



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 10/10

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Commented [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

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ABC Corp is an industrial manufacturing company that is filing for bankruptcy. Which of the following could not be considered a party in interest?

- (a) A neighboring landowner to ABC Corp's manufacturing plant.
- (b) **An environmental advocacy group that opposes ABC Corp's operations.**
- (c) The landlord of ABC Corp's corporate office.

- (d) *People who live several miles downstream from ABC Corp's manufacturing plant and have been exposed to the plant's toxic waste.*
- (e) *The US Internal Revenue Service.*

Question 1.3

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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

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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

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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

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When does an automatic stay come into effect?

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

Question 1.9

Commented [la11]: Correct, 1 mark

Which of the following regarding substantive consolidation is true?

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

Question 1.10

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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)

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

Set off allows a creditor who has a claim against a debtor to net out any money it simultaneously owes to the debtor against that claim. It is not permitted in many circumstances because of its potential to improve the position of those creditors who are eligible for setoff as compared to those who aren't, since the set off reduces the creditor's obligation to the estate.

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Question 2.2 [2 marks]

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

The Federal Rules of Bankruptcy Procedure, which incorporate the Federal Rules of Civil Procedure by reference, as well as any local rules of procedure and personally-issued judicial guidance that are applicable to the relevant bankruptcy court in which your filing will occur.

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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, in a distribution to creditors, payment must be made in full to each category of creditor before any creditor in the next category can receive any payment. Except for in chapter 7 proceedings (where the priorities must be strictly adhered to), the absolute priority rule may be deviated from with the consent of all affected creditors.

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Question 2.4 [2 marks]

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

A priming lien is a lien on property that is senior to, or with the same priority as, existing pre-petition liens on the same estate property, to secure post-petition financing. For a priming lien to be granted to secure DIP financing, financing must not be available on any other terms and the debtor must demonstrate that the interest of the secured creditor that is being primed is otherwise adequately protected.

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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 the debtor's property that occurs within a defined period before the petition date, which must be returned to the estate if it exceeds the amount that the transferor would have received in a chapter 7 liquidation had the pre-petition transfer not been made. To establish a preference claim, there must be (a) a transfer of the debtor's interest in property, (b) to or for the benefit of a creditor, (c) for or on account of an antecedent debt owed by the debtor before the transfer was made, (d) which was effected while the debtor was insolvent; and (e) during the "suspect period", which is 90 days prior to the petition for third parties and one year prior to the petition for insiders. There is no requirement to show any fault, whether of the debtor or the recipient, for a preference to be established.

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

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Question 3.1 [3 marks]

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

The U.S. bankruptcy courts, which are creatures of statute rather than the U.S. Constitution, are only empowered to enter final orders on "core" bankruptcy issues and matters. The statute (11 USC) contains a non-exhaustive list of "core" matters, which includes matters concerning the administration of the bankrupt estate, the allowance or disallowance of claims and orders to turn over property of the estate (11 USC, 157). At the outset of each motion, parties are required to state whether the matter at issue is core or non-core, and the bankruptcy court determines the scope of its jurisdiction to enter a final order. In addition to matters having to be considered "core" for the bankruptcy court to enter a final order, recent authority suggests that the bankruptcy court also cannot issue final orders that invade Article III jurisdiction (*Stern v Marshall*).

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Appeals from bankruptcy court orders are generally reviewed and heard by the district court for the district in which they sit. However, in certain circuits, bankruptcy appeals may be heard by a Bankruptcy Appellate Panel, which is comprised of the judges of the bankruptcy courts within that circuit. From the district court or the Bankruptcy Appellate Panel, there is option to appeal further to the circuit court of appeals. Where a bankruptcy court certifies that the appeal raises a question of law to which there is no controlling decision of the circuit or US Supreme Court or requires resolving conflicting decisions, or that immediate appeal may materially advance the progress of the case, an appeal from a bankruptcy court may go directly to the court of appeals, subject to the court of appeals' discretion as to whether to accept such a case.

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Non-final, or interlocutory, orders may be appealed only with leave of the appellate court (unlike final appeals, which can be appealed as of right). This does not apply to

orders extending the period of exclusivity to propose a plan, which are appealable as of right.

If the ruling of the court is in a court proceeding, over which the bankruptcy court had authority to enter a final order, the district court or appellate panel will review the conclusions of law *de novo*. However, if the order was made in a noncore proceeding, or without authority to enter a final order, then the district court or appellate panel will review *de novo* the findings of fact and conclusions of law to which a party has objected.

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Question 3.2 [3 marks]

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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 provisions of the Bankruptcy Code relating to the following matters automatically apply to the debtor's property within the territorial jurisdiction of the United States:

- (1) The automatic stay;
- (2) Operation of the debtor's business in the ordinary course by the foreign representative;
- (3) Sale, transfer or use of the property outside the ordinary course; and
- (4) Avoidance of post-petition transfers and post-petition perfection of security interests.

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These are set out at 11 USC, 1520. The foreign representative is also granted the right to intervene in any US state or federal proceedings to which the debtor is a party.

For either main or non-main proceedings, the following relief may be granted on a discretionary basis, in accordance with 11 USC, 1521:

- (1) Discovery regarding the debtor's assets and affairs;
- (2) Entrusting administration of the debtor's US assets to the foreign representative or some other person;
- (3) The extension of provisional relief; and
- (4) 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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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?

Directors of a Delaware corporation owe a fiduciary duty of loyalty to the corporation's best interest, as well as a duty of care in educated decision-making. These duties are owed to the corporation and its shareholders and *not* to creditors. This rule is not impacted by the potential or actual insolvency of the corporation. Indeed, the Delaware Supreme Court has confirmed that directors owe no duties to creditors, even when the company is operating "in the zone of insolvency" or is, in fact, insolvent (*North Am Catholic Educational Programming Foundation Inc v Gheewalla*). The business judgment rule protects directors from liability for errors of judgment. By this rule, directors are presumed to have acted in good faith and on the basis of reasonable information. Unless this presumption is rebutted (by showing that a majority of the directors were, in fact, not reasonably informed, did not honestly believe their decision to be in the best interest of the corporation or were not acting in good faith), the directors will not be liable unless gross negligence can be proven. Note, however, that the business judgment rule will not apply where a transaction is approved by a majority of the board that is not disinterested or independent or where a controlling shareholder is on both sides of the transaction.

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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.

Involuntary proceedings can be commenced by creditors under either chapter 7 or chapter 11. To qualify as a petitioning creditor, however, a creditor's claim against the debtor (the "Claim") must be:

- (1) **Non-contingent**. This means that the Claim cannot be one that depends on a future event. An unmatured debt, once all requirements for liability other than the passage of time have occurred will not be considered contingent.
- (2) **Not the subject of a bona fide dispute as to liability or amount**. This means that there cannot be an objectively reasonable basis for a dispute as a matter of fact or law regarding the liability or amount owed by the debtor in the Claim. If the debtor subjectively believes that the debt is not owed or the amount claimed is inaccurate, this will not be sufficient to be categorized as a bona fide dispute. A creditor is also prevented from relying upon the undisputed portion of an otherwise disputed Claim to reach the monetary threshold discussed above. However, if a creditor has multiple claims, then a dispute concerning one claim does not disqualify the application of the other.
- (3) **Unsecured or undersecured**, whether separately or in the aggregate with other petitioning creditors' claims, in the amount of at least USD\$16,750 (which amount is periodically increased to account for inflation).

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Apart from the requirements of the Claim, once qualified as a petitioning creditor, the creditors must be able to demonstrate that the debtor is generally not paying his debts as they become due.

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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?

Chapter 11 proceedings are the US's restructuring-centric proceeding, which can be initiated either by voluntary petition or through an order for relief on an involuntary petition. If Speculation Inc. files a Chapter 11 petition, the worldwide automatic stay, for which US bankruptcy proceedings are well-known, will immediately come into effect. The automatic, which is provided for by 11 U.S. Code § 362, is very broad, designed to provide the debtor with sufficient "breathing room" to formulate a restructuring plan, negotiate with creditors and realize its assets.

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Against that background, the filing of a Chapter 11 petition by Speculation Inc:

- (1) Will not affect the DOJ investigation, as the automatic stay does not impact the commencement or continuation of criminal actions against the debtor (here, Speculation Inc.), as expressly provided for in § 362;
- (2) Will impact its broker's ability to enforce or call in the margin loan. The automatic stay generally applies to any proceedings that impact the property of the estate, which would include the shares purchased and owned by Speculation Inc., which form the collateral for the margin loan. Indeed, the Bankruptcy Code specifically prohibits any acts to obtain possession or control of property of the estate, the enforcement of a lien against property of the estate on account of a pre-petition claim and any attempts to collect on pre-petition claims, including through demand letters or calls. In addition to the broker's collateral being property of the estate, any claim by the broker for the recovery of the margin loan, after declaring a default prior to the filing of the

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Commented [la66]: Incorrect, the margin loan is a securities contract exempt from the automatic stay, so the broker can sell the collateral and apply the proceeds to the balance of the loan

petition, would be a pre-petition claim. It follows that the effect of the filing of the Chapter 11 petition will be that the broker cannot, during the stay, seek to enforce the loan by obtaining possession or control of the shares it holds as collateral or by otherwise attempting to collect on the loan, through any form of demand, litigation or action. Unless the broker applies for and obtains permission to lift the stay, if the broker attempts to take action in violation of the stay, it can be held in contempt of court and the actions will be void or voidable, depending on the relevant circuit. The broker may, if appropriate, apply for the automatic stay to be lifted in order for it to take actions that would otherwise be prohibited on the basis that, for example, there is a lack of adequate protection of its interest in the property of the estate.

(3) *May allow Speculation Inc. to remain in possession of the leased premises. If the Speculation Inc.'s lease has expired at the time of the filing of the petition, then the filing does not affect its landlord's ability to evict Speculation Inc. from the leased premises, as there is a statutory exception to the automatic stay that allows a landlord to evict a debtor-tenant from a non-residential property in those circumstances. However, if the lease has not expired, then the automatic stay will operate to prevent the landlord from taking any steps towards the recovery of the rent owed by Speculation Inc., whether through demands or action for payment or eviction from the premises.*

(4) *Will stay the employment lawsuit. The filing operates as a stay of continuation of an action or proceeding against the debtor that was commenced before the filing of the petition (§ 362(a)(1)). There is no exception for proceedings relating to employees or employee rights and, therefore, without more, the existing proceedings will be stayed.*

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?

US bankruptcy courts generally take a universalist approach towards bankruptcy cases with international implications, with certain exceptions for the protection of US assets and creditors. The US has adopted the UNCITRAL Model Law on Cross-Border Insolvency through Chapter 15 of the Bankruptcy Code.

Commented [la67]: Correct, 1 mark, on the facts here, the rent is in arrears but the lease has not expired

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Under Chapter 15, the requirements of recognition are minimal. There must be a foreign court or administrative proceeding with respect to the debtor that is pending and by which the foreign representative is empowered to act (§101(23)). A “foreign proceeding” is defined as a “collective judicial or administrative proceeding in a foreign country...under a law relating to insolvency or adjustment of debt in which proceedings the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation” (§101(23)). This definition has been found to be sufficiently broad to encapsulate English schemes of arrangement. As such, the English scheme of arrangement being considered by Stella could be recognized by a US bankruptcy court under Chapter 15.

Regarding whether such recognition will be as a foreign main or non-main proceeding, this is a question that will ultimately be within the discretion of the US bankruptcy courts. The determination of foreign proceedings as foreign main or foreign non-main proceedings is relevant, as that classification will determine the scope of relief available to Stella following recognition. Foreign proceedings will be classified as foreign main proceedings if they are commenced in the debtor’s centre of main interest (COMI). The question, thus, becomes whether England can be considered Stella’s “centre of main interests”. A debtor’s COMI is presumed to be its place of incorporation, but that presumption is rebuttable based on consideration of other relevant factors including the location of its headquarters, management, its primary assets and majority of its creditors, and the jurisdiction whose law will apply to most of its disputes (In Re SPhinX Ltd). In the US, COMI is generally assessed as at the date of the US petition for recognition, rather than the commencement of the foreign proceedings (as recommended by the UNCITRAL Working Group), and should be ascertainable by interested parties on the basis of objective evidence.

As Stella was incorporated in France, France will, without more, be presumed to be its COMI. This is buttressed by the fact that its headquarters are also located in France. While Stella has operations and assets in England, where it has a or multiple retail stores, it also has operations and stores throughout Europe, Asia and North America. This means that that factor, alone, is unlikely to be sufficient to rebut Stella’s presumed COMI of France in favour of England. However, Stella’s funding is comprised of a bank loan and Eurobonds, both of which are governed by English law. This likely means that the law of England will apply to most disputes and, moreover, assuming that the governing law is an indication of the location of the lender of the bank loan and issuer of the Eurobonds, that the debtor’s main creditors are located in England. Accordingly, as one of the locations of Stella’s operations and its assets, and also the location of a majority of its creditors and the jurisdiction whose law will apply to most disputes, it is very likely that the English proceedings may be recognised as foreign main proceedings.

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

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Commented [la72]: This is the correct analysis and the mere fact that some financial debt is governed by English law is unlikely to change the outcome. As France is the COMI, the English proceedings cannot be foreign main proceedings. They can be recognized as foreign non-main proceedings because the retail store in England is the necessary establishment.

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(GameMart) has a 10-year exclusive license to manufacture Xbox and pays ToyCo monthly royalties. GameMart operates a factory in California that it leases from Land Corp on a longer term lease with seven years to go; the lease prohibits assignment without Land Corp's consent. The Xbox toys are selling well, but GameMart's other toy lines are doing poorly, so it is considering a Chapter 11 bankruptcy. Answer the following questions:

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

Using the definition formulated by Professor Vern Countryman, an executory contract is a contract with material unperformed obligations on both sides. Assuming that GameMart's 10-year exclusive license to manufacture Xbox is still ongoing, then it will be an executory contract.

Commented [la74]: Correct, 1 mark, ToyCo has the ongoing obligation to maintain exclusivity

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

The Bankruptcy Code allows for the rejection or the assumption and assignment of executory contracts. Once a contract is executory, a debtor can, generally, elect to, amongst other options, assume and assign the contract, by transferring the debtor's rights under the contract to a third-party (whether as part of a 363 sale, as in this instance, or otherwise).

*The US Bankruptcy Code annuls contractual restrictions on assignments, so as to allow a debtor to achieve a higher return for its assets than if he was bound by those provisions. However, counterparty consent is still required in certain instances, including where substantive non-bankruptcy law, including intellectual property and licensing law, provide that the counterparty cannot be compelled to accept performance from a transferee (s. 365(c)). Thus, a licensee of a third-party's intellectual property may not be able to assign a pre-petition license without the licensor's consents. Federal law bans trademark licenses from being assigned without the licensor's consent (*In re Trump Entertainment Resorts, Inc.*). As the Xbox manufacturing license includes the license of ToyCo's patents, under which GameMart is required to pay it continued royalties, it will not be assignable without ToyCo's consent.*

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Commented [la76]: Correct, 1 mark

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

Yes, GameMart can transfer the factory lease as part of 363 sale without Land Corp's consent.

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The Bankruptcy Code allows for the rejection or the assumption and assignment of executory contracts and unexpired leases. Furthermore, the US Bankruptcy Code frees debtors from contractual restrictions on assignments, so as to allow a debtor to achieve

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a higher return for its assets than if he was bound by those provisions. Counterparty consent is, therefore, only required in certain exceptional instances.

As such, as a result of these provisions, GameMart's lease being an unexpired one, with 7 years remaining, it can be assigned without Land Corp's consent, despite the language in the lease that prohibits assignment without its consent.

*** End of Assessment ***