

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.

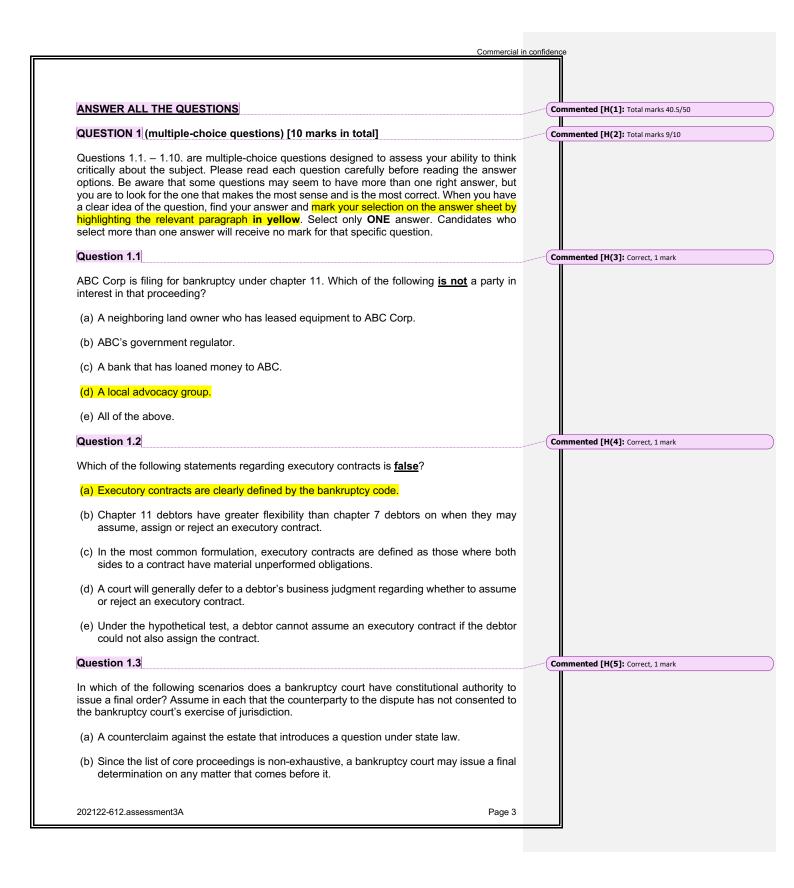
The mark awarded for this assessment will determine your final mark for Module 3A. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

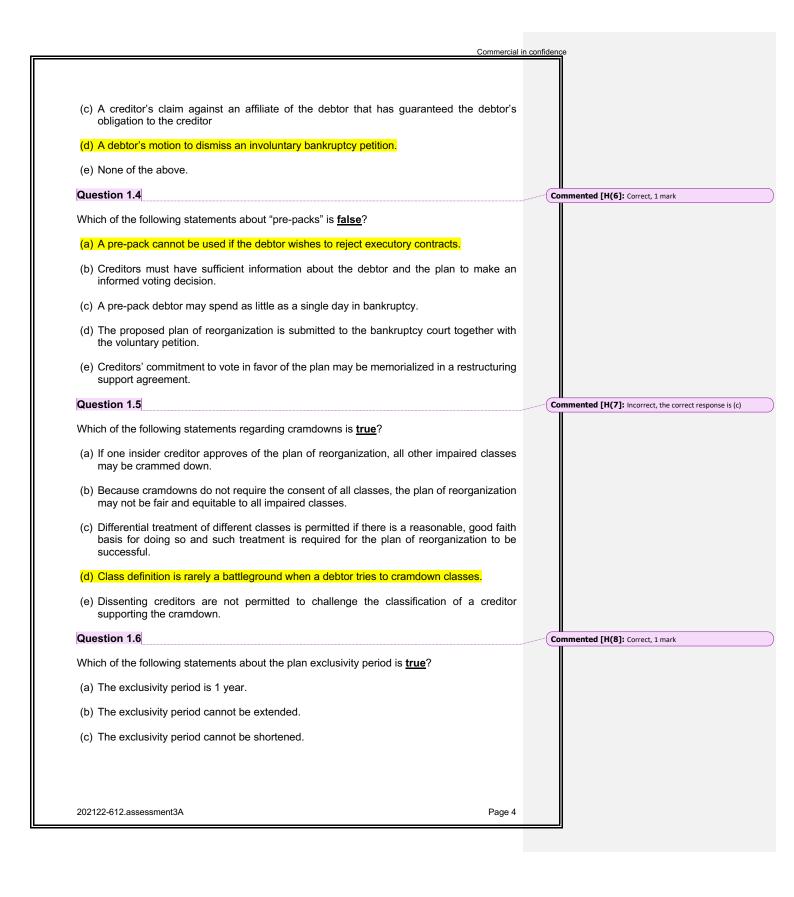
INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

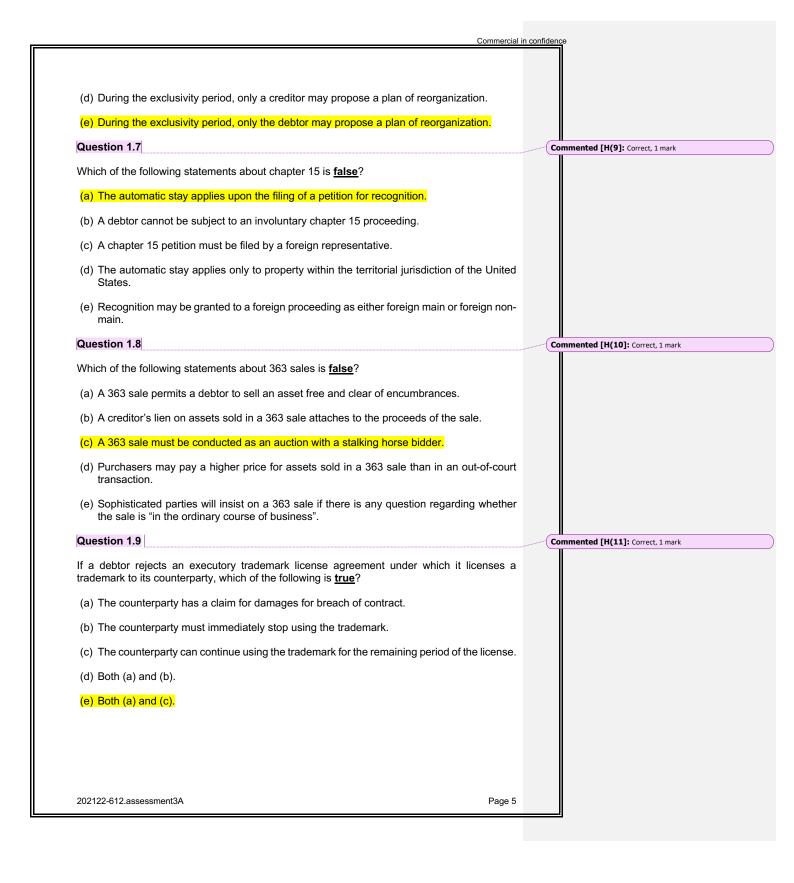
Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

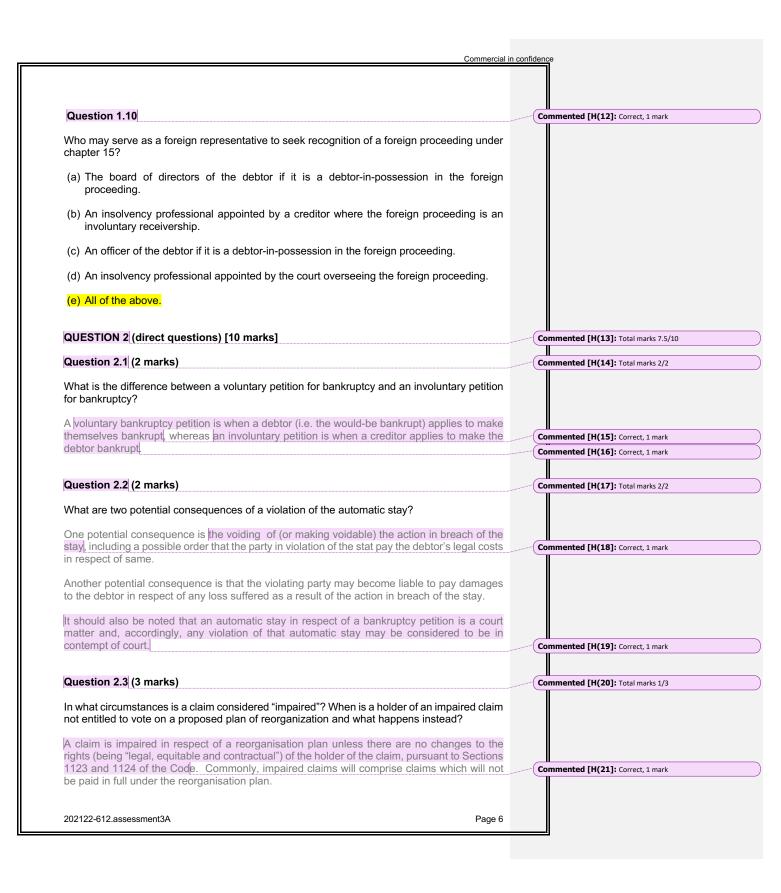
- You must use this document for the answering of the assessment for this module. The
 answers to each question must be completed using this document with the answers
 populated under each question.
- All assessments must be submitted electronically in MS Word format, using a standard A4 size page and 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.
- 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**.

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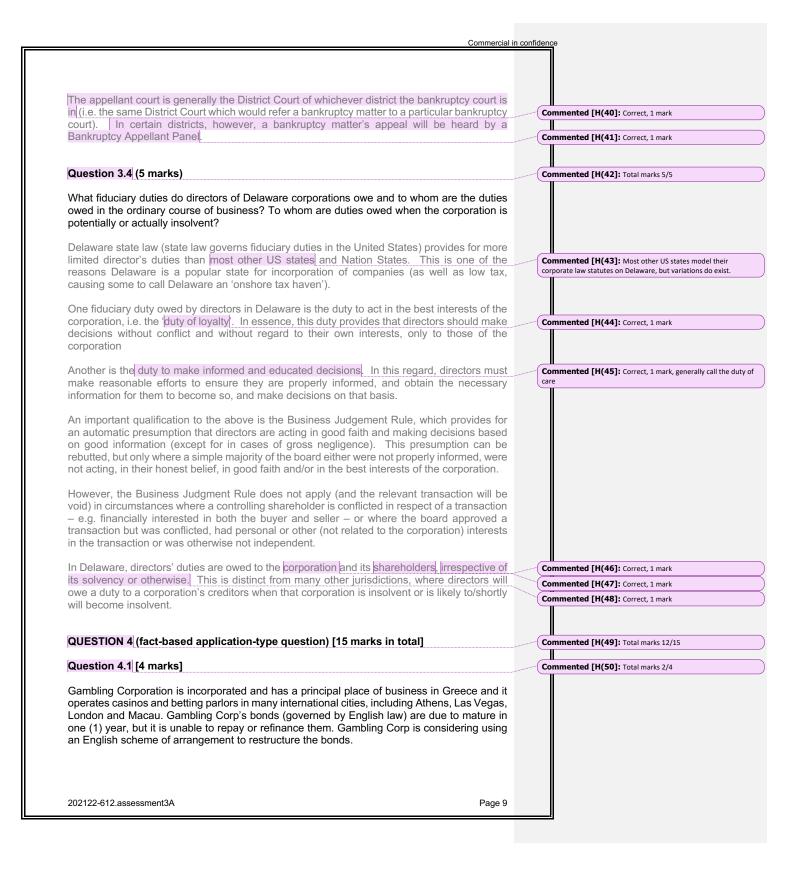






Commercial in confidence It should be noted that a delay in payment of a debt outside of normal (i.e. pre-insolvency) trading/contractual terms is not in and of itself a reason for the claim to be unimpaired, but a delay in payment A holder of an impaired claim is not entitled to vote if it as "insider" / related-partly. Instead, 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 that insider will not be able to vote in respect of the reorganisation plan. and is deemed to reject the plan. П 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 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 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. Commented [H(29]: Correct, 1 mark In effect, this granted superiority of the Supreme Court and other Federal Courts over the US bankruptcy court and made such provisions unconstitutional. 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 Commented [H(30]: Incorrect, these predated the Stern v. Marshall decision and were believed, prior to that decision, to grant bankruptcy judges given the lack of jurisdiction over same and in no cases can a bankruptcy bankruptcy courts jurisdiction to enter final orders on core judge make a final determinations or final order in respect of a non-core proceeding. If an proceedings 202122-612 assessment3A Page 7

Commercial in confidence issue is satisfactorily bankruptcy-related, then the bankruptcy judge make deal with it although Commented [H(31]: The bankruptcy court may enter final is still prevented by statute from making any final order. orders on challenges to petitions and with the consent of the 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 Commented [H(33]: Correct, 1 mark 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). 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 Commented [H(34]: Correct, 1 mark, alternatively the foreign representative may commence a plenary proceeding to access the foreign representative may be able to obtain similar relief to those contained in the bankruptcy 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, Commented [H(36]: Correct, 1/2 mark 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). 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 Commented [H(381: Correct, 1/2 mark 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(39]: Correct, 1/2 mark 202122-612 assessment3A Page 8



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

In 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.

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?

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

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- 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(51]: This would constitute the requisite

Commented [H(52]: Correct, 1 mark

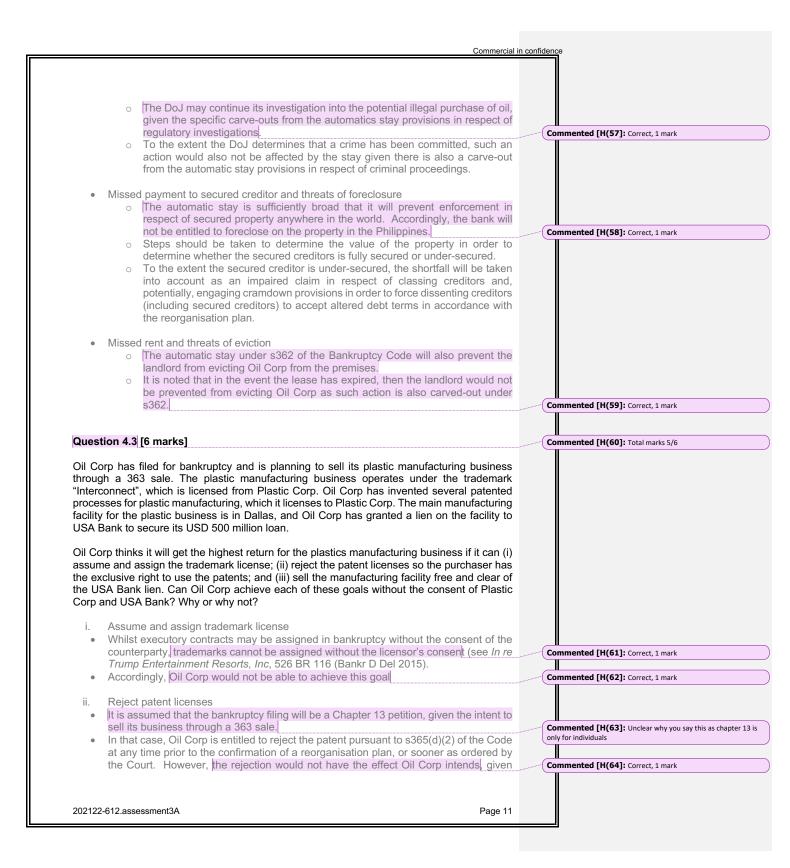
Commented [H(53]: Correct, 1 mark. This is because it is a proceeding not in the debtor's COMI whereas a proceeding in the debtor's COMI is recognized as a foreign main proceeding

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

Commented [H(55]: Correct, 1 mark

Commented [H(56]: Correct, 1 mark

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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:

- 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:
 - 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.

* End of Assessment *

Commented [H(65]: Correct, 1 mark

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Commented [H(66]: The licensee would still have the

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

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