



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

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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

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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?

A voluntary petition is a petition that was filed or commenced by the debtor, while an involuntary petition was filed or commenced by the creditor(s) of the said debtor. The main difference between voluntary and involuntary petitions consists of the following:

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

- Debtors may file the voluntary petitions under any applicable chapter of the Bankruptcy Code, while creditors may only file involuntary petitions under either chapter 7 or chapter 11 of the Bankruptcy Code.
- In an involuntary petition, the number of required petitioners can differ depending on the number of non-insider creditors with claims that are non-contingent. If the debtor has 12 or more non-insider creditors with claims that are non-contingent, the involuntary petition can only be commenced if it is joined by at least 3 qualifying creditors. Where the debtor only has less than 12 non-insider creditors with non-contingent claims, one qualifying creditor is sufficient as petitioner.
- Involuntary petitions require the creditors to allege the debtor's insolvency, while no such allegation of insolvency is required for voluntary petition.
- Voluntary petition is filed by the debtor and as such the debtor would remain in control of its business, while involuntary petition may be accompanied by motion to divest the debtor's management of the control over the debtor.

Question 2.2 (2 marks)

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

Violation of the automatic stay may result in the following potential consequences:

- The violation constitutes contempt of court, and the violator could be subjected to contempt sanctions, such as payment of the fees of debtor's attorney(s), certain affirmative act to undo the effect of the violation, or even coercive sanction such as daily fines.
- The act violating the stay could become void or voidable (which may differ between circuits), which thus undo or neutralize the legal effect of the act.

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Question 2.3 (3 marks)

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 impaired when the plan is proposing to alter the claim-holder's legal, equitable, and contractual rights, including any delay in the timely payment of the claim.

The plan may however reverse contractual acceleration of the claim, by paying or compensating the claim-holder, in which case the impaired claim (and the relevant impaired class) is deemed unimpaired and the claim-holder (and the relevant class) is deemed to accept the plan.

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Commented [H(21)]: Correct, 1 mark, though that should be "or" as any one of these is sufficient

Commented [H(22)]: An impaired claim that will receive nothing under the plan is not entitled to vote and is deemed to reject.

Question 2.4 (3 marks)

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, where one of the key elements of having a preference is that it was for, or on account of, an antecedent debt that was in existence before such preference action was carried out.

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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?

Constructive Fraudulent Conveyances, where the debtor received lower or less than reasonably equivalent value from the transfer or incurrence of obligation, and the debtor was insolvent at the time such transfer was made or obligation incurred, or the debtor became insolvent because of it, notwithstanding the absence of any fraudulent intent.

Commented [H(25)]: Incorrect because there are alternative bases for constructive fraudulent conveyance that do not require insolvency; only preference requires insolvency at the time of the transfer

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

Actual Fraudulent Conveyances, which require that the debtor is proven to have had "actual intent to hinder, delay, or defraud" the creditor(s).

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

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Question 3.1 (3 marks)

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

The US Supreme Court held in *Stem v Marshall* that bankruptcy courts (as courts that are not within the remit of Article III of the US Constitution) lack the jurisdiction and authority to issue a final order or ruling, even when the proceeding beforehand is statutorily designated as a core proceeding, if the order or ruling by the bankruptcy courts would trespass or invade the authority or jurisdiction given to Article III courts.

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Commented [H(30)]: Correct, 1 mark

Stem v Marshall altered the interpretation of the laws in that the authority and jurisdiction of bankruptcy judges and bankruptcy courts, as non-Article III judges and courts, to issue final

order and ruling, do not encompass matters concerning common law actions or actions involving private rights (so-called Stern claims)¹ that are preserved for Article III courts and judges.

Commented [H(31): Bankruptcy courts may rule on such issues where the parties consent, and may adjudicate challenges to petitions for bankruptcy

Question 3.2 (3 marks)

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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?

While the US adopted the UNCITRAL Model Law on Cross Border Insolvency through chapter 15 of the US Bankruptcy Code, chapter 15 explicitly excludes the avoidance powers that are provided in the other chapters of the Bankruptcy Code, from the reliefs made available under chapter 15 to a foreign representative. As such, in the US, a foreign representative would not have access to avoidance power alluded to in chapter 23 of the UNCITRAL Model Law.

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However, the foreign representative would still be able to pursue equivalent relief by way of the followings:

- The foreign representative can initiate and commence an involuntary plenary bankruptcy proceeding against the debtor (under either chapter 7 or 11 of the Bankruptcy Code), and thus gain access to the avoidance relief under the Bankruptcy Code that is available for such plenary bankruptcy proceedings. The foreign representative can initiate this plenary bankruptcy proceeding regardless whether the foreign proceeding has been submitted for recognition under chapter 15.
- Alternatively, the foreign representative in a chapter 15 proceeding, can file for and assert avoidance action arising from or under the foreign law (and as such, it is not an avoidance relief under the US Bankruptcy Code which has been precluded in chapter 15). The Fifth Circuit in its decision² held that US bankruptcy courts have the authority and jurisdiction to hear and adjudicate avoidance actions arising under foreign laws, which is consistent with practices under the Bankruptcy Code prior to enactment of chapter 15.

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Commented [H(35): Correct, 1 mark, it may also rely on non-bankruptcy US law if applicable

Question 3.3 (4 marks)

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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?

Interlocutory orders are orders that only resolve some issues or claims, leaving other and further issues in the proceeding to be resolved separately. In contrast, final orders are orders that have resolved all issues, leaving no further issues to be decided. Final orders are appealable by right, while interlocutory orders are appealable with leave of the relevant appellate court. The same framework is applicable for bankruptcy proceedings, except the orders for extension of exclusivity to propose a plan is appealable by right. Furthermore, the US Supreme Court also held that in bankruptcy proceedings, an order resolving discrete dispute, is a final order for appeal purpose, and such is appealable by right.

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Depending on which circuit a bankruptcy court belongs to, appeals on a bankruptcy court's orders are to be heard either by the relevant district court (within which district such bankruptcy court sits or is attached) or the Bankruptcy Appellate Panel (BAP) for such circuit (in which case, a party may still opt for the appeal to be heard by the district court). Further appeals on

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¹ Jane VanLare and Thomas S. Kessler, *The Supreme Court's Not-So-Final Judgment: Fraudulent Transfer Actions in the Wake of Stern v. Marshall*, 13 Pratt's J. Bankr. L. 455 (2017).

² *In re Condor Ins Ltd*, 601 F.3d 319 (5th Cir. 2010).

decisions from the district court or the BAP would then go to court of appeals of the relevant circuit. Appeals on a bankruptcy court's orders may go directly to the court of appeals in rare cases where the bankruptcy court or district court has certified that such a direct appeal to the court of appeals either (i) involves or raises question of laws with no controlling decision or with conflicting decisions, or (ii) may materially advance the case's progress. The court of appeals has the discretion to accept or reject such direct appeal skipping the district court or BAP.

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 incorporated corporations owe fiduciary duty of loyalty and duty of care, for the best interests of the corporation and its shareholders, either when the corporation is in its ordinary course of business, or when the corporation is potentially or actually insolvent.

The directors' fiduciary duties are not owed to creditors, even when the corporation is potentially or actually insolvent, and creditors "have no right to assert direct claims for breach of fiduciary duty against corporate directors"³. Even when a Delaware company is insolvent, its board may still pursue strategies to maximize the value of the firm, in good faith.

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Commented [H(48)]: Correct, 1 mark

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.

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

The English scheme of arrangement can be recognized under chapter 15 of the US Bankruptcy Code, but it is likely that the English proceeding is recognized as a foreign non-main proceeding.

Recognition of foreign bankruptcy proceeding under chapter 15 of the US Bankruptcy Code is relatively straight-forward as the US adopted the UNCITRAL Model Law, and the requirements for recognition under chapter 15 of the US Bankruptcy Code are consistent with the requirements set by the Model Law (article 17 of the Model Law). To be recognized in the US, the application or petition for recognition shall be submitted by the foreign representative appointed or designated by the English scheme of arrangement, and the foreign representative need only to establish that (i) there is a collective judicial or administrative proceeding pending or commenced against the debtor in a foreign jurisdiction, and (ii) the foreign representative is authorized and empowered by such proceeding, to act as the representative of the proceeding. The foreign proceeding (in this case, the English scheme of arrangement) does not need to be similar with the US bankruptcy proceeding. Unless

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Commented [H(50)]: Total marks 3/4

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³ *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92, 103 (Del. 2007).

recognition of the scheme of arrangement against Gambling Corporation would be manifestly contrary the public policy in the US, Gambling Corporation's English proceeding will be granted recognition.

Gambling Corporation is said to have its principal place of business and was incorporated in Greece rather than the UK. While the presumption that COMI is located at the place of incorporation is rebuttable, having a principal place of business in certain location (in this case, Greece) would be an objective evidence observable by third parties, and as such command the determination of COMI. Therefore, it is likely that the US court in which application for recognition is submitted would conclude that the debtor does not have its COMI in the UK. On the other hand, Gambling Corporation is said to have some business (casinos and betting parlors) in the UK, and as such the UK would qualify to be a location where the debtor has an establishment. Therefore, the recognition granted under chapter 15 of the US Bankruptcy Code for Gambling Corporation's scheme of arrangement is likely to be recognition of a foreign non-main proceeding.

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Commented [H(53)]: Note that COMI would have to be in the UK for foreign main recognition to be appropriate

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Question 4.2 [5 marks]

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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?

Immediately upon the filing of the chapter 11 petition by Oil Corp; (i) a bankruptcy estate consisting of all of Oil Corp's property interests as of the date of its chapter 11 petition, would be created, and (ii) a worldwide statutory automatic stay would come into effect on Oil Corp's bankruptcy estate. The automatic stay would protect Oil Corp's bankruptcy estate, anywhere in the world, from enforcement action by creditors with pre-petition claims, and the stay will be in place until (a) it is otherwise modified or lifted by the court, (b) the dismissal of the case, or (c) the conclusion of the chapter 11 proceeding. Violation of this automatic stay would be a contempt of court and the acts violating the stay would be void or voidable (depending on the circuit in which the chapter 11 petition is filed).

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The effects of Oil Corp's automatic stay on each of the four parties are elaborated below:

- *ShipCo*
The Texas state court proceeding will be stayed following Oil Corp's chapter 11 petition, and ShipCo will need to file its claim against Oil Corp's estate in the chapter 11 proceeding. ShipCo's claim however will potentially be a claim disputed by the debtor.
- *US Department of Justice*
Although the automatic stay invoked by the bankruptcy petition has a very broad reach, criminal proceedings as well as regulatory investigations are statutorily exempted from the stay. As such, the US Department of Justice would be able to continue its investigations without being affected by the worldwide automatic stay invoked by Oil Corp's chapter 11 petition.

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

- *USA Bank*

USA Bank is a creditor with a pre-petition claim against Oil Corp, and would be stayed from any enforcement action against Oil Corp's bankruptcy estate. Oil Corp's refinery in the Philippines is part of Oil Corp's bankruptcy estate and as such, USA Bank will not be able to foreclose on it without violating the automatic stay. USA Bank however, will be able to file and request a 'relief from stay' motion to get permission from the court to foreclose on Oil Corp's property, if USA Bank can demonstrate that the relief is warranted, such as the case where (i) there is a lack of adequate protection on the refinery such that its value may decline during the course of the chapter 11 proceeding, potentially resulting in USA Bank recovering less than its full claim, (ii) Oil Corp has no remaining equity in the refinery and as keeping the refinery is not necessary for Oil Corp's reorganization, or (iii) the chapter 11 filing by Oil Corp is (or part of) a scheme to delay or hinder USA Bank in recovering its claim through the foreclosure.

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- *Landlord*

The lease is an executory contract, and the unpaid rent is the landlord's pre-petition claim against Oil Corp. Oil Corp as the debtor in possession following its chapter 11 petition, has 120 days from the order of relief, to decide whether it will assume or reject the lease. If Oil Corp decides to assume the lease, then it must cure the default by paying the landlord the unpaid rents, and also must provide the landlord with sufficient assurances of the future rent payment. If on the other hand Oil Corp decides to reject the continuation of the lease, then the landlord will have pre-petition unsecured claim in damages against Oil Corp. Where the lease has expired (either because it has expired before the petition, or it expires post petition), the landlord would be able to evict Oil Corp, given that eviction of debtor-tenant from non-residential property following lease expiry, is exempted and not affected by the stay.

Commented [H(60)]: Here, the landlord's threatened eviction would be stayed because there is no indication the lease has expired.

Question 4.3 [6 marks]

Commented [H(61)]: 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?

Oil Corp as the debtor in possession may propose a 363 sale, a sale that is outside the ordinary course of business, by establishing that it is proposing the sale in its business judgement and such sale would be in the best interests of the estate as a whole. Both USA Bank and Plastic Corp are parties in interest. USA Bank is the secured creditor benefiting from the lien over Oil Corp's Dallas property. Plastic Corp is the licensor of the "Interconnect" trademark, and at the same time, it is the licensee of the patented processes invented by Oil Corp.

- *Plastic Corp's trademark licensed by Oil Corp*

The Bankruptcy Code limits the ability of the debtor-in-possession to assume and assign an executory contract, in the event there is substantive non-bankruptcy law that requires

consent from a counterparty in certain type of executory contracts (section 365(c) of the Bankruptcy Code). Intellectual property (including trademark) licensing law in the US is a substantive non-bankruptcy law, and it provides that trademark license cannot be assigned without consent from the licensor. Some courts have interpreted the provision in section 365(c) of the Bankruptcy Code to mean that a debtor is prohibited from assuming any executory contract that the debtor is prohibited from assigning (which is called the hypothetical test), while other courts have applied this provision to prohibit a debtor from assuming those executory contracts which the debtor actually intends to assign or transfer (the actual test). In our case, Oil Corp does intend to assign the trademark license (after assuming it), and as such would satisfy either the hypothetical or actual test, and thus the prohibition of section 365(c) of the Bankruptcy Code would apply and Oil Corp cannot assume (and assign) the trademark license agreement without the consent of Plastic Corp.

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- *Oil Corp's patents licensed to Plastic Corp*

Licensees of a debtor's intellectual property (including patents) are protected by section 365(n) of the Bankruptcy Code, such that the intellectual property license cannot be terminated unilaterally by the debtor (as licensor) for the intended sale, without consent from the licensee. As such, Oil Corp would not be able to reject and terminate the patent license with Plastic Corp, without securing consent from Plastic Corp.

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

- *USA Bank's Lien*

Oil Corp will be able to sell the facility free and clear of the lien in a 363 sale, and any good faith purchaser of such facility would be able to retain the property even if there is an appeal reversing the court approval for the 363 sale. USA Bank as the secured creditor (lien holder), however, can credit-bid the property. By credit-bidding, if it wins the bid, USA Bank would be able to off-set its claim (or part of its claim) against the purchase price of the property in the 363 sale, and if the value or purchase price of the property is lower than USA Bank's claim amount, the remainder would become unsecured claims against the debtor.

Commented [H(66)]: Correct, 1 mark, and the lien would apply to the proceeds of sale

*** End of Assessment ***