



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 40.5/50

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

Commented [H(6): Correct, 1 mark

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

Commented [H(7): Incorrect, the correct response is (c)

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

Commented [H(8): Correct, 1 mark

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

(a) The exclusivity period is 1 year.

(b) The exclusivity period cannot be extended.

(c) The exclusivity period cannot be shortened.

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

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

Question 1.7

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

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

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

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

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

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

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

Question 1.8

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

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

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

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

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

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

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

Question 1.9

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

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(12)]: Correct, 1 mark

QUESTION 2 (direct questions) [10 marks]

Commented [H(13)]: Total marks 7.5/10

Question 2.1 (2 marks)

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

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

A voluntary bankruptcy petition is when a debtor (i.e. the would-be bankrupt) applies to make themselves bankrupt, whereas an involuntary petition is when a creditor applies to make the debtor bankrupt.

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

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

Question 2.2 (2 marks)

Commented [H(17)]: Total marks 2/2

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

One potential consequence is the voiding of (or making voidable) the action in breach of the stay, including a possible order that the party in violation of the stay pay the debtor's legal costs in respect of same.

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

Another potential consequence is that the violating party may become liable to pay damages to the debtor in respect of any loss suffered as a result of the action in breach of the stay.

It should also be noted that an automatic stay in respect of a bankruptcy petition is a court matter and, accordingly, any violation of that automatic stay may be considered to be in contempt of court.

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

Question 2.3 (3 marks)

Commented [H(20)]: 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?

A claim is impaired in respect of a reorganisation plan unless there are no changes to the rights (being "legal, equitable and contractual") of the holder of the claim, pursuant to Sections 1123 and 1124 of the Code. Commonly, impaired claims will comprise claims which will not be paid in full under the reorganisation plan.

Commented [H(21)]: Correct, 1 mark

It should be noted that a delay in payment of a debt outside of normal (i.e. pre-insolvency) trading/contractual terms is not in and of itself a reason for the claim to be unimpaired, but a delay in payment

A holder of an impaired claim is not entitled to vote if it is an "insider" / related-party. Instead, that insider will not be able to vote in respect of the reorganisation plan.

Commented [H(22): Insiders may vote but their votes cannot constitute the consenting impaired class for a cramdown. An impaired class that will receive nothing under the plan cannot vote and is deemed to reject the plan.

Question 2.4 (3 marks)

Commented [H(23): Total marks 2.5/3

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?

Preference claims

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?

Preference claims

Commented [H(25): Correct, 1 mark

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

Fraudulent conveyance

Commented [H(26): Partially correct, 1/2 mark, specifically an actual fraudulent conveyance

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

Commented [H(27): Total marks 12/15

Question 3.1 (3 marks)

Commented [H(28): Total marks 1/3

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

Stern v Marshall was a 2011 judgment (with dispute beginning in 1996) in which the United States Supreme Court held that bankruptcy courts – which were created out of the Bankruptcy Code, rather than Article 3 of the US constitution as with most other US Federal Courts – do not have jurisdiction to rule on matters which may be dealt with by Article 3 of the constitution. In effect, this granted superiority of the Supreme Court and other Federal Courts over the US bankruptcy court and made such provisions unconstitutional.

Commented [H(29): Correct, 1 mark

As a result, new provisions were enacted such that district courts would have primary jurisdiction over bankruptcy matters and would be allowed to 'delegate' such matters to the relevant bankruptcy court within the district court's jurisdiction. District Courts now play a key role in bankruptcy proceedings.

The newly enacted provisions also introduced a concept of core and non-core bankruptcy proceedings, whereby 'core' proceedings would be referred to, heard and ruled upon by judges of the bankruptcy courts. Non-core proceedings cannot generally be heard by bankruptcy judges given the lack of jurisdiction over same and in no cases can a bankruptcy judge make a final determination or final order in respect of a non-core proceeding. If an

Commented [H(30): Incorrect, these predated the *Stern v. Marshall* decision and were believed, prior to that decision, to grant bankruptcy courts jurisdiction to enter final orders on core proceedings

issue is satisfactorily bankruptcy-related, then the bankruptcy judge make deal with it although is still prevented by statute from making any final order.

Commented [H(31): The bankruptcy court may enter final orders on challenges to petitions and with the consent of the parties.

Question 3.2 (3 marks)

Commented [H(32): 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?

A foreign representative is not entitled to the relief of the automatic stay from creditor action provision; rather, the automatic stay will come into once recognition has been granted. In addition, the stay will only apply to assets within the United States.

A foreign representative may be able obtain similar relief to an automatic stay under Chapter 15, which incorporates the United States' adoption of the Model Law, in the form of urgent interim relief as set out in Article 23 of the Model Law. Such urgent interim relief would be at the discretion of the Court rather than by virtue of any automatic provisions, but represents an appropriate legal avenue for a foreign representative to obtain a stay in the United States on an urgent basis whilst recognition is being sought.

Further, a foreign representative is not entitled to commence avoidance action in the United States, despite such relief being available to domestic US bankruptcy proceedings and that the Model Law suggests that actions available to domestic representatives should also be available to foreign representatives (of course the nature of the Model Law is that a jurisdiction can adopt, or not adopt, whichever parts of the Model Law it chooses).

Commented [H(33): Correct, 1 mark

This has generally been interpreted as not applying to pre-petition transactions under other applicable laws. Accordingly, a foreign representative may be able to utilise similar laws or concepts to void transactions which may constitute fraudulent conveyances or preference transactions, whilst not relying on the applicable bankruptcy provisions. In this regard, a foreign representative may be able to obtain similar relief to those contained in the bankruptcy act.

Commented [H(34): Correct, 1 mark, alternatively the foreign representative may commence a plenary proceeding to access the bankruptcy provisions

Question 3.3 (4 marks)

Commented [H(35): Total marks 4/4

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?

A final order is a final decision which closes the proceeding and, unless appeal is available, the parties would 'go their separate ways' and that court will no longer deal with the matters at hand (although a superior court may, if appealed).

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

An interlocutory order is made within an ongoing proceeding, resolving one or more particular points or issues within the wider proceedings but not the whole proceeding in itself.

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

However, a bankruptcy order which deals with a discrete point but in a final and determinative sense will still be considered a final order and, further,

Parties have a right by default to appeal a final order. On the other hand, the relevant appellant court (i.e. the court with jurisdiction to determine the appeal itself) must grant a would-be appellant with the right to appeal an interlocutory order.

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

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

The appellant court is generally the District Court of whichever district the bankruptcy court is in (i.e. the same District Court which would refer a bankruptcy matter to a particular bankruptcy court). In certain districts, however, a bankruptcy matter's appeal will be heard by a Bankruptcy Appellant Panel.

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

Commented [H(41)]: Correct, 1 mark

Question 3.4 (5 marks)

Commented [H(42)]: Total marks 5/5

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?

Delaware state law (state law governs fiduciary duties in the United States) provides for more limited director's duties than most other US states and Nation States. This is one of the reasons Delaware is a popular state for incorporation of companies (as well as low tax, causing some to call Delaware an 'onshore tax haven').

Commented [H(43)]: Most other US states model their corporate law statutes on Delaware, but variations do exist.

One fiduciary duty owed by directors in Delaware is the duty to act in the best interests of the corporation, i.e. the duty of loyalty. In essence, this duty provides that directors should make decisions without conflict and without regard to their own interests, only to those of the corporation

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

Another is the duty to make informed and educated decisions. In this regard, directors must make reasonable efforts to ensure they are properly informed, and obtain the necessary information for them to become so, and make decisions on that basis.

Commented [H(45)]: Correct, 1 mark, generally call the duty of care

An important qualification to the above is the Business Judgement Rule, which provides for an automatic presumption that directors are acting in good faith and making decisions based on good information (except for in cases of gross negligence). This presumption can be rebutted, but only where a simple majority of the board either were not properly informed, were not acting, in their honest belief, in good faith and/or in the best interests of the corporation.

However, the Business Judgment Rule does not apply (and the relevant transaction will be void) in circumstances where a controlling shareholder is conflicted in respect of a transaction – e.g. financially interested in both the buyer and seller – or where the board approved a transaction but was conflicted, had personal or other (not related to the corporation) interests in the transaction or was otherwise not independent.

In Delaware, directors' duties are owed to the corporation and its shareholders, irrespective of its solvency or otherwise. This is distinct from many other jurisdictions, where directors will owe a duty to a corporation's creditors when that corporation is insolvent or is likely to/shortly will become insolvent.

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

Commented [H(47)]: Correct, 1 mark

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

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

Commented [H(49)]: Total marks 12/15

Question 4.1 [4 marks]

Commented [H(50)]: 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.

In general, there is no automatic exclusion in respect of a scheme of arrangement. The only requirements under Chapter 15 are that the foreign representative has power in respect of the debtor's insolvency proceedings pursuant to a pending foreign court-ordered or administrative proceeding. An administrator of an English scheme or arrangement, provided they are validly appointed and otherwise meet the definition of a foreign representative, meets these criteria (and indeed other English schemes of arrangements have been and will continue to be recognised as foreign proceedings under Chapter 15 of the Bankruptcy Code).

It is noted that the UK in this case clearly has significant relevance to Gambling Corporation, being home to at least **one of its casinos (i.e. London)** and, seemingly, a financial centre given its corporate bonds are governed by English law (which would suggest that its bondholders are English-based or that Gambling Corporation has some other significant English presence).

However, Gambling Corporation has its principal place of business in Greece, and also operates casinos there (as well as other locations). In this regard, **it is likely that its Centre of Main Interest (COMI) is in Greece.** On this assumption, should the UK foreign representative be granted recognition as a foreign proceeding, **it would be recognised as a foreign non-main proceeding.**

Commented [H(51): This would constitute the requisite establishment for foreign non-main recognition.

Commented [H(52): Correct, 1 mark

Commented [H(53): Correct, 1 mark. This is because it is a proceeding not in the debtor's COMI whereas a proceeding in the debtor's COMI is recognized as a foreign main proceeding

Question 4.2 [5 marks]

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

Commented [H(54): Total marks 5/5

Chapter 11 bankruptcies are debtor-driven and so Oil Corporation will retain control of its business and assets whilst a reorganisation plan is determined and voted upon.

The specific effects for each of the four points are set out below:

- Breach of contract lawsuit
 - **The automatic stay entitlement under s362 of the Bankruptcy Code would be invoked upon filing the petition, with the effect that the key customer could no longer pursue the claim against Oil Corp.**
 - The damages claim, to the extent it is valid, would be a claim in the bankruptcy. Quantum of the damages would need to be agreed. If the parties (i.e. the debtor in possession and the creditor) could not be agreed, then the parties may litigate in respect of quantum. However, whatever the determination of quantum is the customer would not be able to enforce its claim outside of the bankruptcy process and would likely still be classed as an impaired creditor for the purpose of the bankruptcy.
- DoJ investigating illegally purchased oil

Commented [H(55): Correct, 1 mark

Commented [H(56): Correct, 1 mark

- The DoJ may continue its investigation into the potential illegal purchase of oil, given the specific carve-outs from the automatic stay provisions in respect of regulatory investigations.
 - To the extent the DoJ determines that a crime has been committed, such an action would also not be affected by the stay given there is also a carve-out from the automatic stay provisions in respect of criminal proceedings.
- Missed payment to secured creditor and threats of foreclosure
 - The automatic stay is sufficiently broad that it will prevent enforcement in respect of secured property anywhere in the world. Accordingly, the bank will not be entitled to foreclose on the property in the Philippines.
 - Steps should be taken to determine the value of the property in order to determine whether the secured creditors is fully secured or under-secured.
 - To the extent the secured creditor is under-secured, the shortfall will be taken into account as an impaired claim in respect of classing creditors and, potentially, engaging cramdown provisions in order to force dissenting creditors (including secured creditors) to accept altered debt terms in accordance with the reorganisation plan.
 - Missed rent and threats of eviction
 - The automatic stay under s362 of the Bankruptcy Code will also prevent the landlord from evicting Oil Corp from the premises.
 - It is noted that in the event the lease has expired, then the landlord would not be prevented from evicting Oil Corp as such action is also carved-out under s362.

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

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

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

Question 4.3 [6 marks]

Commented [H(60)]: 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?

- i. Assume and assign trademark license
 - Whilst executory contracts may be assigned in bankruptcy without the consent of the counterparty, trademarks cannot be assigned without the licensor's consent (see *In re Trump Entertainment Resorts, Inc*, 526 BR 116 (Bankr D Del 2015)).
 - Accordingly, Oil Corp would not be able to achieve this goal.
- ii. Reject patent licenses
 - It is assumed that the bankruptcy filing will be a Chapter 13 petition, given the intent to sell its business through a 363 sale.
 - In that case, Oil Corp is entitled to reject the patent pursuant to s365(d)(2) of the Code at any time prior to the confirmation of a reorganisation plan, or sooner as ordered by the Court. However, the rejection would not have the effect Oil Corp intends, given

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

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

Commented [H(63)]: Unclear why you say this as chapter 13 is only for individuals

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

that pursuant to s365(n) of the Code, if the patent is rejected without the licensee's consent then the licensee will, given the patent is intellectual property, be entitled to:

- i. Treat the patent as terminated for the purpose of any claim for damages ordinarily available, pursuant to the patent contract terms, where the patent would be terminated
 - ii. Retain rights, as they existed immediately prior to the commencement of the bankruptcy, in respect of the intellectual property for as long as the contract would have lasted otherwise or for whatever period such a contract may have been extended by the licensee pursuant to any applicable non-bankruptcy law.
- If Oil Corp had entered a Chapter 7 petition, then the patent would be automatically rejected if no be able to unilaterally reject the patent licences and sell them free of encumbrance to a purchaser (although the business as a whole could not operate in the meantime, likely diminishing value as a whole vs a Chapter 11 petition and 363 sale).
- iii. Sell manufacturing facility with free and clear title
 - Assuming it is a Chapter 11 bankruptcy, then if exercising a 363 sale, then the debtor will be entitled to sell the property with free title and clear of liens, only if one of the following requirements under s363(f) of the Code are met, namely:
 - i. The free and clear sale is permitted under applicable non-bankruptcy law
 - ii. The secured creditor consents to the free and clear sale
 - iii. The secured interest is in respect of a lien and there is to be a surplus from the sale of the property after satisfaction of all liens on the property
 - iv. The interest is in bona-fide dispute
 - v. The secured creditor may be otherwise compelled to accept payment in respect of its interest in the property
 - In effect, secured property can generally be sold with free and clear title in a 363 sale if the secured creditor consents and/or there is to be a surplus available following the sale and satisfaction of secured claims.
 - However, the entitlement does not automatically apply if selling on a stand-alone basis.

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

Commented [H(66)]: The licensee would still have the protection of 365(n) on rejection

Commented [H(67)]: Correct, 1 mark, also the lien will attach to the proceeds of the sale

*** End of Assessment ***