



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: 202122-514.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 "studentID" 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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (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

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

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

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

Question 1.1

Commented [H(3)]: Correct, 1 mark

ABC Corp is filing for bankruptcy under chapter 11. Which of the following **is not** a party in interest in that proceeding?

- (a) A neighboring land owner who has leased equipment to ABC Corp.
- (b) ABC's government regulator.
- (c) A bank that has loaned money to ABC.
- (d) **A local advocacy group.**
- (e) All of the above.

Question 1.2

Commented [H(4)]: Correct, 1 mark

Which of the following statements regarding executory contracts is **false**?

- (a) **Executory contracts are clearly defined by the bankruptcy code.**
- (b) Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.
- (c) In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.
- (d) A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.
- (e) Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.

Question 1.3

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In which of the following scenarios does a bankruptcy court have constitutional authority to issue a final order? Assume in each that the counterparty to the dispute has not consented to the bankruptcy court's exercise of jurisdiction.

- (a) A counterclaim against the estate that introduces a question under state law.
- (b) Since the list of core proceedings is non-exhaustive, a bankruptcy court may issue a final determination on any matter that comes before it.

- (c) A creditor's claim against an affiliate of the debtor that has guaranteed the debtor's obligation to the creditor
- (d) A debtor's motion to dismiss an involuntary bankruptcy petition.
- (e) None of the above.

Question 1.4

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Which of the following statements about "pre-packs" is **false**?

- (a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.
- (b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.
- (c) A pre-pack debtor may spend as little as a single day in bankruptcy.
- (d) The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.
- (e) Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.

Question 1.5

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Which of the following statements regarding cramdowns is **true**?

- (a) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.
- (b) Because cramdowns do not require the consent of all classes, the plan of reorganization may not be fair and equitable to all impaired classes.
- (c) 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.
- (d) Class definition is rarely a battleground when a debtor tries to cramdown classes.
- (e) Dissenting creditors are not permitted to challenge the classification of a creditor supporting the cramdown.

Question 1.6

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Which of the following statements about the plan exclusivity period is **true**?

- (a) The exclusivity period is 1 year.
- (b) The exclusivity period cannot be extended.
- (c) The exclusivity period cannot be shortened.

(d) During the exclusivity period, only a creditor may propose a plan of reorganization.

(e) During the exclusivity period, only the debtor may propose a plan of reorganization.

Question 1.7

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Which of the following statements about chapter 15 is **false**?

(a) The automatic stay applies upon the filing of a petition for recognition.

(b) A debtor cannot be subject to an involuntary chapter 15 proceeding.

(c) A chapter 15 petition must be filed by a foreign representative.

(d) The automatic stay applies only to property within the territorial jurisdiction of the United States.

(e) Recognition may be granted to a foreign proceeding as either foreign main or foreign non-main.

Question 1.8

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Which of the following statements about 363 sales is **false**?

(a) A 363 sale permits a debtor to sell an asset free and clear of encumbrances.

(b) A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.

(c) A 363 sale must be conducted as an auction with a stalking horse bidder.

(d) Purchasers may pay a higher price for assets sold in a 363 sale than in an out-of-court transaction.

(e) Sophisticated parties will insist on a 363 sale if there is any question regarding whether the sale is "in the ordinary course of business".

Question 1.9

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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 has a claim for damages for breach of contract.

(b) The counterparty must immediately stop using the trademark.

(c) The counterparty can continue using the trademark for the remaining period of the license.

(d) Both (a) and (b).

(e) Both (a) and (c).

Question 1.10

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

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

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QUESTION 2 (direct questions) [10 marks]

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Question 2.1 (2 marks)

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What is the difference between a voluntary petition for bankruptcy and an involuntary petition for bankruptcy?

[voluntary petitions are filed by creditors, involuntary petitions are filed by debtors.]

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In an involuntary petition, petitioning creditors must allege insolvency of the debtor (i.e. the debtor is not paying its debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount, or that within 120 days before the filing of the petition, a custodian, other than a trustee, receiver or an agent appointed to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession). There is no requirement of allegation of insolvency in a voluntary petition.]

Question 2.2 (2 marks)

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What are two potential consequences of a violation of the automatic stay?

[An act taken in violation of the automatic stay is void or voidable (depending on the circuit in which the bankruptcy proceeding is pending).]

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[Such act also constitutes contempt of court, and a court can impose contempt sanctions, which may include payment of the debtors' attorneys' fees, requiring the stay violator to take affirmative acts to undo the effect of its violation, and/or impose a daily fine to be paid to the court until the stay violation has been rectified.]

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Question 2.3 (3 marks)

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In what circumstances is a claim considered "impaired"? When is a holder of an impaired claim not entitled to vote on a proposed plan of reorganization and what happens instead?

[a claim is impaired unless the plan leaves the holder's legal equitable, and contractual rights unaltered.]

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If the proposed plan reverses contractual acceleration by curing any monetary default and compensating the holder for any damages, the holder of the claim would lose its entitlement to vote on the plan, and it would be deemed to have accepted the plan.]

Commented [H(21)]: Also, a holder of an impaired claim that will receive nothing under the plan is not entitled to vote and is deemed to reject the plan.

Question 2.4 (3 marks)

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Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:

(1) Which cause of action applies only to transfers made on account of antecedent debt?

[Preference. Preference only arises where the debtor pays a creditor for a pre-existing debt.]

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(2) Which cause of action requires that the debtor be presumed or proven to have been insolvent at the time of the transfer?

[Preference. To establish this cause of action, the debtor must be (presumed or proven) insolvent at the time of the transfer.

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Fraudulent and constructive fraudulent conveyancing may be established if the debtor is not insolvent at the time of the transaction but becomes insolvent as a result of the transfer.]

(3) Which cause of action requires that the debtor be proven to have intended to frustrate creditors' recoveries?

[Fraudulent conveyances require proof of actual intent to hinder, delay or defraud a creditor.]

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

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Question 3.1 (3 marks)

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How did *Stern v Marshall* change the law of bankruptcy court jurisdiction and authority to enter a final order?

[Prior to the decision in *Stern v Marshall*, it was widely believed that bankruptcy judges can hear and make final determinations in core proceedings as prescribed by federal statute. As to non-core proceedings, bankruptcy court may hear if they are sufficiently related to a bankruptcy proceeding, but cannot make final determination, instead, the bankruptcy judge must submit the proposed findings of facts and conclusions of law to district court, which has jurisdiction to make final determination.

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In *Stern v Marshall*, the US Supreme Court held under Article III of the constitution, only Article III courts can exercise judicial powers granted by Article III. Bankruptcy courts were established by federal statute and not by Article III of the US Constitution, thus are not Article III courts and cannot exercise Article III judicial power. While Congress did retain the power to assign certain matters to non-Article III tribunals, this power was limited to rights created by federal statute (such as rights under the Bankruptcy Code), and not other rights subject to

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Article III jurisdiction (for example, state law counterclaims as in *Stern v Marshall*), even if they are part of the core proceedings prescribed by statute.

Following the *Stern v Marshall*, in relation to issues in core proceedings over which they lack constitutional authority, bankruptcy courts must follow the procedure for non-core proceedings, which is to issue a report and recommendation for review by the district court. The Bankruptcy Rules have been amended to reflect this by requiring litigants to state in their pleadings whether they consent to the entry of final orders or judgment by the bankruptcy court, and by permitting a district court that determines that a bankruptcy court did not have jurisdiction to enter a final order to treat its order as proposed finding of facts and conclusions of law.]

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Question 3.2 (3 marks)

What provisions of the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding? What are two ways that the foreign representative can obtain equivalent relief?

[A foreign representative cannot invoke the powers of avoidance of preferences, fraudulent conveyances and constructive fraudulent conveyances under the Bankruptcy Code in a chapter 15 proceeding.]

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[To obtain access to the Bankruptcy Code's avoiding powers, the foreign representatives may commence a plenary proceeding such as chapter 7 or chapter 11.]

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[The foreign representative may also use equivalent avoidance powers under applicable foreign law or other US law (*Fogerty v. Petroquest Resources, Inc.*, 601 F.3d 319 (5th Cir. 2010); *In re Massa Falida do Banco Cruzeiro do Sul S.A.*, No. :14-22974-BKC-LMI, 2017 WL 1102814 (Bankr. S.D. Fla. Mar. 23, 2017))]

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Question 3.3 (4 marks)

Describe the differences between interlocutory and final orders and how an appeal may be taken from each. Which courts hear direct appeals from bankruptcy court orders?

[Final orders are those that dispose of all issues, leaving nothing further to be determined. Interlocutory orders resolve only some issues or claims. Final orders can be appealed as of right, and interlocutory orders may only be appealed with leave of the appellate court. In bankruptcy proceedings, order resolving a discrete dispute is a final order for appeals purposes (*Bullard v Blue Hills Bank*, 135 S Ct 1686(2015)).]

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

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

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

As to orders in a core proceeding, over which the bankruptcy court had constitutional authority to enter a final order, the conclusions of law are reviewed de novo and findings of fact are reviewed for abuse of discretion. As to orders in relation to an issue over which the bankruptcy court lacks constitutional authority, all findings of facts and conclusions of law to which a party has objected are reviewed de novo.

In general, appeals from bankruptcy courts are heard by the district court for the district in which they sit. In certain circuits, bankruptcy appeals are heard by a Bankruptcy Appellate Panel. There is a further appeal of right to the circuit court of appeals.]

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Question 3.4 (5 marks)

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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?

[Directors of Delaware corporations are subject to the fiduciary duties of care and duties of loyalty. Duty of care requires directors to make informed, deliberative decisions based on all material information reasonably available. Duty of loyalty requires director to act, on a disinterested and independent basis, in good faith with an honest belief that the action is in the best interest of the corporation and its shareholders. The duties are owed to the corporation and its shareholders in the ordinary course of business (*Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939); *Malone v. Brincat*, 111 A.2d 5, 10 (Del. 1998). When the corporation is potentially or actual insolvent, directors' duties are still owed to the corporation and its shareholders, and not the creditors. (*Nacepf v. Gheewalla*, 930 A.2d 92 (Del. 2007))]

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

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Question 4.1 [4 marks]

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Gambling Corporation is incorporated and has a principal place of business in Greece and it operates casinos and betting parlors in many international cities, including Athens, Las Vegas, London and Macau. Gambling Corp's bonds (governed by English law) are due to mature in one (1) year, but it is unable to repay or refinance them. Gambling Corp is considering using an English scheme of arrangement to restructure the bonds.

Discuss whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding.

[A foreign proceeding may be recognised under Chapter 15 if it satisfies the following requirements:

- A foreign proceeding with respect to the debtor is pending.
- The foreign representative is empowered to act by the proceeding.
- The foreign proceeding must be opened in the debtor's centre of main interests (COMI) or where the debtor has an establishment.

Assuming the chapter 15 petition will be made by a foreign representative.

Foreign Proceeding

Foreign proceeding is defined by the Bankruptcy Code as a collective judicial or administrative proceeding in a foreign country under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation.

The English scheme of arrangement is judicial proceeding, for purpose of restructure Gambling Corp. The English scheme is subject to approval and sanction by English Court. The US courts have held that because the scheme itself is subject to approval by the foreign court, the requirement that the debtor's assets and affairs are subject to control or supervision by a foreign court is satisfied. The English scheme is collective proceeding because it affects the interests of at least one group of creditors. The English law relating to scheme of arrangement is a law relating to the adjustment of debt because it permits the restructuring of a company's debts. In light of above, English scheme of arrangement is a foreign proceeding under the US Bankruptcy Code. English scheme of arrangement

has routinely been recognised as foreign proceedings in chapter 15 cases (see, e.g., *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018); *In re Metinvest B.V.*, No. 17–10130–LSS (Bankr. D. Del. Feb. 8, 2017); *In re DTK Finance (plc)*, No. 16–13521–shl (Bankr. S.D.N.Y. Jan. 18, 2017); *In re Metinvest B.V.*, No. 16–11424–LSS (Bankr. D. Del. Jun. 30, 2016); *In re Abengoa Concessions Investments Limited*, No. 16–12590–kjc (Bankr. D. Del. Dec. 6, 2016); *In re YH Limited*, No. 16–12262 (Bankr. S.D.N.Y. Sep. 8, 2016); *In re Metinvest B.V.*, No. 16–10105–LSS (Bankr. D. Del. Jan. 29, 2016); *In re OIC Run–Off Limited*, No. 15–13054–scc (Bankr. S.D.N.Y. Jan. 11, 2016); *In re Codere Finance (UK) Limited*, No. 15–13017–jig (Bankr. S.D.N.Y. Dec. 22, 2015); *In re Towergate Finance, plc*, Case No. 15–10509 (SMB) (Bankr. S.D.N.Y. Mar. 27, 2015); *In re New World Resources N.V.*, Case No. 14–12226 (SMB) (Bankr. S.D.N.Y. Sept. 9, 2014); *In re Zlomrex International Finance S.A.*, No. 13–14138 (Bankr. S.D.N.Y. Jan. 31, 2014); *In re Magyar Telecom B.V.*, No. 13–13508, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013); *In re Tokio Marine Europe Insurance Ltd.*, No. 11–13420 (MG) (Bankr. S.D.N.Y. Sept. 08, 2011); *In re Highlands Ins. Co.(U.K.)*, No. 07–13970 (MG) (Bankr. S.D.N.Y. Aug. 18, 2009); *In re Castle Holdco 4, Ltd.*, No. 09–11761 (REG) (Bankr. S.D.N.Y. May 7, 2009).

COMI and Establishment

A debtor's COMI is presumed to its place of incorporation, here Greece. However, that can be rebutted. Though the bonds are governed by English law, it is unlikely that the COMI of Gambling Corp is in the UK, because Gambling Corp's principal place of business is not in the UK and does not have any substantial operation in the UK. However, the place of COMI will be assessed at the date of the US petition, so the COMI may be shifted to the UK through the conduct of the English proceeding, for example, by appointing a provisional liquidator in the UK, moving the books and records to the UK, appointing local agents to marshal the debtor's assets, and holding meetings with creditors and the debtor's management in the UK (*In re Ocean Rig UDW Inc.* 570 BR 687 (Bankr SDNY 2017).

Alternatively, English scheme of arrangement may be recognised as a foreign non-main proceeding if it can be established that Gambling Corp has an establishment in the UK. Under the US Bankruptcy Code, establishment means a place of operations where the debtor carries out a non-transitory economic activity.

Question 4.2 [5 marks]

Oil Corporation is incorporated in Delaware and has its principal place of business in Texas. Oil Corp is facing a number of challenges to its business. First, ShipCo, one of its key customers, has filed a breach of contract lawsuit in Texas state court alleging that Oil Corp sold it contaminated oil that caused USD 1 billion in damage to ShipCo's container ships. Second, the US Department of Justice is investigating whether Oil Corp illegally purchased oil from countries subject to US sanctions. Third, Oil Corp. has missed a payment on its secured loan from USA Bank, and USA Bank is threatening to foreclose on an Oil Corp refinery located in the Philippines. Fourth, because of all these distractions, Oil Corp has forgotten to pay rent on its Houston, Texas office space and its landlord is threatening to evict it. What would be the effect of Oil Corp filing a chapter 11 petition on each of these four situations?

Upon filing of the chapter 11 petition, a worldwide automatic stay will immediately come into effect.

ShipCo will be barred from continuing the breach of contract proceeding (11 US Code s 362(a)(1)).

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Commented [H(52)]: This would not be possible due to the nature of the scheme proceeding, but otherwise a good point, 1/2 mark

Commented [H(53)]: Correct, 1 mark, note that Gambling Corp has a casino in the UK so would qualify

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

DOJ may continue its investigation. The automatic stay does not apply to criminal investigation and criminal actions (11 US Code s 362(b)(1))

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

Despite that the oil refinery is located in the Philippines, USA Bank is barred from foreclosing the refinery (11 US Code s 362(a)(4)&(5). The automatic stay bars actions worldwide.

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

The landlord is barred from evicting Oil Corp from the office space under 11 US Code s 362(a)(3), unless the term of the lease is otherwise expired (i.e. not terminated for non-payment of rent).

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Question 4.3 [6 marks]

Commented [H(60)]: Total marks 6/6

Oil Corp has filed for bankruptcy and is planning to sell its plastic manufacturing business through a 363 sale. The plastic manufacturing business operates under the trademark "Interconnect", which is licensed from Plastic Corp. Oil Corp has invented several patented processes for plastic manufacturing, which it licenses to Plastic Corp. The main manufacturing facility for the plastic business is in Dallas, and Oil Corp has granted a lien on the facility to USA Bank to secure its USD 500 million loan.

Oil Corp thinks it will get the highest return for the plastics manufacturing business if it can (i) assume and assign the trademark license; (ii) reject the patent licenses so the purchaser has the exclusive right to use the patents; and (iii) sell the manufacturing facility free and clear of the USA Bank lien. Can Oil Corp achieve each of these goals without the consent of Plastic Corp and USA Bank? Why or why not?

(i) Because intellectual property licensing law provides that a trademark licensee can assign the benefit of an exclusive or non-exclusive trade mark licence only with the express consent of the licensor, Oil Corp as the licensee cannot assume and assign the trademark license without express consent of Plastic Corp (11 US Code s 365(c))

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

(ii) The patent licenses are executory contracts, because there are material unperformed obligations on both sides (i.e. Oil Corp is obliged to continue to make the patent available to Plastic Corp, and Plastic Corp is obliged to make payments in accordance with the agreement). Under 11 US Code s 365(a), Oil Corp may reject the patent licenses, but Plastic Corp may elect (1) to treat such contract as terminated if such rejection amounts to such a breach as would entitle Plastic Corp to treat the licensing agreement as terminated; or (2) to retain its rights under the licensing agreement including a right to enforce the exclusivity provision of the agreement, but excluding the right to specific enforcement, for the duration of the agreement (11 US Code s 365(n)). In light of the aforesaid, without Plastic Corp's consent, Oil Corp may not reject the patent licenses and grant the exclusive right to use the patents to the purchaser.

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

(iii) the manufacturing facility may be sold free and clear from the lien with USA Bank's consent, or without its consent if the sale price is greater than the aggregate value of all liens on the property under 11 US Code s 363(f). So if the sale price is greater than US\$ 500 million, the facility may be sold free and clear of USA bank's lien even without its consent. Note that 11 US Code s 363(e) requires Bank USA's interest to be adequately protected. This can be satisfied by giving Bank USA a replacement lien on the proceeds of sale.

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

* End of Assessment *