



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 32.75

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

Commented [H(2)]: Total marks 4/10

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

Question 1.1

Commented [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)]: Incorrect, the correct response is (b), the neighboring land owner may have environmental contamination claim from runoff from the plant

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)]: Incorrect, the correct response is (b)

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)]: Incorrect, the correct response is (e)

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)]: Incorrect, the correct response is (d)

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

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)]: Incorrect, the correct response is (a)

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 7.75/10

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?

Set off permits a creditor holding a claim the right to offset it against debts owed to the debtor.

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

Set off may not be permitted when:

Commented [H(16): The policy reason is that setoff permits a creditor to do better than other similarly situated creditors

- The creditor claim is disallowed.
- The creditor claim was acquired within 90 days of the petition being filed.
- The creditor's obligation was incurred 90 days prior to the petition being file for the purpose of exercising set-off rights.

Question 2.2 [2 marks]

Commented [H(17): Total marks 1.5/2

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

When preparing a filing for a bankruptcy court one should review:

- The **Bankruptcy Code** - This set out the legal framework for bankruptcy cases in the United States.
- The **Federal Rule of Bankruptcy Procedure** - this set out the procedural requirements for filing and litigating bankruptcy cases.
- The **Local Rules** - each bankruptcy court has its own set of local rules which supplements the Federal Rules of Bankruptcy Procedures.
- Standing Orders - these are court rules and protocols with court procedures and practices.
- Jurisdictional Laws - it is important to review any specific laws and regulations that apply to the jurisdiction in which the case is being filed.
- Ethical rules - bankruptcy lawyers have to follow ethical rules for their jurisdiction.

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

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

Commented [H(20): Correct, 1/2 mark, also the judge's personal practices

Question 2.3 [2 marks]

Commented [H(21): Total marks 2/2

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

The rule of absolute priority states that each category of entitlement must be paid in full before the next category receives anything.

Commented [H(22): Correct, 1 mark

In Chapter 11, the absolute priority rule can be deviated from with the consent of the affected creditors, but in Chapter 7, no deviation is possible and statutory priority must be followed.

Commented [H(23): Correct, 1/2 mark

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

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?

Priming lien

A priming lien is a lien on a property that ranks senior to or has the same priority as existing liens on the same property, even if they existed prior to filing for bankruptcy.

Requirements

The following requirements must be met for the lien to be granted to secure DIP financing:

- The financing must be necessary to finance the debtor's operations during the bankruptcy proceedings;
- The financing must be in the best interest of the estate and help maximise the value of the estate for the benefit of the creditors;
- There must be sufficient unencumbered assets to provide adequate security for the DIP financing;
- The proposed financing must be fair and reasonable to the other creditors;
- The lender must agree to provide the financing on the condition that it is secured by a priming lien; and
- The lender should have a court order approving the priming lien.

Commented [H(25)]: Total marks 1.25/2

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

Commented [H(27)]: Partially correct, 1/4 mark, the debtor must demonstrate that financing is not available without the priming lien. Also, the interest of the secured creditor being primed must be adequately protected.

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?

Preference is the transfer of assets or money to a creditor in the period before filing or bankruptcy. These creditors are suspected of receiving preferential treatment at the expense of other creditors.

Elements

The elements that must be proved to establish a preference claim are:

- The debtor has made a transfer of assets;
- The transfer was made to or for the benefit of a creditor;
- The transfer took place while the debtor was insolvent;
- The transfer took place on or within 90 days before the debtor filed for bankruptcy;
- The transfer enabled the creditor to receive more than it would have received in a Chapter 7 liquidation; and
- The transfer did not occur in the ordinary course of business.

Commented [H(28)]: Total marks 2.5/3

Commented [H(29)]: Correct, 1/2 mark

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

Commented [H(31)]: Correct, 1/2 mark, the transfer must be on account of a pre-existing debt

Commented [H(32)]: Correct, 1/2 mark, or one year if the recipient is an insider

Fault

The debtor or creditor does not have to prove fault. The receiving creditor is also not penalised, however he or she may be required to return the asset(s).

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

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

Commented [H(34)]: Total marks 12/15

Question 3.1 [3 marks]

Commented [H(35)]: 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 may enter a final order in any of the following cases:

- Confirmation of a Chapter 11 plan of reorganisation, the court may enter a final order confirming the plan if it meets the statutory requirements.
- Conversion or dismissal of a Chapter 11 proceeding. If the debtor is unable to confirm a plan of reorganisation, the court may enter a final order converting the case to a Chapter 7 liquidation or dismissing the case altogether.
- Approval of a Chapter 7 plan of liquidation. The court shall enter a final order approving the trustee's plan for distribution of the debtor's assets to creditors.
- Discharge of debts, the court may issue a final order releasing the debtor from liability for certain debts.
- Conclusion of proceedings after all the debtor's assets have been administered and distributed to creditors.

Commented [H(36)]: Correct, 1/2 mark, also when the parties consent. When the bankruptcy court does not have authority to enter a final order, its order is treated as a report and recommendation to the district court

Appeal

Appeals from decision of the Bankruptcy Court are usually taken by the Federal District Court for the district in which it is located. Certain appeals are heard by a Bankruptcy Appellate Panel. In rare cases, an appeal goes directly to the Court of Appeal.

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

Non-final order

An interlocutory or non-final order allows the Court of Appeal to exercise its discretion in deciding an appeal. It only resolves some issues or claims.

Question 3.2 [3 marks]

Commented [H(39)]: 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?

Recognition of a foreign main proceeding triggers an automatic stay of payment for creditors limited debtor's assets within the territory of the United States.

The reliefs granted for foreign main proceedings are:

- An automatic stay of payment;
- The appointment of the foreign representative to administer or realise the debtor's assets;
- The foreign representative is allowed to manage the debtor's business operation; and
- Prohibiting post-petition transfer of collateral of assets and the enforcement of the petition.

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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

The reliefs granted to non-main foreign proceedings are:

- Any of the above reliefs on a discretionary basis;
- Authorisation to obtain information about the debtor's assets and affairs;
- Extension of provisional relief; and
- Any measures necessary to enforce the purpose of Chapter 15 and to protect the debtor's assets or the interests of creditors.

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

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

Question 3.3 [4 marks]

Commented [H(46)]: 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?

Delaware Corporation

The liability of directors of a Delaware Corporation is more limited than elsewhere. However, directors of a Delaware Corporation owe a fiduciary duty of loyalty and care to the corporation and its shareholders.

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

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

The duty of loyalty requires the directors to put the best interests of the Corporation and its shareholders above their personal interests and to act in good faith.

Potential or actual insolvent

A director's duties are owed to the Delaware Corporation and its shareholders even if the corporation is insolvent and the shareholder receives nothing.

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

Business judgment rule

Directors owe a duty of care in making sound decisions. The business judgement rule protects directors who exercise their powers in good faith and with reasonable care from liability even if the action led to an unfortunate result.

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

Under the business judgement rule, directors are presumed to have acted in good faith. This presumption can only be rebutted if it is shown that the majority of the Directors were not

reasonably informed, that the Directors did not act in the best interests of the corporation or that they did not act in good faith.

Question 3.4 [5 marks]

Commented [H(51): Total marks 3.5/5

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

The requirements that a creditor's claim must meet to qualify as a petitioning creditor in involuntary proceedings are:

Non-contingent

The creditor's claim must be unconditional, that is there must be no other triggering events, for example, no outstanding future payments or undue debts.

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Commented [H(53): Correct, 1/2 mark

No bona fide dispute

The claim is not subject to a bona fide dispute meaning that the debt is owed to the creditor and there is no factually supported dispute as to the amount owed.

Commented [H(54): Correct, 1 mark

Commented [H(55): Correct, 1/2 mark

Non-payment of claim

The petitioning creditor must allege that the debtor has not paid the debt within 120 days before filing the petition.

Commented [H(56): Partially correct, 1/2 mark, the creditor must allege that the debtor is generally not paying its debts or that a custodian has been appointed for its assets

Foreign representative

If the petitioning creditor is a foreign representative, it may file an involuntary Chapter 7 or Chapter 11 petition against the debtor even if the foreign proceeding was not the subject of a Chapter 15 recognition petition.

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

Commented [H(57): Total marks 9/15

Question 4.1 [5 marks]

Commented [H(58): Total marks 4/5

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?

DOJ Investigation

The Chapter 11 application will affect the DOJ investigation. Although the appointment of a Chapter 11 trustee is mandatory, a trustee may still be appointed for cause, for example, if the

Commented [H(59): Assuming you left out "not mandatory", it is correct the DOJ might seek an appointment of a trustee

DOJ has found insider trading in its investigation. Until then, the investigation will continue as normal.

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

A trustee, if appointed, would oversee the reorganisation of the company; the trustee's office reports to the US Department of Justice. The Department of Justice will be able to appoint a trustee if it deems it necessary.

Commented [H(61)]: Incorrect, the U.S. Trustee is an officer of the DOJ but trustees appointed for debtors are not from the U.S. Trustee's office. They are usually lawyers from private practice.

Margin Loan Default

The effect of Chapter 11 on Margin Loan Default is that the Debtor (Speculation Inc) enjoys the protection of an automatic stay of all enforcement proceedings of its creditors, including brokers with whom it has Margin of Default. This allows Speculation Inc to continue its normal business operations while implementing its corporate recovery plan.

Commented [H(62)]: Correct that the filing of the petition brings the automatic stay into effect, 1 mark, but the margin loan is a securities contract that is exempt from the automatic stay so the broker can liquidate the debtor's collateral.

This also allows Speculation Inc to make 363 sales of its shares free of the broker's interest. However, the broker's interest will share into the proceeds. The value of the 363 sales is usually higher than the value of the assets.

Delinquent Leases

The effect of a Chapter 11 petition on the delinquent lease is that the lessor is prohibited from evicting the lessee (Speculation Inc) because of the automatic stay. However, the lessor has the option to apply to the courts to lift the automatic stay. The lessor also has the option to take possession of the property when the lease expires. Regardless of whether this expiry date occurs before filing or during reorganisation.

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

In addition, the lessee has the option to reject the unexpired portion of the lease, which means Speculation Inc must vacate the premises. Speculation Inc has 120 days after filing to decide whether to reject the lease, with an option to renew for an additional 90 days.

Employment discrimination lawsuit

The effect of Chapter 11 on the employment discrimination lawsuits is that any judgement or ongoing litigation is stopped once Chapter 11 is filed and the automatic stay is triggered. This also applied to the former employee's discrimination claim. Instead they becomes an unsecured creditor and must file a proof of claim.

Commented [H(64)]: Correct, 1 mark

Question 4.2 [5 marks]

Commented [H(65)]: Total marks 0/5

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?

First, the court must determine the Centre of Main Interest (COMI) before deciding whether Stella SA can apply English scheme of arrangement in relation to the Eurobonds. Since the location, if its creditors are subject to English Law, it can be considered the COMI, Stella SA can apply the English Scheme of Arrangement.

For a long time, it was assumed that the COMI of a debtor was the place where it was incorporated. This has now been rebutted and the location of the majority of the creditors that will be affected can also be considered a COMI.

English Schemes of Arrangement can be recognised by the US Bankruptcy Court under Chapter 15 once one of the retail stores operating in the US. Stella SA is assumed to operate in the US as the scenario mentions that the company owns stores in North America.

There is no barrier to venue as Stella SA already has significant assets and business outside the US. Venue is created by commencing proceedings in the District Court where the retail stores operate. In the filing is made in the wrong venue, the proceedings will be transferred to the proper venue.

According to the guidance text, a foreign main proceeding is a foreign proceeding pending in a country where the debtor (Stella SA) has its COMI, and a foreign non-main proceeding is a foreign proceeding pending in a country where the debtor has an establishment carrying on a non-transitory economic activity.

The distinction between these proceedings is important because a foreign main proceeding receives an automatic stay of payment after recognition, whereas in non-main foreign proceeding the level of defence is determined on a case-by-case basis.

As it has been established that the location of the creditors is the COMI and they engaged in economic activity for Stella SA that secure loan funding, recognition under Chapter 15 would constitute foreign main proceeding.

Question 4.3 [5 marks]

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

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

A contract is considered enforceable if material obligations have not been fulfilled.

The Xblox manufacturing licensee has been partially fulfilled and still has seven years to go. The base length of the standard contracts for the unfulfilled part of the contract (seven years) is considered substantial and therefore an executory contract if any of the parties decides not to fulfil its obligation or to terminate the contract.

If the contract is executory the debtor could choose to:

Reject the contract – this would give the other party an unsecured claim for damages prior to the petition.

Commented [H(66): Incorrect, the presumption that COMI is in France where Stella is incorporated is unlikely to be rebutted on these facts as it is also headquartered in France and likely has a number of creditors other than its bondholders.

Commented [H(67): Incorrect, there is not a need to have a business in the US. You may be thinking of the establishment requirement for foreign non-main recognition, but this concerns the presence of an establishment in the jurisdiction where the foreign proceedings are pending--England. Here, there is a retail store in England so foreign non-main recognition would be possible.

Commented [H(68): Total marks 5/5

Commented [H(69): Correct, 1 mark, the parties are obligated to pay royalties and maintain exclusivity.

Assume the contract - the debtor must remedy the default and assure the other party that it will perform its obligations.

Assume and transfer the contract - transfer the debtor's rights under the contract to a third party. The transferee must give the other party reasonable assurance of future performance obligations.

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

The Bankruptcy Code may remove contractual restrictions on assignment to allow the debtor to obtain a higher value for its assets, that is the contract has been enforced.

However, if a non-bankruptcy law prohibits a counterparty from forcing the other party to accept the assignment. An example of this is the Intellectual Property Licensing Act.

The Xbox is an invention and can be considered intellectual property that may be subject to intellectual property laws. Therefore, Game Mart cannot transfer the Xbox in the 363 Sale without Toyco's consent for the reasons described above.

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

Commented [H(71)]: Correct, 1 mark

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

Following on from the point raised in 4.3 iii, Game Mart can transfer the factory lease as part of the 363 Sale without Land Corp's consent, if Game Mart may realise a higher value than the amount owed as a result of the 363 Sale, as the lease is likely to be transferred at a premium. However, Game Mart will need to obtain Land Corp's consent if the transfer involves the use of the lease as security in a loan agreement or a financial concession.

Commented [H(72)]: Correct, 1 mark, the landlord consent requirement is ineffective

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

* End of Assessment *