



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

Commented [H(1)]: Total marks 30.5/50

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

Commented [H(2)]: Total marks 5/10

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 [H(3)]: 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 [H(4)]: Correct, 1 mark

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

- (a) A neighboring landowner to ABC Corp's manufacturing plant.
- (b) An environmental advocacy group that opposes ABC Corp's operations.**
- (c) The landlord of ABC Corp's corporate office.
- (d) People who live several miles downstream from ABC Corp's manufacturing plant and have been exposed to the plant's toxic waste.
- (e) The US Internal Revenue Service.

Question 1.3

Commented [H(5)]: Incorrect, the correct response is (a)

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

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

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

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.

Commented [H(6)]: Incorrect, the correct response is (b)

Commented [H(7)]: Incorrect, the correct response is (e)

Commented [H(8)]: Incorrect, the correct response is (c)

(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 [H(9)]: 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 [H(10)]: 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 [H(11)]: Correct, 1 mark

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.

Commented [H(12)]: Correct, 1 mark

QUESTION 2 (direct questions) [10 marks]

Commented [H(13)]: Total marks 9/10

Question 2.1 (1 mark)

Commented [H(14)]: Total marks 0.5/1

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

[Answer:

Setoff is a concept under which entities are allowed to apply and set-off their mutual debts against each other. This concept will avoid the useless transactions of X making some payment to Y and Y making some payment to X for some previous obligations.

Commented [H(15)]: Correct, 1/2 mark

Setoff is not permitted in the following circumstances:

Commented [H(16)]: The disallowance of setoff is because it can improve the position of the creditor as compared to other unsecured creditors

- The claim of creditor against the estate is disallowed.
- The position of creditor is improved after setoff over what it was if setoff had been done 90 days before petition.
- The obligation of creditor towards the debtor 90 days before the petition and at a time when debtor was insolvent for exercising setoff.
- The claim of creditor in the estate was acquired after the petition or within 90 days before petition when debtor was insolvent.]

Question 2.2 [2 marks]

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

[Answer:

The following rules should be reviewed while preparing for a filing for a bankruptcy court:

- 1- Bankruptcy Rules
- 2- Local Rules of Bankruptcy Court
- 3- Federal Rules of Civil Procedure
- 4- Personal practices of Judges
- 5- Unwritten local practices]

Commented [H(18)]: Correct, 1/2 mark

Commented [H(19)]: Correct, 1/2 mark

Commented [H(20)]: Correct, 1/2 mark

Commented [H(21)]: Correct, 1/2 mark

Commented [H(22)]: A good reason to have local counsel

Question 2.3 [2 marks]

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

[Answer:

Absolute Priority Rule is the rule governing the order in which payments to creditors and shareholders are made in the event of a liquidation. Creditors are paid their debts first then the remaining assets are divided among shareholders. Among creditors, secured creditors are paid first and then the unsecured creditors.

This rule also requires that each category of claims must be paid in full before moving on to the next category of creditors.

Deviations from the absolute priority rule is not allowed in Chapter 7 plan but deviation from this rule is allowed in Chapter 11 plan.

Following are the possible deviations:

- 1- The deviation is allowed under Chapter 11 with the consent of effected creditors
- 2- In Chapter 11 plan, senior creditors may agree to receive less amount than they would have under APR if giving money to lower priority creditors would help them in getting their approval of the plan.]

Question 2.4 [2 marks]

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

[Answer:

A priming loan is a type of debtor-in-possession (DIP) financing that allows a company in Chapter 11 bankruptcy proceedings to get credit to help in specific areas of its business operations and its reorganization. Funds from a priming lien can be used only for core business expenses., such as repairs, supply chain management, and payroll. A priming loan may also be called a DIP loan.

Following requirements must be met for granting priming lien:

- 1- Credit will be available to the debtor after granting a priming lien
- 2- The secured creditor being primed has adequate protection through an equity cushion, periodic cash payments or otherwise
- 3- A priming loan must also satisfy requirements for the borrower's existing creditors, and the loan agreement might call for money to be automatically set aside by the debtor company to pay interest and outstanding debt to these existing creditors.
- 4- Those incumbent creditors who lent money to the company before it filed for bankruptcy protection, will have a say in deciding whether the debtor company can get a priming loan or not.]

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Commented [H(25)]: Correct, 1/2 mark

Commented [H(26)]: Correct, 1/2 mark

Commented [H(27)]: Total marks 1.5/2

Commented [H(28)]: Specifically, the lien securing the loan is equal or senior to existing liens on the debtor's property

Commented [H(29)]: Specifically, the funds must be unavailable without the priming lien

Commented [H(30)]: Correct, 1/2 mark

Question 2.5 [3 marks]

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

[Answer:

Preference: It's a transfer of the debtor's property which was made in a suspect period before the date of petition and it has to be returned to the debtor's estate if it exceeds the amount the recipient would have received in a chapter 7 liquidation if the transfer had not been made. There is no need of showing any fault of debtor or the recipient for the payments made, and the recipient creditor suffers no penalty except return of the transfer. The recipient of a avoided preference has an unsecured claim for the value returned to the estate.

Following elements of a preference claim need to be proved:

- 1- It was made during the suspect period.
- 2- It was made when the debtor was insolvent.
- 3- It was made for benefit of a creditor.
- 4- Interest of the debtor in a property was transferred.
- 5- Preference was made for a pre-existing debt of the debtor before the transfer.
- 6- Due to this preference, the creditor has received more than he would have under Chapter 7 bankruptcy.]

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

Question 3.1 [3 marks]

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

[Answer:

The circumstances in which a bankruptcy court may enter a final order are as follows:

- 1- Only District courts have the jurisdiction to adjudicate a petition for commencement of bankruptcy proceedings, but a bankruptcy court can exercise the district court's delegated power to enter a final order on the ~~case~~ challenging the validity of a bankruptcy petition.
- 2- The judges of bankruptcy courts may determine a core proceeding over which they lack constitutional authority by issuing a report and recommendation its review by the district court, and with the consent of the parties, can pass a final order.

Appeals from bankruptcy court orders are reviewed by district court for the district in which they have their office. In some cases, the bankruptcy appeals are heard by the BAP (Bankruptcy Appellate Panel), which is constituted from the judges of the bankruptcy courts within the same circuit. In these circuits, a party has the option to request that instead of BAP, the appeal may be heard by the district court only. Against the orders of district court or BAP, appeal can be preferred before the circuit court of appeals. In some rare cases, an appeal from a bankruptcy court can go directly to the court of appeals, where the bankruptcy court or district court certifies that either that (i) the appeal raises a question of law as to which there is no controlling decision of the circuit or the US Supreme Court, or it required resolving conflicting controlling decisions, or (ii) immediate appeal may materially

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Commented [H(33)]: Correct, 1/2 mark

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Commented [H(41)]: Correct, 1/2 mark

Commented [H(42)]: Correct, 1/2 mark

Commented [H(43)]: Correct, 1/2 mark

advance the progress of the case. The court of appeals has discretion whether to accept such a case or not.

Non-final or interlocutory orders can be reviewed with the permission of appellate courts only. Some final orders may not be final if they do not resolve all matters in dispute. Also, a final order may not be a final order if the parties involved do not agree to the bankruptcy court's jurisdiction.]

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?

[Answer:

Following will apply on a discretionary basis to the debtor's property within the territorial jurisdiction of the United States upon recognition of a foreign main proceeding:

- 1- Automatic stay
- 2- Transfer, use or sale of property outside the ordinary course.
- 3- Avoidance of post-petition transfers and post-petition perfection of security interests.
- 4- operation of the debtor's business by the foreign representative in the ordinary course

In addition to the above, the following relief can also be granted on a discretionary basis:

- (1) extension of provisional relief.
- (2) allowing administration of the debtor's assets in US by the foreign representative or any other person.
- (3) authorization of discovery regarding the debtor's assets and affairs.
- (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.

When the bankruptcy court seeks to use its discretion in a foreign non-main proceeding, the bankruptcy court must satisfy itself that it is proper under US law to administer the relevant assets in the foreign non-main proceeding. In addition, the bankruptcy court's ability to give relief to the adequate protection of interested parties and to terminate arbitrary exceptions at the request of an interested party to the recognition of a foreign non-main proceeding is less protective than the recognition of a foreign main proceeding.]

Question 3.3 [4 marks]

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

Commented [H(44)]: Total marks 2/3

Commented [H(45)]: Incorrect, these are all automatically applicable on recognition of a foreign main proceeding

Commented [H(46)]: Correct, 1/2 mark

Commented [H(47)]: Correct, 1/2 mark

Commented [H(48)]: Correct, 1/2 mark

Commented [H(49)]: Correct, 1/2 mark

Commented [H(50)]: Total marks 4/4

[Answer:

Following are the duties of Directors:

Directors owe a fiduciary duty of faithfulness to the corporation's best interest and a duty of care in their decision making. The directors have a duty to act in good faith with reasonableness on the basis of available information and they are expected to do so. They are protected from liability for errors of judgment by the business judgment rule. The business judgement rule does not apply if a decision is taken by majority in the board of directors.

Directors have a duty towards the corporation and its shareholders. They do not owe any duty towards creditors even during insolvency proceedings. This has been held and confirmed by the Delaware judgement also.]

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.

[Answer:

Following are the requirements of a petitioning creditor:

- The creditor should have a claim against the debtor that is non-contingent. It should not depend on the occurrence of a future event.
- The creditor must have a debt that is unmaturred and is not contingent if all the requirements for liability, have been met.
- The claim should not be the subject of a bona fide dispute as to its liability or the amount. A bona fide dispute is said to exist if there is a reasonable basis for a dispute as a matter of fact.
- If a creditor has more than one claim and one part of the claim is disputed, then the creditor cannot use the undisputed part to reach the threshold required for filing of claim. It is also to be noted that a dispute in one claim does not disqualify filing of the other claim if it meets the requirements of a petitioning creditor.
- Underscored or Unsecured claims, separately or in the aggregate with all other petitioning creditors' claims, should be of an amount of at least USD 16,750. This amount can change depending upon the inflation.]

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

Commented [H(51)]: Correct, 1 mark

Commented [H(52)]: Correct, 1 mark

Commented [H(53)]: Correct, 1 mark

Commented [H(54)]: This is only correct if the majority of the directors are not independent / disinterested in the subject of the decision

Commented [H(55)]: Correct, 1 mark

Commented [H(56)]: Total marks 4.5/5

Commented [H(57)]: Correct, 1 mark

Commented [H(58)]: Correct, 1/2 mark

Commented [H(59)]: Correct, 1 mark

Commented [H(60)]: Correct, 1/2 mark

Commented [H(61)]: Correct, 1 mark, I assume this is autocorrect for undersecured

Commented [H(62)]: Correct, 1/2 mark, and creditors must allege the debtor is not paying debts as they come due or that "within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or an agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession."

Commented [H(63)]: Total marks 3/15

Commented [H(64)]: Total marks 0/5

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?

[Answer:

- (i) The effect of Chapter 11 petition on DOJ investigation would be that a court-appointed trustee will step in to run the company throughout the bankruptcy proceeding. Speculation Inc will not be able to make certain decisions without the permission of the courts. These decisions include the sale of assets, other than inventory in the regular course of business, starting or terminating a rental agreement, and stopping or expanding the business operations. In this case, the court also has complete control over the decisions related to retaining and paying attorneys and entering contracts with vendors and unions. Moreover, Speculation Inc will not be able to arrange any loan that will start after the bankruptcy is complete.
- (ii) The effect on margin loan default will be that Speculation Inc will continue to stay in business but will have to restructure its obligations towards the margin loan. It has to propose a reorganisation plan that is in the best interest of its creditors including its broker who had given the margin loan. If Speculation Inc does not put forth a plan then the creditors may propose one. During Chapter 11 proceedings court will help Speculation Inc to restructure its debts and obligations.
- (iii) Speculation Inc will have to seek permission of the court to renew a delinquent lease as it is not allowed to do so under Chapter 11 proceedings.
- (iv) Speculation Inc can defend the employment discrimination but the courts has control over its decisions relating to any payments to be made to its attorneys for defending the lawsuit and also over its decision to settle the case or enter into a contract with the employee who has filed the employment discrimination lawsuit.]

Commented [H(65): Incorrect, although the existence of a fraud investigation may be a basis to seek appointment of a trustee, that is not automatic on filing the petition. On the filing of the petition, the automatic stay comes into effect, but it will not bar the continuation of the DOJ investigation.

Commented [H(66): Incorrect, the margin loan is a securities contract that is exempt from the stay, so the counterparty can closeout the contract post-petition.

Commented [H(67): Because the lease did not expire prior to the petition being filed, the landlord cannot commence eviction proceedings due to the effect of the stay

Commented [H(68): Incorrect, pre-petition litigation is stayed by operation of the automatic stay

Commented [H(69): Total marks 0.5/5

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?

[Answer:

To file for Chapter 15 proceedings, Stella will first have to prove that a foreign proceeding exists and an insolvency proceeding is pending in any country other than US.

The English scheme of arrangement will be recognised as a foreign proceeding as a scheme of arrangement, which is under consideration by Stella, is to help the company in the restructure of its debt, and recovery from financial distress. No doubt it is not an insolvency process as it is the provisions of Companies Act 2006 of UK and not under any insolvency legislation, but it has been recently held in the Cayman Islands case that those schemes which are legalized at home, should be recognized in other countries also.

In view of the above, Stella will be able to file for Chapter 15 proceedings.

The recognition will be that of a Foreign Non-Main proceedings as Stella does not have a COMI in the US.]

Question 4.3 [5 marks]

ToyCo is an American toy company that has created a popular line of folding robot toys called Xbox. The toys are covered by several US patents. Currently, GameMart Inc (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?

[Answer:

Yes, the license to manufacture Xbox is an executory contract as it is legally binding agreement between ToyCo and GameMart and currently have a 10 year period.]

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

[Answer:

No. GameMart cannot transfer the Xbox license as part of 363 sale without ToyCo's consent as the license to manufacture has been granted by ToyCo only. They are the main creditors and can object to sale of license as part of 363 sale in the court]

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

[Answer:

Yes, GameMart can transfer the factory lease as part of 363 sale without Land Corp's consent as under Section 363, a debtor-in-possession can sell property of the estate free and clear of any interests, including leasehold interests, provided that one of these five situations exist - applicable non-bankruptcy laws permit, the entity consents, the interest is a lien and the sale price is greater than all liens, the interest is in bona fide dispute and the entity is compelled to accept a money in lieu of the interest.

Commented [H(70): Correct, 1/2 mark, Stella's COMI is in France due to incorporation and headquarters, and connections to other jurisdictions are not sufficient to make its COMI anywhere else. Assuming that Stella has a store in England, the requirement of an establishment in the jurisdiction of the foreign proceeding is met.

Commented [H(71): Incorrect, the difference between main and non-main is whether the debtor has its COMI in the jurisdiction of the foreign proceeding (England). Because Stella's COMI is not in England, foreign main recognition is not available.

Commented [H(72): Total marks 2.5/5

Commented [H(73): Correct, 1/2 mark, specifically the ongoing obligation not to license to others and to pay royalties are obligations of both sides as required for a contract to be executory

Commented [H(74): Correct, 1 mark, but the reasoning is wrong--the bar on transfer arises from substantive intellectual property law

Commented [H(75): Correct, 1 mark, specifically the ipso facto clause in the lease would be ineffective

In this case, applicable non-bankruptcy laws permit transfer of factory lease. As only one condition is required to be fulfilled so as to enable sale of leasehold interests, GameMart can transfer the lease as part of 363 sale without Land Corp's consent.]

*** End of Assessment ***