code, certain provisions automatically apply to the debtor's property within the territorial jurisdiction of the United States. These provisions are found in Chapter 15 of the Bankruptcy Code, which governs cross-border insolvency cases. Here are the key provisions that automatically apply upon recognition of a foreign main proceeding:*

- *Automatic stay*<sup>[la43]</sup>;
- *Operation of the debtor's business in the ordinary course by the foreign representative*<sup>[la44]</sup>;
- *Sale, transfer or use of property outside the ordinary course*<sup>[la45]</sup>;
- *Avoidable of post-petition transfer and post -petition perfection of security interests.*

*As for relief that may be granted on a discretionary basis, both for foreign main and non-main proceedings, the court has the authority to provide additional relief. Some examples of discretionary relief that the court may grant include:*

- *Authorization of discovery regarding debtors assets and affairs*<sup>[la46]</sup>;
- *Entrusting debtor assets to the foreign representative or other person*<sup>[la47]</sup>;
- *Extension of provisional relief*<sup>[la48]</sup>;
- *Any other relief necessary to protect the assets and interests of creditors.*

**Question 3.3**<sup>[la49]</sup> [4 marks]

**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?**

*In a Delaware corporation, directors have fiduciary obligations to act in the best interests<sup>[la50]</sup> of the company and exercise due care<sup>[la51]</sup> in making informed decisions. These duties are owed to the corporation and its shareholders, rather than creditors, even in situations where the corporation is insolvent<sup>[la52]</sup>. Unlike certain jurisdictions, the US law does not have an equivalent concept of "wrongful trading."*

*To protect directors from personal liability for errors of judgment, Delaware law provides the "Business Judgment Rule."<sup>[la53]</sup> The Business Judgment Rule is a legal presumption that, in making business decisions, directors acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the corporation. Unless evidence proves otherwise, the court presumes that directors acted with due care and loyalty. As a result, directors are shielded from liability for decisions that turn out to be unwise or result in financial losses, as long as they can demonstrate that they acted in accordance with the Business Judgment Rule.*

*It's important to note that while the Business Judgment Rule provides protection for directors' decisions, it does not shield them from liability for breaches of fiduciary duties, such as self-dealing, fraud, or intentional misconduct. Directors can still be held personally liable if they act outside the scope of their fiduciary duties or engage in wrongful conduct.*

**Question 3.4** [1a54][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.**

*creditors are authorized to institute an involuntary proceeding against a qualified debtor under either Chapter 7 or Chapter 11 of the US bankruptcy laws. However, the initiation of involuntary proceedings is limited exclusively to these chapters and is precluded in the context of other bankruptcy chapters, as well as against farmers, family farmers, or not-for-profit corporations. The determination of the requisite number of petitioning creditors is contingent on the count of non-contingent, non-insider creditors affiliated with the debtor. If the debtor's count of such creditors falls below 12, a solitary creditor is sufficient to initiate the involuntary petition. Conversely, if the debtor's tally of such creditors is equal to or surpasses 12, a minimum of three qualifying creditors must collectively institute the petition.*

*To qualify as a petitioning creditor, the creditor must have a claim against the debtor is that:*

- **Non-contingent** [1a55]
- **Not the subject of bona fide dispute as to liability or amount** [1a56]
- **Unsecured or undersecured** [1a57], *separately or in the aggregate with all other petitioning creditors' claims, in the amount of at least USD 16,750* [1a58] *(this amount is periodically increased due to inflation)*

*The involuntary proceeding requires no allegation of insolvency, the involuntary petition form requires the petitioning creditors to allege either that the debtor is generally not paying its debt as they become due, unless they are the subject of a bona fide dispute as to liability or amount or that, "within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or an agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession* [1a59].

**QUESTION 4** [1a60](fact-based application-type question) [15 marks in total]

**Question 4.1** [1a61][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 filing of a Chapter 11 bankruptcy petition by Speculation Inc would have various effects on the ongoing legal and financial issues the company is facing.*

**(i) DOJ Investigation:**

*Filing for Chapter 11 bankruptcy triggers an automatic stay<sup>[la62]</sup>, which halts most legal actions against the debtor, including government investigations. The automatic stay would temporarily pause the DOJ investigation into Speculation Inc's alleged illegal trading on insider information<sup>[la63]</sup>. During the Chapter 11 proceedings, the DOJ would need to seek relief from the automatic stay to continue its investigation. However, it's worth noting that the stay does not apply to criminal proceedings and regulatory investigations, so if the DOJ's investigation leads to criminal charges, those proceedings may continue.*

**(ii) Margin Loan Default:**

*Upon filing for Chapter 11 bankruptcy, Speculation Inc would likely seek to restructure its debts, including the margin loan from its broker. The automatic stay would also apply to the margin loan default<sup>[la64]</sup>, preventing the broker from taking immediate action to collect on the debt or liquidate the collateral (shares). Speculation Inc would have an opportunity to propose a plan to reorganize its finances and negotiate with the broker on how to address the margin loan default within the framework of the bankruptcy proceedings.*

**(iii) Delinquent Lease:**

*The filing of a Chapter 11 bankruptcy petition would halt any ongoing eviction or collection actions related to the delinquent lease payments.<sup>[la65]</sup> The automatic stay would provide Speculation Inc with a breathing space to negotiate with its landlord and potentially come up with a plan to cure the delinquency or terminate the lease if necessary. The bankruptcy process would allow the company to address its lease obligations and potentially reorganize its business operations.*

**(iv) Employment Discrimination Lawsuit:**

*Similar to the DOJ investigation and the margin loan default, the filing of a Chapter 11 petition would trigger the automatic stay on the employment discrimination lawsuit.*

[la66] *This means that the former employee's lawsuit would be temporarily halted and put on hold while the bankruptcy proceedings are underway. Speculation Inc would have an opportunity to address the discrimination claim as part of its reorganization efforts and potentially negotiate a settlement or present a plan to address the issue during the bankruptcy process.*

*Overall, the filing of a Chapter 11 bankruptcy petition would provide Speculation Inc with the chance to restructure its financial affairs, address its legal challenges, and potentially continue its business operations while under the protection of the bankruptcy court. It is essential for the company to work with experienced bankruptcy counsel to navigate the complex bankruptcy process and maximize the chances of a successful reorganization.*

**Question 4.2** [la67] [5 marks]

***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 with respect to Stella's Eurobonds could potentially be recognized by a US bankruptcy court under Chapter 15 of the US Bankruptcy Code. Chapter 15 governs cross-border insolvency cases and provides a framework for recognizing and assisting foreign insolvency proceedings in the United States.*

*In this scenario, Stella SA is a foreign entity, and the English scheme of arrangement is a foreign insolvency proceeding. To determine whether the recognition would be as a foreign main or non-main proceeding, certain criteria need to be considered:*

***Foreign Main Proceeding:*** *A foreign proceeding qualifies as a foreign main proceeding if it is taking place in the country where the debtor's centre of main interests (COMI) is located. [la68] COMI is the place where the debtor conducts the administration of its interests on a regular basis. Since Stella SA's headquarters are in Paris, the US bankruptcy court would need to assess whether Stella's COMI is in France or another jurisdiction.*

***Foreign Non-Main Proceeding:*** *If the foreign proceeding is not a main proceeding (i.e., the COMI is not in England), it would be considered a foreign non-main proceeding. [la69]*



*The determination of whether the English scheme of arrangement would be recognized as a foreign main or non-main proceeding depends on where the bankruptcy court finds Stella SA's COMI to be located.*

*If the US bankruptcy court concludes that Stella SA's COMI is in France (where its headquarters are located), the English scheme of arrangement would likely be recognized as a foreign non-main proceeding. In such a case, the recognition would still provide certain protections and benefits to Stella within the US, including the automatic stay and an opportunity for cooperation and coordination between the US court and the English court overseeing the scheme.*

*On the other hand, if the court determines that Stella's COMI is in England, then the recognition would likely be as a foreign main proceeding. This recognition would grant Stella broader protections and allow for more extensive coordination between the English court and the US bankruptcy court.*

**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?***

*Yes, the license to manufacture Xblox would likely be considered an executory contract. An executory contract is a contract in which both parties have ongoing obligations to perform. In this case, GameMart has the obligation to pay monthly royalties to ToyCo for the right to manufacture Xblox toys, and ToyCo has the obligation to allow GameMart to use its patents and intellectual property to produce the toys. Since both parties still have unperformed obligations under the license agreement, it would be considered an executory contract.*

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

*No, GameMart cannot transfer the Xblox license as part of a 363 sale without ToyCo's consent. A 363 sale refers to the sale of assets in a Chapter 11 bankruptcy proceeding. While GameMart can sell its assets, including the license agreement, as*

*part of the bankruptcy process, it cannot transfer the license without the licensor's consent unless the license agreement specifically allows for such transfer without consent.*

*The license agreement between ToyCo and GameMart likely contains provisions regarding the assignment or transfer of the license. It is common for such agreements to require the licensor's consent before the licensee (GameMart) can transfer the license to a third party. [la75] Therefore, GameMart would need to obtain ToyCo's consent to include the Xbox license as part of a 363 sale.*

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

*In most cases, GameMart cannot transfer the factory lease as part of a 363 sale without Land Corp's consent. Similar to the license agreement, a commercial lease typically contains provisions regarding assignment or transfer of the lease. Many leases prohibit assignment without the landlord's consent, and this would be the case with the lease between GameMart and Land Corp. [la76]*

*If the lease agreement prohibits assignment without Land Corp's consent, GameMart would need to obtain Land Corp's approval before transferring the lease as part of a 363 sale. Land Corp has an interest in protecting its property rights and ensuring that the new party assuming the lease is capable of fulfilling its obligations. Therefore, GameMart would likely need to negotiate with Land Corp to obtain the necessary consent for the lease transfer.*

**\* End of Assessment \***