



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 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) because the software licensing agreement would require counterparty consent to assign

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]: Correct, 1 mark

Question 1.5

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

Commented [la7]: Correct, 1 mark

- (a) *The plan of reorganization must be fair and equitable to all impaired classes.*
- (b) *Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.*
- (c) *Class definition is often a battleground when a debtor tries to cramdown classes.*
- (d) *Dissenting creditors are permitted to challenge the classification of a creditor supporting the cramdown.*
- (e) ***If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.***

Question 1.6

Commented [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]: Incorrect, the correct response is (d) because insolvency is not required for actual fraudulent transfer

*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

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]

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**Question 2.1** (1 mark)

Commented [la14]: Total marks 1/1

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

*[Setoff arises where a creditor with a claim against a debtor and at the same time owing money to the debtor seeks to net out the two obligations. Setoff can result in the improvement of the position of one creditor as compared to other unsecured creditors owed money by the debtor. Effectively, setoff decreases the obligation to the estate by the full amount that the debtor owes. However, in decreasing the obligation to the estate, the amount owing to one creditor decreases more than the amounts owed to other unsecured creditors, which results in the improved position for one creditor. Setoff is not permitted where:*

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Commented [la16]: Correct, 1/2 mark

- A creditor's claim against the estate has been disallows
- A creditor's claim against the estate was acquired post-petition or in the 90 days prior to petition at a time when the debtor was insolvent
- The creditor's obligation to the debtor was incurred in the 90 days prior to the petition at a time when the debtor was insolvency for the purposes of exercising set off rights
- The creditors improves their position by setoff as compared to the position had setoff been exercised 90 days prior to the petition.

*Commodity, forward, security, repurchase, swap, and master netting contracts are exempted from the restrictions on setoff. ]*

**Question 2.2** [2 marks]

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

*[When preparing a filing for a bankruptcy court, you should review:*

- The **Bankruptcy Rules** (including the Bankruptcy code)
- The **Federal Rules of Civil Procedure**
- The **local rules of the bankruptcy court;** and
- The **judge's personal practices**

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Commented [la20]: Correct, 1/2 mark

Commented [la21]: Correct, 1/2 mark

*Where a party does not practice regularly in a specific jurisdiction, they should consult with a local practitioner for advice on any unwritten local practices that could impact the filing and/or the proceedings.]*

**Question 2.3** [2 marks]

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

*[The absolute priority rule requires that full payment is made to each category of claims before the next category receives payment.]*

Commented [la23]: Correct, 1 mark

The absolute priority rule can be deviated from in a chapter 11 plan with the consent of the affected creditors. However, in a chapter 7, deviation is not permitted as statutory priorities must be followed.]

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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 that is senior in ranking, or in the same priority as liens that are already in place on a property. In order to meet the requirements for a priming lien and secure DIP financing, a debtor must demonstrate that interest of the secured creditor that is being primed is adequately protected.]

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Commented [la28]: Correct, 1/2 mark, also the debtor must show that DIP financing is not available without the priming lien

Question 2.5 [3 marks]

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What is a preference? What are the elements of a preference claim that need to be proved? Is a showing of fault, by either the debtor or creditor, required?

[A preference is a transfer of a debtor's property made in a suspect period before the petition date. An amount that is deemed to have been a preference must be returned to the estate if it happens to exceed the amount that a recipient would have received in a chapter 7 liquidation if the transfer had not been made.]

Commented [la30]: Correct, 1 mark

In the US, there is no need to show any fault of the debtor or the recipient, i.e. the creditor, in connection with the payment having been made, and the recipient creditor does not suffer any penalty other than return of the transfer (and any prejudgement interest from the date of the transfer).

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The avoidance of preference should equalize the treatment of creditors and "disincentivize a race to collect from a distressed debtor". A party that receives a preference that is avoided has an unsecured claim for the value returned to the estate.

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

- A transfer of an interest of the debtor property - this may be a transfer of funds, property or an interest in property, granting of a lien, transfer of property where a debtor does not have an interest, such as property held by the debtor as agent for another party.
- A transfer to or for the benefit of a creditor - the transfer should be to a creditor or the debtor. Where a transfer was not to a creditor or the debtor, the transfer cannot be considered a preference, however may still be recoverable as a fraudulent conveyance.
- A transfer that is for or on account of an antecedent debt owed by the debtor before the transfer was made - a preference can only arise where a debtor is paying a creditor for a pre-existing debt. Where there is a contemporaneous exchange of value, that is not considered a preference.

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Commented [la33]: Correct, 1/2 mark

Commented [la34]: Correct, 1/2 mark



- A transfer made while the debtor was insolvent - a debtor is presumed to have been insolvent on and during the 90 days prior to the petition date for purposes of determining preference claims.
- A transfer made during the suspect period - for third parties, the suspect period is considered to be 90 days prior to the petition date. For insiders of a corporate entity, the suspect period is one year prior to the petition date.
- A transfer that enables the creditor to receive more than they would in a chapter 7 liquidation a transfer is an avoidable preference if it results in the creditor improving its position as compared to the result of the liquidation in the even a transfer had not occurred. ]

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

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**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?**

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*[The bankruptcy court has limited jurisdiction to enter final orders. However, the bankruptcy court can enter final orders on core bankruptcy issues. In each motion or pleading, parties state whether the matter being considered is a core or non-core matter in order for the bankruptcy court to determine the scope of its jurisdiction and power to enter a final order or judgement. In the Stern v Marshall case, the Supreme Court held that a bankruptcy court cannot issue a final order that invades Article III or the US Constitution.*

Commented [la37]: Partially correct, 1/2 mark, this is limited to issues specific to the Bankruptcy Code such as a challenge to a petition, or other core proceedings with the consent of the parties

*If a ruling issued was in a core proceeding where the bankruptcy court had authority to enter a final order, a district court of BPA reviews the conclusions of law de novo and reviews finding of fact for abuse or discretion recognizing that the bankruptcy court had a greater opportunity to weigh the evidence. Where a ruling was in a non-core proceeding and a bankruptcy court did not have authority to enter a final order, the district court or BAP reviews de novo all finding of fact and conclusions of law to which a party has objected. The order of a district court of BAP is reviewed by a circuit court of appeal de novo as to conclusions of law and for abuse of discretion for findings of fact.]*

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Commented [la39]: Correct, 1/2 mark, I assume you are referring to Bankruptcy Appellate Panels

Commented [la40]: Correct, 1 mark

**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?**

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*[Upon recognition of a foreign main proceeding, the following provisions apply to a debtor's property within the territorial jurisdiction of the United States:*

- Automatic stay
- Operation of the debtor's business in the ordinary course by the foreign representative
- Safe, transfer, or use of property outside the ordinary course
- Avoidance of post-petition transfers and post-petition perfection of security interests

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Commented [la43]: Correct, 1/2 mark

Commented [la44]: Correct, 1/2 mark

The reliefs that may be granted on a discretionary basis are:

- Authorization of discovery regarding the debtor's assets and affairs
- Entrusting administration of the debtor's US assets to the foreign representative or other person
- Extension of provisional relief
- Any other relief necessary to effectuate the purposes of chapter 15 and to protect the assets of the debtor or the interests of creditors.]

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Commented [la46]: Correct, 1/2 mark

Commented [la47]: Correct, 1/2 mark

Question 3.3 [4 marks]

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

[ In the United States, director liability is generally more limited than other jurisdictions. Directors owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision making.

Commented [la49]: Correct, 1 mark

Commented [la50]: Correct, 1 mark

Directors are protected from liability for errors of judgement by the business judgement rule. Under the business judgement rule, a board of directors is presumed to have acted in good faith on the basis of reasonable information. However, this presumption can be rebutted by showing that a majority of the board in fact were not reasonably informed, did not honestly believe that their decision was in the corporation's best interest and were not acting in good faith.

Commented [la51]: Correct, 1 mark

However, the business judgement rule does not apply where a transaction is approved by a board majority that is not disinterested and independent or a controlling shareholder is on both sides of the transactions. In such situations, a transaction will be void unless the "entire fairness standard" is satisfied.

Directors owe their duties to the corporation and its shareholders, and not to creditors, even where a corporation is potentially insolvent. The shareholders stand to receive nothing in bankruptcy.

Commented [la52]: Correct, 1 mark

The Delaware Supreme Court has decided historically on the suggestion that directors owe duties to creditor when a company is operating in the zone of insolvency or is indeed actually insolvency. As such, there is no equivalent of wrongful trading or deepening insolvency in US law. ]

Question 3.4 [5 marks]

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

[In order for a creditor's claim to qualify as a petitioning claim in a involuntary proceeding, the creditor must have a claim against the debtor that is:

- **Non-contingent**
  - o A contingent claim depends on the occurrence of a future event, such as a guarantee, which is typically contingent on the occurrence of a default under the guaranteed obligation.
  - o A debt that has not matured, because of payment being due in the future, is not contingent if all requirements for liability, other than the passage of time, have occurred.
- **Not the subject of bona fide dispute as to liability or amount**
  - o A bona fide dispute arises where there is an objectively reasonable basis for a dispute as a matter of fact or law, a debtor's subject belief that a debt is not owed or the amount claims is incorrect is not sufficient.
  - o A portion of the amount claimed is disputed, the creditor cannot use the undisputed portion to reach the monetary threshold, but a dispute as to one claim does not disqualify application of other, undisputed claims held by the same creditor to meet petitioning creditor requirements.
- **Unsecured or undersecured**
  - o The creditor must be unsecured or undersecured, separately, or in the aggregate with all other petitioning creditors' claims, in the amount of at least USD16,750, or other stipulated amount

[An involuntary petition form requires the petitioning creditors to allege either that the debtor is generally not paying debts 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 the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge or 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.]

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,

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Commented [la54]: Correct, 1 mark

Commented [la55]: Correct, 1/2 mark

Commented [la56]: Correct, 1 mark

Commented [la57]: Correct, 1/2 mark

Commented [la58]: Correct, 1 mark

Commented [la59]: Correct, 1/2 mark

Commented [la60]: Correct, 1/2 mark

Commented [la61]: Total marks 5/15

Commented [la62]: Total marks 4/5

**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?**

*The worldwide automatic stay comes into effect upon the filing of any plenary petition and provides the debtors some breathing room to formulate a restructuring plan, negotiate with creditors and realize the value of its assets in an order process culminating in the payment of creditor claims in accordance with the priorities prescribed by the Bankruptcy code. The automatic stay applies to interference with the property of the estate anywhere in the world. The Bankruptcy code prohibits*

- litigation on pre-petition claims
- enforcement of pre-petition judgement against the debtor or property of the estate
- any act to obtain possession or control of property of the estate
- creation, perfection or enforcement of a lien against property of the estate on account of a prepetition claim
- any attempt to collect on pre-petition claims (including through demand letters or calls)
- setoff of any pre-petition debt against pre-petition claim.

**DOJ Investigation**

- o With respect to the DOJ investigation, to the extent that the investigation is a regulatory investigation, the filing of a petition will not interfere with the investigation. Following the filing of the petition, the debtor could approach the DOJ and seek to enter into a stipulation to stay proceedings until a certain time. However, the automatic stay will not have the effect of stopping the investigation.

**Margin loan default**

- o With respect to the margin loan default, to the extent the default and notification occurred before the filing of the chapter 11 petition, any action taking by the broker may be stayed, as that will effectively be enforcement of a lien against the property that the broker holds on behalf of Speculation Inc. Since it is not an exercise of rights under a commodity, forward or security contract, the automatic stay might apply to the default and the broker might not be able to take any enforcement action.
- o The broker might also not be able to simply take the shares held as security and setoff against the margin loan default. That would need consideration and possibly legal input and raising with the bankruptcy court.

**Delinquent lease**

Commented [la63]: Correct, 1 mark

Commented [la64]: Correct, 1 mark

Commented [la65]: Incorrect, a margin loan is a securities contract so the broker can sell the shares held as collateral notwithstanding the automatic stay

- Automatic stay would apply to the delinquent lease and the landlord's claim would be considered as a claim in the Chapter 11 proceedings. With respect to leases, the automatic stay does not apply in the eviction of a debtor tenant from non-residential property where a lease has expired. However, in this case, we are not provided with any indication as to whether the lease has expired or whether the lease is still valid. If valid, the automatic stay would apply. However, the landlord could still review their contractual agreement to identify the steps that they might be able to take despite the automatic stay being in place.
- Employment discrimination
  - Litigation on pre-petition claims will be stayed on the filing of the Chapter 11 petition. As such the lawsuit involving the former employee will be stayed. The parties in the law suit could seek a relief for the lifting of the stay and allow the parties to proceed with the lawsuit. ]

**Commented [la66]:** Correct, 1 mark, also the facts say only that rent has gone unpaid, not that the lease has expired, so the landlord cannot commence eviction proceedings

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

**Question 4.2 [5 marks]**

**Commented [la68]:** Total marks 0/5

**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 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?**

*[ A case under chapter 15 will be commenced by the filing of petition by the foreign representative of the debtor. The requirements for recognition under Chapter 15 are minimal, a foreign representative must establish that a foreign court or administrative proceeding with respect to the debtor is pending and that the foreign representative is empowered to act by the proceeding. A foreign proceeding does not need to resemble a US bankruptcy case in order to be recognized. A foreign proceeding is defined by Bankruptcy code as "a collective judicial or administrative proceeding in a foreign country...under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. Diverse proceedings such as the English scheme of arrangement and the Australian creditor appointed receivers have been granted recognition in the US. The circumstances in which a proceeding meeting these requirements may be refused recognition or assistance are where they are contrary to US public policy. This exception is however narrow and rarely applicable.*

*During the recognition of proceedings, one main point will be to characterize the proceedings as foreign main proceedings or foreign non-main proceedings and this*

will determine the scope of relief available to the debtor following recognition. In considering the centre of main interests, the following factors will be considered:

- Location of headquarters
- Location of management
- Location of primary assets
- Location of a majority of the debtor's creditors of a majority of the creditors that will be affected by the relief requested by the foreign representative; and
- Jurisdiction whose law will apply to most disputes.

Proceedings in a jurisdiction other than the debtor's COMI can be recognized as a foreign non-main proceeding if the debtor has an establishment in the jurisdiction

Based on the above, the English scheme of arrangement can be recognized in the US under Chapter 15.

As the Eurobonds are governed by English law, the COMI with respect to the Eurobonds could be deemed to be England. The proceedings with respect to the Eurobonds may therefore be deemed to be foreign main proceedings if they are commenced under English law.]

**Commented [la69]:** Incorrect, the COMI is presumed to be France based on incorporation and that presumption is unlikely to be rebutted where the headquarters are in the same country. Foreign non-main recognition would be appropriate because the retail store in England is an establishment.

Question 4.3 [5 marks]

**Commented [la70]:** Total marks 1/5

**ToyCo is an American toy company that has created a popular line of folding robot toys called Xblox. The toys are covered by several US patents. Currently, GameMart Inc (GameMart) has a 10-year exclusive license to manufacture Xblox and pays ToyCo monthly royalties. GameMart operates a factory in California that it leases from Land Corp on a longer term lease with seven years to go; the lease prohibits assignment without Land Corp's consent. The Xblox toys are selling well, but GameMart's other toy lines are doing poorly, so it is considering a Chapter 11 bankruptcy. Answer the following questions:**

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

[Under Section 365 of the Bankruptcy code, licenses are generally considered to be executory contracts. An contract is executory if there are material unperformed obligation on both sides. In this case the contract can be deemed to be executory because GameMark has an exclusive license to manufacture Xblox for 10 years and to pay monthly royalties to ToyCo. ToyCo's part of the contract would be ensure that the toys remain covered by the US patents and to maintain the exclusive license with GameMark. More information would however be needed on the time remaining in the 10 year period in order to determine whether one side of the agreement has been delivered on. I.e. for example has GameMark already produced all the toys that it could under the current license.]

**Commented [la71]:** Correct, 1 mark

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

*[Under section 363 of the Bankruptcy Code, assets should be sold free and clear of liability. GameMart would be able to sell its property in a 363 sale where the property is free and clear of interests. From creditors, for example ToyCo. However, in this case, Toyco would still have an interest as the toys are covered by US patents and Gamemart has an exclusive license and ToyCo might be owed monthly royalties by GameMark Inc. In that case, transfer may need the consent of Toyco as they would be a creditor of GameMark otherwise the transfer of the license would not be free and clear of liability as the new party that takes up the contract would need to manufacture Xbox and make payment of monthly royalties to TopCo.]*

**Commented [la72]:** Incorrect, the license would require ToyCo's consent to transfer because substantive intellectual property law would permit ToyCo to refuse to accept performance from a transferee.

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

*[ The lease prohibits assignment without LandCorp's consent. GameMark might therefore not be allowed to transfer the factory lease as part of the 363 sale without Land Corp's consent. As highlighted above, assets in bankruptcy should be sold free and clear of any interests. Further, the terms of the lease indicate that GameMark may not transfer the lease without Land Corp's consent.*

**Commented [la73]:** Incorrect, the Bankruptcy Code makes contractual restrictions on assignment inapplicable

*Additionally, the transaction is not an ordinary course transaction.]*

\* End of Assessment \*