



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 37.5/50

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

Commented [H(2): Total marks 8/10

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

Question 1.1

Commented [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)]: Correct, 1 mark

Which of the following contracts to which ABC Corp is a party is executory and may be assigned without counterparty consent?

- (a) A lease on a manufacturing plant that contains a provision that requires landlord approval of any assignment.**
- (b) *An employment contract between ABC Corp and a former employee, requiring the company to provide health insurance through the end of the current year.*
- (c) *A 10-year software licensing agreement with XYZ Corp that is three years into performance.*
- (d) *A lease on office space that ended the prior year, but for which ABC Corp still owes past rent.*
- (e) *None of the above are executory and may be assigned without counterparty consent.*

Question 1.4

Commented [H(6)]: Correct, 1 mark

Which of the following conditions must be true about a reorganization plan for a court to confirm it under Chapter 11 proceedings?

- (a) *Have a possibility of success, even if it relies on speculative or improbable events to be capable of execution.*
- (b) The plan is not likely to be followed by liquidation.**
- (c) *All impaired classes must accept the plan.*
- (d) *All of the above.*
- (e) *None of the above.*

Question 1.5

Commented [H(7)]: 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 [H(8)]: Incorrect, the correct response is (c)

Which of the following about 363 sales is false?

- (a) *A good faith purchaser at a 363 sale may retain the property notwithstanding a subsequent reversal of court approval for the sale on appeal.*
- (b) *The debtor in possession must establish that the transaction is in the best interests of the estate as a whole.*
- (c) *In chapter 15 proceedings, a foreign court's approval alone suffices for a 363 sale.*
- (d) *Debtors must carry out a robust marketing process for the sale.*
- (e) *A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.*

Question 1.7

Commented [H(9)]: Correct, 1 mark

Which of the following is true of both an actual fraudulent conveyance and a constructive fraudulent conveyance?

- (a) *The debtor must have had an actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted.*
- (b) *Both require at least circumstantial evidence of the fraudulent intent.*
- (c) *The debtor must have been insolvent at the time of transaction.*
- (d) *In addition to provisions in the Bankruptcy Code, the debtor or the trustee may invoke applicable state or foreign fraudulent conveyance laws.*

(e) All of the above are true.

Question 1.8

Commented [H(10)]: Correct, 1 mark

When does an automatic stay come into effect?

(a) Immediately on the filing of any plenary petition.

(b) On the filing of a voluntary petition but not on the filing of an involuntary petition.

(c) Once the court reviews the petition and grants the stay.

(d) Once the petitioner announces their intention to file for bankruptcy publicly.

(e) Once a plan of reorganization is confirmed.

Question 1.9

Commented [H(11)]: Incorrect, the correct response is (c)

Which of the following regarding substantive consolidation is true?

(a) It respects the boundaries of corporate separateness.

(b) It is the treatment of two or more creditors as a single creditor to simplify the claims process.

(c) If a creditor can show it extended credit on the basis of corporate separateness, it has a valid objection to substantive consolidation.

(d) Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.

(e) Authority for substantive consolidation comes from the Bankruptcy Code.

Question 1.10

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

Which of the following are relevant factors in determining a debtor's center of main interests (COMI) in the recognition stage of a Chapter 15 bankruptcy case?

(a) The location of the headquarters.

(b) The location of primary assets.

(c) The location of the majority of the affected creditors in the request for relief.

(d) The jurisdiction whose law will apply to most disputes.

(e) All of the above.

QUESTION 2 (direct questions) [10 marks]

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

Question 2.1 (1 mark)

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

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

Set offs allow a creditor holding a claim against the debtor and at the same time owing money to the debtor to net off the two obligations.

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

A set off can improve the position of the creditor and this can impact the creditor ranking of secured/unsecured. This is because it decreases its obligation to the estate by the full amount owed by the debtor rather than the lesser amount the debtor would pay on the unsecured claim.

Commented [H(16)]: Correct, 1/2 mark

The cases when it is not permitted are:

- *It is not allowed.*
- *It was acquired post-petition or 90 days prior to petition when insolvent.*
- *Creditor improves position by set off.*

This includes commodity, forward, security, repurchase, swap, master netting contracts.

Question 2.2 [2 marks]

Commented [H(17)]: Total marks 2/2

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

When preparing for bankruptcy court you should review the following rules and consider:

- *Bankruptcy rules*
- *Federal rules of civil procedure*
- *Local rules of the bankruptcy court*
- *Judge's personal practices*
- *You should also get advice on what local unwritten local practices are.*

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)]: Also correct

Question 2.3 [2 marks]

Commented [H(23)]: Total marks 2/2

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

The absolute priority rule is a rule that needs to be complied with that assists with that no creditor or class of creditors may receive less under a plan of reorganization than it would under a normal liquidation, in which the claims are paid in priority schedules. This needs consent from the affected creditors.

Under chapter 7, certain employees (unpaid salaries and benefit plans) are given admin priority under this rule.

Requirements:

- *That the payment in full made to each category of claims before the next category receives anything.*

Commented [H(24)]: Correct, 1 mark

It can be deviated:

- *In chapter 11, a more senior creditor may consent to receiving less than the rule would require if distribution of the funds to lower priority claims is necessary to approve the plan.*

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

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

This is not the same in Chapter 7 where the statutory priorities must be strictly followed.

- *For small business reorganisations, section V- the cram down plan which cram down dissenting creditors with out an accepting impaired class and the priority rule does not apply, permitting the business owner to retain its equity without paying all creditors in full. But the debtor must make use of all disposable income to pay the creditors over 3-5 years until all payments have been made.*

Question 2.4 [2 marks]

Commented [H(27)]: 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 loan is a form of debtor in possession financing that allows a company in Chapter 11 Bankruptcy proceedings to obtain credit to assist them in specific areas of the business operations and organisation.

Fund from a priming loan can usually be used only to maintain core business.

This is when financing cannot be obtained on any other terms, the court assists in granting a priming lien that is senior or equal to the pre-petition lien on estate property to secure post-petition financing. The debtor must demonstrate that the interest of the secured creditor being primed is adequately protected.

Commented [H(28)]: Correct, 1/2 mark

Commented [H(29)]: Correct, 1 mark

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

Question 2.5 [3 marks]

Commented [H(31)]: 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?

A preference is a transfer of the debtors' property made in a suspect period before the petition date that must be returned to the estate if it exceeds the amount the recipient would have received in chapter 7 liquidation had the transfer not been made.

Commented [H(32)]: Correct, 1 mark

There is no need to show any fault of either the debtor or the recipient in connection with the payment being made and the recipient creditor has no penalty other than returning of the transfer.

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

This is intended to equalise treatment of similarly situated creditors and stop a race to collect claims from debtors. Recipients of a preference has an unsecured claim for the value of the returned assets into the estate.

Preferences only arise where the debtor is paying a creditor for a pre-existing debt.

Elements of a preference claim:

- Transfer of interest of debtor in property
- To or for the benefit of the creditor
- For or on account of an antecedent debt owed by the debtor before the transfer was made.

Commented [H(34)]: Correct, 1/2 mark

Commented [H(35)]: Correct, 1/2 mark

Commented [H(36)]: Correct, 1/2 mark

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

Commented [H(37)]: Total marks 13.5/15

Question 3.1 [3 marks]

Commented [H(38)]: Total marks 1.5/3

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?

Final orders are those that dispose of all issues, leaving nothing more to be decided.

Final Bankruptcy order means an order of judgement of the bankruptcy court. It is a non-appealable order. Bankruptcy judges are appointed by courts of appeal. Bankruptcy judges are permitted to only hear and determine core proceedings. They can only hear non-core proceedings if they are related to the bankruptcy proceedings but cannot make final determination but will submit the findings and law conclusions to the district court. And the district court will make the final decision.

Commented [H(39)]: Partially correct, 1/2 mark, the bankruptcy court can enter a final order on a challenge to a petition and on a core matter with the parties' consent. A non-final order is treated as a report and recommendation or proposed findings of fact and conclusions of law.

Therefore, it must be stated as to if it is core or non-core. Then the bankruptcy court can determine the scope of the jurisdiction and the power to render the final order or judgement.

The bankruptcy court orders can be appealed by not on the litigants involved in the issue but also other persons who are affected by the ruling and have stand to seek a review.

Appeals from bankruptcy court decisions are heard by the district court for the district in which they sit. But bankruptcy appeals are heard by bankruptcy appellate panel (BAP) which has judges from the bankruptcy court.

Commented [H(40)]: Correct, 1/2 mark

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

Question 3.2 [3 marks]

Commented [H(42): Total marks 3/3

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?

During recognition state the characterization of the foreign proceedings as either main or non-main determines the scope of relief available to the debtor. Main proceedings are those that commenced in the debtors COMI this is presumed to be where the place of incorporation is or else where the location of management, headquarters, primary assets, majority of creditors and most disputes.

Upon recognition of foreign main proceedings:

1) *The following provisions automatically apply to the debtor's property under the bankruptcy code:*

- Automatic stay
- Operation of the debtor's business in ordinary course by the foreign rep
- Sale and transfer or use of the property outside of the ordinary course
- Avoidance of post-petition transfers and perfection of security interest.

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

Commented [H(44): Correct, 1/2 mark

Commented [H(45): Correct, 1/2 mark

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

2) *The following reliefs may be granted on a discretionary basis:*

- Authorisation of discovery regarding the debtors' assets and affairs
- Entrusting admin of the debtors US assets to the foreign representative
- Extension of provisional relief
- Any other relief which assists chapter 15 to protect the assets of the debtor or interests of the creditors.

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

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

With regards to foreign non main proceedings:

1) *The following reliefs may be granted on a discretionary basis:*

- The court must be satisfied that it is appropriate under US law for assets.
- Recognition as a foreign non main is less protective.

Question 3.3 [4 marks]

Commented [H(49): Total marks 4/4

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

Directors' liability is a matter for state law of the state of incorporation. Delaware is the pre-eminent US jurisdiction for corporate law. US director liability is more limited than anywhere else.

Directors owe a fiduciary duty of loyalty to the corporation in its best interest and the duty to make careful educated decisions. They are protected from liability for errors in judgement. This is known as the business judgement rule.

Commented [H(50)]: Correct, 1 mark

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

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

Under this rule, the board of directors are presumed to have acted in good faith with reasonable information. This can be rebutted in which shows that majority of the board were not reasonable informed, not acting in the best interest of the Corp nor in good faith. But with this rule, directors will not be liable in the presence of showing of gross negligence.

When the corporation is potentially insolvent and the shareholder stand to receive nothing in bankruptcy the Directors have a duty to the corporation and its shareholders, not to the creditors.

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

Question 3.4 [5 marks]

Commented [H(54)]: Total marks 5/5

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

Creditors can commence an involuntary proceeding against an eligible debtor under chapter 7 or 11. Involuntary proceedings cannot be commenced under other chapters or against farmer, famer families or NPOs.

The petitioning creditors required are:

- *If there are fewer than 12 creditors, then only one is required.*
- *If there are more than 12 then at least 3 are required.*

To qualify as a petitioning creditor, the creditor much have a claim against the debtor that is:

- **Non contingent**
A debt that is unmatured
A claim that is not dependent on a future event (under guarantee or obligations)
- **Not the subject bona fide dispute as to liability or amount**
This is when the dispute is based on an objectively reasonable basis, it cannot be based on belief.
- **Unsecured or under secured, separately or in aggregate with all other petitioning creditors claims, in the amount of at least US\$16,750 (this amount changes)**

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

Commented [H(56)]: Correct, 1/2 mark

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

The involuntary petition form requires the petitioning creditor to allege either that the debtor is generally not paying its debts as they become due, unless they are subject to the bona fide dispute as to liability or amount or that within 120 days before signing the petition, enforcing a lien against the assets.

Commented [H(61)]: Correct, 1/2 mark

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

Commented [H(62)]: Total marks 6/15

Question 4.1 [5 marks]

Commented [H(63)]: Total marks 1/5

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 deals with the duties of the trustees and creditors in reorganisations as well as the procedures applicable to the plan for reorganisation. When under Ch 11, there is an automatic stay of any proceeding against the debtor, ability to have powers to sell assets free and clear and avoid pre-petition transactions and reject unprofitable contracts. The reorganisation plan may be confirmed by the court without the approval of all the creditors. This is a debtor friendly rehabilitation.

The effect of opening proceedings under Chapter 15 would be:

Commented [H(64)]: I assume this is a typo for "chapter 11", note that the automatic stay comes into effect on the filing of the chapter 11 petition

- i) The Department of justice which is investigating insider trading.
 - a. Due to the automatic stay, it has statutory exceptions which include regulatory investigations. Therefore, the automatic stay would not affect this.
- ii) The broker who declared a default. Under Chapter 11 the debtors are slightly broader but stockbrokers and commodity brokers may be debtors under chapter 7 so may not be debtors under chapter 11. This is due to the bankruptcy being governed by other federal statutes.
- iii) Speculation has fallen behind on rent payments.
 - a. Rent on Real estate that is continued to be occupied is paid on an ongoing basis as an administrative expense.
- iv) Speculation is being sued by a former employee for discrimination.

Commented [H(65)]: Correct, 1 mark

Commented [H(66)]: Incorrect, these only apply if the broker is in bankruptcy; here is it a creditor and benefits from the exception to the automatic stay for enforcement of rights under securities contracts

Commented [H(67)]: The automatic stay would bar eviction proceedings

- a. *Due to the automatic stay, it has statutory exceptions which include criminal proceedings investigations. Therefore, the automatic stay would not affect this.*
- b. *They are a former employee so do not fall into the current employee contracts.*

Commented [H(68): Incorrect, this is a private lawsuit, so it would be stayed by the automatic stay

Question 4.2 [5 marks]

Commented [H(69): Total marks 2/5

Stella SA (Stella) is a an international cosmetics company incorporated in France, with its headquarters in Paris. Stella's products are made in Italy and shipped to its retail stores in Europe (including England), Asia, and North America. Stella's funding comes from a bank loan and Eurobonds, both of which are governed by English law. Stella's retail sales have suffered due to pandemic-related closures and it is considering options to restructure its debt. One option is to use an English scheme of arrangement with respect to the Eurobonds. Could the English scheme of arrangement be recognized by a US bankruptcy court under Chapter 15, and would such recognition be as a foreign main or non-main proceeding?

Under chapter 15, a filing of a petition is done by a foreign rep of the debtor. The debtor cannot be places into chapter 15 involuntarily by a creditor filling.

The requirements are minimal to be recognised as a foreign proceeding. The foreign rep must establish that a foreign court or admin proceeding with respect of the debtor and the foreign rep is acing for the proceedings. It is foreign if it is a collective judicial proceeding are in a foreign country, of which English scheme of arrangements are recognised.

The amount of relief that the debtor gets is based on whether the proceedings are seen as main or non-main. For main, they are the proceedings which are commenced in the debtors COMI and then non main are for proceedings that commenced outside of the debtors COMI.

COMI is assessed by place of principal business, location of assets or place of incorporation. Other factors that can be used to assess COMI is, location of headquarters, location of management, Location of primary assets, location of majority of creditors and the jurisdiction where most laws will be applicable.

Therefore, the agreement could be recognised as a US Bankruptcy as a chapter 15 proceeding based on what COMI is determined:

- *As a non-main proceeding due to France being seen as the COMI.*
- *Or due to the bank loan and Eurobonds being English law governed, resulting in laws mainly being from England and retail stores being in England too, it*

Commented [H(70): Correct, 1 mark, the retail store in England would constitute the necessary establishment for foreign non-main recognition

Commented [H(71): Correct, 1 mark, the other connections are not sufficient to overcome the presumption in favor of the jurisdiction of incorporation

could change the COMI to England which would then make the foreign proceedings being main.

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?

An executory contract is executory if there are material unperformed obligations on both sides. This is an unexpired license agreement. Game mart must manufacture and pay Toyco. The licensor is Toyco and the licensee is Game mart. These are treated as executory contracts.

The license agreement remains valid and enforceable during proceedings until the debtor rejects the agreements. This license may be treated as a material breach and licensee may continue to use the IP for the life of the agreement. Or the licensee can see it as a breach and put in a damage claim for the breach of agreement. If the debtor assumes the license, it will remain valid and enforceable.

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

Before a debtor licensee can sell or transfer its rights under a license agreement it must cure the prior defaults and provide assurance for future performance. The licensor is Toyco and the licensee is Game mart, and therefore cannot transfer the license without Toyco consent. Licenses are not transferable without licensor consent.

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

Game mart may not transfer the lease as it is prohibited as per the lease to be transferred without Land Corp's consent.

Commented [H(72): Total marks 3/5

Commented [H(73): Correct, 1 mark, the obligation not to license to anyone else is an ongoing obligation of ToyCo

Commented [H(74): Correct, 1 mark

Commented [H(75): Correct, 1 mark, because this is an IP license

Commented [H(76): Incorrect, the prohibition on assignment is unenforceable because it is based in contract, not in substantive non-bankruptcy law.

*** End of Assessment ***