



### **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: **[student number.assessment3A]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. 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 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

**ANSWER ALL THE QUESTIONS**

Commented [A&O1]: Total marks 27.75

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

Commented [A&O2]: Total marks 6/10

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 [A&O3]: Correct, 1 mark

FabCo, based in Utah, owes SupplyCo, based in Mexico, US\$10,000 on a past-due invoice. May SupplyCo file an involuntary petition to place FabCo into chapter 11 bankruptcy proceedings?

- (a) Yes.
- (b) Yes, if FabCo has fewer than 12 non-contingent, non-insider creditors.
- (c) Yes, if other creditors owed at least US\$5,775 join in the petition.**
- (d) No, because SupplyCo doesn't know whether FabCo is insolvent.
- (e) No, because SupplyCo is not a US company.

**Question 1.2**

Commented [A&O4]: Incorrect, the correct response is (b)

Which of the following is a *mandatory*, rather than *discretionary*, basis to deny recognition of a foreign judgment under state law based on one of the Uniform Acts?

- (a) The foreign judgment is subject to appeal in the foreign country.
- (b) The foreign judgment is an injunction.
- (c) The foreign judgment was issued by a court, contrary to the parties' agreement to arbitrate.
- (d) The defendant did not have sufficient notice of the foreign proceeding to put on a defense.**
- (e) The foreign judgment is inconsistent with another final judgment on the same subject matter.

**Question 1.3**

Commented [A&O5]: Correct, 1 mark

Which of the following is likely to be a party in interest in the bankruptcy of XYZ Corp?

- (a) A shareholder in ABC Corp, to which XYZ Corp is substantially indebted.
- (b) A journalist writing about XYZ Corp's bankruptcy.
- (c) A shareholder in MNO Corp, which owns all of XYZ Corp's shares.

(d) A retired employee of XYZ Corp who receives payments from the company's pension plan.

(e) A non-profit organization that advocates for companies like XYZ Corp to be held responsible for climate change.

**Question 1.4**

If a debtor rejects an executory trademark license agreement under which it licenses a trademark to its counterparty, which of the following is true:

- (a) The counterparty must immediately stop using the trademark.
- (b) The counterparty can continue using the trademark for the remaining period of the license.
- (c) The counterparty has a claim for damages for breach of contract.

(d) Both (a) and (c).

(e) Both (b) and (c).

**Question 1.5**

In which of the following circumstances may a counterparty enforce a contractual *ipso facto* clause?

- (a) The contract would obligate the counterparty to extend a loan to the debtor.
- (b) The contract is a lease of real property.
- (c) The clause is triggered by the bankruptcy filing of a third party, not the debtor.
- (d) Both (a) and (c).
- (e) *Ipso facto* clauses are never enforceable against a debtor.

**Question 1.6**

What does a chapter 11 debtor have exclusivity to propose for the first 120 days of proceedings?

- (a) Avoidance actions.
- (b) A plan of reorganization.
- (c) DIP financing.
- (d) Lifting the automatic stay.
- (e) Formation of an equity committee.

Commented [A&O6]: Incorrect, the correct response is (d)

Commented [A&O7]: Incorrect, the correct response is (d)

Commented [A&O8]: Correct, 1 mark

**Question 1.7**

Which of the following is **not** a requirement to confirm a “cramdown” plan?

- (a) Acceptance of the plan by all classes of secured creditors.
- (b) Acceptance of the plan by at least one class of impaired, non-insider creditors.**
- (c) The plan is fair and equitable to dissenting classes of creditors.
- (d) The plan does not discriminate unfairly against dissenting classes of creditors.
- (e) The dissenting creditors receive no less than they would under a liquidation scenario.

**Commented [A&O9]:** Incorrect, the correct response is (a)

**Question 1.8**

When may distributions to creditors diverge from the absolute priority rule?

- (a) In a chapter 7 proceeding with consent of the affected senior creditor.
- (b) In a chapter 7 proceeding with consent of the affected junior creditor.
- (c) In a chapter 11 proceeding with consent of the affected senior creditor.**
- (d) In a chapter 11 proceeding with consent of the affected junior creditor.
- (e) The absolute priority rule cannot be deviated from.

**Commented [A&O10]:** Correct, 1 mark

**Question 1.9**

Who may serve as a foreign representative to seek recognition of a foreign proceeding under chapter 15?

- (a) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (b) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (c) An insolvency professional appointed by the court overseeing the foreign proceeding.
- (d) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.
- (e) All of the above.**

**Commented [A&O11]:** Correct, 1 mark

**Question 1.10**

Which of the following is *not* available as relief in a chapter 15 proceeding?

- (a) Sale of US property free and clear pursuant to section 363.
- (b) Prosecution of avoidance actions pursuant to section 544 .**
- (c) Entrusting the management of US assets to the foreign representative.

**Commented [A&O12]:** Correct, 1 mark

(d) Application of the automatic stay under section 362 to the debtor's interests in US property.

(e) Discovery about the debtor's assets.

**QUESTION 2 (direct questions) [10 marks]**

Commented [A&O13]: Total marks 7.75/10

**Question 2.1 [maximum 1 mark]**

Commented [A&O14]: Total marks 1/1

What two alternative qualifications render a corporation eligible to be a debtor in a US chapter 7 or 11 proceeding?

Answer 2.1: Although, to be a debtor under any chapter of the Bankruptcy Code in the US, a debtor must have its presence or its place of business or any of the assets in the United States. This requirement may be met by minimal or intangible assets, such as a retainer paid to a US attorney or a claim under a US law. Though, for specific qualification under chapter 7 or 11 below is true.

Commented [A&O15]: Correct, ½ mark

Commented [A&O16]: Correct, ½ mark

Eligibility of the Debtor for Chapter 7: Railroads, insurance companies, banks and certain other financial institutions are excluded for being a debtor under chapter 7 as separate liquidation proceedings exist for these entities under state and federal laws.

Eligibility of the Debtor for Chapter 11: Eligibility for this chapter is slightly broader as railroads and certain types of financial institutions qualify but stockbrokers and commodity brokers, which may be a debtor under chapter 7, cannot be a chapter 11 debtors, operation of such entities in bankruptcy is governed by other federal statutes.

**Question 2.2 [maximum 2 marks]**

Commented [A&O17]: Total marks 1.5/2

What is an executory contract?

Answer 2.2: Executory contract: Under US bankruptcy laws, a contract is said to be executory if there are material unperformed obligations on both sides. For example, if the debtor is party to a construction contract with a builder and, as of the petition date, construction and payment are only partially complete, the contract is executory, whereas if construction is complete, but the debtor had not made its final payment, the contract would not be executory.

Commented [A&O18]: Correct, ½ mark, and the nature of the obligations must be such that failure to perform would be a material breach.

Commented [A&O19]: Correct, 1 mark

**Question 2.3 [maximum 2 marks]**

Commented [A&O20]: 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?

Answer 2.3: Under chapter 11 proceedings where the debtor is in possession, a lot of cost is incurred to run the process such as to pay the lawyers and other advisors of debtor and the creditors. It is generally difficult to take out the money for these expenses from the already stressed debtor, so the Bankruptcy Code provides incentives to lenders and counterparties to extend credit to the debtor which is called debtor in possession (DIP) financing.

There are four alternative ways to secure DIP financing, out of them one is the method of "priming lien".

Priming Lien: To obtain the finance under this, court may grant a priming lien that is senior or equal to a pre-petition lien on estate property to secure post-petition financing. The debtor also must demonstrate that the interest of the secured creditor being primed is adequately protected.

Commented [A&O21]: Correct, 1 mark

Commented [A&O22]: Correct, ½ mark, also the debtor must show that financing is not available without a priming lien

#### Question 2.4 [maximum 2 marks]

Commented [A&O23]: Total marks 1.75/2

In voting on a plan of reorganization, which class(es) of creditors are (i) deemed to accept the plan, (ii) deemed to reject the plan and (iii) permitted to vote on the plan? What vote is necessary for a class of creditors to accept a plan?

Answer 2.4: (i): Class of creditors deemed to accept the plan: An unimpaired class.

Commented [A&O24]: Correct, ½ mark

(ii): Class of creditors deemed to reject the plan: The class that will receive nothing in the plan.

Commented [A&O25]: Correct, ½ mark

(iii): Class of creditor permitted to vote on the plan: The impaired classes.

Commented [A&O26]: Partially correct, ¼ mark, specifically impaired classes that will receive something under the plan.

For a class of creditor to accept a plan, simple majority of the creditors in the class, holding at least two-thirds of the value of claims in the class, vote in favour or for equity interests, if two-thirds in amount of interests vote in favour.

Commented [A&O27]: Correct, ½ mark

#### Question 2.5 [maximum 3 marks]

Commented [A&O28]: Total marks 2/3

How does the automatic stay available in chapter 15 proceedings differ from that available in chapter 11 proceedings?

Answer 2.5: Automatic stay under Chapter 11: To formulate a restructuring plan, negotiate with creditors and realize the value of its assets in an orderly process culminating in the payment of creditors' claims in accordance with the priorities set out in the Bankruptcy Code, a debtor is provided with the worldwide automatic stay on filing of any plenary petition which gives it the breathing space required for doing so. The scope of automatic stay is very wide and only upon a specific application can that be lifted to for specific purposes only.

Commented [A&O29]: Correct, ½ mark

Commented [A&O30]: Correct, ½ mark

Automatic stay under Chapter 15: Here there is a distinction qua main and non-main proceedings. Upon recognition of a foreign main proceedings, certain provision of the Code automatically applies such as operation of the debtor's business in the ordinary course by the foreign representative, sale transfer or use of property outside the ordinary course. Upon recognition of a foreign non-main proceedings most of the stays apply on a discretionary basis.

Commented [A&O31]: Correct, ½ mark, though the stay can also come into effect on an application for interim relief and is limited to property in the US

Commented [A&O32]: Correct, ½ mark

In chapter 11 stay, an act taken in violation of the stay constitutes contempt of court and is void or voidable depending on the circuit. Whereas automatic stay under chapter 15 is subject to a carveout to permit the filing of a plenary proceedings even after the recognition of a foreign proceedings.

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

Commented [A&O33]: Total marks 9/15

#### Question 3.1 [maximum 3 marks]

Commented [A&O34]: Total marks 3/3

What fiduciary duties do directors of Delaware corporations owe and to whom are the duties owed in the ordinary course of business? To whom are duties owed when the corporation is potentially or actually insolvent?

Answer 3.1: As per the Delaware corporations' law, which is the pre-eminent US jurisdiction for corporate law, Directors' liability is more limited than that elsewhere, i.e., Directors owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision-making. Although they are protected under the Business Judgement Rule arising from liability for errors of judgement. As per this rule directors have acted in good faith based on reasonable information. And this presumption can only be rebutted by showing that majority of the board in fact were not reasonably informed and did not honestly believe that their decision was in the corporation's best interest or were not acting in good faith. In addition, directors may be exculpated by a corporation's certificate of incorporation from liability for breach of the duty of care (but not for breach of the duty of loyalty). The business judgement rule does not apply where a transaction is approved by a board majority that is not disinterested and independent or a controlling shareholder is on both sides of the transaction, in such cases, the transaction will be void unless the entire fairness standard is satisfied.

Commented [A&O35]: Correct, ½ mark

Commented [A&O36]: Correct, ½ mark

In case of corporation being potentially insolvent, director's duties are owed to the corporation and its shareholders, not to the creditors and therefore the shareholders stand to receive nothing in bankruptcy. The Delaware Supreme Court has put to rest any suggestion that directors owe duties to creditors when a company is operating "in the zone of insolvency", or indeed is actually insolvent. Thus, there is no equivalent under US law of the concept of 'wrongful trading' or 'deepening insolvency'.

Commented [A&O37]: Correct, ½ mark

Commented [A&O38]: Correct, ½ mark

Commented [A&O39]: Correct, ½ mark

Commented [A&O40]: Correct, ½ mark

### Question 3.2 [maximum 3 marks]

Commented [A&O41]: Total marks 2/3

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

Answer 3.2: As a procedure, US non-bankruptcy laws distinguishes between final and interlocutory orders. Final orders are those that disposes of all the issues, leaving nothing further to be decided, whereas interlocutory orders resolve only some issues or claims. Final orders may be appealed as a matter of right, whereas interlocutory orders may be appealed only with leave of the appellate court. This same procedure applies to the bankruptcy proceedings as well, except that orders extending the period of exclusivity to propose a plan are appealable as of right. When a bankruptcy court decides upon not only claims between two parties but an issue of broad applicability, such as the post-petition interest rate applicable to the debtor's obligations, it would be a final order. Recognizing the unique nature of bankruptcy proceedings as "an aggregation of individual controversies", the US Supreme Court has held that a bankruptcy order pronounced in the bankruptcy court resolving a discrete dispute is a final order for appeals.

Commented [A&O42]: This question for looking for constitutional authority to enter a final order, which the bankruptcy court has on a challenge to the petition or on a core matter with the consent of the parties.

In general, appeals from bankruptcy court orders are heard by the district court for the district in which they sit in. In certain circuits, however, bankruptcy appeals are heard by a Bankruptcy Appellate Panel (BAP), convened from the judges of the bankruptcy courts within the circuit. From the district court or BAP, there is a further appeal of right to the circuit court of appeals. In rare circumstances, such as if an appeal raises a question of law or requires conflicting controlling decisions, it may directly go to court of appeals.

Commented [A&O43]: Correct, ½ mark

Commented [A&O44]: Correct, ½ mark

If the ruling was in a noncore proceeding or the bankruptcy court did not have authority to enter a final order, the district court or BAP reviews *de novo* all findings of fact and conclusions of law to which a party has objected.

Commented [A&O45]: Correct, 1 mark

### Question 3.3 [maximum 4 marks]

Commented [A&O46]: Total marks 2/4



Describe how claims for recovery of preferences, fraudulent conveyance and constructive fraudulent conveyance differ.

Answer 3.3: Preferences: A preference is a transfer of the debtor's property made in a suspect period before the petition date that must be returned to the estate if it exceeds the amount the recipient would have received in a chapter 7 liquidation had the transfer not been made. The avoidance of preference is intended to equalize treatment of similarly situated creditors and disincentivize a race to collect from a distressed debtor. The recipient of a preference that is avoided has an unsecured claim for the value returned to the estate.

Fraudulent conveyances: A fraudulent conveyance is proven by showing that the debtor made a transfer or incurred an obligation "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted". Intent may be proven circumstantially, by references to "badges of fraud" developed in state fraudulent transfer law.

Constructive fraudulent conveyances: A constructive fraudulent conveyances can be proved by showing that the debtor received less than reasonably equivalent value in exchange for a transfer or incurrence of obligation.

Differences: 1. Look back period for preferences is generally immediately prior to the initiation of the bankruptcy proceedings or 90 days prior to the petition date. Whereas, in the other two it is generally two years prior to petition date.

2. The intent or impact of the preferences is to improve the position of a particular creditor in comparison to others, as if in the event of liquidation of chapter 7. Whereas others are done with the intention of defrauding the creditors or hiding material information from the creditors.

3. In case of fraudulent conveyances and constructive fraudulent conveyances, the major difference is of the intent. In the first one, it is the intent of the debtor to defraud which is proved, in the second one actions of the debtor are amounting to be a loss to the creditors in the event if insolvency of the debtor happens.

#### Question 3.4 [maximum 5 marks]

How does a US bankruptcy court determine whether a foreign proceeding is a main or non-main proceeding under chapter 15?

Answer 3.4: Commencement of a chapter 15 proceedings under US bankruptcy law is done by filing a petition for recognition in the bankruptcy courts. Whether a proceeding is a foreign main or foreign non-main proceeding, depends on various factors which are not absolute in nature, as US law does not exactly recognise concept of COMI (center of main interests), which uses the concept of domicile, principal place of business, and location of assets in determining jurisdiction and venue. Although relevant factors to decide COMI are:

- Location of headquarters;
- Location of management;
- Location of primary assets;
- Location of majority of debtor's creditors or a majority of the creditors that will be affected by the relief requested by the foreign representative and;
- Jurisdiction whose law will apply to most disputes.

Based on the above factors a debtor's COMI can be established and any proceedings for which debtor's COMI cannot be established would be recognized as foreign non-main proceeding subject to debtor having an establishment in the jurisdiction, a place where it

**Commented [A&O47]:** It must be a transfer to a creditor on account of an antecedent debt, whereas an actual or constructive fraudulent transfer can be any transfer of an interest of the debtor in property. Also, the debtor must have been insolvent at the time of a transfer for a preference, whereas this is not a necessary element for a fraudulent conveyance.

**Commented [A&O48]:** Correct, ½ mark, or 1 year for insiders

**Commented [A&O49]:** Correct, 1 mark

**Commented [A&O50]:** Correct, ½ mark, whereas intent is irrelevant in the other two

**Commented [A&O51]:** Total marks 2/5

**Commented [A&O52]:** A foreign main proceeding is one pending in the jurisdiction of the debtor's COMI.

**Commented [A&O53]:** Incorrect, chapter 15 is the only place where US law uses the concept of COMI. The bankruptcy court assesses COMI as of the date of the commencement of the US proceedings, there is a rebuttable presumption that the company's place of incorporation is its COMI and COMI should be capable of being established by a creditor or third party on objective evidence.

**Commented [A&O54]:** Correct, 1 mark

**Commented [A&O55]:** Correct, 1 mark

carried out non-transitory economic activity, prior to commencement of chapter 11 proceedings.

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

Commented [A&O56]: Total marks 5/15

**Question 4.1 [maximum 5 marks]**

Commented [A&O57]: Total marks 3/5

Rental Corporation is a publicly-traded company that leases office space from office building owners and sublets the space to small businesses. It has recently announced that it is being investigated by the US Department of Justice Fraud Division (DOJ) regarding allegedly fraudulent misstatements of revenues; shortly after the announcement, a securities class action litigation was filed against Rental Corporation in New York federal court. Due to the increase in the numbers of businesses operating remotely, Rental Corporation has suffered a decline in revenues. As a result, it has failed to pay rent on some of its office space leases and it has just defaulted on its quarterly payment on its credit facility. What would be the effect of a chapter 11 petition being filed by Rental Corporation on each of (i) the DOJ investigation, (ii) the securities class action litigation; (iii) the delinquent leases and (iv) the credit facility?

Answer 4.1: After filling a petition under chapter 11 of Bankruptcy court, a worldwide automatic stay comes into effect. Although there are some exceptions to this stay.

Commented [A&O58]: Correct, 1 mark

(i): As the DOJ investigation is regulatory investigation, it will continue.

Commented [A&O59]: Correct, 1 mark

(ii): The securities class action litigation will stay.

Commented [A&O60]: Correct, 1 mark, it will be stayed as pre-petition litigation

(iii): The delinquent leases can be terminated.

Commented [A&O61]: Incorrect, as they had not terminated by their terms pre-petition and only had a payment default, the lessors would be barred from pursuing eviction proceedings.

(iv): the credit facility will continue.

Commented [A&O62]: Incorrect, the lenders would be barred from pursuing enforcement to recover on the facility.

**Question 4.2 [maximum 5 marks]**

Commented [A&O63]: Total marks 0/5

Considering the facts set forth in Question 4.1, what protections does the Bankruptcy Code provide to lessors of office space to Rental Corporation?

Answer 4.2: Upon expiry of the rent agreements for non-residential properties, lessors can terminate the contract if the lessee/tenant/debtor is undergoing the chapter 11 proceedings. Otherwise, there will be a stay on eviction from the tenant.

Commented [A&O64]: Rental Corporation only has 120 days to decide whether to assume or reject the leases. This period can be extended by 90 days for cause, but not further without lessor consent. Rental Corporation must pay rent as an administrative expense for the period prior to rejection of a lease. Administrative priority treatment for 2 years of rental payments for leases that are assumed and subsequently rejected. Lessors have a claim in the bankruptcy for unpaid pre-petition rent.

**Question 4.3 [maximum 5 marks]**

Commented [A&O65]: Total marks 2/5

Paint Corporation formulates house paint according to proprietary and patented recipes at its factory in the United States, which it sells to home improvement stores under a number of distribution contracts. The US Environmental Protection Agency is investigating whether Paint Corporation's operations are causing harmful chemicals to contaminate a nearby river. Paint Corporation is concerned it cannot afford the clean-up that may be required and is seeking to sell its business. Home Corporation is interested in buying the business but does not want the potentially contaminated property (it can manufacture paint at its own factory) and is concerned about obtaining consent from all the home improvement stores to assign the distribution contracts. How would a sale under section 363 of the Bankruptcy Code address these issues?

Answer 4.3: A sale under section 363 empowers a debtor to sell its property free and clear of creditor interests with court approval. It also has a "home court" in which to consolidate litigation of creditor claims relating to those interests.

To perform 363 sales, a debtor in possession must establish that it is proposing the transaction in its judgement which is in the best interest of the business and its creditors. Although there is no particular procedure for 363 sales specified in the Code, the practice in most cases for sales is to conduct an auction with a "stalking horse" bidder.

In the above cited case also, this will be relevant. Paint corporation will market its sale of business and invite interested parties to conduct due diligence, ultimately leading to negotiation of proposed transaction documents with Home Corporation. Upon court approval of these documents, Home Corporation's bid becomes the stalking horse for the auction, which another bid must exceed in price or terms to be selected as highest and best offer. If another bid would be selected Home Corporation will be paid with a "break fee" as it had invested time and resources in the process. And if there is no better bid then Home Corporation's bid would be accepted as a conclusion of the bidding.

This process also provides for, that debtors assets can be sold as a whole or separately. So, the process will enable Home Corporation to submit a bid where it chooses to not buy the factory which is subject to investigations but chooses to buy the proprietary and patented recipes and home improvement stores' distribution contracts.

**Commented [A&O66]:** Correct, 1 mark, and that sale cannot be overturned on appeal

**Commented [A&O67]:** Correct, 1 mark, it could also obtain the distribution contracts through assumption and assignment and this might generate a higher sales price than sale of the business outside of the bankruptcy

**\* End of Assessment \***