



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.**
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- 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 35.5/50

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [H(2): Total marks 6/10

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): Incorrect, the correct response is (d)

In which of the following scenarios does a bankruptcy court have constitutional authority to issue a final order? Assume in each that the counterparty to the dispute has not consented to the bankruptcy court's exercise of jurisdiction.

- (a) A counterclaim against the estate that introduces a question under state law.
- (b) Since the list of core proceedings is non-exhaustive, a bankruptcy court may issue a final determination on any matter that comes before it.

- (c) A creditor's claim against an affiliate of the debtor that has guaranteed the debtor's obligation to the creditor
- (d) A debtor's motion to dismiss an involuntary bankruptcy petition.
- (e) None of the above.

Question 1.4

Which of the following statements about "pre-packs" is **false**?

- (a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.
- (b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.
- (c) A pre-pack debtor may spend as little as a single day in bankruptcy.
- (d) The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.
- (e) Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.

Commented [H(6): Correct, 1 mark

Question 1.5

Which of the following statements regarding cramdowns is **true**?

- (a) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.
- (b) Because cramdowns do not require the consent of all classes, the plan of reorganization may not be fair and equitable to all impaired classes.
- (c) Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.
- (d) Class definition is rarely a battleground when a debtor tries to cramdown classes.
- (e) Dissenting creditors are not permitted to challenge the classification of a creditor supporting the cramdown.

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

Question 1.6

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

- (a) The exclusivity period is 1 year.
- (b) The exclusivity period cannot be extended.
- (c) The exclusivity period cannot be shortened.

Commented [H(8): Correct, 1 mark

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

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

Question 1.7

Commented [H(9)]: Incorrect, the correct response is (a)

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)]: Incorrect, the correct response is (e)

If a debtor rejects an executory trademark license agreement under which it licenses a trademark to its counterparty, which of the following is **true**?

(a) The counterparty has a claim for damages for breach of contract.

(b) The counterparty must immediately stop using the trademark.

(c) The counterparty can continue using the trademark for the remaining period of the license.

(d) Both (a) and (b).

(e) Both (a) and (c).

Question 1.10

Who may serve as a foreign representative to seek recognition of a foreign proceeding under chapter 15?

- (a) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (b) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.
- (c) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (d) An insolvency professional appointed by the court overseeing the foreign proceeding.
- (e) All of the above.

Commented [H(12)]: Correct, 1 mark

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?

Voluntary Petition for bankruptcy is where the process has been willingly brought to the court by the debtor. An example would be for a chapter 11 reorganisation where the debtor files for the order with the restructuring agreement and this is brought to the court on a voluntary basis.

Involuntary petition for bankruptcy would be where the debtor has not willingly brought the petition to the court, an example of this would be if a creditor was petitioning for chapter 7 proceedings against a debtor. In this case the debtor has not consented to the proceedings.

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

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

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

Question 2.2 (2 marks)

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

Automatic stay – section 362 – Chapter 3

Automatic stay is a moratorium which is placed on the debtor's assets when a filing has been made at the court which invokes such. This means that, along with other things, there are to be no sale or disposal of assets in the period without the consent of the court, no creditor can take action against the debtor - there may be some exemptions.

Any action taken in this time is considered contempt of court and is void or voidable.

Potential consequences of violation of this stay would be:

Recovery of funds/assets – any sale of asset not sanctioned by the court would be overturned and the assets would re-vest within the estate

Adverse cost order may also be issued in relation to the above.

There may be sanctions imposed on the stay violator.

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

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

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

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?

An impaired creditor is one that is likely to receive less than 100% of their claim, a creditors who is being affected by the proposed plan in that they are losing out.

If it is deemed the plan leaves the holder of the claim “legally, equitable, and contractual right unaltered” then they may be classified as unimpaired and not able to vote.

In the case of a contingent claim, or a claim whereby the outcome has not been determined – for example ongoing litigation on the matter – the claim would be admitted for minimal value or not entitled to vote.

The impaired class are the only ones that are able to vote on a plan. If a creditor is deemed to have zero interest (ie will receive nothing) they will be deemed as rejecting of the plan, if a claim is due to receive 100% they are deemed to automatically approve and are also exempted from voting.

Therefore the voting power is with the impaired class.

If a creditor is not happy with the proposal and has no voting rights, they can request a contested confirmation hearing where they may have their issues heard by the court. The court will make the determination as to whether to confirm the plan.

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?

Antecedent debt falls under the elements of a preference claim. A preference claim is one in which there has been a transaction prior to the petition which the value received was less than that would have been received in a chapter 7 liquidation. This may be up to two year prior to the date of the petition/onset of insolvency proceedings. Any consideration would be payable back into the estate.

This is covered in chapter 11, section 548

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

Preferential payments require the debtor to be presumed insolvent, or having been made insolvent by the transaction. In which the transactions was for less value that would have been available to creditors in a chapter 7 realization. This is covered in chapter 11, section 548.

Commented [H(20)]: Total marks 2.5/3

Commented [H(21)]: Partially correct, 1/2 mark, any change to the legal, equitable or contractual rights of a creditor renders it impaired

Commented [H(22)]: Correct, 1 mark

Commented [H(23)]: Correct, 1 mark

Commented [H(24)]: Total marks 2.5/3

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

Commented [H(26)]: Correct, 1 mark

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

chapter 11, section 548

Commented [H(27): Partially correct, 1/2 mark, only actual fraudulent transfers under 548(a)(1)(A) require intent; constructive fraudulent transfers under 548(a)(1)(B) do not

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

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Question 3.1 (3 marks)

Commented [H(29): Total marks 2.5/3

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

Bankruptcy law (code) is a matter of federal legislation.

There will however be cross over between the state and federal laws of a state owing to the fact that there will be matters arising to amongst other things, differences in property legislation state to state.

The 1978 Bankruptcy Code was 'struck down' as unconstitutional, and as a response new provisions were included to give jurisdiction to the district courts, and that they would refer to the bankruptcy courts in their region to try and materialise some of these issues for clarity as to when matters would be heard by the District court, and which by the Bankruptcy court, and which could issue final orders on said matters.

The status refers to a distinction between "core and "non-core" matters, with the core proceedings only being dealt with by the bankruptcy court. The bankruptcy court may appeal to the district court in relation to non-core matters, and the district would have the right to issue a final order.

Commented [H(30): Correct, 1 mark

The district court has the discretion to refer its jurisdiction to that of the bankruptcy court at its discretion.

Stern V Marshall, the US Supreme Court ruled that even in core proceedings a bankruptcy court cannot issue final orders that invade Article III jurisdiction. In this case a bankruptcy claim was filed, and subject to a counter claim against the debtor. As there were ongoing matters in the state court in relation to the counter claim, the bankruptcy court issues the judgment first (ahead of the district court hearing the other matters). Although the counter claim would fall as core proceedings, which would usually be a matter for the Bankruptcy court to issue a final order owing to section 157, the US supreme court held that issuing this order was unconstitutional and the final order was a matter determined not by the bankruptcy court.

Commented [H(31): Correct, 1 mark

Following this case, subsequent rulings and legislation amendments have provided that:

- As district courts would have the jurisdiction on matters that may give rise to a petition, the bankruptcy court can in these case seek sanction from the district court in enter the order
- Bankruptcy judges can determine core proceedings over which they lack constitutional authority by consent of the district court by issuing a report for their review

Commented [H(32): Correct, 1/2 mark, and every district court has a standing order delegating that power

Commented [H(33): They can also enter final orders with the parties' consent.

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?

Chapter 15 deals with the enactment of UNCITRAL Model law (with modification) and the procedures for recognition of foreign proceedings and coordination of US and foreign proceedings.

Chapter 15 excluded the foreign representatives from being granted the use of avoidance powers provided for in the Bankruptcy code – section 1521 (a) (7).

The relief available to the foreign representative is mainly in line with that of the trustee, exempting the relief available under the following sections:

- 522 – relation to property which is exempt including property exempt owing to federal law
- 544 – representative as lien creditor and as successor to certain creditors
- 545 – statutory lien
- 547 - preferential transactions
- 548 – fraudulent transfers and obligations
- 550 – liability of transferee of avoidance transfer
- 724(a) – lien that secures a claim in relation to a fine, penalty or forfeiture

Relief will be dependant on whether the proceedings are main or none main.

In terms of foreign main proceedings chapter 15 will automatically give the following relief:

- Automatic relief
- Operation of the debtors business by the foreign representative
- Sale of business in the ordinary course of business
- Avoidance of post-petition transfers

If the proceedings are foreign none-main the above will be at the discretion of the court.

The following relief may be granted on a discretionary basis:

- Discovery regarding the debtor – compelling of information from various parties
- Administration of the US based assets
- Extension and terms of provisional relief
- Any other matters pertaining to relief as determined under Chapter 11 - 1521(a)

A foreign representative can invoke the avoidance powers (as listed above) only in plenary proceedings such as chapter 7 and 11. Usually in cases where the proceeding has already commenced before the foreign representative sought recognition.

The foreign representative may also commence plenary proceedings under the bankruptcy code in order to invoke the avoidance powers, however this will need to be sought after the recognition has been granted and will be conditional on same.

Commented [H(34)]: Total marks 2/3

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

Commented [H(36)]: Correct, 1 mark, also the foreign representative may bring claims under analogous foreign and non-bankruptcy US law

Question 3.3 (4 marks)

Describe the differences between interlocutory and final orders and how an appeal may be taken from each. Which courts hear direct appeals from bankruptcy court orders?

Final orders are those which deal with all issues whereby there is nothing left to decide outside of the matter.

Appeal to final order:

- Appeal can be made by the litigants and any person who has been/will be adversely affected by the ruling.
- Needs consent of all parties as final order encompasses all issues

Interlocutory orders are those which seek to resolve some issues or claims.

Appeal to interlocutory order:

- Needs leave of the appeal court
- Appeal can be made by the litigants and any person who has been/will be adversely affected by the ruling
- Heard by the district court (28. Section 158 (a) (2)) or the appellate panel subject to section (28. Section 158 (b) (1))

Appeals from bankruptcy court decision are generally heard by the Court of that district. Sometimes they might be (dependent on the circuit) heard by an Appellate Panel – convened from judges of the bankruptcy courts within that circuit. It may be requested that this is heard by the district court (this would be requested by an interested party)

Appeals may in some cases be heard by the United States Supreme Court, in these cases it may be because the district court/circuit has resolved that the appeal raises matters of law where there is no controlling decision, or conflicting decisions, of the circuit available.

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?

Director liability/responsibility is determined by state law, and as such will differ between states.

The state of Delaware in its legislation generally limits the Directors liability more so than other states.

The Directors fiduciary duty is to the corporations best interest and duty of care is in educated decision making. Under the business judgment rule (for Delaware) the directors are presumed to have acted in good faith.

The Directors of Delaware, fiduciary duties can be further expanded to:

- Duty of care – informed, deliberate decision-making based on all information which would reasonably be available.
- Duty of loyalty. This requirement is to act on an independent and disinterested basis, in good faith with a belief that their actions are in the best interests of the Company and the Company shareholders.

Commented [H(37)]: Total marks 3.5/4

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

Commented [H(39)]: Specifically the appeal is by right, no leave required

Commented [H(40)]: Correct, 1/2 mark

Commented [H(41)]: Correct, 1/2 mark

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

Commented [H(43)]: Correct, 1 mark

Commented [H(44)]: Total marks 5/5

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

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

The Directors must still consider the interests of other stakeholders, but the interests of the Company and the Shareholders is of priority.

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

The directors duties in Delaware are for the best interest of the corporation and its shareholders, and not to the creditors. This is not affected by insolvency, their duty remains to the company and its shareholders as a priority to the companies creditors.

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

Commented [H(49)]: Correct, 1 mark

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

Commented [H(50)]: Total marks 8/15

Question 4.1 [4 marks]

Commented [H(51)]: Total marks 3/4

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.

Foreign-main proceedings are where the COMI is established as being in the foreign state. Non-main proceedings would be a foreign proceeding whereby the COMI is not established in the jurisdiction.

Commented [H(52)]: Correct, 1 mark

Commented [H(53)]: Correct, 1 mark

COMI is not defined in the US bankruptcy code but in section 1516 (c) provides that: "in the absence of evidence to the contrary, the debtors registered office, or habitual residence in the case of an individual, is presumed to be the debtors COMI"

On this basis as Gambling Corporation is incorporated and has principal place of business in Greece this would qualify as foreign none-main proceedings.

Commented [H(54)]: Correct, 1 mark, in addition the London casino is an establishment in the jurisdiction where the foreign proceedings are pending as required for foreign non-main recognition

According to Section 101 (23) foreign proceedings are defined as:

The term "foreign proceeding" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

In order to be granted recognition in the US under chapter 15, the foreign representative must be able to evidence that:

- Administrative proceedings with respect to the debtor is pending
- Foreign representative if empowered to act in the proceedings

Both these are met by the proceedings as the scheme of arrangement would classify as an administrative proceedings, and this could be started on the proposals as the proceedings qualify as 'pending'. Also, the insolvency practitioner qualified and regulated under UK insolvency law would be empowered to act in the proceedings.

Both England and US have adopted UNCITRAL Model Law – in the US this falls under section 1501.

The Gambling Corporation may be able to apply for recognition as an ancillary proceedings as opposed to a plenary proceeding, this is where there is authority to be granted over the

Commented [H(55)]: In the US, chapter 15 is always an ancillary proceeding, and plenary proceedings are those under the other chapters

entries estate but just provides assistance to the foreign proceedings, this will depend on the full extent of operation in the US and what would be covered by the UK scheme or arrangement.

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 proceedings are for the re-organisation of the business through a proposal.

Filing for chapter 11, has provisions ahead of receiving an order for chapter 11, the implications are detailed for each case below:

Breach of contract

A petition for chapter 11 grants relief for a period of 120 days from creditor action (section 1121)

In this case if any claims were awarded from the ongoing breach of contract issues these would not be enforceable on the Company while the chapter 11 petition is in place.

Illegally purchased oil from countries subject to US sanctions

Chapter 11 does not give any relief from sanctions violations and any resulting implications would still be brought upon the Company. One being that the Company may suffer loss of the OFCA licence and not be able to continue to trade indefinitely.

USA Bank is threatening to foreclose on refinery located in the Philippines

Firstly, it will depend how much % claim the bank has over the property and if this was deemed to establish the bank as a fulcrum creditor. If this was the case then the bank would have a potential controlling vote in the chapter 11 proceedings.

The bank may not be able to foreclose on the property if it was deemed to be essential for the continuation of the business.

The petition will grant an instant relief or 'moratorium; for certain assets being sold or taken action against in the period leading up to the hearing of the proposal. However in this case, this will also be dependant on the local law in the Philippines in relation to re-possession of property and if the chapter 11 petition would be recognised. It is possible that this would not have an implication in that it is a petition and not a final order.

Commented [H(56): Total marks 3/5

Commented [H(57): Partially correct, 1/2 mark, filing the petition brings the automatic stay into effect and it remains in effect until the case ends or the stay is lifted, even past the exclusivity period for the debtor to propose a plan; actions in the bankruptcy court, like filing a claim or proposing a plan, are not stay violations.

Commented [H(58): Partially correct, 1/2 mark, the litigation would be immediately stayed, rather than proceeding to judgment

Commented [H(59): Correct, 1 mark

Commented [H(60): Here, USA Bank is presumably subject to the jurisdiction of the US courts, so even if the law of the Philippines would let them enforce, they would be subject to contempt sanctions if they foreclosed in violation of the stay and therefore would not do so.

Failure to pay rent on its Houston - landlord is threatening to evict

Owing to the moratorium relief that will be applied on the petition for the chapter 11, the landlord will not be able to evict for the designated period – 120 days.

Commented [H(61)]: Correct, 1 mark, though as noted above the stay is not limited in time to the exclusivity period

The landlord however, dependant on the amount by which his claim is impaired may have a considerable voting advantage in relation to the proposal for the Chapter 11 proceedings and may, being aggrieved not wish to vote in favour.

Question 4.3 [6 marks]

Commented [H(62)]: Total marks 2/6

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?

Assuming Oil Corp has filed for Chapter 11 petition and is proposing the sell the plastic manufacturing business as the re-organization.

If Oil Corp was filing for chapter 7 (liquidation) then the Company and its Directors, on the making of the order for liquidation would not have the rights to sell the business.

As section 363 established the criteria for a sale 'in the normal course of business', Oil Corp will not be able to sell the plastic manufacturing business under this basis as this does not fall under the normal course of business for the Company. The Company is not in the business of selling plastic manufacturing companies and therefore this would not be in the normal course of business. Therefore the sale will require court approval.

Assume an assign the trademark license

Oil Corp does not own the trademark license and as such is subject to a licensing agreement which may terminate on the chapter 11 filing. Breaching this trademark agreement may give rise to Plastic Corp becoming a fulcrum creditor whom will be able to vote in the proceedings and may object to same.

Commented [H(63)]: Incorrect, the bankruptcy code prevents "ipso facto" clauses (that terminate contracts on bankruptcy) from being enforced

Oil Corp cannot force the assignment of the trademark to the party whom will be purchasing the business. Oil Corp will therefore need to enter into negotiation with Plastic Corp directly in relation to this.

Commented [H(64)]: Correct, 1 mark, this is because trademark law allows Plastic Corp to refuse to accept an assignment

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

Under chapter 11 filings for a petition, the Debtor may not reject contracts but may negotiate these for the inclusion in the restructuring plan as is expected in the period between the filing of the petition and the filing of the re-organization plan.

Commented [H(65)]: Incorrect, the debtor may reject executory contracts, but because this contract is a patent license, rejection does not end the ability of the licensee to practice the patent due to the provisions of section 365(n). Thus, consent of the licensee to terminate the license would be required

The termination clauses of the contact will not in this period be affected the filing in so much as Oil Corp does not have any addition right to breach same.

The court may order than the rejection of the license be sanctioned if it can be demonstrated that it would be in the best interest of estate and the continuation of the Company.

Any termination of the license, would result in Plastic Co having a claim for damages in the proceedings, which may give them a considerable % vote and therefore able to reject as an impaired creditor.

Oil Corp may be able to terminate the license under provisions of Section 365, this will be required to be consent to b the court.

Sell the manufacturing facility free and clear of the USA Bank lien

If the sale of the facility generate a return in full or the bank then the sale would be sanctioned under the chapter 11 and the bank would not be able to reject to the proposal as they would not have a voting right as their claim is not impaired.

Commented [H(66)]: Correct, 1 mark, where the value of the property exceeds the lien, it can be sold without the secured creditor's consent, with the lien attaching to the proceeds

Oil Corp could not sell the manufacturing factory free of the lien if the return under the lien was not paid in full.

Chapter 11 does allow provisions for sales free of liens, but it must be demonstrated that this is in the best interests of the creditors. This may be able to be argued in this case as the Company may not be able to be sold without the sale of the manufacturing premises, and this return from the sale may be a higher return to creditors as whole than would be available through a chapter 7 liquidation.

*** End of Assessment ***