



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]

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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]**Question 2.1 (2 marks)**

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

The voluntary proceeding can be commenced under any applicable chapter by filing the petition while Creditors may commence an involuntary proceeding against an eligible debtor under either chapter 7 or chapter 11. The involuntary proceedings cannot be commenced under the other Chapters or against a farmer, family farmer or non-profit corporation. The form for a voluntary petition for an entity is four pages long. The form requires the debtors to disclose estimated funds on hand, number of creditors, assets and liabilities, it is not required to be insolvent. For creditor to file an involuntary petition the creditors must have a claim against the debtor which can be non-contingent, not subject of bona fide dispute as to liability or amount.

The voluntary petition does not require allegations of insolvency while the involuntary petition form requires the petitioning creditors to allege either that the debtor is generally not paying its debt as they become due, unless they are the subject of a bona fide dispute as to liability or amount. In the absence of order by the bankruptcy court, the debtor who is subject of an involuntary petition remains in control of its business. A voluntary petition, under any Chapter other than Chapter 15, is immediately effective to open proceedings and impose the statutory automatic stay unless the petition is challenged by the filing of motion to dismiss. No further order of court is required to be made with respect to the existence of the case. While the involuntary petition is also immediately effective to invoke the automatic stay and unless challenged by the debtor, the court will enter an order confirming the petition.

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Commented [H(16): Correct, 1 mark, the voluntary petition is filed by a debtor

Question 2.2 (2 marks)

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

The failure to obtain the relief from the stay may result in the imposition of contempt sanctions against the stay violator, which may include the payment of the debtor's attorneys' fees and requiring the violator to take affirmative acts to undo the effect of its violation. Secondly, the court can also impose coercive contempt sanctions on the violator such as a daily fine to be paid to the court until the stay violation has been rectified.

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Commented [H(18): Correct, 1 mark, also the act itself is void or voidable

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?

The class is said to be impaired unless, as to every claim or interest in the class the plan leaves the holder's legal, equitable and contractual rights unaltered. If the plan reverses contractual acceleration by curing any monetary default and compensating the holder for any damages than that class may be deemed unimpaired. Further, a delay in payment is also considered impairment. Only the impaired classes have the rights to vote on the plan. The treatment for the impaired claims is the value they will receive as a percentage of the value of their claims and the form in which that value will be provided i.e., cash or new securities to be issued by debtor. The same treatment is required be given to all class of creditors unless the creditor agrees for the less favourable treatment.

Commented [H(19): Total marks 1/3]**Commented [H(20):** Correct, 1 mark. However 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?

Preference only arises where the debtor is paying a creditor for the pre-existing debt. Contemporaneous exchange of value or prepayment for goods and services cannot be a preference, cause in the later the debt is not incurred until the debtor receives the product or owes more than it has paid. The Bankruptcy Code looks to applicable non-bankruptcy law to determine when a debt arose and when a transfer of an interest in the debtor's property occurred. The date of transfer, where the transfer is a security interest and the date of perfection of the security interest, i.e., if the perfection occurred more than 30 days after the transfer become effective between the parties. One should note that, if the security interest is not perfected before the petition date, the automatic stay will bar the interest from being perfected and the security interest will be unenforceable.

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

The debtor is presumed to be insolvent on and during the 90 days prior to the petition date for the purpose of determining preference claims. A creditor can present evidence to deny the presumption, however the ultimate burden of proving the insolvency on the balance sheet basis at the time of transfer is on the trustee or debtor himself.

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

An actual fraudulent conveyance is proven by showing that the debtor made a transfer or incurred an obligation with actual intent to hinder delay or defraud any entity to which the debtor was or became indebted. A debtor is expected to become indebted when it anticipates liability under a money judgement, penalty, settlement or similar obligation arising from violation of state or federal securities laws or fraud. The intend may be proven by reference to badges of fraud developed in state fraudulent transfer law. i.e., i) the transfer or obligation was to an insider; ii) the transfer or obligation was disclosed or concealed; iii) the debtor retained possession or control of the property transferred after the transfer; iv) the debtor absconded;

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v) the debtor removes or concealed assets; vi) the transfer was of substantially all the debtor's assets; vii) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. While a constructive fraudulent conveyance is proven by showing that the debtor received less than reasonably equivalent value in exchange for transfer or incurrence of obligation.

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

Question 3.1 (3 marks)

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

In *Stern v Marshall* case the bankruptcy court was not able to issue final orders even in the core proceedings, as it invaded Article III jurisdiction. In this case, bankruptcy claims were filed against the debtor and the debtor counterclaimed and the issues in the counterclaim were subject to separate state court proceedings. In US, the law permits parallel proceedings in states and federal courts and provides that the first judgement issued is binding on the parties. In this case, the bankruptcy court issued its judgement first, awarding US\$400million to the debtor, but the state court case continued while the bankruptcy judgement was appealed to the district court, in the meantime the state court jury verdict in favor of the claimant was issued, before the district court's affirming the judgement of the Bankruptcy Court. The US Supreme court mentioned that Bankruptcy court's issuance of a final order over a state law was unconstitutional under Article III. Thus, the jury verdict was the first final judgement and was conclusive of the issues.

US Supreme court subsequently have provided more guidance to the rulings and amendments to the Bankruptcy Rules. Because district courts have exclusive jurisdiction to adjudicate a petition commencing bankruptcy proceedings, a Bankruptcy court may exercise a District court's delegated authority to enter a final order on the motion challenging the validity of a petition. Further, US Supreme court has held that Bankruptcy judges may determine a core proceeding over which they lack constitutional authority by issuing a report or recommendation for review by the District court, the same procedures as in non-core proceedings or with consent of parties, may issue final orders. The Bankruptcy Rules have implemented these rulings by litigants to state in their pleadings whether they consent to the entry of final orders or judgement by the Bankruptcy court, and by permitting a district court that determines that a Bankruptcy court did not have jurisdiction to enter a final order to treat that its order as proposed findings of facts and conclusions of law.

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Commented [H(27): Correct, 1 mark, whereas previously bankruptcy courts were understood to have jurisdiction to enter final orders on core proceedings

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Commented [H(32): Correct, 1 mark, or the foreign representative may bring claims under analogous foreign or non-bankruptcy US law.

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?

The foreign representative cannot use the avoidance powers provided by the Bankruptcy Code. The power of avoidance of preferences and fraudulent conveyances are excluded from the Chapter 15 of Bankruptcy Code.

A foreign representative can only invoke the Bankruptcy Code avoidance powers in a plenary proceeding such as Chapter 7 or 11. In some circumstances, such a proceeding is either commenced by a debtor or its creditor prior to involvement of the foreign representative. However, the foreign representative may choose to commence a plenary proceeding under the Bankruptcy Code after recognition of the foreign proceeding under chapter 15, wherein the scope of the plenary proceeding is limited to the debtor's US assets and will be coordinated with the foreign proceedings. The foreign representative can also commence plenary

proceedings to obtain access to the Bankruptcy Code's avoiding powers where relief under other applicable law is unsatisfactory, such as where the statute of limitations has expired, or applicable law does not allow claims for constructive fraudulent conveyance.

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?

US non-bankruptcy procedures have provided the distinction between final and interlocutory orders. Final orders are those that disposes of all issues, leaving nothing further to be decided, whereas interlocutory orders resolve only some issues or claims. Final orders may be appealed as of right, whereas interlocutory orders may be appealed only with leave of the appellate court. Further, the distinction between interlocutory and final orders can be vague where a court resolves not simple claims between two parties but an issue of broad applicability such as post-petition interest rate applicable to the debtor's obligations.

Appeals from the bankruptcy court decisions are heard by the district court for the district in which they sit. In certain circuits, however the bankruptcy appeals are heard by a Bankruptcy Appellate Panel (BAP), convened from the judges of the bankruptcy courts within the circuits. In these circuits, a party has the option to request that the appeal be heard by the district court instead. From the district court or BAP, there is further appeal right to the circuit court of appeals. However, in rare case an appeal from the bankruptcy court goes directly to the court of appeals where the bankruptcy court or district court certifies that either a) the appeal raises a question of law as to which there is no controlling decision of the circuit or the US Supreme Court or requires resolving conflicting controlling decisions, or b) immediate appeal may materially advance the progress of the case. The court of appeals has discretion whether to accept a case so certified.

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' liability is very limited in Delaware as compared to that elsewhere. Directors own a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision making, but they are protected from liability for errors of judgement by the business judgement rule. As per the business judgement rules, the board of directors are presumed to be have acted in the good faith based on the reasonable information. This presumption can be denied only by showing that most of the facts were not reasonably informed and/or they did not believe that their decision was not in the corporation's best interest or were not acting in good faith. However, this presumption can be denied, and the directors will not be liable in the absence of showing of gross negligence. Directors may also be exempt by a corporation's certificate of incorporation from liability for breach of duty of care. However, the business judgement rule does not apply where the transaction is approved by a board majority that is not disinterested and independent or a controlling shareholder is on both side of transactions. In such circumstance, the transaction will be void unless the entire fairness standard is satisfied.

Director's do not owe any duties to creditors. However, they owe duties to the corporation and its shareholders, this is even when the company/corporation is potentially insolvent and therefore it is seen that shareholders do not receive anything in bankruptcy. The Delaware Supreme Court has put to rest any suggestion that directors owe duties towards creditors when the company is operating, in the zone of insolvency or is insolvent. Hence there is no equivalent under US law of the concept of "wrongful trading or deepening insolvency".

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QUESTION 4 (fact-based application-type question) [15 marks in total]**Commented [DB46]:** 11/15**Question 4.1 [4 marks]****Commented [H(47):** Total marks 0/4

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.

In this case, even if the Gambling Corp's bonds are governed by English law, it has operations in many international cities and the proceedings are ongoing as per English scheme of arrangement, the proceedings can be commenced under US chapter 15, however the foreign representative will have to file the petition. The creditor can not place the debtor in Chapter 15 involuntarily by filing the petition. The requirement of recognition of the proceedings in US Chapter 15 are minimal i.e., foreign representative need to establish that a foreign court or administrative proceedings with respect to the debtor are pending or no and the foreign representative will need to act by the proceedings. Further, there is also no requirement of resemblance of foreign proceedings with that of the US Bankruptcy case to be recognised. However, one should note that, filing the petition, will not automatically invoke a stay of creditors actions. The stay will only arise once the petition for recognition of a foreign main proceeding being granted, however the same is limited to the property of the debtor within US. Further, the one point that may arise at the recognition stage is the characterization of the foreign proceedings as foreign main or foreign non-main proceeding, as this may determine the scope of relief available to debtor following recognition.

Question 4.2 [5 marks]**Commented [H(48):** I was looking for you to analyze the location of the debtor's COMI, note that this determines whether foreign main or non-main recognition is appropriate and whether an establishment exists to support foreign non-main recognition**Commented [H(49):** Total marks 5/5

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?

Once, the Oil Corp. files a voluntary petition in the Chapter 11, there will be an automatic stay of any proceedings against the debtor or its property. This will provide a breathing space for the debtor to continue operating in the ordinary course of business and work with its key constituencies to propose a plan of reorganisation that will adjust its debt. ShipCo, in this case can file a pre-petition claim against Oil Corp for breach of contract, further all the litigations will be stayed.

However, in the second case, filling of Chapter 11, will not put an automatic stay on the regulatory investigations, thus the US Department of Justice will continue to carry its investigation with regards to Oil Corp illegally purchased oil from countries subject to US sanctions.

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Again, the USA bank will not be able to foreclose on an Oil Corp refinery located in the Philippines, if Oil Corp. has filed a voluntary petition in Chapter 11, given there will be automatic stay worldwide, on all the assets incl. foreign assets of Oil's Corp's. In the fourth case, the landlord can evict the property if it is non-residential property of the debtor and if the lease has expired; however the landlord can file the claim in bankruptcy for its pre-petition rent.

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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?

As the Oil Corp's plastic manufacturing business operates under the trademark "Interconnect", it is correct that it will get higher returns if it can assume and assign the trademark license. However, given the trademark is licensed from Plastic Corp and this is executory contract, it may not be assignable to the purchaser as the trademark licenses are not assignable without licensor's consent. Oil Corp can transfer its rights under the contract to a third party, with the consent of licensor, however such transferee must give the Oil Corp adequate assurance of future performance. Further, Oil Corp can reject the patent licenses which are licensed to Plastic Corp.; however, the reject of contract must be based on the business judgement of the Oil Corp that the sale of business is in good faith. As the court may deny approval of such rejection if it is not made in the good faith or in the reasonable exercise of business judgement. Further, the licensees of patents and copyrights owned by Oil Corp will be protected such that their licenses may not be terminated in connection with the sale of the intellectual property without their consent.

Perse, Section 363 of the Bankruptcy Code provides sale of assets/ property in the ordinary course of business which is free and clear of all liens with the court approval. However, in this case, the USA Bank has lien over Oil's Corp's main facility, which is in Dallas, those the USA Bank's consent is not required, if the value of property exceeds the value of interest, in that instances the USA Bank's interest will be attached to the proceeds of the sale and it will receive priority in distribution of those proceeds.

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* End of Assessment *