



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

Commented [H(1): Total marks 41.5/50

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

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

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

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.

Commented [H(6)]: Correct, 1 mark

Commented [H(7)]: Correct, 1 mark

(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(8)]: 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(9)]: 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

Commented [H(10)]: Incorrect, the correct response is (e)

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.

Commented [H(11)]: Correct, 1 mark

QUESTION 2 (direct questions) [10 marks]

Commented [H(12)]: Total marks 8/10

Question 2.1 (2 marks)

Commented [H(13)]: Total marks 2/2

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

1. A debtor may commence a voluntary proceeding under any chapter by filing a petition. However, creditors may only commence an involuntary proceeding against a debtor under chapter 7 or chapter 11. Such cannot be commenced against a farmer, family farmer, or not-for-profit corporation.
2. A debtor does not to be insolvent to file for a voluntary petition for bankruptcy. However, creditors filing an involuntary petition need to allege that the debtor is not pay its debts as and when they fall due.

Commented [H(14)]: Correct, 1 mark

Commented [H(15)]: Correct, 1 mark

Question 2.2 (2 marks)

Commented [H(16)]: Total marks 2/2

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

A violation of the stay, even if taken without being aware of the filing of the petition, would be contempt of court. A such, the action will be void/voidable. Parties may request relief from the court to permit an action either prospectively or retroactively. However, should this not be obtained, any breach of the stay may result in contempt sanctions against the violator. The violator may also receive orders to pay the debtor's legal fees and/or daily fines until the issue is rectified.

Commented [H(17)]: Correct, 1 mark

Commented [H(18)]: Correct, 1 mark

Question 2.3 (3 marks)

Commented [H(19)]: Total marks 1/3

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?

Impaired creditors are those who are receiving less than 100% on their claims. A class is considered to be an impaired class unless the plan leaves all creditor's "legal, equitable, and contractual rights unaltered"¹.

Commented [H(20)]: Correct, 1 mark

Please note that 'Insiders' are not entitled to vote on a proposed plan of reorganization. Insiders of a corporate debtor include, its officers, directors, controlling person, general partner, partners, affiliates and insiders of affiliates.

If all impaired classes of creditors were required to approve the plan, it is foreseeable that a holdout problem may occur. As such, the plan may be confirmed by "cramming down" dissenting impaired classes by only requiring (at least) one impaired class to vote to accept the plan². In order to use such, all 'confirmation' requirements in 11 USC § 1129 must be met. In addition, the plan must not "discriminate unfairly" and must be "fair and equitable" for the other impaired classes³.

Commented [H(21)]: Impaired classes that will receive nothing under the plan cannot vote and are deemed to reject the plan.

Question 2.4 (3 marks)

Commented [H(22)]: Total marks 3/3

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?

Preferences arise when the debtor pays a creditor for a pre-existing debt.

Commented [H(23)]: 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?

Preference claims are the only ones that require proof of insolvency *at the time of the transfer*.

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

In relation to actual and constructive fraudulent conveyance claims, insolvency *either at the time or shortly after* the transfer may assist with proving intent *but is not required*.

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

Actual Fraudulent Conveyance involves "*actual intent to hinder, delay or defraud any entity to which the debtor was or became ... indebted*"⁴. (Fraudulent intent is not required to prove constructive fraudulent conveyances).

Commented [H(25)]: Correct, 1 mark

¹ 11 USC § 1124.

² 11 USC § 1129.

³ 11 USC § 1129(b)(2).

⁴ 11 USC § 548(a).

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

Commented [H(26)]: Total marks 13.5/15

Question 3.1 (3 marks)

Commented [H(27)]: Total marks 2.5/3

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

The issue at play in *Stern v Marshall*, was a debtor's counterclaim to a bankruptcy claim which had been filed against the debt. However, the issue in the counterclaim was also the subject of separate state court proceedings (which is allowed, however, the first court to make a judgment will be binding on all parties). In this case, the Bankruptcy Court issued its judgment first, which was appealed, so the State Court continued its proceedings and found in favour of the other party which was contrary to the Bankruptcy Court's judgment (pending appeal).

Although a counterclaim to a proceeding forms part of the core proceeding, and therefore a Bankruptcy Court can issue a final order, the US Supreme Court held in that even in core proceedings, a Bankruptcy Court cannot issue final orders if they were to invade Article III jurisdiction.

Commented [H(28)]: Correct, 1 mark

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

As such, this created further uncertainty as to the jurisdiction of the Bankruptcy Court such that the US Supreme Court has made new rulings and amendments to the Bankruptcy Rules to provide further guidance. The US Supreme Court has held that Bankruptcy Court judges may determine a core proceeding, over which they lack constitutional authority, by issuing a report and recommendation for review by the District Court⁵ - which is the same as what occurs in core proceedings. Alternatively, all parties may consent to the Bankruptcy Court issuing final orders⁶.

Commented [H(30)]: Correct, 1/2 mark, the bankruptcy court may also issue a final order on a challenge to a petition

Question 3.2 (3 marks)

Commented [H(31)]: Total marks 2/3

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?

1. Stay of creditor action⁷
 - o The filing of the Chapter 15 petition does not automatically invoke a stay of creditor action as this only arises upon the petition being granted and is limited to the property of the debtor within the United States' jurisdiction.
 - o To overcome such, the foreign representative may request the Bankruptcy Court grants a stay or similar relief on an interim basis pending recognition.
2. Avoidance powers⁸
 - o Despite following the Model Law closely, Chapter 15 excludes a foreign representative from using the avoidance powers provided by the Bankruptcy Code which would be available to other similar person administering a liquidation.
 - o The foreign representative would be able to invoke these avoidance powers in a plenary proceeding (e.g. Chapter 7 or 11) after chapter 15 is granted.

Commented [H(32)]: Correct, 1 mark

Commented [H(33)]: Correct, 1 mark, also the foreign representative may bring claims under analogous foreign or non-bankruptcy US law

⁵ Executive Benefits Ins Agency v Arkinson, 134 S Ct 20165 (2014)

⁶ Wellness Int; Network, Ltd v Sharif, 135 S Ct 1932 (2015)

⁷ 11 USC § 1520(a)(1)

⁸ 11 USC § 1521(a)(7)

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 given when all issues are disposed and there is nothing further to determine. However, interlocutory orders seek to resolve only some of the issues/claims.
- Parties to final orders *may appeal* such. However, parties to interlocutory orders *require leave of the appellate court* to appeal.
- In Bankruptcy Court proceedings, any orders to extend the period of exclusivity to propose a plan may be appealed *without leave* being requested.
- In Bankruptcy Court matters proceedings are unique and the US Supreme Court has held that if the order resolves a discrete dispute, it shall be considered to be a final order for appeals purposes.
- Bankruptcy Court order appeals are heard by the District Court for that district in which they sit. However, in certain circuits, the appeals may be heard by a Bankruptcy Appellate Panel which is convened from the judges of the various bankruptcy courts within the circuit.
- Rarely, an appeal may go directly to the court of appeals in situations where the Bankruptcy or District Court certifies that either the appeal raises a question of law which has no prior controlling decision or in the situation where an immediate appeal may materially progress the case.

Commented [H(34)]: Total marks 4/4

Commented [H(35)]: Correct, 1/2 mark

Commented [H(36)]: Correct, 1/2 mark

Commented [H(37)]: Correct, 1/2 mark

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

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

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

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 owe a fiduciary *duty of loyalty* to the *entities' best interest*, including its *shareholders* (but not creditors).

Directors also owe a *duty of care* to make educated decisions, however, errors of judgement fall under the '*business judgment rule*' in which directors are presumed to have acted in good faith on the basis of reasonable information, as such, they are protected from any liability. Noting, that this rule is not applicable if the approved transaction is not an independent / arm's length transaction – in this situation the transaction will be void unless the '*entire fairness standard*' is satisfied.

The Delaware Supreme Court has held that *even in the case of potential insolvency, directors do not owe duties to creditors*. So even in situations where a company is "in the zone of insolvency" - or actually insolvent whereby shareholders no longer have an economic interest in the company as there will be a shortfall to creditors - even then, directors do not owe a due to creditor⁹. A such, US law has no concept of "wrongful trading" or "deepening Insolvency"¹⁰

Commented [H(41)]: Total marks 5/5

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

Commented [H(43)]: Correct, 1 mark—we would usually say the duty is owed to the corporation

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

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

Commented [H(46)]: Correct, 1 mark

⁹ North AM Catholic Education Programming Foundation, Inc v Gheewall, 930 A.2d, 103 (Del 2007)

¹⁰ Trenwich AM Litig Trust v Ernst & Young, LLP, 906 A.2d 168 (Del Ch 2006).

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

Commented [H(47)]: Total marks 11/15

Question 4.1 [4 marks]

Commented [H(48)]: Total marks 2/4

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.

1. Ability for Scheme to be Recognised

An English scheme of arrangement is able to be granted recognition in the US under Chapter 15 as the requirements for such are quite minimal as summarised below:

- The foreign representative will need to establish that a foreign court/administrative proceeding is pending and that they are empowered to act.
- The proceeding does not need to resemble a US bankruptcy case
- Chapter 15 follows the Model Law definition in that the proceeding needs to be "a *collective judicial or administrative proceeding in a foreign country... under a law relating to insolvency ... in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation*"¹¹
 - English schemes of arrangement have been approved in the US before. The US court will want to confirm that this scheme is 'collective' and is not just in relation to a particular class of creditor, along with the other terms in the above-mentioned definition.

Based on the information provided, it appears that the English scheme will satisfy the above.

2. Main vs Non-main

The determination on either it is foreign main proceedings or foreign non-main proceedings, will depend on what is determined to be the debtor's centre of main interests ("COMI").

I note that the debtor's incorporation is presumed to be its COMI, however, the following needs to be considered:

- Location of incorporation:
 - Have been advised that it is Greece.
- Location of headquarters:
 - Have been advised that the principal place of business is Greece.
- Location of management:
 - It is possible that we could assume this is also at the principal place of business in Greece, but more information is required.

¹¹ 11 USC § 101(23).

- Location of primary assets:
 - Greece, US, UK, Macau. Unknown if there are any other key assets.
- Location of the majority of the debtor's creditors/ parties which will be impacted:
 - We are aware that the bonds governed by English Law.
 - Based on the information provided in the question it appears the bondholders are the main creditors as a restructure of the bonds is the purpose of the scheme.
 - However, I note that just because the bonds are governed by English Law does not mean they are UK residents.
- Which jurisdiction's law will apply to most disputes:
 - Based on the above assumption, appears likely that any claims will be made in the English courts given the bonds are governed by English law.
 - We are not aware of any other creditors or disputes.
- Where the creditors believe the COMI is:
 - Unknown. Further information required.

Based on the information provided it seems most likely that the debtor's COMI will be either Greece or the UK. However further information is required as the creditor's of the entity and where they believed the debtor's COMI is.

Based on the assumption there are no other key creditors, and that the company's sole issue is in relation to its bondholders, I believe the UK scheme administrator and the UK courts could argue that that the debtor's COMI is in the UK. As such, it would be granted status as a foreign main proceeding. However, challenges to such are possible if it is evidenced that creditors/bondholders were aware that the debtor's COMI was Greece, in which case the English proceedings would be foreign non-main proceedings.

Commented [H(49): Correct, 1 mark, though more likely Greece is the COMI

Commented [H(50): Correct, 1 mark, and the casino in London will constitute the required establishment for foreign non-main recognition

Commented [H(51): Total marks 4/5

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?

A debtor may commence a voluntary chapter 11 petition and does not need to be insolvent to do so.

1. ShipCo – Breach of contract lawsuit in Texas

If Oil Corp filed a chapter 11 petition, there is a worldwide automatic stay of any proceedings against the debtor or its property such that the Texas state court lawsuit will be frozen. Ship Co, will have a pre-petition breach of contract claim.

Commented [H(52): Correct, 1 mark

Commented [H(53): Correct, 1 mark

If the contract is ongoing, the debtor will want to consider if the contract is an executory contract. A contract is executory if there are materially, unperformed obligations on both sides. If so, under chapter 11, the debtor will have the ability to assume, reject or assume, and assign the contract.

2. DoJ sanction investigation

Chapter 11 filings would not prevent the DOJ's investigation into illegal oil purchases from countries subject to US sanctions. However, any fines given would be subject to the order of priority¹². Penalties against the company (and the directors) if found to be the case are likely to be high and may result in any plan being unsuccessful.

Commented [H(54)]: Correct, 1 mark

3. Missed USA Bank payment and foreclosure in Philippines

If Oil Corp filed a chapter 11 petition, there is a worldwide automatic stay of any proceedings against the debtor or its property. This applies to USA Bank and the Philippines property, and no action is allowed to be taken by USA Bank against same. The debtor therefore can continue ordinary business and work to propose a plan of reorganization. Through the plan, a debtor can force its secured creditors to accept altered terms. The creditors secured by real property will be in their own class in any plan of reorganization. Any plan will need to be fair and equitable. The value of the property will need to be considered to confirm the extent of the bank's security.

Commented [H(55)]: Correct, 1 mark

Debtor is allowed to sell its property free and clear of creditor interests with court approval in a 363 sale. As such, the debtor may wish to sell the asset their self to obtain a greater value. A benefit of a 363 sale is also that the debtor has a 'home court' in which to consolidate litigation of creditor claims relating to any interests in the asset.

A Chapter 11 is frequently used as a vehicle for the sale of assets as the purchase price is likely to be higher under a chapter 11 compared to chapter 7 due to the debtor's ability to carry on the business. Purchasers are also more likely to pay a high value for an asset sold via a 363 sale as it means the asset is free and clear of any third-party interests.

4. Texas office eviction

If Oil Corp (a Delaware entity) filed a chapter 11 petition,

The debtor has the ability to reject burdensome contracts, which may include the Texas office, allowing the debtor to find new property/downsize.

Commented [H(56)]: The debtor cannot be evicted unless the lease has expired pre-petition

Post-petition, rent in relation to a real estate property which a debtor continues to occupy is paid on an ongoing basis and is treated as an administrative expenses. However, it is noted that over COVID-19, a number of bankruptcy courts held that due to lockdowns, the rental payments were not beneficial and as such did not have administrative priority¹³.

¹² 11 U.S. Code § 507

¹³ In re Pier 1 Imports, Inc, No 20-30805-KRH, 2020 WL 2374539 (Bankr ED Va May 10, 2020).

Question 4.3 [6 marks]

Commented [H(57): Total marks 5/6

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?

1. Assume and assign the trademark license

This goal is not achievable. Trademark licences are not assignable without the licensor's consent as seen in the Trump Entertainment Resorts matter¹⁴.

Commented [H(58): Correct, 1 mark

As such, Oil Corp may not assume and assign the trademark licence unless consent is obtained from Plastic Corp. If consent is achieved, then the goal is achievable.

Commented [H(59): Correct, 1 mark

Plastic Corp would not require the consent of the Bank as this would not affect the lien/facility to USA Bank for the secured loan, unless such a term is specifically provided for in the loan documents.

2. Reject the patent licenses, so the purchaser has the exclusive right to use the patents

This goal is not achievable. Oil Corp requires Plastic Corp's consent as the licensees of patents and copyrights are protected and may not be terminated in connection with the proposed sale of intellectual property without consent. If consent is achieved, then the goal is achievable.

Commented [H(60): Correct, 1 mark

Commented [H(61): Correct, 1 mark

Oil Corp would not have to tell USA Bank or require their consent, unless such a term is specifically provided for in the loan documents.

3. Sell the manufacturing facility free and clear of the USA lien

This goal is achievable as neither parties' consent is required.

Commented [H(62): Correct, 1 mark, USA Bank's lien will attach to the proceeds of sale

Pursuant to a 363 sale, Oil Corp can sell the property in the ordinary course of business without court or creditor interference. A major benefit of 363 sales is that the debtor can sell its property free and clear of creditor interests, subject to court approval.

USA Bank may however make a bid to buy the property subject to the secured lien via a "credit bid"¹⁵. This works by offsetting a portion of the purchase price against the amount of the secured lien.

*** End of Assessment ***

¹⁴ In re Trump Entertainment Resorts, Inc 526 BR 116 (Bankr D Del 2015).

¹⁵ 11 USC § 363(k).