



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3A
THE INSOLVENCY SYSTEM OF THE UNITED STATES

This is the **summative (formal) assessment** for **Module 3A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 3**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment3A]**. An example would be something along the following lines: 202122-514.assessment3A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 3A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 3A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

Commented [H(1): Total marks 32/50

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

Commented [H(2): Total marks 7/10

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Commented [H(3): Correct, 1 mark

ABC Corp is filing for bankruptcy under chapter 11. Which of the following **is not** a party in interest in that proceeding?

- (a) A neighboring land owner who has leased equipment to ABC Corp.
- (b) ABC's government regulator.
- (c) A bank that has loaned money to ABC.
- (d) **A local advocacy group.**
- (e) All of the above.

Question 1.2

Commented [H(4): Correct, 1 mark

Which of the following statements regarding executory contracts is **false**?

- (a) **Executory contracts are clearly defined by the bankruptcy code.**
- (b) Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.
- (c) In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.
- (d) A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.
- (e) Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.

Question 1.3

Commented [H(5): Correct, 1 mark

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

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

(c) A creditor's claim against an affiliate of the debtor that has guaranteed the debtor's obligation to the creditor

(d) A debtor's motion to dismiss an involuntary bankruptcy petition.

(e) None of the above.

Question 1.4

Commented [H(6): Correct, 1 mark

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

(a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.

(b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.

(c) A pre-pack debtor may spend as little as a single day in bankruptcy.

(d) The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.

(e) Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.

Question 1.5

Commented [H(7): Correct, 1 mark

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

(a) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.

(b) Because cramdowns do not require the consent of all classes, the plan of reorganization may not be fair and equitable to all impaired classes.

(c) Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.

(d) Class definition is rarely a battleground when a debtor tries to cramdown classes.

(e) Dissenting creditors are not permitted to challenge the classification of a creditor supporting the cramdown.

Question 1.6

Commented [H(8): Incorrect, the correct response is (e)

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

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

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

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).

Commented [H(9)]: Incorrect, the correct response is (a) - the debtor can be the subject of an involuntary proceeding if it is not in control of the foreign representative

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

Commented [H(11)]: Incorrect, the correct response is (e)

Question 1.10

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

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

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

QUESTION 2 (direct questions) [10 marks]

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

Question 2.1 (2 marks)

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

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

[A voluntary petition for bankruptcy, as is clear from its name, is commenced by the debtor itself under US Bankruptcy Code, (Section 301) by the filing a petition with the bankruptcy court when its business is unable to service its debt or pay its creditors.

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

Involuntary petition (303), on the other hand, is commenced only under chapter 7 or 11 by other three or more entities having a claim against the debtor. The claim should not be contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate exceeds the prescribed threshold limit, which is more than the value of any lien on property of the debtor securing such claims held by the holders of such claims.

Commented [H(16)]: Correct, 1 mark, though not only 1 creditor is required if the debtor has fewer than 12 creditors

Involuntary bankruptcy cannot be initiated against a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation where bankruptcy petition has been dismissed within a prescribed time.]

Question 2.2 (2 marks)

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

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

[Under Section 362(a) of the US Bankruptcy Code, automatic stay comes into operation immediately on filing of petition. This operates as stay on commencement or continuation of proceeding against the debtor that was or could have been commenced before the commencement of the case to recover a claim against the debtor. It also stays enforcement, against the debtor or against property of debtor, of a judgment obtained before the commencement of the case. It also stays recovery of debt, set off, enforcement of securities, and creation or perfection of charge on the assets of the debtor.

Violation of automatic stay could attract contempt proceedings against the violator. The second consequence would be annulling of the transactions, i.e. reversing the effects of the

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

violation. While annulling renders the act as void ab initio but there are some precedents where the acts violating automatic stay are held to be voidable. It may also attract action for damages.]

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Commented [H(20)]: Also correct

Question 2.3 (3 marks)

Commented [H(21)]: Total marks 1/3

In what circumstances is a claim considered "impaired"? When is a holder of an impaired claim not entitled to vote on a proposed plan of reorganization and what happens instead?

[Under Section 1123 of the US Bankruptcy Code, the plan must provide classification of claims and how each class of claims will be treated under the plan. Creditors whose claims are impaired vote on the plan. Under section 1124, a claim is considered to have been impaired if the plan:

- a) alters the legal, equitable, and contractual rights of the claimant; or
- b) does not cures default or reinstates the maturity of such claim or interest
- c) does not compensates the holder the claim or interest for any damages
- d) does otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

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

Entire class of claims is deemed to accept a plan if the plan is accepted by creditors who hold at least two-thirds in amount and more than one-half in number of the admitted claims in the class. Under section 1129(a)(10), if there are impaired classes of claims, it must be accepted by at least one class of non-insiders who hold impaired claims. Others claimant are not required to vote. The option for them is to file objection before the Bankruptcy Court while considering approval of the plan.

Commented [H(23)]: Specifically, a holder of an impaired claim is not entitled to vote and is deemed to reject the plan.

Challenge can be made on the ground of "unfair discrimination" and or that the plan is not "fair and equitable" and that the classification of the claimant was not reasonable, to non-consenting class.

Question 2.4 (3 marks)

Commented [H(24)]: 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?

[Under Section 547 of US Bankruptcy Code, any transfer made during the look back period, on account of antecedent debt would attract action as preferential transaction.]

Commented [H(25)]: 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?

[Under section 547(f), a debtor is presumed to have been insolvent on and during 90 days prior to the petition date for determining preference transactions.]

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

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

[Fraudulent conveyance (Section 548(a))]

Commented [H(27)]: Partially correct, 1/2 mark, specifically! it is an actual fraudulent conveyance (548(a)(1)(a))

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

Commented [H(28)]: Total marks 11.5/15

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?

[US have special federal Bankruptcy Courts which are created through legislations and there are civil courts or state courts which are established under Article III of the US Constitution.

Commented [H(30)]: This should be "district court"--the US has separate state and federal court systems, and the bankruptcy courts are part of the federal system.

Such State Courts have much wider powers to enter upon a final judgement, while Bankruptcy Courts have limited jurisdiction to enter upon a final judgement relating to bankruptcy issues unless it is consented to by the parties. There may be instances where there is overlap as regards the issues arising out of Bankruptcy proceedings or the issues that relates to cases under bankruptcy.

Issues that arise out of or which arise in bankruptcy proceedings under Chapter 11, jurisdiction of district court is non-exclusive, but bankruptcy court cannot exercise jurisdiction which are really the matters of Article III. Thus, the focus remained on core and non-core bankruptcy differentiation.

Commented [H(31)]: Correct, 1 mark

[However, United States Supreme Court in the case of *Stern v. Marshall*, by way of majority ruled that the Congress cannot constitutionally authorize non-Article III bankruptcy judges to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. The effect of the ruling was that even in core proceedings, a bankruptcy court cannot assume jurisdiction on Article-III jurisdiction. Thus, federal court cannot enter upon a final judgement on an issue which falls within the jurisdiction of district court even in core proceedings, unless it is referred to by the district court or with the consent of parties.]

Commented [H(32)]: Correct, 1 mark

Commented [H(33)]: Partially correct, 1/2 mark, the bankruptcy court may also rule on the validity of a petition

Question 3.2 (3 marks)

Commented [H(34)]: 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?

[Once US Court recognise a proceeding as a foreign "main" proceeding, there are relief under section 1520(a) of the Bankruptcy Code, which come into operation which include:

- (i) the automatic stay preventing creditor collection efforts with respect to the debtor or its U.S. assets subject to certain enumerated exceptions.
- (ii) the right of any entity asserting an interest in the debtor's U.S. assets to "adequate protection" of that interest; and
- (iii) restrictions on use, sale, lease, transfer, or encumbrance of the debtor's U.S. assets.

But the provisions relating to action to avoid transactions or actions on the ground of preference or fraudulent act, may not be invoked by a foreign representative in Chapter 15 proceedings. Such reliefs can be obtained by commencing plenary proceedings under the Bankruptcy Code (section 1528)

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

Commented [H(36)]: Correct, 1 mark, also can rely on state or foreign law of transaction avoidance

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?

[A final order is one that is pronounced at the culmination of the legal proceedings, and which ends the litigation by pronouncing excitable judgement. On the other hand, an interlocutory order is passed by the Court during hearing of the case to decides some intervening matter]

[An appeal against a final order can be filed by notice of appeal within the prescribed limitation period, but an appeal from an interlocutory order would require leave to appeal from the Court pronouncing the interlocutory order.]

Court: Appeals from bankruptcy court orders is filed before the District Court. However, in some circuits who have elected to form Bankruptcy Appellate Panels under the Code, such appeals from the order of bankruptcy court are filed to Bankruptcy Appellate Panel. However, in such cases, the party has an option and may request that its appeal be heard by the district court instead of Bankruptcy Appellate Panel.

There is further process of second appeal from BAP or the District Court to Circuit Court of Appeal. [There is also provisions for direct appeal to the Circuit Court of Appeals under two circumstances] based upon certification by a bankruptcy Court or the district court that (1) the appeal raises a question of law as to which there is no controlling decision of the circuit or the US Supreme Court or requires resolving conflicting controlling decisions or (2) where immediate appeal to the Circuit Court may materially advance the progress of the case. However, in such cases it is discretion of the Circuit Court whether to accept a case for appeal.]

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?

[Under Section 141 of the General Corporation Law of Delaware, directors owe two types of duties which is called fiduciary duties (1) duty of care and (2) a duty of loyalty.]

These two duties are owed to shareholders of the corporation. The duty of care requires the directors to keep themselves reasonably informed when making decisions on behalf of the corporation and the duty of loyalty requires a director to act in good faith and in a manner, it reasonably believes to be in the best interests of the corporation and its stockholders.

As submitted earlier, directors generally owe duties to the shareholders of a corporation, but during insolvency of the corporation, these duties of directors get shifted from the company's shareholders to the company's creditors during zone of insolvency.

However, this position stands diluted to a great extent on account of judgment of the Supreme Court in the case of **North American Catholic Educational Programming Foundation, Inc. v. Gheewalla** where it was asserted that when a company is in the zone of insolvency, a creditor does not have standing to assert a direct fiduciary duty claim against a director, thereby overruling the decisions which held that directors of a Delaware corporation have direct duties to creditors when operating in the zone of insolvency.

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

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

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

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)]: Also correct

Commented [H(45)]: Total marks 3/5

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

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

Commented [H(48)]: Correct, 1 mark, but also owed to the corporation itself

Commented [H(49)]: Incorrect, as the next paragraph correctly states, the Delaware Supreme Court has held that the duties remain owed to the corporation, but creditors have the right to bring claims on behalf of the corporation when it is in bankruptcy

The Supreme Court observed that when a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change, directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners.]

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

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Question 4.1 [4 marks]

Commented [H(51)]: Total marks 0/4

Gambling Corporation is incorporated and has a principal place of business in Greece and it operates casinos and betting parlors in many international cities, including Athens, Las Vegas, London and Macau. Gambling Corp's bonds (governed by English law) are due to mature in one (1) year, but it is unable to repay or refinance them. Gambling Corp is considering using an English scheme of arrangement to restructure the bonds.

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

[As per section 501 of Chapter 15 of the US Code, one of the purpose and scope of the Chapter is facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment. Scheme of arrangement under the English Corporate Law enables corporates to facilitate restructuring by proposing a scheme of arrangements to its stakeholders. The scheme is akin to a resolution plan under Bankruptcy proceedings, which becomes binding upon the stakeholders on approval by the Court.

But since it is restructuring plan under the Company Act 2006 and not under bankruptcy or insolvency law, it can be used by solvent and insolvent companies alike. This issue of was considered under few cases such as Thomas Cook, Matalan Finance Plc cases (where scheme of arrangement was proposed under the English Companies Act) from the point of view whether a chapter 15 petition, English Scheme of arrangements constituted a Bankruptcy Credit Event. In such cases, Credit Derivatives Determinations Committee for EMEA determined that the chapter 15 filing by British retailer Matalan triggered a **Bankruptcy Credit Event** under standard credit default swaps but not in case of Thomas Cook where the company did not seek a stay of proceedings in the United States and that the Chapter 15 petition did not otherwise seek to compromise creditor rights independent of the scheme.]

Commented [H(52)]: This is an important issue for some restructurings, but was looking for you to discuss the COMI of Gambling Corp (likely Greece), whether there is an establishment in England and whether recognition on a foreign non-main basis is appropriate.

Question 4.2 [5 marks]

Commented [H(53)]: Total marks 5/5

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

[On Chapter 11 filing by a debtor, an automatic stay comes into effect which protects property of the estate of the debtor from actions by its creditors by way of enforcement actions about

Commented [H(54)]: Correct, 1 mark

pre-petition claims. The debtor (unless a trustee is appointed) continue to run the Company in the ordinary course of business. Stay may, in exceptional circumstances, also extends to third party properties if the debtor can show that it has interest in the property. However, certain other type of actions like criminal actions, regulatory investigations, exercise of right under commodity, forward, or security contract, repo contract, swap agreement, eviction of debtor from non-residential property where lease has expired etc., are not covered under the automatic stay.

Automatic stay can be lifted on the application of creditor in certain circumstances.

Therefore, based upon the above analysis, the effect of the transaction mentioned in the above question will be as follows:

- 1) 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.

ShipCo would require leave of the Bankruptcy Court to continue the proceedings based upon breach of agreement.

Commented [H(55)]: Correct, 1 mark

- 2) Second, the US Department of Justice is investigating whether Oil Corp illegally purchased oil from countries subject to US sanctions.

These investigations are not covered under automatic stay, thus will be continued irrespective of filing of bankruptcy.

Commented [H(56)]: Correct, 1 mark

- 3) 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.

This action of USA Bank would be covered under the automatic stay as the action is for enforcing the securities.

Commented [H(57)]: Correct, 1 mark, even though the property is in the Philippines, they are covered by the worldwide automatic stay

- 4) 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

In this case, it is presumed that the lease of the office space has not expired, in such a situation, the action of Landlord of Houston property will be covered under automatic stay.

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

Question 4.3 [6 marks]

Commented [H(59)]: Total marks 3/6

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?

[Under sub-section (f) of Section 363 of U S Bankruptcy Code, a debtor in possession may sell, with the approval of the Court, its property under subsection (b) or (c) of section 363, free and clear of any interest in such property, if-- (1) applicable non bankruptcy law permits sale of such property free and clear of such interest, or such party consents for such sale.

An asset which is subject to a lien can also be sold under Chapter 11 if the price at which such property is to be sold is greater than the aggregate value of all liens on such property or otherwise the entity holding lien could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. Under clause (k) of Section 363, the holder of such claim with secured interest may also bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

Commented [H(60): Correct, 1 mark, the lien would attach to the proceeds

As regards intellectual properties, the Bankruptcy Code defines "intellectual property" to include (1) trade secret; (2) invention, process, design or plant protected under patent laws; (3) patent application; (4) plant variety; (5) work of authorship etc. Trademarks are not covered in the definition of "intellectual property" in the Bankruptcy Code.

Since, the contract governing license of intellectual properties are in the form of executory contracts, the debtor may choose and reject a license of intellectual property.

In such a situation, the debtor/licensor is released from the performance of future obligations and the non-debtor licensee may elect to retain the licensed property, it can retain its rights under the agreement to use the licensed intellectual property for the duration of the contract period and for any extension periods. In case, the non-debtor elects to rescind the contract, the licensee may assert a claim against the estate of the debtor for damages caused by the rejection but in such a situation, the licensee forfeits any and all of its rights to continued use of the intellectual property. In such as case, the licensee may file a claim in the bankruptcy case for breach of contract damages which is treated as a prepetition, general unsecured claim. However, a non-debtor licensee of trademarks is not protected under 365(n) of the Code in the event of rejection of the license agreement.

Commented [H(61): Note that here the debtor is the licensee, not the licensor

In view of the above legal position, Oil Corp can move motion for sale of its plastic manufacturing business through a 363 sale, with proposal for assignment of the trademark license and sale of the manufacturing facility free and clear of the USA Bank lien with supporting valuation to show that the value of the Dallas facility is sufficient to clear the dues USA Bank of USD 500 million loan.

As regards, its proposal to reject the patent licenses so the purchaser has the exclusive right to use the patents, Oil Corp can include this proposal as part of the motion however this proposal will be subject to the right of licenses to Plastic Corp. Plastic Corp cannot be prevented from using the license for the unexpired portion. Thus, while Oil Corp can sell the patents which are licensed to Plastic Corp but the buyer will get is subject to user right of Plastic Corp if it chooses to assert it.

Commented [H(62): Correct, 1 mark

Commented [H(63): Correct, 1 mark

Therefore, Oil Corp will be able to sell the trademark license and Dallas facilities without the consent of Plastic Corp and USA Bank, respectively, but for selling the patents licensed to Plastic Corp, it will require its prior consent of Plastic Corp (otherwise, it will be sold subject to legal rights)]

Commented [H(64): Incorrect, Plastic Corp's consent would be required because it has the right under non-bankruptcy law to refuse to accept substituted performance

*** End of Assessment ***