



**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

Commented [H(5)]: Correct, 1 mark

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**

Commented [H(9)]: Correct, 1 mark

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**

Commented [H(10)]: Correct, 1 mark

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)**

Commented [H(14)]: Total marks 2/2

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

The following are the main differences between a voluntary petition for bankruptcy and an involuntary petition for bankruptcy:

- A voluntary petition can be filed by the debtor under any relevant chapter of the Bankruptcy Code and the debtor does not need to be or claim to be insolvent. On the other hand, an involuntary petition for bankruptcy can be filed by a creditor under Chapter 7 or 11 of the Bankruptcy Code and the creditor who has filed the petition needs to allege that the debtor is generally not paying its debts as they become due (unless it is subject to a bona fide dispute in relation to the liability or the amount) or if within 120 days before filing of the petition, a custodian, other than a trustee, receiver or an agent appointed or authorised to take charge of less than substantially all of the debtor's property for the purpose of enforcing a lien against such property was appointed or took possession.
- Requirements for a voluntary petition include filing certain schedules relating to list of creditors, assets, details of its liabilities, executory contracts etc. However, a naked petition without these schedules can also be filed to commence a case under the Bankruptcy Code.
- In case of an involuntary petition, an important requirement is that a certain number of petitioning creditors (one, if the debtor has less than 12 non-contingent, non-insider creditors and three in case if it has more than 12 such creditors) whose claims meet certain criteria (such as being non-contingent, not subject to a bona fide dispute and being of a minimum amount which is updated periodically) need to file the petition.

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

**Question 2.2 (2 marks)**

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

Two potential consequences of a violation of the automatic stay:

- **Contempt of court:** Any action violating an automatic stay, even if such action was taken without knowledge of the stay may be treated as contempt of court. This may result in sanctions such as payment of the fees of the debtor's attorneys and undertaking actions to reverse the violating action. In cases where the court feels the violator of the stay will not act quickly, it may even impose daily fines to be paid to the court till the rectification of the stay violation is completed.
- **Void or voidable:** Any action taken in violation of the automatic stay may be void or voidable, depending on the circuit in which the bankruptcy proceeding is being heard as different circuits have differing view on whether it is void or voidable.

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Commented [H(19)]: Correct, 1 mark

An affected party may try to seek lifting of the stay either on a retrospective or prospective basis to allow act which would otherwise be in violation of the stay.

### 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 considered to be impaired unless the reorganization plan leaves the claimant's legal, equitable and contractual rights unaltered. Late payments in full after the effective date of the reorganization plan is also considered as an impairment. However, it may be deemed that a class is unimpaired if the plan reverses any acceleration of debt under the contract by curing monetary defaults and providing compensation to the claimant for any damages.

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A holder of an impaired claim is not entitled to vote on a proposed plan of reorganization if he is an insider (such as entities/individuals covered under the definition of insider under 11 USC § 101(31)) with respect to the debtor. Votes of insiders such as shareholders is disregarded in the voting on a proposed reorganization plan. In case an impaired class consisting of insiders exists, then even if such class approves the plan, their vote is disregarded and cannot be used to approve the plan and cramdown other impaired classes of creditors of the debtor.

Commented [H(22)]: Votes of insiders are disregarded in a cramdown. Non-insiders who will receive nothing under the plan cannot vote and are deemed to reject the plan.

Even a class which is receiving nothing under the plan is deemed to have rejected 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?

Cause of action relating to **preferences** applies to transfers made on account of antecedent debt.

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

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

Cause of action relating to **preferences** requires that the debtor be presumed or proven to have been insolvent at the time of the transfer.

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

Cause of action relating to **actual fraudulent conveyances** requires that the debtor be proven to have intended to frustrate creditors' recoveries.

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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?

In order to understand the impact of *Stern v Marshall*, it is first important to understand the context in which it was passed. In the case *Northern Pipeline Construction Co. v Marathon Pipe Line Co*, the US Supreme Court struck down the provisions relating to jurisdiction under the 1978 Bankruptcy Code on the ground that bankruptcy proceedings involve issues relating to statutory or contract rights which would otherwise fall under the jurisdiction of courts established under Article III of the US Constitution.

Following this, new jurisdictional provisions were introduced which granted district courts the jurisdiction over bankruptcy proceedings and also allowed the district court to refer such bankruptcy proceedings to bankruptcy court of their district. The statute identified certain 'core' and 'non-core' matters and the bankruptcy court was only allowed to determine proceedings related to core matters such as matters relating to administration of the estate, allowing or disallowing claims against the estate, among others. On the other hand, while the bankruptcy court could hear non-core proceedings if they were sufficiently related to the bankruptcy proceeding, they were not allowed to make a final determination which would fall in the district court's domain.

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After these amendments, the core/non-core principle became established. However, in 2011, in the case *Stern v Marshall*, the US Supreme Court held that even in core proceedings, the bankruptcy court cannot pass final orders in relation to matters under Article III. The facts of the case involved a claim being filed against the debtor who had counterclaimed in response. The counterclaim was also subject to state court proceedings. While the bankruptcy court passed its ruling first in favour of the debtor, the state court jury ruled in favour of the claimant.

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Therefore, this ruling changed the status quo because despite the fact that proceedings in relation to counterclaims are identified as 'core proceedings', the US Supreme Court held that issuance of a final order by the bankruptcy court in relation to a state law claim was unconstitutional under Article III. Therefore, the verdict of the jury was taken to be the conclusive one.

The *Stern* ruling added confusion on issues relating to jurisdiction of bankruptcy courts. However, subsequent Supreme Court rulings and amendments to the Bankruptcy Code have provided more clarity on the issue. The current position is that bankruptcy courts may determine core proceedings over which they do not have constitutional authority by providing a report and recommendations to the district court (similar to what is followed for non-core proceedings). The US Supreme Court has also held that bankruptcy courts may pass final orders if the parties involved consent to the same. This was supported by amendments to bankruptcy rules which require parties to mention in their pleadings whether they consent to passing of final orders by the bankruptcy court and by allowing district courts to treat bankruptcy court orders on issues where it lacks jurisdiction as proposed findings of fact and conclusions of law.

Commented [H(31)]: Correct, 1/2 mark, also bankruptcy courts may enter final orders on challenges to petitions.



**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?

According to 11 U.S. Code § 1521(a)(7), a foreign representative cannot invoke provisions relating to use of avoidance powers under the Bankruptcy Code in a Chapter 15 proceeding. Therefore, a foreign representative may not be able to invoke avoidance powers in relation to preferences or fraudulent conveyances in Chapter 15 proceedings.

The two ways in which the foreign representative can obtain equivalent relief are:

- **Rely on other non-bankruptcy laws:** Seek avoidance of pre-petition transactions under other non-bankruptcy US laws or foreign laws (other than the Bankruptcy Code);
- **Commence plenary proceedings under the Bankruptcy Code:** Commence plenary proceedings such as a chapter 7 or 11 proceeding to get access to and benefit from the avoidance related provisions of the Bankruptcy Code. In certain cases, such proceedings may have already been initiated by the debtor or other creditors before the foreign representative was in the picture and in certain cases the foreign representative may choose to initiate plenary proceedings after recognition of its foreign proceedings. In case of the latter, the ambit will be limited to the debtor's US assets and will need to be coordinated with the foreign proceeding. Initiation of plenary proceedings under the Bankruptcy Code may be useful in cases where appropriate relief in relation to avoidance actions could not be obtained under other laws, on account of limitation related issues or because they simply do not permit claims for constructive fraudulent conveyances.

**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?

The key differences between interlocutory and final orders are:

- **Scope of order:** Orders which dispose of all matters at hand and do not leave anything further to be decided are final orders. Interlocutory orders do not resolve all issues at hand but only some issues or claims.
- **Appealability of order:** While final orders are appealable as a matter of right, interlocutory orders can only be appealed with the leave or permission of the appellate court.

This distinction between final and interlocutory orders might be harder to establish in bankruptcy proceedings which may involve multiple issues such as determination of claims and interest rate applicable to the debtor post filing of petition. In view of the different nature of issues involved in bankruptcy proceedings, the US Supreme Court held that an order determining a discrete dispute is final for the purposes of the appeal.

Appeals from bankruptcy courts are heard by:

- the district court of its district;
- in certain circuits, appeals from bankruptcy court orders may be heard by the Bankruptcy Appellate Panel (BAP) which constitutes of judges of bankruptcy courts in the circuit. However, in these cases, a party may request that the appeal be heard by the district court instead of the BAP.

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

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

A further appeal may lie from these appeals to the circuit court of appeals.

In rare instances, a direct appeal may be filed from the bankruptcy court orders to the court of appeal. This is done in case where either the bankruptcy court or the district court certifies that:

- The matter involves a question of law over which there is no controlling decision of the US Supreme Court or the circuit or if the matter requires resolution of conflicting controlling decisions;
- Direct appeal to the courts of appeal would materially increase the progress of the case.

### Question 3.4 (5 marks)

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 have the following fiduciary duties:

- **Fiduciary duty of loyalty** towards the best interests of the corporation;
- **Duty of care** to ensure educated decision-making. In case of errors of judgment, the directors may be protected from liability under the business judgment rule which presumes that the board of directors acted in good faith on the basis of reasonable information. This presumption can only be rebutted on the grounds that:
  - o Majority of the board was not reasonably informed;
  - o Majority of the board did not honestly believe that their decision was in the best interest of the corporation; or
  - o They were not acting in good faith.

Therefore, unless the presumption is rebutted, the directors will not be liable unless gross negligence is proved. Even a corporation's certificate of incorporation may release directors from any liability for breach of duty of care.

Importantly, the protection under the business judgment rule does not extend in case where a transaction is approved by the board majority which is an interested party or not independent or if a controlling shareholder is a party to both sides of the transaction. In these cases, the transaction may be declared void unless it meets the entire fairness standard (which requires strict scrutiny of the transaction to check for fairness).

In the ordinary course of business, the fiduciary duties are owed to the corporation and its shareholders and not to its creditors. Even when the corporation is potentially or actually insolvent, the Delaware Supreme Court has clarified that the directors have a fiduciary duty only to the corporation and its shareholders and not to creditors.

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

#### Question 4.1 [4 marks]

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.

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

In order to answer whether the English scheme of arrangement is likely to be granted recognition under US chapter 15 as a 'foreign non-main or main proceeding', first, we look at whether an English scheme of arrangement satisfies the definition of a "foreign proceeding" under 11 U.S. Code § 101(23). As per this provision, a foreign proceeding is one which meets the following elements:

- It is a collective judicial or administrative proceeding in a foreign country (including an interim proceeding);
- Proceeding must be under a law related to insolvency;
- The assets and affairs of the debtor should be subject to the control and supervision of the court;
- The purpose of the proceeding must be reorganization or liquidation.

A foreign proceeding need not be like a US Bankruptcy proceeding in order to be recognized. An English scheme of arrangement fulfils the abovementioned criteria (it involves all the bondholders governed by English law, is collective in nature and is under a law for restructuring of Gambling Corporation's non-performing debt for the purpose of restructuring them).

The issue of whether the proceeding will be recognized as main or non-main depends on where the centre of main interest (COMI) of Gambling Corporation lies. For instance:

- Foreign proceedings taking place in a jurisdiction where the COMI of the debtor lies are recognized as foreign main proceedings.
- If only an 'establishment' (defined under 11 U.S. Code § 1502(2) as any place of operation where the debtor carries out non-transitory activities) of the debtor lies in the foreign jurisdiction, then proceedings of that jurisdiction will be recognized as foreign non-main proceedings.

COMI is presumed to be its place of incorporation but this presumption can be rebutted on the basis of certain factors such as:

- Location of management, headquarters, primary assets, jurisdiction whose law apply to most of the debtor's disputes, location of the majority of debtor's creditors or location of majority creditors who will be affected by the relief.
- It needs to be ascertainable by its creditors or other third parties.

In the given facts, the principal place of Gambling Corporation's business is Greece. Besides that, it has casinos and betting parlors in several other cities including London in UK. The US court is likely to recognize the English scheme of arrangement as a 'foreign non-main proceeding' because the presence of a casino in the UK may not be sufficient to satisfy as COMI of Gambling Corporation. Given that it has several such casinos in different countries, establishing that UK being the COMI would be ascertainable by its creditors may be difficult. The US court will likely identify it as jurisdiction with an 'establishment' of the debtor and therefore recognize the scheme of arrangement as a "foreign non-main proceeding".

The fact that Gambling Corporation's bonds are governed by English law can be used to argue that given that it is the law that will govern the debtor's disputes, UK can be treated as COMI of Gambling Corporation. However, whether such an argument will succeed may depend on whether Gambling Corporation has debts and liabilities other than the bonds which is not governed by English law.

Therefore, it is likely that the English scheme of arrangement will be recognized as a "foreign non-main proceeding" in the US.

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

Commented [H(52)]: Correct, 1 mark, on these facts Greece is the COMI

Commented [H(53)]: Correct, 1 mark, and the London casino will qualify as the required establishment in the jurisdiction of the foreign proceeding

**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?

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Filing of a chapter 11 petition results in a worldwide automatic stay with a broad scope to ensure non-interference with the estate property anywhere in the world. The effect of filing of a chapter 11 petition on each of the four situations is discussed below:

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1. 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.

According to the provisions of 11 U.S. Code § 362 (a)(1), the automatic stay upon filing of chapter 11 petition automatically stays continuation of proceedings against the debtor that was commenced before the commencement of the petition. Therefore, ShipCo's breach of contract lawsuit in Texas will be stayed upon filing of a chapter 11 petition.

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2. the US Department of Justice is investigating whether Oil Corp illegally purchased oil from countries subject to US sanctions.

The chapter 11 petition will not affect US Department of Justice investigation of whether Oil Corp illegally purchased oil from countries subject to US sanctions, as regulatory investigations are exempt from the automatic stay upon filing of a chapter 11 petition

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- 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

Once a chapter 11 petition has been filed, USA Bank will not be allowed to foreclose on an Oil Corp refinery in the Philippines as the automatic stay under chapter 11 has a worldwide effect and stays actions to foreclose the debtor's offshore properties as well.

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

- Oil Corp has forgotten to pay rent on its Houston, Texas office space and its landlord is threatening to evict it

Once a chapter 11 petition has been filed, its landlord may not be able to evict Oil Corp from its office space as the automatic stay will stay any such proceeding to retake possession of Oil Corp's leased office space. However, there is an exception from automatic stays for eviction from non-residential properties under a lease which has expired. Therefore, the landlord may be able to get an exemption from the stay in case the term of the lease of the office space (being non-residential in nature) to Oil Corp has expired.

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

**Question 4.3 [6 marks]**

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?

Whether Oil Corp can achieve the following three goals without the consent of Plastic Corp and USA Bank is discussed below:

- (i) assume and assign the trademark license;

The trademark "Interconnect" is licensed from Plastic Corp to Oil Corp. The trademark license agreement is an executory contract. Under the Bankruptcy Code, the debtor i.e., Oil Corp can assume and assign executory contracts unless the contract is of a nature which cannot be assigned. According to 11 U.S. Code § 365, a debtor may not assume or assign an executory contract where substantive non-bankruptcy law (such as licensing law) do not permit the counterparty to accept performance from the transferee chosen by the debtor. In such cases, assignment can only be done with the permission of the licensor.

Therefore, in the given fact scenario, Oil Corp will not be able to assume and assign the trademark license without the consent of Plastic Corp (i.e., the licensor).

- (ii) reject the patent licenses so the purchaser has the exclusive right to use the patents; and

As mentioned above, the Bankruptcy Code permits the debtor to reject executory contracts. Patent licenses have been granted by Oil Corp in favour of Plastic Corp. In this scenario, Oil Corp (being the licensor itself) will be permitted to reject the patent licenses even without Plastic Corp's consent. This will be treated as a breach of contract by Oil Corp before the bankruptcy filing, and Plastic Corp will be entitled to file a claim for unsecured claim for pre-petition damages.

- (iii) sell the manufacturing facility free and clear of the USA Bank lien

Under a 363 sale, a debtor can sell its property free and clear of creditor encumbrances only with the consent of the creditor and with court approval. Therefore, the debtor may not be able to sell the manufacturing facility free and clear of lien under a 363 sale without the consent of USA bank. If USA Bank does consent, then the manufacturing facility may be sold free and clear of the USA Bank lien but USA Bank's interest will attach to the sale proceeds recovered from

**Commented [H(60)]:** Total marks 3/6

**Commented [H(61)]:** Correct, 1 mark

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

**Commented [H(63)]:** Incorrect, section 365(n) protects patent licensees from termination and therefore exclusivity is possible only with consent of Plastic Corp.

**Commented [H(64)]:** Incorrect, sale free and clear can occur without consent under certain circumstances, such as where the value of the asset exceeds the amount secured by the lien

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

the sale of the manufacturing facility and USA Bank will receive a priority in the distribution of those proceeds.

**\* End of Assessment \***