



Total = 45.5/50 = 91%

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3A

THE INSOLVENCY SYSTEM OF THE UNITED STATES

This is the summative (formal) assessment for Module 3A of this course and is compulsory for all candidates who selected this module as one of their compulsory modules from Module 3. Please read instruction 6.1 on the next page very carefully.

If you selected this module as one of your elective modules, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 3A. *In order to pass this module, you need to obtain a mark of 50% or more for this assessment.*

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. **You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
2. **All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
3. **No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
4. **You must save this document using the following format: [studentID.assessment3A]. An example would be something along the following lines: 202223-336.assessment3A. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "student number" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. **Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 **If you selected Module 3A as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 3A as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of 9 pages.

ANSWER ALL THE QUESTIONS

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

Commented [la1]: Total marks 10/10

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

Question 1.1

Commented [la2]: Correct, 1 mark

Which of the following entities does not satisfy the minimum presence requirement to be a debtor under any chapter of the Bankruptcy Code?

- (a) A foreign domiciled company that pays a US attorney a retainer.
- (b) A company with several US bank accounts, but no physical presence in the United States.
- (c) A company with US patents, but no physical presence in the United States.
- (d) All of the above satisfy the minimum requirement for presence in the United States.**
- (e) None of the above satisfy the minimum requirement for presence in the United States.

Question 1.2

Commented [la3]: 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 [la4]: 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 [la5]: 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 [la6]: 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 [la7]: 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 [la8]: 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

When does an automatic stay come into effect?

- (a) Immediately on the filing of any plenary petition.**
- (b) On the filing of a voluntary petition but not on the filing of an involuntary petition.
- (c) Once the court reviews the petition and grants the stay.
- (d) Once the petitioner announces their intention to file for bankruptcy publicly.
- (e) Once a plan of reorganization is confirmed.

Commented [la9]: Correct, 1 mark

Question 1.9

Which of the following regarding substantive consolidation is true?

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

Commented [la10]: 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 [la11]: Correct, 1 mark

QUESTION 2 (direct questions) [10 marks]

Commented [la12]: Total marks 8.5/10

Question 2.1 (1 mark)

Commented [la13]: Total marks 1/1

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

[Setoff refers to the legal right of a creditor to offset mutual debts with a debtor. It allows a creditor to apply a debt owed to them by the debtor against a debt owed by the creditor to the debtor.

Commented [la14]: Correct, 1/2 mark

Setoff is not permitted in many circumstances due to several reasons including the following:

- to ensure fairness among creditors;
- comply with bankruptcy code requirements;
- policy reason is that setoff permits a creditor to do better than other similarly situated creditors
- preserve the debtor's estate; and
- avoid collateral consequences that could disrupt the financial system.

Commented [la15]: Correct, 1/2 mark

While there may be exceptions, setoff is generally limited to maintain a fair and stable insolvency process.

Question 2.2 [2 marks]

Commented [la16]: Total marks 1/2

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

[When preparing a filing for a bankruptcy court the following should be reviewed:

- The Bankruptcy Code: which is the primary federal law governing bankruptcy proceedings.
- Local Bankruptcy Rules: Each bankruptcy court district may have its own set of local rules that complement the Bankruptcy Code, this can include the Judges personal practices.
- Federal Rules of Bankruptcy or Civil Procedure: This provides the procedural framework for bankruptcy cases and governs matters such as commencement of the case, filing requirements, service of documents, hearings, and appeals.
- Court Forms: Bankruptcy courts often provide official forms that must be used when filing specific documents, such as petitions or motions.
- Local practitioners in the area for advice on unwritten local best practices.

Commented [la17]: Correct, 1/2 mark

Commented [la18]: This is actually separate from the Local Bankruptcy Rules and specific to each judge

Commented [la19]: Partially correct, 1/2 mark, both these sets of rules should be consulted

]

Question 2.3 [2 marks]

Commented [la20]: Total marks 1.5/2

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

[The absolute priority rule requires that creditors with higher priority in the distribution of assets must be paid in full before creditors with lower priority receive anything. This rule ensures a fair and orderly distribution of a debtor's assets during the bankruptcy process.

Commented [la21]: Correct, 1 mark

There are circumstances where the absolute priority rule can be deviated from being when creditors affected consent to a different distribution. This can occur in Chapter 11 bankruptcy cases when a reorganization plan is proposed and not all creditors agree to the plan. In such cases, if the plan is fair and equitable, it may be confirmed by the court even if it deviates from the strict order of priority. The deviation is not allowed in a Chapter 7 proceeding.

Commented [la22]: Correct, 1/2 mark, though it is also permissible in a plan of liquidation

Commented [la23]: Incorrect, the affected creditors must consent

Question 2.4 [2 marks]

Commented [la24]: Total marks 2/2

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

[A priming lien is a lien on a property that ranks senior to or has the same priority as existing liens on the same property.]

Commented [la25]: Correct, 1 mark

The requirements that must be met for a priming lien to be granted to secure DIP financing is that:

- the lender must agree to provide the financing on the condition that it is secured by a priming lien;
- the debtor must demonstrate that financing is not available without the priming lien;
- Furthermore, the interest of the secured creditor being primed must be sufficiently protected.]

Commented [la26]: Correct, 1/2 mark

Commented [la27]: Correct, 1/2 mark

Question 2.5 [3 marks]

Commented [la28]: Total marks 3/3

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

[Preference refers to the act of transferring assets or funds to a specific creditor shortly before filing for bankruptcy. Such transfers raise suspicion that these particular creditors have received favourable treatment, potentially at the expense of other creditors.

The following are the elements of a preference claim that need to be proved:

- The debtor has made a transfer of assets (Property, funds, or interest in property etc);

Commented [la29]: Correct, 1/2 mark

- The transfer was made to or for the benefit of a creditor and the transfer must be due to a pre-existing debt held;
- The transfer took place while the debtor was insolvent (financial state in which said person is unable to meet its financial obligations or pay off its debts when they become due);
- The transfer took place on or within 90 days before the debtor filed for bankruptcy; and
- The transfer enabled the creditor to receive more than it would have received in a Chapter 7 liquidation.

Commented [la30]: Correct, 1/2 mark

Commented [la31]: Correct, 1/2 mark

Commented [la32]: Correct, 1 mark

Is a showing of fault, by either the debtor or creditor, required?

The debtor or creditor does not have to prove fault in connection with the transfer. The receiving creditor is also not penalised, however the creditor may be required to return the assets that were transferred.

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

Commented [la34]: Total marks 14/15

Question 3.1 [3 marks]

Commented [la35]: Total marks 3/3

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;
- When the bankruptcy court does not have authority to enter a final order over a core proceeding, its order is treated as a report and recommendation to the district court or it must be issued with the consent of the parties;
- Dismissal or confirmation 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.
- Conclusion of proceedings after all of the necessary steps in a bankruptcy case have been completed, the court will enter a final order closing the case.
- Discharge of debts, the court may issue a final order discharging the debtor from liability for certain types of debts.
-

Commented [la36]: Correct, 1/2 mark

Commented [la37]: Correct, 1 mark

Commented [la38]: Correct, 1/2 mark

Who reviews appeals from bankruptcy court orders?

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

Commented [la39]: Correct, 1/2 mark

Commented [la40]: Correct, 1/2 mark

Commented [la41]: Also correct

How are non-final orders reviewed?

Non-final orders, also known as interlocutory orders resolve only some issues or claims and may only be appealed with leave of the appellate court.

]

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?

[
Recognition of a foreign main proceeding causes an automatic stay of payment for creditors and is limited to the debtor's property within the territory jurisdiction of the United States.

What relief may be granted on a discretionary basis for either foreign main or non-main proceedings?

Reliefs granted for Foreign main proceedings:

- **An automatic stay;**
- **The appointment of the foreign representative to administer or manage the debtors business in ordinary course of business;**
- **The foreign representative is allowed to transfer or realise the debtor's assets; and**
- **Disallowing post-petition transfer or perfection of surety assets and the enforcement of the petition.**

Reliefs granted for Non-Main proceedings:

- **Authorisation to obtain evidence or information about the debtor's assets and their affairs;**
- **Assigning the managing of the debtors assets located in the USA to the foreign representative or other person;**
- **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**

]

Question 3.3 [4 marks]

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

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Commented [la42]: Total marks 2.5/3

Commented [la43]: Correct, 1/2 mark

Commented [la44]: These are automatically applicable on recognition

Commented [la45]: Correct, 1/2 mark

Commented [la46]: Correct, 1/2 mark

Commented [la47]: Correct, 1/2 mark

Commented [la48]: Correct, 1/2 mark

Commented [la49]: Total marks 4/4

[
What duties do directors owe to a Delaware corporation in the ordinary course of business?

- Directors of a Delaware Corporation owe a fiduciary duty of loyalty and care to the corporation and its shareholders. Directors duties are owed to the shareholders and the company and not to the creditors.
- The duty of loyalty requires the directors to put the best interests of the Corporation and its shareholders, acting in good faith, above any personal interests.

Commented [la50]: Correct, 1 mark

Commented [la51]: Correct, 1 mark

To whom are these duties owed when the corporation is potentially or actually insolvent?

- Director duties are owed to the Delaware Corporation and its shareholders even if the corporation is insolvent and the shareholder does not collect anything.

Commented [la52]: Correct, 1 mark

What rule protects directors from liability for errors of judgment?

Directors owe a duty of care in making good 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 ill-fated result.

Commented [la53]: Correct, 1 mark

]

Question 3.4 [5 marks]

Commented [la54]: Total marks 4.5/5

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

- Non-contingent - The creditor's claim must be not be dependant on an event that may occur in the future, meaning that there must be no other triggering events and must be unconditional. - a debt that is not yet due for payment, can be considered as non-contingent if the only requirement that needs to be met to be classified as a liability is the passing of time.
- 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.
- Non-payment of claim - The petitioning creditor must allege that the debtor has not paid the debt within 120 days before filing the petition and that the debtor

Commented [la55]: Correct, 1 mark

Commented [la56]: Correct, 1/2 mark

Commented [la57]: Correct, 1 mark

Commented [la58]: Correct, 1/2 mark

is generally not paying its debts or that a custodian has been appointed for its assets.

- The debt has no collateral or is under secured by a certain amount (threshold of USD16,750) as specified (this amount increases periodically due to inflation). The debt cannot regard any undisputed portions of the claims when trying to meet this threshold.

]

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?

[

- (i) DOJ investigation - The Chapter 11 application will have an impact on the DOJ investigation. While the appointment of a Chapter 11 trustee is not mandatory, a trustee may still be appointed if the DOJ has found insider trading in its investigation. The DOJ might seek an appointment of a trustee, this would be a US trustee. Until this happens the investigation will continue as normal.

- (ii) Margin loan default - the filing of the petition brings the automatic stay into effect for the debtor (Speculation Inc). This automatic stay temporarily prevents creditors, including margin lenders, from pursuing debt collection efforts, including calling in the default of the margin loan. However, the margin loan is a securities contract that is exempt from the automatic stay so the broker can liquidate the debtor's security subject to the loan agreement.

It should be noted that the margin loan may be part of of the bankruptcy reorganization plan and could potentially be restructured, subject to the bankruptcy court's approval.

Commented [la59]: Correct, 1/2 mark

Commented [la60]: Correct, 1/2 mark

Commented [la61]: Correct, 1/2 mark

Commented [la62]: Incorrect, it's the disputed parts that are disregarded for meeting the monetary threshold

Commented [la63]: Total marks 13/15

Commented [la64]: Total marks 5/5

Commented [la65]: Incorrect, the trustee would be a third party, not the US Trustee

Commented [la66]: Correct, 1 mark

Commented [la67]: Correct, 1 mark

Commented [la68]: Correct, 1 mark

(iii) *delinquent lease - As soon as a company files for Chapter 11, an "automatic stay" goes into effect. This is a legal provision that temporarily halts all collection activities. This also means that for the time being, Lessors are unable to evict the tenant (Speculation Inc) for non-payment or pursue other legal actions to collect delinquent lease payments.*

Commented [la69]: Correct, 1 mark

Chapter 11 bankruptcy allows Speculation Inc (debtor) to either assume or reject its lease agreements. The debtor (Speculation) initially has 120 days to decide whether to assume or reject the lease, and this period can be extended with the court's permission.

(iv) *Employment discrimination lawsuit - A Chapter 11 filing impacts all ongoing lawsuits against that company, including employment discrimination lawsuits. Once the Chapter 11 process starts, an automatic hold is put in place which pauses any current legal proceedings. Therefore, any ongoing discrimination lawsuit from a past employee is halted. The former employee, who has claimed discrimination, now gets categorized as an unsecured creditor. This means they have to submit a proof of claim, a document stating the amount they believe the company owes them, to participate in the distribution of any assets during the bankruptcy process.*

Commented [la70]: Correct, 1 mark

]

Question 4.2 [5 marks]

Commented [la71]: Total marks 5/5

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?

[
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.

The presumption that COMI is in France where Stella is incorporated is not likely to be refuted based on the fact that it is headquartered in France and likely has a number of French creditors other than its loan and bond holders.

Commented [la72]: Correct, 1 mark

Commented [la73]: Correct, 1 mark

To recognize a foreign proceeding, it would need to be a proceeding in a foreign country under a law related to insolvency or debt reorganisation in which proceeding

the Stella's assets and affairs are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. Given that an English scheme of arrangement can be considered such a proceeding, it may be recognized by a U.S. court.

Whether such a proceeding would be recognized as a foreign main or non-main proceeding, it would depend on whether Stella's COMI is in England. The Code states that a foreign proceeding will be considered a "foreign main proceeding" if it is pending in the country where the debtor has the COMI.

Stella SA is incorporated and headquartered in France, its products are made in Italy, and it sells products in several countries including England. This makes the determination of COMI complex, is the COMI is found to be in England, the scheme of arrangement would be recognized as a foreign main proceeding. If Stella's COMI is not in England, but Stella has an establishment (there is a retail store in England) in England, the scheme of arrangement would be recognized as a foreign non-main proceeding.

]

Commented [la74]: As you stated above, the COMI is France, so foreign main recognition is not available

Commented [la75]: Correct, 1 mark

Commented [la76]: Correct, 1 mark

Question 4.3 [5 marks]

Commented [la77]: Total marks 3/5

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 seen as enforceable when there are still significant obligations that have not been completed by the parties involved. In the case of the manufacturing license for Xblox, part of the contract has been fulfilled, but there are still seven years remaining. The duration of seven years for the uncompleted portion of the contract is viewed as significant. The parties are obligated to pay royalties. Therefore, it's regarded as an executory contract, meaning it could be subject to termination or non-fulfilment of obligations by any of the parties involved.

]

Commented [la78]: Correct, 1 mark

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

[
The Bankruptcy Code has the power to lift restrictions on contract transfers, enabling the debtor to extract more value from their assets, implying the contract has been enforced. However, certain non-bankruptcy laws could prevent a party from making the other accept a contract assignment, like what's seen in the Intellectual Property Licensing Act. Since Xbox is an invention, it could be deemed intellectual property and, as such, could be governed by intellectual property laws. Therefore, because of the reasons mentioned above, Game Mart can't transfer the Xbox during the 363 Sale without getting Toyco's approval first.

]

Commented [la79]: Correct, 1 mark, the right to manufacture is an IP license and the consent of the counterparty is required by applicable non-bankruptcy law

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

[
Game Mart can transfer the factory lease as part of the 363 Sale without Land Corp's consent. Game Mart will however need to obtain Land Corp's consent if the transfer includes the use of the lease as surety in a loan agreement or similar.

]

Commented [la80]: Correct, 1 mark, specifically the anti-assignment provisions would not be enforceable in bankruptcy

* End of Assessment *