



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3A

THE INSOLVENCY SYSTEM OF THE UNITED STATES

***This is the summative (formal) assessment for Module 3A of this course and is compulsory for all candidates who selected this module as one of their compulsory modules from Module 3. Please read instruction 6.1 on the next page very carefully.***

***If you selected this module as one of your elective modules, please read instruction 6.2 on the next page very carefully.***

The mark awarded for this assessment will determine your final mark for Module 3A. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. **You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
2. **All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
3. **No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
4. **You must save this document using the following format: [studentID.assessment3A]. An example would be something along the following lines: 202223-336.assessment3A. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "student number" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. **Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 **If you selected Module 3A as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 3A as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of 9 pages.

**ANSWER ALL THE QUESTIONS**

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

Commented [la2]: Total marks 8/10

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]: Incorrect, the correct response is (d)

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

Commented [la5]: 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 [la6]: 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 [la7]: 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 [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]: Incorrect, the correct response is (c)

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

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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]**

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**Question 2.1 [1 mark]**

**Commented [la14]:** Total marks 0.5/1

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

Setoff is a financial mechanism that reduces creditor debt using any outstanding costcreditor owes to the debtor. Setoffs are considered inequitable to the creditor due to the inconsistency of their time bound nature. Where there is a timebound issue that exist outside of the agreement between the debtor and the creditor, the loss is often incurred by the creditor often without the creditor's knowledge. For this reason, this method is rarely accepted and often frowned upon.<sup>1</sup>

**Commented [la15]:** Correct, 1/2 mark

**Commented [la16]:** Unclear what you mean here--setoff is unfair to creditors who do not have a debt owed to the debtor because they receive proportionally less recovery

**Question 2.2 [2 marks]**

**Commented [la17]:** Total marks 2/2

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

You should review the Bankruptcy Rules, the Federal Rules of Civil Procedure, the local rules of the bankruptcy court and the judge's personal practices.<sup>2</sup>

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**Commented [la19]:** Correct, 1/2 mark

**Question 2.3 [2 marks]**

**Commented [la20]:** Correct, 1/2 mark

**Commented [la21]:** Correct, 1/2 mark

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

**Commented [la22]:** Total marks 2/2

The absolute priority rule ensures that every entity within a class receives their full payment before the sub or next class can receive their full payment. Deviation can only occur in chapter 11 circumstances and only in the case where the creditor agrees to the terms.<sup>3</sup>

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**Commented [la24]:** Correct, 1/2 mark

**Question 2.4 [2 marks]**

**Commented [la25]:** Correct, 1/2 mark

**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 claim against a debtor's assets that supersedes or in equal rasion to any current debt on the debtor's belongings. In order, for such a lien to be issued as security for DIP financing, the following requirements must be met:

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1. The existing lienholder will be adequately protected after a priming lien is granted;
2. The court must approve the priming lien and find it to be in the best interest of the debtor's estate; and
3. The DIP financing must be obtained in good faith.<sup>4</sup>

**Commented [la28]:** Correct, 1/2 mark

**Commented [la29]:** The court also must find that DIP financing is unavailable without the priming lien

**Question 2.5 [3 marks]**

**Commented [la30]:** Total marks 2.5/3

**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?**

In the event that a movement does not occur before the petition date and the amount received is in excessive of what would have been granted in a chapter 7 the beneficiary must return the excess to the estate.

**Commented [la31]:** Unclear what this means

**Commented [la32]:** Correct, 1/2 mark

<sup>1</sup> Laura Hall, Module 3A Guidance Text, Insolvency System of the United States 2022/2023, p 58

<sup>2</sup> Ibid. p 5

<sup>3</sup> Ibid. p 48

<sup>4</sup> Ibid. pp26-29

The elements of a preference claim that need to be proved are:

1. A transfer of the interest of the debtor in property;
2. To or for the benefit of a creditor; and
3. For or on account of an antecedent debt owed by the debtor before such transfer was made.

Regarding fault, there is no need to show any fault of either the debtor or the recipient in connection with the payment being made.<sup>5</sup>

**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?**

A bankruptcy court may enter a final order under several circumstances. A final order can be entered to contest the validity of a petition. Second, where the court lacks jurisdiction and authority in core-proceedings, and third, where the parties provide consent and in non-core proceedings.<sup>6</sup>

District Courts or Bankruptcy Appellate Panels review the appeals from bankruptcy court orders. Claimants also have a right to further appeal directly to the Circuit Court of Appeal. Non-final orders are reviewed with fresh eyes in the district court or BAP and disregards any previous ruling.<sup>7</sup>

**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?**

Upon recognition of a foreign main proceeding, the following provisions of the Bankruptcy Code automatically apply to the debtor's property within the United States: the first being a chapter 15 proceeding permitting the full and absolute bankruptcy process (automatic stay). Second, the day-to-day running of the debtor's business. Third, the relinquishment of the property for any purpose other than its intended use. Last, evading the consignment of property following the start of a case as well as, a submission of notice of a claim.

The Bankruptcy Code also grants discretionary relief that may be granted on a case-by-case basis for both foreign main and non-main proceedings. Some examples of discretionary relief that may be granted include permission to reveal the debtors property and other relevant matters. Second, granting and overseer, for the debtors US property to a non-US person. Third, expanding the terms of the relieve.<sup>8</sup>

**Question 3.3** [4 marks]

<sup>5</sup> Ibid. pp50-51

<sup>6</sup> Ibid. p18

<sup>7</sup> Ibid. p20

<sup>8</sup> Laura Hall, Module 3A Guidance Text, Insolvency System of the United States 2022/2023, pp63-64

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Commented [la35]: Correct, 1/2 mark

Commented [la36]: Correct, 1/2 mark

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Commented [la38]: Total marks 1.5/3

Commented [la39]: Correct, 1/2 mark

Commented [la40]: Incorrect, if the court lacks jurisdiction, it cannot enter a final order

Commented [la41]: Correct, 1/2 mark

Commented [la42]: Correct, 1/2 mark

Commented [la43]: Correct, 1/2 mark

Commented [la44]: Incorrect, the review is de novo only to the extent that one of the parties has objected to the ruling

Commented [la45]: Total marks 3/3

Commented [la46]: Correct, 1/2 mark, but this is not equivalent to the full bankruptcy process applicable in a plenary proceeding like chapter 7 or 11

Commented [la47]: Correct, 1/2 mark

Commented [la48]: By this, I assume you mean transfers outside the ordinary course--ordinary course doesn't mean intended use, but rather a regular occurrence for the debtor (e.g., if it is a car dealership, it can keep selling cars as ordinary course, but if it is another kind of business that owns a car, selling the car is not ordinary course)

Commented [la49]: Correct, 1/2 mark

Commented [la50]: Correct, 1/2 mark

Commented [la51]: Correct, 1/2 mark

Commented [la52]: 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?**

Directors of Delaware corporations are responsible to act in the best interest of the business and operate in loyalty, sound decision making and a duty of care. When a Delaware corporation is potentially or actually insolvent, the directors' duties extend to include the shareholders and the company to the exclusion of all creditors. The business judgment rule protects the directors from liability or bad judgement because it presumes that directors are acting with fiduciary responsibility and in good faith.<sup>9</sup>

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Commented [la54]: Correct, 1 mark

Commented [la55]: Correct, 1 mark

Commented [la56]: Correct, 1 mark

Question 3.4 [5 marks]

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

In an involuntary proceeding, against a debtor, there are specific requirements that a creditor's claim must fulfill to qualify as a petitioning creditor. The key requirements include:

1. **Non-Contingent:** this is a debt not in the guarantors responsibility.
2. **Not the subject of bona fide disputes as to liability or amount:** as a matter of law or certainty or the debtor's personal belief that the debt is not owed or the amount claimed is not correct or in dispute.
3. **Minimum Number of Creditors:** Depending on whether the petitioners are non-contingent or non-insider creditors, there must be one petitioner if the creditors are fewer than twelve in the instance where the creditors are more than twelve, there must be a minimum of three sanctioned creditors. Notably, the collective action by a minimum group of creditors staves off one person from commencing proceedings that may be unfair and exclude the group.
4. **Unsecured and Under Secured:** can be collectively combined amongst the petitioning creditors and should represent a claim of a minimum of \$16,750 depending on inflation.<sup>10</sup>

Commented [la58]: Correct, 1 mark

Commented [la59]: Incorrect, the guaranty was just an example of a contingent claim. The claim to qualify must not depend on any further event happening.

Commented [la60]: Correct, 1 mark

Commented [la61]: Incorrect, only an objective dispute qualifies

Commented [la62]: Correct, 1 mark

Commented [la63]: Correct, 1/2 mark, also the creditor must allege that the debtor is not paying its debts as they come due or has had a custodian appointed

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

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Question 4.1 [5 marks]

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**Speculation Inc is engaged in day-trading stocks from leased office space with two employees. It funds its trading through a margin loan from its broker, where the shares it purchases are held as collateral. For a while, Speculation Inc was very successful in trading, and the US Department of Justice (DOJ) has announced an investigation into whether its success was due to illegally trading on insider information. More recently, Speculation Inc has had serious trading losses, causing its broker to declare a default on the margin loan. It also has fallen behind on its rent, and been sued by a former employee alleging she was fired due to gender bias.**

**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?**

<sup>9</sup> Ibid. p59

<sup>10</sup> Ibid. pp 10-11

A case filed under chapter 11 of the United States Bankruptcy Code is frequently referred to as a "reorganization" bankruptcy. In the Chapter 11 process, reorganization is recommended by the debtor, specifying the economic difficulties of the company and how the process of undertaking those challenges. However, where the proposed reorganization affects the rights of the creditors, the creditors have a right to vote on the recommendation. Notably, in order for the recommendation of reorganization to be confirmed by the Court, the Court must have received the required votes and satisfied certain legal requirements. As a component of the debtor's reorganization plan, assets are sold to make the purchase price higher if the business continues to operate.

Among the ability to reorganize the company, the Chapter 11 bankruptcy process also offers the principle of "automatic stay". Under this principle, all bankruptcy proceedings or legal actions are stayed. The execution of the 'automatic stay' principle provides the debtor with an opportunity to develop and administer their reorganization proposition. Oftentimes in this type of bankruptcy, the debtor continues to operate and manage the company and its possession, thus functioning as a "debtor in possession". Therefore, conveying the obligations and powers of a trustee onto the debtor, permitting the company or debtor to carry on with the business and borrow money with a court approval. In this instance, where no trustee is appointed to manage Speculation's affairs, it is a debtor in possession. The debtor can exercise powers of a trustee safeguarding the interests of creditors over equity holders. Appointing a trustee in Chapter 11 proceedings demands a high threshold, requiring confirmation of good cause, trust and loyalty. This allows the debtor to continue to operate in the ordinary course of business and may reorganize or liquidate.

The effects of Speculation Inc filing a Chapter 11 petition on the below issues are as follows:  
**DOJ** – The office of the US trustee forms part of the US DOJ and is responsible for the oversight of the administration of bankruptcy cases and the appointment of trustees. As part of its administration, the US Trustee has a right to object to or comment on filings. Debtors oftentimes seek the approval of the US Trustee prior to filing significant motions in their bankruptcy matters, especially concerning areas such as compensation for professionals and provisions of plans of reorganization. While the 'automatic stay' principle has the power of halting proceedings, criminal investigations are not subject to this principle. On this account, a Chapter 11 bankruptcy would not prevent the DOJ from looking into Speculation Inc's illegal trading on insider information. Therefore, it is presumable for the DOJ to pursue its investigation and take any legal action necessary, notwithstanding a pending bankruptcy case.

**Marginal loan default** – At the time of filing a Chapter 11 bankruptcy petition, the debtor enjoys the protection of worldwide automatic stay, which stops the all creditor enforcement proceedings from the moment petition is filed. During the Chapter 11 process, Speculation Inc is given time to reorganize its infrastructure (operations) and financial situation. Through the construction of recommendations, the debtor can force secured creditors to accept altered terms of debt – which means that the creditors may not fully recover debts owed to them by the debtor. Additionally, with court approval in a 363 sale, the debtor can sell property without creditor interests to earn money for its reorganization efforts. Furthermore, the debtor may seek to modify the terms of loan, potentially reducing interest rates, extending repayment period or adjusting other aspects of the loan to make it manageable inside the limits of its plan to reorganize the company.

**Delinquent lease** – With regard to delinquent lease, the filing of a Chapter 11 bankruptcy petition initiates the automatic stay principle, blocking the landlord from obtaining rental arrears or removing Speculation Inc. Additionally, the debtor in possession has ability to reject burdensome contracts, sell assets free and clear of liens, pursue claims for recovery of preferential or fraudulent transfers, to increase the estate's value for creditors. The debtor in possession under a Chapter 11 proceeding can lease estate property, or assume or reject the lease depending on if it's seen to be beneficial or not. Where it is beneficial to remain in the lease, renegotiations of lease terms or payment plans may be suggested to allow for the

**Commented [la66]:** The US trustee being part of the DOJ is not relevant here

**Commented [la67]:** Correct, 1 mark

**Commented [la68]:** Correct, 1 mark

**Commented [la69]:** This is generally correct, but a margin loan is a securities contract that is exempt from the stay so the broker can sell the shares and apply the proceeds to the loan balance

**Commented [la70]:** Correct, 1 mark

continued use of the property and to repay the amount owed. These renegotiations are reviewed and approved by the court taking into consideration the debtor and creditors interests. The debtor in possession also have the option to reject contracts that prove to be burdensome to the reorganization strategy.

**Employment discrimination** – The automatic stay principle is implemented, suspending the employment discrimination lawsuit during Speculation Inc's bankruptcy proceedings. This could impact the potential settlement or judgment of the lawsuit, and any settlement may require court approval. Discrimination claims are categorized as unsecured claims; therefore, will be ranked lower in priority compared to secured claims and expenses. Consequently, there exists a risk of not receiving damages in full from debtor's available assets.

Debtors can avoid pre-petition transactions. In chapter 11 the court may permit a party to deviate from the absolute priority rule with the consent of affected creditors (where payment in full must be made).

Under the chapter 11 process, there's a worldwide automatic stay on filing the petition in such proceedings. Also, the debtor in possession has the option of rejecting burdensome contracts and can sell assets free and clear of liens. Preferential/fraudulent transfers can be avoided if not in the best interests and under a scheme, there is an option to cramdown dissenting creditors in approving plan.<sup>11</sup>

If discharge given under chapter 11 then this will exclude company from personal liability for any pre-petition debts.

#### Question 4.2 [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?***

Identifying a Foreign Main proceeding scheme's eligibility for recognition in a US bankruptcy court depends on the answer to one qualifying question; where does the organisation conduct its administrative business?

The answer to this question, should put the organisation and the proceedings into one of two categories, 1) A Foreign Main proceeding or 2) A Foreign Non-Main proceeding. "A foreign main proceeding is a foreign proceeding pending in the country where the debtor has the center of its main interest (registered office)".<sup>12</sup> Foreign non-main proceedings, however, is [identified as] a foreign insolvency proceeding that is pending in a country where the debtor has an establishment, but not its main interest."<sup>13</sup> Thus, in the present case, the English scheme of arrangement can be recognized by a US bankruptcy court under Chapter 15 of the bankruptcy code, given that Stella SA has an establishment in England and its COMI being in France, both recognised countries in Chapter 15 of the US code.

<sup>11</sup> Laura Hall, Module 3A Guidance Text, Insolvency System of the United States 2022/2023, p73

<sup>12</sup> Laura Hall, Module 3A Guidance Text, Insolvency System of the United States 2022/2023, p 62

<sup>13</sup> USC, s1502(2); Ibid. p 62

Commented [la71]: Correct, 1 mark

Commented [la72]: Total marks 4/5

Commented [la73]: Correct, 1 mark

Commented [la74]: Correct, 1 mark

Commented [la75]: Correct, 1 mark, the presumption in favor of the place of incorporation being the COMI is unlikely to be rebutted where the headquarters is also in that jurisdiction

Commented [la76]: There is no requirement that a specific country be recognized, unlike the listing of proceedings in the European Insolvency Directive.

Chapter 15 provides a mechanism for recognizing and assisting foreign insolvency proceedings, including schemes of arrangement. To obtain recognition, the foreign representative must file a petition in the bankruptcy court where the debtor has its principal place of business or assets. The court will then determine the appropriateness of recognition. Recognition of a foreign proceeding under Chapter 15 does not automatically invoke a stay, but once the proceedings have been recognised, a stay is imposed on foreign main proceedings, which is limited to property within the US jurisdiction. However, the court may grant a stay or provide other assistance in pending recognition or following recognition of a non-main proceeding.<sup>14</sup> Scheme can have many effects once recognised:

Stay of proceedings-preventing creditors from bringing actions against the debtor. Additionally, it allows for the cooperation and communication between the English court overseeing the scheme'. Asset protection is also provided, allowing assets in the US to be preserved and distributed as directed by the English court.

To meet the requirements for recognition,<sup>15</sup> the foreign representative must establish that a foreign proceeding is pending and that the foreign representative can act on behalf of the proceeding. A foreign proceeding encompasses collective judicial or administrative proceeding in a foreign country,<sup>16</sup> which includes schemes of arrangement. However, if proceeding is contrary to US public policy, it can be refused recognition or assistance by the US Bankruptcy court despite meeting the requirements for recognition.<sup>17</sup> Where relief is sought, the court must be satisfied that it is appropriate under US law for the assets in question to be administered in the foreign non-main proceeding.<sup>18</sup>

Given that Stella SA's COMI is located in France and they conduct their sales in Europe, Asia and North America, the scheme would be decided with Eurobonds in mind and therefore would likely be categorised as a Foreign Non-Main proceeding for recognition in a US court under Chapter 15.

Commented [la77]: Correct, 1 mark

#### 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:***

Commented [la78]: Total marks 3/5

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

Executory contracts are those in which both parties have existing responsibilities that are not yet fulfilled. In this case, the license agreement to manufacture this toy will most likely be considered an executory contract in the context of a Chapter 11 bankruptcy filing. The licence agreement between the two companies is ongoing with monthly royalties being made to ToyCo in exchange for the right to manufacture the toys. Both parties have existent obligation

Commented [la79]: Correct, 1 mark

<sup>14</sup> 11 USC, §1520(a)(1); Laura Hall, Module 3A Guidance Text, Insolvency System of the United States 2022/2023, p61

<sup>15</sup> Laura Hall, Module 3A Guidance Text, Insolvency System of the United States 2022/2023, p61

<sup>16</sup> 11 USC, §101(23); *ibid.* p62

<sup>17</sup> 11 USC, §1506

<sup>18</sup> *Ibid.* §1521(c)

under the contract, with the licence being granted by ToyCo and GameMart paying royalties. Under chapter 11 bankruptcy, the debtor (GameMart) has the option to assume or reject the executory contract. However, the court will assess whether assuming or rejecting is in the best interest of the bankrupt estate. Factors considered by the court include, the value of continuing the licence, any costs or burdens associated with it and financial situation of the debtor. If court considers that assuming the contract is beneficial to the estate then GameMart may be able to continue manufacturing toys under the licence agreement during bankruptcy proceedings.

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

Under a 363 sale, a debtor in possession may sell its property or assets free and clear of creditor interest (where disputed and value of property exceeds this interest) to reorganize the company with creditor consent<sup>19</sup> However, when it comes to intellectual property the rules are dissimilar as consent is required.

Commented [la80]: Correct, 1 mark

In the case of ToyCo and GameMart Chapter 11 bankruptcy claim, ToyCo must give its consent to relinquish any licences or contracts that speaks to ownership of its intellectual property; for example the Xbox intellectual property license would remain with ToyCo and not transfer to a third party in the event that GameMart pursued a 363 sale.

ToyCo's ability to retain its ownership of its license, patents and copyrights is due in large part to the protections afforded to it regardless of any executory contracts. This means should GameMart file for Chapter 11 bankruptcy, the intellectual property (the Xbox) would remain with ToyCo if ToyCo does not consent to transfer the licence over in the sale.

Commented [la81]: 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 cannot transfer the factory lease as part of 363 sale without Land Corp's consent. This is because the term of the lease gives Land Corp control over its factory and therefore must be consulted for approval for GameMart to transfer its lease to any other party. Therefore, the lease rights would remain with Land Corp. Any potential transfer of the factory lease would require negotiation and agreement between GameMart and Land Corp.

Commented [la82]: Incorrect, the Bankruptcy Code makes contractual restrictions on assignment not apply

\* End of Assessment \*

<sup>19</sup> 11 USC, S 363(f) - Laura Hall, Module 3A Guidance Text, Insolvency System of the United States 2022/2023, p 26