



33.5/50 = 67%

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**

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

Commented [la1]: Total marks 4/10

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 [la2]: 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 [la3]: Incorrect, the correct response is (b). The neighbor may have a claim for environmental contamination from the debtor's property.

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 [la4]:** Incorrect, the correct response is (a). (b) is not correct because the former employee has no future obligations to perform.

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 [la5]:** Incorrect, the correct response is (b)

Question 1.5

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

**Commented [la6]:** 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

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

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.*

**Commented [la7]:** Incorrect, the correct response is (c), the debtor is entitled to deference to its business judgment on whether to sell assets

**Commented [la8]:** Incorrect, the correct response is (d)

Question 1.8

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.

Commented [la9]: Correct, 1 mark

Question 1.9

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.

Commented [la10]: Incorrect, the correct response is (c)

Question 1.10

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.

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

**Commented [la12]:** Total marks 8.5/10

**Question 2.1** [1 mark]

**Commented [la13]:** Total marks 1/1

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

*Set off refers to the process by which creditor holding a claim against the debtor as well as simultaneously owing the debtor is allowed to set off these two amounts against each other. Set off rights can usually improve the position of creditors in relation to other unsecured creditors who do not owe the debtor since it gives the creditor the benefit of the full amount owed to rather than dealing with the lower amount owed by the debtor on the claim which is invariable unsecured.*

**Commented [la14]:** Correct, 1/2 mark

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

**Question 2.2** [2 marks]

**Commented [la16]:** Total marks 2/2

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

*In filing a petition in US Bankruptcy Court, one needs to review the Federal Bankruptcy Rules of Procedure. These Rules establish the procedure followed in the US Bankruptcy jurisdiction and are actually promulgated by the Supreme Court. You would also need to be familiar with the Federal Rules of Civil Procedure as these may impact on the conduct of bankruptcy proceedings together with the bankruptcy rules made by the local court in which the filing is proposed to be made as well as any local practices (both of the judge and the local attorneys) in the relevant legal profession.*

**Commented [la17]:** Correct, 1/2 mark

**Commented [la18]:** Correct, 1/2 mark

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

**Commented [la20]:** Correct, 1/2 mark, generally local attorneys' practices aren't codified in writing for others to review

**Question 2.3** [2 marks]

**Commented [la21]:** Total marks .5/2

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

*The absolute priority is a rule in US bankruptcy law which determines the order in which payments are made to the creditors of a person (juridical or individual) in liquidation and its shareholders where applicable. It provides that some debts are to be settled in absolute priority to other debts as part of the fair and equitable requirement which underpins the distribution. Those debts are usually the costs of the bankruptcy proceedings and in the case of an individual debtor, any outstanding estate debts. The principle requires that secured creditors be paid first followed by unsecured creditors and then shareholders.*

**Commented [la22]:** Partially correct, 1/2 mark, specifically senior claims must be satisfied in full before a junior claim receives anything

*The recognised exception to this rule is that a lower ranking creditor who invests new money into the debtor could be placed in a better position to a higher-ranking creditor in another class. In order to meet this requirement, the new injection must be new, substantial, necessary for the success of the reorganisation plan, reasonable equivalent to the value retained and in the form of money or money's worth.*

**Commented [la23]:** Incorrect, this describes the creation of a new senior claim. The exception to the absolute priority rule is that in a chapter 11 plan, deviation is permitted with permission of the affected creditor.

**Question 2.4** [2 marks]

**Commented [la24]:** Total marks 2/2

**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 refers to a lien which has been collateralized and made to rank at least on the same level as or senior as liens which existed before the bankruptcy proceedings were commenced. It is usually granted by the court when other methods of DIP financing are not available. In order for this lien to be granted, the debtor must show by the interests of the secured creditor holding pre-existing liens are adequately protected. This protection is usually demonstrated by (as provided in section 361(e) of the Bankruptcy Code) period payments to set off any decrease in collateral value, additional/replacement lien to the same value of any decrease in collateral value of any other mechanism through which the secured creditor is compensated for the value of its collateral.

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Commented [la26]: Correct, 1/2 mark

Commented [la27]: Correct, 1/2 mark

Question 2.5 [3 marks]

Commented [la28]: Total marks 3/3

**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?**

An underlying principle of bankruptcy proceedings in the US is the notion that creditors in the same class should be subject to the same rules of recouping their investment in the debtor and that all creditors should be treated equally and without preference. In enforcing this principle there are circumstances in which pre-bankruptcy payments made to creditors could be recouped and made available to the general pool of creditors.

A preference claim refers to a claim usually made under section 547 of the Bankruptcy Code which provides that certain payments made by the debtor within a prescribed period should be clawed back and made available for distribution to the general pool of creditors. Every payment made by the debtor before entering bankruptcy is not liable to be deemed as preferential and in order to be so classified, the transaction must satisfy the following requirements:

- A. The transaction should provide something of value to the creditor. This is to be determined on the facts and usually includes the payment of money or some other interest in property.
- B. The transaction should have been for the benefit of the creditor
- C. The payment or value received must have been in respect of a pre-existing debt owed to the creditor
- D. The transaction has to have been made within 90 days of the bankruptcy petition for arm's length creditors and 365 days in respect of a creditor connected with the debtor
- E. The transaction must have been made while the debtor was insolvent. This presumption arising in the 90-day period before the issuance of the petition

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Commented [la30]: Correct, 1/2 mark

Commented [la31]: Correct, 1/2 mark

Commented [la32]: Correct, 1/2 mark

Commented [la33]: Correct, 1/2 mark



F. *The transaction must have allowed the creditor to receive a better return or payment than it would have obtained under the bankruptcy process.*

Commented [la34]: Correct, 1/2 mark

*It is important to note that no fault on the part of either the debtor or creditor is required to establish a preference payment under section 547*

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

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Question 3.1 [3 marks]

Commented [la37]: Total marks 2.5/3

**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 is a court created by statute in the Bankruptcy Code 1978. They are subject to the general jurisdiction of the district court which refers bankruptcy matters to them for determination. As part of this process of jurisdictional control, bankruptcy courts are only permitted to issue review and issue final orders in core proceedings. the court may hear non-core proceedings which are related to core proceedings but must submit its proposed final determination to the district court for confirmation.*

Commented [la38]: Correct, 1 mark

*Core proceedings are related to the administration of the bankrupt's estate, the allowance or disallowance of claims, counterclaims, orders in relation to obtaining credit and similar issues. The list of what may qualify as a core proceeding is non-exhaustive and is designed to be flexible. It should be noted that final orders in core proceedings which impinge on the Article III jurisdiction of the district, circuit and Supreme Court are prohibited.*

Commented [la39]: Correct, 1/2 mark, specifically the bankruptcy court can enter a final order on a matter unique to the Bankruptcy Code such as a challenge to a petition

*Appeals from a bankruptcy court are sent to the district court overseeing the bankruptcy court. In some circuits, the bankruptcy appeal are heard by a Bankruptcy Appellate Panel, a specialist panel.*

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Commented [la41]: Correct, 1/2 mark

*Non final orders are defined an interlocutory order which do not decide the final litigation between the parties one way or another. In reviewing non final orders on appeal, the appeal must have been commenced by leave of either the bankruptcy court or the district court. The standard of revie applied is that the decision will only be interfered with if the bankruptcy court committed an abuse of discretion. This is established if the bankruptcy court consideration irrelevant factors or failed to consider relevant factors, made an error or law of fact or acted arbitrarily.*

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 the recognition of a foreign main proceeding, several provisions of the Bankruptcy Code automatically apply. Firstly, an automatic stay takes effect. This stay prevents creditors from commencing, continuing and enforcing any court proceedings against the debtor and its assets. The foreign representative in the foreign main proceedings is also granted the permission to operate the debtor's business in the ordinary course of such business pending finalization of the proceedings. There is also an automatic prohibition on the sale, transfer and use of the debtor's property and assets for transactions outside the ordinary course of business. There is also the prohibition on post-petition transfers and perfection of security interests.

Commented [la43]: Correct, 1/2 mark

Commented [la44]: Correct, 1/2 mark

Commented [la45]: It's better to think of this as permitting the foreign representative to request approval for such transactions

Commented [la46]: Correct, 1/2 mark

These relief may be granted on a discretionary basis in foreign non main proceedings provided that the foreign representative can convince the US bankruptcy court that an order in those terms is appropriate under US law. This is one of the prime disadvantages of being recognised as a foreign non-main proceeding vis-à-vis a foreign main proceeding.

Upon recognition as either a foreign main or non-main proceeding, a foreign representative may apply for discretionary relief in the form of discovery in respect of the debtor's assets and financial affairs and the vesting of the debtor's US assets in the foreign representative or other person for management. The foreign representative is also able to seek any other relief which is necessary for the management and purposes of the bankruptcy process and to protect the assets of the debtor or safeguard the interests of creditors.

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Commented [la48]: Correct, 1/2 mark

Commented [la49]: Correct, 1/2 mark

Question 3.3 [4 marks]

Commented [la50]: Total marks 4/4

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

Two main duties are owed to a Delaware corporation by its directors. These are a fiduciary duty which requires the director to be loyal to the best interests of the corporation as well as a duty of care to make educated and informed decision making in carryout his duties as a director.

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Commented [la52]: Correct, 1 mark

These duties are essentially limited by the operation of the business judgment rule. This rule presumes that the director has acted in good faith and on the basis of reasonable information. This presumption can only be rebutted where it can be shown that the director had no honest belief in the course of action undertaken, or was not reasonably informed or where the action complained of was not in the best interests of the corporation. These are all questions of fact and law which must be judged against the appropriate factual background. Unless the presumption is rebutted as set out above, a director of a Delaware corporation may only be liable on account of gross

Commented [la53]: Correct, 1 mark

negligence in the performance of his duties although in practice he is also likely to be exempted from liability in accordance with the corporation's internal documents.

These directors' duties are owed to the corporation itself and to its shareholders. It should be noted that unlike other jurisdictions, these duties are not owed to creditors when the corporation is potentially or actually insolvent. The debate on this issue was firmly established in the case of *North Am Catholic Educational Programming Foundation Inc v Gheewalla* where it was remarked that individual creditors have no standing to prosecute a claim of breach of fiduciary duty by a director.

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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.

An involuntary proceeding refers to proceedings commenced by the creditors of a debtor under either chapter 7 or chapter 11 of the Bankruptcy Code. These types of proceedings cannot be commenced against a farmer, family farmer or nonprofit corporation or under any of the other chapters in the Bankruptcy Code.

In order to qualify as a petitioning creditor, a creditor's claim must fulfil the following conditions:

- a. The debt must be at least USD16, 750. This figure is not fixed and is periodically increased in accordance with inflation.
- b. It must be a non-contingent claim. That is, it must be a claim whose existence does not depend on the occurrence of a future event such a default on the part of the debtor or an unmatured debt in respect of which the obligation on the part of the debtor to pay has not yet arisen.
- c. The claim itself must not be the subject of a bona fide dispute as to the liability for the debt or the actual amount owed. In determining what constitutes a bona fide dispute, there must be an objectively verifiable challenge to either the liability or amount of the debt said to be owed. For these purposes, the personal or subjective belief of the debtor that the money is not owed at all or in the amount claimed is not sufficient. Where only a portion of the debt is disputed, then the undisputed portion may not be used to found the petition even where it exceeds the statutory amount.
- d. The petition must claim that the debtor has not or is unable to pay its debts as they fall due or that a receiver or other custodian of assets has been appointed over the debtor in the previous 120 days.

Commented [la56]: Correct, 1/2 mark, also the claim must be unsecured or undersecured in this amount

Commented [la57]: Correct, 1 mark

Commented [la58]: Correct, 1/2 mark

Commented [la59]: Correct, 1 mark

Commented [la60]: Correct, 1/2 mark

Commented [la61]: Correct, 1/2 mark

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

Commented [la62]: Total marks 7.5/15

Question 4.1 [5 marks]

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

*Once a petition has been filed pursuant to Chapter 11 of the Bankruptcy Code, an automatic stay comes into effect. This stay is a very broad one under section 362 and prohibits the interference with any assets of the debtor whether located in the US or elsewhere. Any breach of this stay is likely to be considered a contempt of court which attracts the usual contempt sanctions in addition to potentially rendering the underlying transaction void or voidable.*

*The wide ambit of the stay is subject to certain statutory exceptions which have been set out in section 362(b) - (d). The actions set out above are affected as follows:*

- a. *The DOJ investigation is exempted from the stay as the investigation is part of the regulatory process and does not in any way interfere with the assets or property of the debtor.*
- b. *The margin loan default similarly is exempted on the basis that any enforcement of it would be an exercise of rights under a security contract.*
- c. *The landlord would be prevented from acting on the delinquent lease as that would constitute an acting to either establish a pre-petition claim for rent owed or an attempt to obtain possession of the demised premises which would constitute interference with the debtor's property.*
- d. *The continuation of the employment lawsuit would be prohibited since it would constitute litigation on a pre-litigation claim which is specifically prohibited by section 362.*

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*

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Commented [la64]: Correct, 1 mark

Commented [la65]: Correct, 1 mark

Commented [la66]: Correct, 1 mark

Commented [la67]: Correct, 1 mark

Commented [la68]: Correct, 1 mark

Commented [la69]: Total marks 0/5

***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?***

*In order to obtain recognition of the English scheme of arrangement, the foreign representative must satisfy the US court that a foreign proceeding in relation to the debtor is pending and that in those proceedings, the foreign representative has been authorised to act. It should be noted that the foreign proceeding need not resemble in US bankruptcy proceeding in order for the recognition order to be granted once it falls under the fairly broad definition of a foreign proceeding under section 101(23) of the Bankruptcy Code.*

*In order to determine whether the English scheme of arrangement should be recognised a either foreign main or non-main proceeding, the US court must consider the location of the company's headquarters, the location of its management and primary assets, the location of the majority of its creditors and the law governing the disputes.*

*On consideration of these factors, it is likely that the English scheme of arrangement would be considered a foreign main proceeding for the main reason that, although, Stella is incorporated in and managed from France, the loans and bonds which fund its business are governed by English law and are likely advanced by English creditors. This means that most of Stella's creditors will be based in England and English law will govern most the disputes likely to arise in the bankruptcy. These two factors outweigh the fact that the factories are located in Italy and business is conducted worldwide. There is simply a greater connect with England on the fact to justify the scheme of arrangement being designated a foreign main proceeding.*

**Question 4.3 [5 marks]**

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

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

**Commented [la70]:** Incorrect, on these facts the presumption in favor of COMI in the jurisdiction of incorporation is unlikely to be rebutted because the headquarters are also in that country and only financial debt is governed by English law. Because COMI is not the jurisdiction of the proceeding, foreign main recognition would not be available. Foreign non-main would be available because there is a retail store in England that would constitute the necessary establishment.

**Commented [la71]:** Total marks 2.5/5

The license to manufacture Xbox should be considered as an executory contract given that as at the current date, the majority of the obligations owed by GameMart are yet to be performed. Indeed, the contract itself is a long-term contract heavily based on future performance.

**Commented [la72]:** Correct, 1 mark, and ToyCo has the obligation not to sue for infringement (a license is a covenant not to sue)

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

GameMart would be unable to transfer the Xbox licence as part of a 363 sale in the absence of Toyco's. The exclusive license most likely contains copyright information which means that ToyCo's consent would be required.

**Commented [la73]:** Correct, 1/2 mark, the facts state that the toys are patented. Also, intellectual property law requires the consent of the licensor.

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

GameMart would be able to transfer the lease notwithstanding the terms that the landlord's consent is required. The question becomes whether the 363 sale is being undertaken in its business judgment in respect of which creditors must be considered and the fiduciary duty to them complied with. GameMart must also show that the transaction is in the best interests of the company as a whole.

Given the performance of the toy lines and the resulting impact on its business operations, Game Mart would be able to establish these two points and transfer the lease even if the landlord's consent is not obtain.

**Commented [la74]:** Correct, 1 mark, contractual anti-assignment provisions are ineffective in bankruptcy

\* End of Assessment \*