



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 36.5/50

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

Commented [H(2)]: Total marks 9/10

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

Question 1.1

Commented [H(3)]: Correct, 1 mark

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

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

Question 1.2

Commented [H(4)]: Correct, 1 mark

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

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

Question 1.3

Commented [H(5)]: Correct, 1 mark

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

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

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

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

(e) None of the above.

Question 1.4

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.

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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)]: Correct, 1 mark

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

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

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

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

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

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

Question 1.8

Commented [H(10)]: Incorrect, the correct response is (c)

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

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

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

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

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

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

Question 1.9

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

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

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

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

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

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

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

Question 1.10

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

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

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QUESTION 2 (direct questions) [10 marks]

Commented [H(13): Total marks 7/10

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 is a debtor-issued action. It is usually brief (the form is only four pages long). The debtor need not be or claim to be insolvent. Such a petition can be filed under any applicable chapter¹.

Commented [H(15): Correct, 1 mark

An involuntary petition is a creditor-issued action. It is usually longer than a voluntary petition. The form requires the petitioning creditor to allege the debtor is cash-flow insolvent, unless they are the subject of a bona fide dispute regarding the debt or debt amount, or that, "within 120 days of filing 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."²

Commented [H(16): Correct, 1 mark

Unlike a voluntary petition, an involuntary petition can only be filed under chapter 7 or 11 and it cannot be brought against a farmer, family farmer or non-profit corporation.³

Question 2.2 (2 marks)

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

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

Violation of the stay could result in contempt sanctions against the violator, and/or could result in the (violating) action being void or voidable.⁴

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Commented [H(19): Correct, 1 mark

Question 2.3 (3 marks)

Commented [H(20): Total marks 1/3

¹ INSOL Guidance Text Module 3A Insolvency System of the US 202122, chapter 5.3.3.

² Form B205 at 2.

³ INSOL Guidance Text Module 3A Insolvency System of the US 202122, chapter 5.3.3.

⁴ INSOL Guidance Text Module 3A Insolvency System of the US 202122, chapter 5.4.2.2.

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

A claim is considered "impaired" where the plan of reorganisation alters the legal, contractual and equitable rights of the claim-holder.⁵

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

A holder of an impaired claim is not entitled to vote on a proposed plan of reorganisation where such a plan has already been confirmed by another impaired claim-holder, who has already voted in favour of it ("cramdown"). However, a cramdown plan needs to have been proposed in good faith, and may be subject to reversal if not.⁶

Commented [H(22)]: Incorrect, the dissenting vote may be disregarded, but the impaired claimholder gets to vote in that scenario. The impaired claimholder cannot vote if it will 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?

Preferences.

Commented [H(24)]: Correct, 1 mark

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

Constructive fraudulent conveyances.

Commented [H(25)]: Incorrect, the correct response is "preference"

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

Actual fraudulent conveyances.

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

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

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Question 3.1 (3 marks)

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

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

On certiorari review, the US Supreme Court considered whether the bankruptcy court below had jurisdiction to enter a judgment on a counterclaim for tortious interference⁷.

⁵ <https://www.lawinsider.com/dictionary/impaired-claims>.

⁶ In re Village Green I, GP, 811 F.3d 816, 819 (6th Cir 2016).

⁷ <https://www.lexisnexis.com/community/casebrief/p/casebrief-stern-v-marshall>;
<https://www.law.cornell.edu/supct/html/10-179.ZS.html>

In a landmark decision in *Stern v Marshall*, the Supreme Court held that although the bankruptcy court had the statutory authority to enter judgment on the core counterclaim, it lacked the constitutional authority to do so under Article III of the US Constitution⁸.

Commented [H(29): Correct, 1 mark, whereas prior to that decision jurisdiction was determined based on the core / non-core distinction. A bankruptcy court may enter a final order on a challenge to a petition or with the consent of the parties.

Whilst § 157 purported to extend bankruptcy jurisdiction to any counterclaim by a debtor, the bankruptcy court was not established under Article III and was therefore not subject to the constitutional powers⁹, which would allow adjudication of a common law action or action involving private rights¹⁰.

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?

The use of avoidance powers provided by the Bankruptcy Code (widely interpreted to apply to the use of avoidance of preferences and fraudulent conveyances) may not be invoked by a foreign representative in a chapter 15 proceeding¹¹.

Commented [H(31): Correct, 1 mark

Two ways that the foreign representative can obtain equivalent relief are: i. to invoke the avoidance powers in a plenary proceeding, such as chapter 7 or 11, or ii. to intervene in a plenary proceeding where such a proceeding was commenced by a debtor or its creditors prior to the involvement of the legal representative¹².

Commented [H(32): Correct, 1 mark, also may invoke other applicable US or foreign law

Question 3.3 (4 marks)

Commented [H(33): Total marks 4/4

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

An interlocutory order is an order which disposes of some issues or claims but does not fully resolve a matter. Interlocutory orders may be appealed with leave of the appellate court¹³.

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A final order is one which disposes of all issues in a matter. A final order may be appealed as of right¹⁴.

Commented [H(35): Correct, 1/2 mark

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

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

In bankruptcy proceedings, interlocutory or final orders extending the period of exclusivity to propose a plan are appealable as of right¹⁵.

Direct appeals from bankruptcy court orders are heard by district courts for the relevant district or, in certain circuits, a Bankruptcy Appellate Panel, which is convened from judges of the bankruptcy courts within the relevant circuit¹⁶.

Commented [H(38): Correct, 1 mark

Commented [H(39): Correct, 1 mark

⁸ <https://www.lexisnexis.com/community/casebrief/p/casebrief-stern-v-marshall>;
<https://www.law.cornell.edu/supct/html/10-179.ZS.html>.

⁹ [ibid].

¹⁰ <https://www.clearygottlieb.com/-/media/files/the-supreme-courts-notsofinal-judgment-fraudulent-transfer-actions-in-the-wake-of-stern-v-marshallva.pdf>.

¹¹ INSOL Guidance Text Module 3A Insolvency System of the US 202122, chapter 6.2.4.

¹² [ibid].

¹³ INSOL Guidance Text Module 3A Insolvency System of the US 202122, chapter 5.3.5.3.

¹⁴ [ibid].

¹⁵ [ibid].

¹⁶ [ibid].

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?

In the ordinary course of business, directors of Delaware corporations owe fiduciary duties of loyalty and educated decision-making to the corporation and its shareholders to act in the corporation's best interest¹⁷.

When a Delaware corporation is potentially or actually insolvent, directors' duties do not switch to creditors. The Delaware Supreme Court has confirmed that such duties remain owed to the corporation¹⁸.

Commented [H(40)]: Total marks 5/5

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

Commented [H(42)]: Correct, 1 mark, usually called the duty of care

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

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

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

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

Question 4.1 [4 marks]

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.

The requirements for chapter 15 recognition are that the foreign representative must establish that a foreign court or administrative proceeding with respect to the debtor is pending, and that the foreign representative is empowered to act by the proceeding¹⁹. A "foreign proceeding" is defined in the Bankruptcy Code as "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"²⁰.

We are told that Gambling Corporation, a Greek entity, wishes to embark on an English scheme of arrangement. Should it do so and should it subsequently seek US chapter 15 recognition, it is likely to obtain the same, as English schemes are administrative reorganisation proceedings governed by English insolvency law and supervised by the English court.

The characterisation of the English scheme as foreign main or foreign non-main determines the scope of relief available to Gambling Corporation. Under US law, whether a proceeding is a foreign main proceeding is usually determined by domicile, principal place of business and location of assets in order to identify jurisdiction and venue. We are told that Gambling Corporation is incorporated and has its principal place of business in Greece, and betting parlours in several international cities. It is likely that the US court will consider Gambling

Commented [H(46)]: Total marks 8.5/15

Commented [H(47)]: Total marks 2/4

¹⁷ INSOL Guidance Text Module 3A Insolvency System of the US 202122, chapter 5.7.5.

¹⁸ [ibid].

¹⁹ INSOL Guidance Text Module 3A Insolvency System of the US 202122, chapter 6.2.2.

²⁰ US Bankruptcy Code Chapter 1 (General Provisions) §101 (23)

Corporation's jurisdiction and venue to be Greece. Therefore the English scheme is likely to be characterised as a foreign non-main proceeding.

Commented [H(48): Correct, 1 mark, because England is not the COMI, it cannot be a foreign main proceeding

Commented [H(49): Correct, 1 mark, note that the casino in London would be the required establishment in the jurisdiction of the foreign proceeding

Commented [H(50): Total marks 3.5/5

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?

Breach of contract claim against Oil Corporation in Texas. This action is automatically stayed, pursuant to §362 (a). The claim may be listed by Oil Corp in its debtor schedule, or it may be left off. If the claim is scheduled without caveats by Oil Corp (i.e. it is not scheduled as being disputed, contingent or unliquidated), then Oil Corp's schedule is deemed to constitute evidence of the validity and amount of the claim²¹. Assuming the claim is unsecured or scheduled as being disputed or contingent, ShipCo will be required to file a proof of claim (with evidence of the claim) in order to be treated as a creditor for the purpose of voting on any plan/distribution²².

Commented [H(51): Correct, 1 mark, the petition would bring the automatic stay into effect

US Department of Justice investigation into Oil Corp. This is not a judgement, foreclosure, collection activity, repossession or foreclosure, therefore it is not automatically stayed²³. The investigation can continue whilst Oil Corp is in chapter 11 proceedings.

Commented [H(52): Partially correct, 1/2 mark, it is not stayed because it is a criminal investigation

Oil Corp's default on a secured loan from USA Bank, which is threatening foreclosure on an Oil Corp refinery in the Philippines. The foreclosure action is stayed pursuant to §362 (a). However, depending on the circumstances, USA Bank may be able, as a secured creditor, to seek an order of the court lifting the stay to permit USA Bank to foreclose on the Oil Corp refinery in the Philippines, sell it, and apply the proceeds of sale to the debt owed to the bank, pursuant to §362 (d).

Commented [H(53): Correct, 1 mark

Oil Corp has rental arrears on its Houston, Texas office and is facing eviction. Any eviction action is automatically stayed pursuant to §362 (a). However, the rent should qualify as an ordinary expense of the business, so the rental payments should be brought up to date and continue to be paid during the chapter 11 proceedings, especially as we are told that Oil Corp has "forgotten" to pay its rent, i.e., there is no suggestion that Oil Corp is unable to pay its rent.

Commented [H(54): Correct, 1 mark

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

Commented [H(55): Total marks 3/6

²¹ <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics>

²² [ibid].

²³ [ibid].

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?

A 363 sale is generally the preferred approach for disposing of bankruptcy assets, because the process is less expensive than sales under chapter 11 plans or foreclosure remedies. Such sales also present less execution risk and provides buyers with certainty that the assets they acquire are free of all interests and encumbrances²⁴.

The trademark license from Plastic Corp is an executory contract. The license is most likely not assignable to the future purchaser of Interconnect without consent from Plastic Corp, the licensor²⁵.

The patent licenses granted by Oil Corp to Plastic Corp may not be terminated in connection with the 363 sale of the intellectual property without Plastic Corp's consent²⁶.

Oil Corp can probably sell the Dallas facility free and clear of the bank lien used to secure its US\$500m loan, as long as the price at which the property is to be sold is greater than the aggregate value of all liens on the property. Assuming the US\$500m loan is the only lien, the Dallas facility would need to be sold for in excess of that. This should permit a sale under §363 (f) (3), even if USA Bank opposes it²⁷.

Commented [H(56): Correct, 1 mark, specifically because trademark law permits a trademark holder to refuse to accept performance from a transferee

Commented [H(57): Correct, 1 mark, this is due to the protections of section 363(n)

Commented [H(58): Correct, 1 mark, and the lien will attach to the proceeds

*** End of Assessment ***

²⁴ <https://www.akingump.com/a/web/1362/aogKL/free-and-clear-asset-sales-through-section-363.pdf>

²⁵ In re Trump Entertainment Resorts, Inc, 526 BR 116 (Bankr D Del 2015) ("[F]ederal trademark law generally bans assignment of trademark licenses absent the licensor's consent.")

²⁶ §365 (n).

²⁷ https://www.mcguirewoods.com/news-resources/publications/financial_services/jblp.15.02.pdf