



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 44.5/50

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

Commented [H(2): Total marks 9/10

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

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)]: Correct, 1 mark

Which of the following about 363 sales is false?

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

Question 1.7

Commented [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)]: Correct, 1 mark

*Which of the following regarding substantive consolidation is true?*

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

Question 1.10

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 9.5/10

**Question 2.1** (1 mark)

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

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

*Setoff is a legal concept whereby a creditor and a debtor, each simultaneously owing money to each other, allows the creditor to net out the two (or more) obligations.*

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

*Setoff is not permitted in many circumstances because it often can improve the position of the setting-off creditor compared to other unsecured creditors who are not owed money by the debtor. This is because the effect of setoff is to effectively decrease the bankruptcy estate by the full amount of the debt owed by the debtor, rather than a potentially lesser amount that the debtor would otherwise pay on an unsecured claim. In other words, there might not be equal treatment amongst unsecured creditors due to setoff.*

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

**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 a filing for a bankruptcy court, I should read:*

1. *The US Bankruptcy Code (title 11 of the United States Code);*
2. *The Federal Rules of Bankruptcy Procedure;*
3. *The Federal Rules of Civil Procedure (which are frequently incorporated by the Federal Rules of Bankruptcy Procedure);*
4. *The local rules of the particular bankruptcy court; and*
5. *Any other practice directions in relation to the working procedures of the judges, issued by the relevant judge / bankruptcy court.*

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

**Question 2.3** [2 marks]

Commented [H(22)]: Total marks 2/2

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

*The absolute priority rule stipulates that payment in full must be made to each category of claims before the payment can be made to the next category, i.e. in accordance with statutorily required priorities.*

Commented [H(23)]: Correct, 1 mark

*The absolute priority rule can be deviated from in a Chapter 11 plan (but not in a Chapter 7) with the consent of the affected creditors, which is usually done by a senior creditor in order to obtain the approval of the plan by lower priority creditors.*

Commented [H(24)]: Correct, 1/2 mark

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

**Question 2.4** [2 marks]

Commented [H(26)]: Total marks 1.5/2

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

*A priming lien is a lien on the debtor's property that is senior or equal to a pre-petition lien on the debtor's property.*

Commented [H(27)]: Correct, 1 mark

*In order for a priming lien to be granted to secure DIP financing, the debtor must demonstrate that the interest of the secured creditor of the pre-petition lien is adequately protected.*

Commented [H(28)]: Correct, 1/2 mark, also the debtor must show that financing is not available without the priming lien

Question 2.5 [3 marks]

Commented [H(29)]: 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 debtor's property made in a "suspect period" (which in the case of third parties is 90 days) prior to the petition date. The recipient to any such transfer must return the property to the debtor's estate if it exceeds the amount that the recipient would otherwise have received in a Chapter 7 liquidation had the transfer not been made.*

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

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

- 1. a transfer of an interest of the debtor in property;*
- 2. to or for the benefit of a creditor;*
- 3. for or on account of an antecedent debt owed by the debtor before such transfer was made;*
- 4. made while the debtor was insolvent;*
- 5. made during the suspect period;*
- 6. that enables the creditor to receive more than it would have in a Chapter 7 liquidation.*

Commented [H(31)]: Correct, 1/2 mark

Commented [H(32)]: Correct, 1/2 mark

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

*It is not necessary to show any fault on behalf of either the debtor or creditor.*

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

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

Commented [H(35)]: Total marks 13/15

Question 3.1 [3 marks]

Commented [H(36)]: 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?**

*A bankruptcy court is a creature of legislation as opposed to the US Constitution. Judges of the bankruptcy court have limited jurisdiction to enter final orders (being orders that dispose of all issues, leaving nothing further to be decided) on matters outside of core bankruptcy issues and no jurisdiction to issue final orders that contravene the Article III jurisdiction. As a result, the bankruptcy can only issue final orders with respect to core issues / proceedings that do not invade Article III.*

*Final orders may be appealed as of right and appeals from the bankruptcy court are generally heard by the district court for the district in which they sit. The exceptions to this is where, in certain circuits (being the First, Sixth, Eighth, Ninth and Tenth Circuits), the appeals are heard by a Bankruptcy Appellate Panel, which comprises of judges of bankruptcy courts within that circuit. In exceptional situations, the appeals may be heard directly by the court of appeals if that appeal is certified by the bankruptcy court / district court: (i) as raising a question of law as to which there is no controlling decision of the circuit or the US Supreme Court, or requires resolving conflicting decisions; or (ii) that immediate appeal may materially advance the progress of the case. The ultimate discretion on whether an appeal should be certified to be heard directly by the court of appeals rests with the court of appeals itself.*

*Non-final (i.e. interlocutory) orders can only be appealed with leave of the appellate court (i.e. usually the district court). Therefore, the appellate court has the discretion to review an interlocutory order, as opposed to a final order.*

**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?**

*The provisions of the Bankruptcy Code that automatically apply to the debtor's property within the territorial jurisdiction of the United States upon recognition of a foreign main proceeding are:*

- 1. an automatic stay, subject to an exception to permit the filing of a plenary US bankruptcy proceeding (i.e. under any Chapter other than Chapter 15) following recognition;*
- 2. the foreign representative being able to operate the debtor's business in the ordinary course;*
- 3. the sale, transfer or use of property outside the ordinary course; and*

**Commented [H(37)]:** Correct, 1/2 mark, an example would be a challenge to a petition. The bankruptcy court may also enter a final order with the consent of the parties. When the bankruptcy court doesn't have authority to enter a final order, its ruling is treated as a report and recommendation.

**Commented [H(38)]:** Correct, 1/2 mark

**Commented [H(39)]:** Correct, 1/2 mark

**Commented [H(40)]:** Total marks 3/3

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

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

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

4. the avoidance of post-petition transfers and perfection of security interests.

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

The relief that may be granted on a discretionary basis for either foreign main or non-main proceedings are:

1. the authorisation of discovery with respect to the debtor's assets and affairs;
2. entrusting the foreign representative or other person with the administration of the debtor's assets within the US, including the return of funds collected in the US proceeding to the foreign proceeding distribution (which can only be granted if the foreign representative can show that the interests of creditors in the US are sufficiently protected);
3. the extension of provisional relief that may have been granted between the filing of a Chapter 15 petition and the entry of an order for recognition; and
4. any other relief necessary to effectuate the purposes of Chapter 15 and to the protect the assets of the debtor or the interests of the creditors.

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

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

Question 3.3 [4 marks]

Commented [H(47)]: 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?

Under Delaware law, there are relatively limited duties owed by directors. These are, the:

1. fiduciary duty of loyalty to the corporation's best interests; and
2. duty of care in educated decision-making.

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

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

These duties are owed to the Delaware Corporation and its shareholders, not to creditors. This is even the case if the corporation is potentially or actually insolvent (see *North Am Catholic Educational Programming Foundation, Inc v Gheewalla*, 930 A.2d 92, 103 (Del 2007)).

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

Directors are protected from liability for errors of judgment by the business judgment rule in the absence of there being gross negligence. Under the business judgment rule, the board of directors are subject to a rebuttable presumption that it has acted in good faith on the basis of reasonable information. The grounds for rebuttal of the business judgment rule are in circumstances where the majority of the board were, in fact:

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

1. not reasonably informed; or
2. not acting in good faith.

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.

The requirements that a creditor's claim must fulfil in order to qualify as a petitioning creditor in an involuntary proceeding are, there being:

1. a non-contingent claim; i.e. a claim that is not dependent on the occurrence of an event in the future with respect to liability;
2. no existence of a bona fide dispute, whether as to liability or quantum;
3. a total quantum of at least US\$16,750 (subject to inflationary adjustments from time-to-time) being claimed as unsecured or undersecured (whether separately or in the aggregate with all other petitioning creditors' claims); and
4. an allegation either:
  - a. that the debtor is generally not paying its debts as they become due (unless such debts are subject to a bona fide dispute); or
  - b. that, in the 120 days prior to the filing of the petition, a custodian (other than certain carve-outs) was appointed or took possession.

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

Question 4.1 [5 marks]

Speculation Inc is engaged in day-trading stocks from leased office space with two employees. It funds its trading through a margin loan from its broker, where the shares it purchases are held as collateral. For a while, Speculation Inc was very successful in trading, and the US Department of Justice (DOJ) has announced an investigation into whether its success was due to illegally trading on insider information. More recently, 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 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?

1. The DOJ investigation

Commented [H(52)]: Total marks 4.5/5

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

Commented [H(54)]: Correct, 1/2 mark

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

Commented [H(56)]: A bona fide dispute requires an objective basis in fact or law to challenge liability or amount of the debt

Commented [H(57)]: Correct, 1/2 mark

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

Commented [H(59)]: Correct, 1/2 mark

Commented [H(60)]: Total marks 13/15

Commented [H(61)]: Total marks 4/5

**A Chapter 11 petition would grant an automatic stay in order to allow Speculation Inc breathing room to formulate a restructuring plan.**

**Commented [H(62):** Correct, 1 mark

**Despite the breadth of the automatic stay, it does not apply to any regulatory investigations. This would mean that the DOJ investigation could continue against Speculation Inc notwithstanding the Chapter 11 filing.**

**Commented [H(63):** Correct, 1 mark

2. Margin loan default

**The margin loan is purportedly secured by collateral, being the shares purchased by Speculation Inc.**

**Assuming that such security was perfected, then the collateral must first be valued to ascertain whether the broker is fully secured or undersecured. Given the fact that Speculation Inc had incurred serious trading losses (i.e. significant diminution of value of the collateral), there is a risk that the broker may be undersecured.**

**If the broker has an undersecured claim, it would be paid as a secured claim to the extent of the value of the collateral and the balance would be treated as an unsecured claim.**

**Under certain circumstances, the broker (to the extent it has a secured claim) can obtain an order from the bankruptcy court granting relief from the automatic stay, e.g. where Speculation Inc has no equity in the collateral and the collateral is not necessary for an effective reorganisation.**

**Commented [H(64):** Incorrect, the margin loan is a securities contract that is not covered by the automatic stay, so the broker can liquidate the collateral.

3. Delinquent lease

**Unless the lease for the office space has expired, there is no exception to the automatic stay.**

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

**It would also be unclear whether the delinquent lease is an executory contract because Speculation Inc committed a pre-petition breach (and the legal consequences of this) and it is unclear how much of the term is left on that lease.**

4. Employment discrimination

**Certain employment expenses, such as unpaid salaries and contributions to employee benefit plans, are entitled to priority treatment if earned 180 days prior to the petition date (or cessation of business). However, this would not extend to separate employment grievances, such as an employment discrimination lawsuit, which would be subject to the automatic stay.**

**Commented [H(66):** Correct, 1 mark

**Question 4.2 [5 marks]**

**Commented [H(67):** Total marks 4/5

**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?**

**Yes - an English scheme of arrangement would be recognised by a US Bankruptcy Court under Chapter 15 (subject to very narrow exceptions where such recognition would be manifestly contrary to the public policy in the US). This is because the definition of "foreign proceeding" under the Bankruptcy Code is broadly defined as follows:**

**"... a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."**

**Whether the recognition would be as a foreign main or non-main proceeding is a question of fact on whether those proceedings were commenced in Stella's centre of main interest (COMI). Stella's COMI will presumptively be in Stella's place of incorporation, being France. The presumption can be rebutted, although the indicia points towards France being the COMI, since that is also Stella's headquarters (and presumably the location of management). It would be arguable that the Eurobonds being governed by English law (and is the applicable law for disputes) may point towards the COMI being England, but it is unclear whether those creditors are also based in England or elsewhere. On balance, it would be more than likely that the recognition would be as a foreign non-main proceeding because Stella's COMI is in France and not England.**

**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:**

**Commented [H(68)]:** Correct, 1 mark

**Commented [H(69)]:** Correct, 1 mark

**Commented [H(70)]:** Correct, 1 mark

**Commented [H(71)]:** Correct, 1 mark, also the retail store in England satisfies the establishment requirement

**Commented [H(72)]:** Total marks 5/5

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

*Assuming there is still a material duration left on the license to manufacture Xbox (noting that it is a 10-year license), it is likely that the license is an executory contract. This is because an executory contract is one where there are material unperformed obligations by both parties. In this case, both parties have ongoing obligations that are materially performed: ToyCo must keep the license exclusive for GameMart (similar to a lessor of a lease) while GameMart must pay the monthly royalties.*

Commented [H(73)]: Correct, 1 mark

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

*No. Whilst the Bankruptcy Code, in the usual course, annuls any contractual restrictions to assignment, it would not do so where there is any substantive non-bankruptcy law - such as intellectual property / licensing - that protects the counterparty from being forced to accept performance from a transferee. As a result, GameMart must obtain ToyCo's consent before any assignment.*

Commented [H(74)]: Correct, 1 mark

Commented [H(75)]: Correct, 1 mark

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

*Yes. The factory lease is an executory contract because there is seven years left on the lease and therefore there are material unperformed obligations by both parties.*

Commented [H(76)]: Correct, 1 mark

*The factory lease is assignable to the purchaser without Land Corp's consent even if there is a 'no assignment' contractual provision, because the Bankruptcy Code annuls any such contractual restrictions in the usual course.*

Commented [H(77)]: Correct, 1 mark

\* End of Assessment \*