INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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]

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Question 2.1 (2 marks)

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

A voluntary petition for bankruptcy may be brought by a debtor in terms of the relevant and applicable chapter by filing a petition. The voluntary petition form does not require the debtor to be or claim to be insolvent. In other words, no allegation of insolvency is required.

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Whereas an involuntary petition is brought by a creditor and requires an allegation of insolvency to be made. In other words the creditors are required to allege either that the debtor is generally not paying its debts as and when they become due, unless they are the subject of a *bona fide* dispute as to liability or an amount or that, "*within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or an agent appointed or authorised to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession*".

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Question 2.2 (2 marks)

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

An act which violates the automatic stay constitutes contempt of court and is void or voidable, depending on the circuit in which the bankruptcy is pending due to a circuit split on the issue. Ignorance of the notice of the filing of the petition, is no excuse. Failure to lift the stay may result in contempt sanctions being imposed against the party who violated the stay. The sanction may include payment of the debtor's attorney's fees and requiring the violator to take steps to reinstate the status quo or undo the effect of its violation. In circumstances where the court may be of the view that the violator may not act expeditiously, it may impose coercive contempt sanctions such as a daily fine to be paid to the court until the stay violation has been rectified.

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Question 2.3 (3 marks)

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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?

1 A claim is considered impaired under the following circumstances:

1.1 where the holder will get less than 100% of its claim (i.e where the holder will take a "hair cut");

1.2 where there will be a delay in receiving full payment after the effective date of the plan.

2 A holder of an impaired claim is precluded from voting on plan where.....

Commented [H(21]: Partially correct, 1/2 mark, a claim is impaired if any of the holder's legal, equitable or contractual rights is altered. A holder of an impaired claim is not entitled to vote if it would receive nothing under the plan. It is deemed to reject the plan.

Question 2.4 (3 marks)

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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

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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?

Preference

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

Actual Fraudulent Conveyances

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

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Question 3.1 (3 marks)

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

Introduction

1. In order to answer this question, I will first look at the legal position before Stern v Marshall ("***Stern***"). Secondly, I will analyse the facts in *Stern* and its legal principles. Lastly, I will look at the implications of Stern: It would appear that Stern exacerbated the complication surrounding the jurisdiction of bankruptcy courts.

The position before Stern

2. Unlike most other federal courts which are established by Article (iii) of the US Constitution, the bankruptcy courts are creatures of statute. That is to say, bankruptcy courts are established in terms of the 1978 Bankruptcy Code. It bears flagging to note that Article (iii) courts are established in terms of the constitution. There is a line of cases where the US Supreme Court held that judges who have not been appointed in terms of Article (iii), cannot exercise jurisdiction over matters subject to Article (iii). Such judges include bankruptcy judges.

3. Accordingly, the Supreme Court set aside the jurisdictional provisions of the 1978 Bankruptcy Code as unconstitutional on the basis that issues that arise in and relate to bankruptcy proceedings involve statutory and contractual rights which would otherwise fall within the jurisdiction of Article (iii) courts which are established in terms of the constitution. As a result, new provisions were enacted in order to give jurisdiction over bankruptcy proceedings to district courts and allow them to (in turn) refer such proceedings to bankruptcy courts of their district.

4. The statute which makes provision for the aforesaid referral, distinguishes between "*core*" and "*non-core*" matters and allows bankruptcy judges to hear and determine only core proceedings. Although the bankruptcy court may hear non-core proceedings and if they are sufficiently related to a bankruptcy proceeding, they are precluded from making a final determination: instead, it can only submit proposed findings of fact and conclusions of law to the district court, to which interested parties may object, for the district court's final decision. That is why it is critical at the commencement of each motion or pleading, for the parties to indicate whether the matter at hand is core or non-core, to enable the bankruptcy court to establish the scope and ambit of its jurisdiction and power to render a final order or judgment.

5. After the 1984 amendments to the Bankruptcy Code, the bankruptcy court's jurisdiction to resolve issues which arose in core proceedings appeared trite and settled and that is why the spotlight was accordingly shone in the distinction between core and non-core matters, which, it would appear, required some attention and development. I will now turn to deal with *Stern* which understandably "unpleasantly" surprised the bankruptcy industry.

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Stern v Marshall

6. In 2011, the US Supreme Court of Appeal held, in *Stern*, that even in core proceedings, a bankruptcy court cannot issue final orders which violate or encroach upon Article (iii) jurisdiction. One would have expected bankruptcy courts to have the power to issue final orders at least in core proceedings. The brief facts of *Stern* bear mentioning to contextualise matters. In that case, a bankruptcy claim had been filed against the debtor and the debtor counterclaimed. The issues in the counterclaim were a subject of a separate state court proceedings. The bankruptcy court issued its judgment first in terms of which USD 400 million to the debtor was awarded to the debtor. The state court case continued whilst the bankruptcy judgment was appealed to the district court. The bankruptcy judgment was appealed to the district court, whilst the state court case continued. The state court jury verdict in favour of the claimant issued before the district court's judgment confirming the bankruptcy court. Although 28 USC section 157 provides that a counterclaim is a core proceeding as to which a bankruptcy court can issue a final order, the US Supreme Court held that the bankruptcy court's issuance of a final order over a state law claim was unconstitutional under Article (iii). Therefore, the jury verdict was the first final judgment and was dispositive of the issues.

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7. It would thus appear that Stern exacerbated the complication surrounding the jurisdiction of bankruptcy courts. Fortunately, subsequent US Supreme Court rulings and amendments to the bankruptcy rules have provided more guidance. As district courts have exclusive jurisdiction to adjudicate a petition commencing bankruptcy proceedings, a bankruptcy court may exercise a district court's delegated authority to issue a final order on a motion challenging the validity of a petition. The US Supreme Court held that bankruptcy judges may determine a core proceeding over which they lack constitutional authority by issuing a report and recommendation for review by the district court, which is the same procedure applicable in relation to non-core proceedings, all, with the consent of the parties, may issue final orders. The

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bankruptcy rules have codified or implemented these rules by requiring litigants to state in their pleadings whether they consent to the entry of final orders or judgments by the bankruptcy court and by allowing a district court that determines that a bankruptcy court did not have jurisdiction to enter a final order to treat its order as proposed findings of fact and conclusions of law.

Question 3.2 (3 marks)

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What provisions of the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding? What are two ways that the foreign representative can obtain equivalent relief?

Introduction

1. In order to contextualise matters and for sake of completion, I will first deal with Article 23 of the Model Law insofar as it relates to the powers which are afforded to a foreign representative upon recognition of foreign proceedings with respect to avoidance actions. Thereafter I will address the provisions of the Bankruptcy Code which may not be invoked by a foreign representative in a chapter 15 proceeding. I will then conclude with the two ways that a foreign representative can obtain equivalent relief.

Article 23 of the Model Law

2. Unfortunately, the Model Law does not prescribe the powers which should be given to a foreign representative in respect of avoidance actions (i.e. actions to avoid acts detrimental to creditors). Instead, it provides that the enacting legislature should "*refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganisation or liquidation*". It is said that reference to "*in this state*" is to the enacting jurisdiction and therefore means that the avoiding actions available to a foreign representative will only be those that a local debtor or trustee would be able to use. That is to say, a foreign representative will not be able to invoke avoiding actions which are not available to a local debtor or trustee. It bears flagging that surprisingly, despite chapter 15 having a close resemblance with the Model Law in many respects, it excludes from the rights granted to foreign representatives the right to invoke avoidance powers legislated for in the Bankruptcy Code. Chapter 15 has been widely interpreted only to be of application to the use of Bankruptcy Code's powers of avoidance of preferences and fraudulent conveyancers and not to preclude a foreign representative from seeking to avoid pre-petition transactions under other applicable US or foreign law. It is correctly held that this is consistent with the practice in cases under section 304 of the Bankruptcy Code which predates the enactment of chapter 15. But the exclusion referred to above does not constitute the end of the road for a foreign representative who wishes to obtain equivalent relief. I address this below.

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Two ways that a foreign representative can obtain equivalent relief

3. A foreign representative is entitled only to invoke the Bankruptcy Code avoidance powers in a plenary proceeding such as chapter 7 or 11. In this regard, in certain circumstances, such a proceeding would have been initiated by a debtor or its creditors prior to the involvement of the foreign representative. In other uncommon circumstances, the foreign representative may choose to initiate a plenary proceeding under the Bankruptcy Code after recognition of the foreign proceeding under chapter 15. However, in that case, the scope and ambit of the plenary proceeding is restricted to the debtor's US assets and will be co-ordinated with a foreign proceeding.

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Additionally, a foreign representative may also be desirous of initiating plenary proceedings to obtain access to the Bankruptcy Code's avoiding powers where relief under applicable law is unsatisfactory (i.e. where the claim has prescribed or time barred or where applicable law does not permit claims for constructive fraudulent conveyance).

Question 3.3 (4 marks)

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

Differences between interlocutory and final orders

1. Final orders are those which are final in effect and are dispositive of all issues in dispute. On the other hand, interlocutory orders are not final in effect in the sense that they are interim in nature and are not dispositive of all the issues or claims in dispute.

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2. Having said that, the distinction between interlocutory and final orders is not always clear in circumstances where a court resolves not just claims between two parties but an issue of "*board applicability*", such as the post-petition interest rate applicable to the debtor's obligations. With this in mind, the US Supreme Court has held that a bankruptcy order resolving a discreet dispute is a final order for appeals purposes.

3. An order that is constitutionally final because the bankruptcy court had authority to entertain it, is not final for purposes of appeal if it does not resolve the entire issue in dispute. By the same token, an order that resolves an entire dispute and thus would be final for purposes of appeal may not be final in the constitutional sense if the parties have not consented to the bankruptcy court's jurisdiction.

How interlocutory and final orders may be appealed

4 Final orders may be appealed as of right. On the other hand, interlocutory orders may only be appealed with the permission of the appellate court. The position is no different in the context of bankruptcy proceedings, save to state that orders extending the period of exclusivity to propose a plan are appealable as of right (28) USC, s158(a)(2).

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Which courts hear direct appeals from bankruptcy court orders?

5. As a general rule, appeals from bankruptcy court decisions are heard by the district court for the district in which they sit. Having said that, in some circuits, bankruptcy appeals are heard by a bankruptcy appellate panel ("***the BAP***"). The BAP consists of judges of bankruptcy courts within the circuit. It bears flagging that in those circuits, a party has an election to ask that the appeal be heard by the district court instead. From the district court or the BAP, there is a further appeal of right (provided the initial order was one from which an appeal or right was available) to the circuit court of appeals. It is therefore an appeal from a bankruptcy court to go directly to the court of appeals: where the bankruptcy court or district court certifies that either the appeal raises a question of law in respect of which there is no controlling decision of the circuit or the US Supreme Court, or requires resolving conflicting controlling decisions or immediate appeal may materially advance the progress of the case. The court of appeal is empowered with the discretion whether to accept such a case.

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Question 3.4 (5 marks)

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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 corporations directors fiduciary duties in the ordinary course of business

1. To contextualise matters, it is important to note that:-

1.1 director liability is based on the state law of the state of incorporation of the corporation in question;

1.2 many other US states have based their corporate laws on the Delaware's legislation;

1.3 according to the Delaware Secretary of State's division of corporations, over two thirds of all Fortune 500 companies, and 1.3 million companies in total, are incorporated in Delaware as of 2018;

1.4 That is why Delaware is regarded as the leading US jurisdiction for corporate law. Having laid the foundation, I now turn to deal with the fiduciary duties attaching to directors of Delaware corporations in the ordinary course of business.

2. Generally, US director liability is not as broad as it is in other jurisdictions. On this score, directors owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision making, but are immune from liability for errors of judgment by the business judgment rule. The business judgment rule entails that the board of directors is presumed to have acted in good faith on the basis of reasonable information available to it. However the presumption is not absolute or irrebuttable. It may be rebutted only by showing that the majority of the board in fact were not reasonably informed or they did not honestly believe that their decision was in the corporation's best interest, or were not acting in good faith. Whilst it may be objectively established on the facts that the majority of the board in fact were not reasonable informed, it may prove difficult to show that the majority of the board did not honestly believe that their decision was in the corporation's best interest or were not acting in good faith, because the latter two grounds suggests subjectivity or ones state of mind which is not easy to establish. Having said that, if the party seeking to hold the directors liable for breach of the aforesaid fiduciary duties is unable to rebut the aforesaid presumptions, he will have to show gross negligence on the part of the directors. It bears mentioning that the protection of directors immunity from liability may be enshrined in the corporation's certificate of incorporation in relation to a breach of the duty of care. However, such protection may not be provided for in the certificate of incorporation in relation to a breach for their duty of loyalty. However, the business judgment rule is not available where the transaction is approved by a board majority having an interest or a controlling shareholder on both sides of the transaction. In that case, transaction will be void unless the entire fairness standard is satisfied.

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3. The directors' duties are owed to the corporation and its shareholders.

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Duties owed when corporation is potentially or actually insolvent

4 Corporation's creditors unfortunately are not owed such duties, even where the corporation is potentially insolvent with the result that the shareholders will not receive anything in bankruptcy. In the case of North Am Catholic Educational Programming Foundation, Inc v Gheewalla 930 A.2d 92,103 (Del 2007), the SCA held that "*Individual*

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creditors of an insolvent corporation have no right to assert direct claims for breach of fiduciary duty against corporate directors. Creditors may nonetheless protect their interest by bringing derivative claims on behalf of the solvent corporation…". This decision thus settled the issue whether or not directors or duties to creditors when a company is operating under insolvent circumstances or where it is actually insolvent. In the case of Trenwic Am Litig Trust c Ernst and Young, LLP, 906A.2d 168 (Del Ch 2006) where it was held that "*Delaware law imposes no absolute obligation on the board of a company that is unable to pay its bills to cease operations and to liquidate. Even when the company is insolvent, the board may pursue, in good faith, strategies to maximise the value of the firm*". That is why it is said that there is no equivalent under US law of the concept of "*wrongful trading*" or "*deepening insolvency*".

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

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Question 4.1 [4 marks]

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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.

1. An English scheme of arrangement could be granted recognition under US chapter 15 because it meets the definition of a foreign proceeding as defined in the Bankruptcy Code and have been granted recognition. The definition of a foreign proceeding is "*a collective judicial or administrative proceeding in a foreign country … 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 reorganisation or liquidation*".

2. If the English scheme of arrangement is commenced in Greece where it is incorporated and has a principal place of business, the English scheme of arrangement may be recognised as a foreign main proceeding. That is because a debtor's Comi is presumed to be its place of incorporation (i.e. Greece) and its principal place of business (i.e. Greece). It is also an important determining fact. But the place of incorporation presumption is not irrebuttable. It could be rebutted by analysing the location of the headquarters, location of management, location of primary assets, location of a majority of debtor's creditors or a majority of the creditors that will be affected by the relief requested by the foreign representative and the jurisdiction whose law will apply to most disputes. Because *inter alia*, the facts of our case are silent as to the location of headquarters and location of management and the location of Gambling Corporation's primary assets (i.e. casinos and betting parlours) are scattered in many international cities including Athens, Las Vegas, London and Macau, the presumption remains undisturbed, in my view. This means, on my analysis, the Comi remains in Greece, with the result that if the scheme of arrangement was commenced in Greece, it would be recognised as a foreign main proceeding under chapter 15.

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Commented [H(52]: Partially correct, 1/2 mark. An English scheme of arrangement is governed by English law and supervised by a UK court, so it would not be happening in the debtor's COMI. Here, there is an establishment in England (the London casino), so foreign non-main recognition would be available.

Question 4.2 [5 marks]

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Oil Corporation is incorporated in Delaware and has its principal place of business in Texas. Oil Corp is facing a number of challenges to its business. First, ShipCo, one of its key customers, has filed a breach of contract lawsuit in Texas state court alleging that Oil Corp

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

1. The issue that arises in this question is the nature and scope of the stay which comes into effect immediately on the filing of a chapter 11 petition. It bears flagging that the scope of the automatic stay is extremely broad and has a worldwide effect. Thus it applies to any interference with the property of the estate anywhere in the world.

2. ShipCo's claim of breach of contract lawsuit for USD 1 billion in damage would be prohibited as it is litigation on pre-petition claim.

3. The US Department of Justice's investigation is not affected by the stay (i.e. it is not barred) as it is a regulatory investigation.

4 The USA banks' threat to foreclose on an Oil Corp refinery located in the Philippines is also prohibited because it is an act to obtain possession or control of the property of Oil Corp's estate, *alternatively*, it can be argued that it is constitutes perfection or enforcement of a lien against property of the estate of account of a pre-petition claim.

5. The landlord may not be precluded from evicting Oil Corp from its Texas office space where the landlord can show that it is a non-residential property (which is the case) and where the lease has expired (and/or cancelled).

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Commented [H(58]: Correct, 1 mark, here there is no evidence it expired though, so the eviction would be barred

Commented [H(59]: Total marks 4/6

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?

Can Oil Corp assume and assign the trademark license without Plastic Corp's consent?

1. Oil Corp cannot assume and assign the trademark license without Plastic Corp's consent because intellectual property licensing law provides that the counter party (i.e. Plastic Corp) cannot be compelled to accept performance from a transferee. As the prohibition is formulated as precluding or barring either assumption or assignment, some courts have held that a debtor may not assume an executory contract that it would not be permitted to assign, in terms of *the hypothetical test*. That is to say that Oil Corp may be precluded from assuming and continuing performing under a pre-petition trademark license without Plastic Corp's consent. For sake of completion, it bears flagging that others have held that this rule applies only where the debtor actually intends to assign the agreement. This is regarded as *the actual test*. In fact as Oil

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Commented [H(61]: Correct, 1 mark

Corp is desirous of assigning the trademark license to a third party purchaser, it would in any event be struck and hindered by the actual test.

Can Oil Corp reject its patent licenses so that the purchaser has the exclusive right to use the patents?

2. Oil Corp can reject the patent licenses without the consent of Plastic Corp because counter party consent is not necessary for purposes of rejecting patent licenses. However, having rejected the patent licenses, Oil Corp will not be able to grant exclusive use of the patent to the purchaser, especially without the consent of Plastic Corp who is the licensee of the patents.

Commented [H(62]: Correct, 1 mark, this is because of the special treatment of patent licensees under the Bankruptcy Code

Can Oil Corp sell the manufacturing facility free and clear of the USA Bank lien without consent of the USA Bank?

3. No. That is because a 363 sale permits a debtor to sell an asset free and clear of encumbrances and a creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.

Commented [H(63]: Incorrect, so long as the value of the assets exceed the amount secured by the lien, it can be sold free and clear

Commented [H(64]: Correct, 1 mark

*** End of Assessment ***