



**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]**

Commented [H(2): Total marks 4/10

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**

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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**

Commented [H(5): Incorrect, the correct response is (d)

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

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

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

**Question 1.4**

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

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

Commented [H(6)]: Incorrect, the correct response is (a)

**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.

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(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)

**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.

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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 for and an involuntary petition for bankruptcy are the two procedures under the Federal Rules of Bankruptcy for commencing Insolvency proceedings under 11 USC.

[Under Voluntary proceeding, the debtor may commence any insolvency proceeding under any applicable chapter of the 11 USC by filing a petition with the clerk of the Bankruptcy Court.<sup>1</sup> By the Federal Rules of Bankruptcy procedure, the debtor under the Voluntary petition is required to file with the petition a specified number of schedules such as lists of assets and creditors. Notwithstanding the absence of the specified schedules, a "naked" petition that is, a petition filed without the specified number of schedules, is also sufficient to invoke the automatic stay and commence a case under the Bankruptcy Code.<sup>2</sup> The Form to file a Voluntary petition by a debtor for an entity (rather than a natural person) is only four pages long. Though, the form requires the debtor to disclose estimated funds on hand, number of creditors, assets and liabilities, it need not be a claim to be insolvent.<sup>3</sup> The obligation of the debtor in a Voluntary petition to file with its petition, the specified number of schedules disclosing its assets, including all property, executory contracts as stated earlier, also required the debtor to file with the petition, the unexpired leases of real and personal property, including identifying its secured and 20 largest unsecured claims. The schedules are electronically filed on the docket of the proceedings and therefore are publicly available. The Social Security numbers of individual persons and names of minor must be redacted, however other redactions or filing under seal are granted only by leave of court and subject to limitations due to the presumption that the public should be permitted to access information about pending legal proceedings. Furthermore, debtors preparing for a voluntary petition are required to consider whether the said disclosures may violate contractual or other confidentiality obligations, including under foreign data privacy law, and confer with the US Trustee about

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<sup>1</sup> This process is set out in Section 301 (a) of 11 USC; Sections 1002 (a), 1005 of the Fed. R. Bankr. P.; Forms B 101 and B 201 of the Official Bankruptcy Forms.

<sup>2</sup> See, Module 3A Guidance Text, p 10.

<sup>3</sup> Idem. See also generally Fed. R. Bankr. P. 1007.

appropriate measures. This is because the US Trustee will strongly oppose any sealing request that would prevent it from soliciting creditors to constitute the committee of unsecured creditors.<sup>4</sup>

Whereas Involuntary petition for Bankruptcy under the Bankruptcy Code is used by creditors under certain circumstances to force an unwilling debtor into bankruptcy by filing an involuntary bankruptcy petition against the debtor under Chapter 7 or Chapter 11.<sup>5</sup> The number of petitioning creditors required to file an Involuntary petition for bankruptcy depends on how many non-contingent, non-insider creditors the debtor has. If it has fewer than 12 such creditors, only one is required to file an Involuntary petition; if it has 12 or more of such creditors, at least three qualifying creditors must join in the petition. However, to qualify as a petitioning creditor, the creditor must have a claim against the debtor that is:

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- (1) Non-contingent. A debt that is not yet matured because the payment is due in the future, is not contingent if all requirements for liability, other than the passage of time, have occurred. A contingent claim however, is one that depends on the occurrence of a future event. For example, a claim under a guarantee is typically contingent on the occurrence of a default under the guaranteed obligation.<sup>6</sup>
- (2) Not the subject of *bonafide* dispute as to liability or amount. A *bonafide* dispute exists if there is an objectively reasonable basis for a dispute as a matter of fact or law; the debtor's subjective belief that the debt is not owed or the amount claimed is incorrect, is not sufficient. However, if a portion of the amount claimed is disputed, the creditor cannot use the undisputed portion to reach the monetary threshold required in the next bullet, but a dispute as to one claim does not disqualify application of other, undisputed claims held by the same creditor to meet petitioning creditor requirements.<sup>7</sup>
- (3) Unsecured or under secured, separately or in the aggregate with all other petitioning creditors' claims, in the amount of at least USD 15,775 (this amount is however periodically increased due to inflation).

It is pertinent to note that unlike, the Voluntary petition, which requires no allegation of Insolvency, the Involuntary petition form requires the petitioning creditors to allege either that the debtor is generally not paying its debts as they become due, unless they are the subject of a *bonafide* dispute as to liability or 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".<sup>8</sup>

In an Involuntary petition for bankruptcy, a foreign representative of an estate in a foreign proceeding can commence an Involuntary Chapter 7 or Chapter 11 petition against the debtor even if the foreign proceeding has not been the subject of a petition for recognition under Chapter 15.<sup>9</sup>

Furthermore, in an Involuntary petition for bankruptcy, except by the order of the court, the debtor as the subject of the Involuntary petition remains in control of its business and may operate in the ordinary course, including disposing of property. However, if the purpose of the involuntary proceeding is to divest management of control over the business, the petition must be accompanied by a motion for the appointment of an interim trustee on an expedited basis.

<sup>4</sup> Idem, p12.

<sup>5</sup> 11 USC. Section 303; Fed. R. Banker. P. 1003. Note that Involuntary proceedings cannot be commenced under the other Chapters or against a farmer, family farmer or not-for-profit Corporation. See, Guidance Text Ibid, p 11.

<sup>6</sup> See Guidance Text, *ibid*.

<sup>7</sup> Idem.

<sup>8</sup> Idem. See Form B 205 at 2.

<sup>9</sup> See, USC, s 303. See also Guidance Text, Idem.

The Involuntary debtor, in the Involuntary petition may also seek dismissal of the bankruptcy proceedings by controverting the involuntary petition and showing that the claims held by the petitioning creditors do not meet the requirements set out under 11 USC or above, and upon dismissal, the debtor may be entitled to damages and Attorneys' fees. Nevertheless, if the petitioning creditor requirements prove not to have been met, the court can refuse to dismiss the proceedings if the debtor is not generally paying undisputed debts as they become due or has, within preceding 120 days, had a trustee, agent or receiver be appointed or take possession of substantially all the debtor's property if the proceeding is not dismissed, the debtor must then file the required schedules.<sup>10]</sup>

### Question 2.2 (2 marks)

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

[Section 362 of Title 11 United States Code referred to as the US Bankruptcy Code made provision for a worldwide automatic stay upon filing of any plenary petition. The automatic stay provides the debtor a breathing room to formulate a restructuring plan, negotiate with creditors and realize the value of its assets in an orderly process culminating in the payment of creditor claims in accordance with the priorities set out in the Bankruptcy code. The stay is "automatic" because "it operates without the necessity for judicial intervention"; it is "triggered upon the filing of a bankruptcy petition regardless of whether the other parties to the stayed proceedings are aware that a petition has been filed"<sup>11</sup> The automatic stay generally remains in effect until the bankruptcy court closes the case, dismisses the case, or grants the debtor a discharge, whichever comes first.<sup>12</sup>

The scope of the automatic stay is extremely broad; it applies to any interference with the property of the estate anywhere in the world. Particularly, the US Bankruptcy code specifically prohibits the following actions;

1. Litigation on pre-petition claims;
2. Enforcement of pre-petition judgment against the debtor or property of the estate;
3. Any act to obtain possession or control of property of the estate;
4. Creation, perfection or enforcement of a lien against property of the estate on account of a pre-petition claim;
5. Any attempt to collect on pre-petition claims (including through demand letters or calls;
6. Set off of any pre-petition debt against any pre-petition claim.<sup>13</sup>

Meanwhile, the two potential consequences of a violation of the automatic stay are;

- (a) A violation of the automatic stay may result to a recovery of actual damage against the violator, including costs and attorneys' fees, and, in appropriate circumstances, recovery of punitive damages.<sup>14</sup>
- (b) An act taken in violation of the automatic stay (even if taken without notice of the filing of the petition) 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 this issue).<sup>15</sup> And this may require the violator to take affirmative acts to undo the effect of its violation.

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<sup>10</sup> Idem.

<sup>11</sup> See, Kevin M. Lewis, Bankruptcy Basics: A Primer, Congressional Research Service, March 22, 2018, p 7.

<sup>12</sup> Idem.

<sup>13</sup> 11 USC, s 362 (a). See also Guidance Text, Ibid, p 22.

<sup>14</sup> 11 USC, s 362 (k)(1).

<sup>15</sup> See, Guidance Text, ibid.



Nevertheless, if a creditor or other entity subject to the automatic stay wishes to take action against the debtor or his estate, it must usually ask the bankruptcy court to grant “grant relief from the stay, ... such as by terminating, annulling, modifying, or conditioning the stay” to allow the creditor to take the requested action.<sup>16</sup> The court may grant relief from the automatic stay “for cause”<sup>17</sup>, as may exist when “the hardship to the movant” resulting from the enforcement of the automatic stay would outweigh “the hardship to the debtor” if the automatic stay were lifted, or when the debtor has filed bankruptcy in bad faith solely to prevent an impending foreclosure.<sup>18</sup> The likelihood however, that a bankruptcy court will grant a party relief from the stay varies depending on the context.<sup>19</sup> ]

### Question 2.3 (3 marks)

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

[A claim is considered “impaired” under the US bankruptcy code where the right in the claim can be modified or where the right in the claim can be paid less than the full value of the claim under a plan in Chapter 11 reorganization which may be filed by the debtor at any time.<sup>20</sup> “A class is impaired if there is “any alteration of a creditor’s rights, no matter how minor”.<sup>21</sup> In re Woodbrook Assocs.,<sup>22</sup> the court held that, a class is impaired if its legal equitable, or contractual rights are altered under the reorganization plan. Also, A class is impaired unless, as to every claim or interest in the class, the plan leaves the holder’s “legal, equitable, and contractual rights unaltered” except that a class may be deemed unimpaired where the plan reverses contractual acceleration by curing any monetary default and compensating the

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<sup>16</sup> See, *Ibid*, s 362 (d). See also FED. R. BANKR. P. 4001 (a) (governing motions for relief from the automatic stay). See also Kevin M. Lewis, *ibid*.

<sup>17</sup> 11 USC, s 362(d)(1): Kevin M. Lewis, *idem*.

<sup>18</sup> Kevin M. Lewis, *ibid*.

<sup>19</sup> *Idem*.

<sup>20</sup> See, 11 USC, s 1121 (a).

<sup>21</sup> *Idem*, s 1124 states that except as provided in section 1123(a)(4) of this title, “a class of claims or interest is impaired under a plan unless, with respect to each claim or interest of such class, the plan-

1. Leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or
2. Notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default-
  - (A) Cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;
  - (B) Reinstates the maturity of s h claim or interest as such maturity existed before such default;
  - (C) Compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable
  - (D) If such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a non-residential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and
  - (E) Does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest”. See also Kevin M. Lewis, *ibid*, p 15.

<sup>22</sup> 19 F. 3d 312, 321 n10 (7<sup>th</sup> Cir. 1994).

holder for any damages.<sup>23</sup> Delayed payment in full (after the effective date of the plan) is considered impairment. Only impaired classes have the right to vote on the plan.<sup>24</sup>

A holder of an impaired claim is not entitled to vote on a proposed plan of reorganization where the proposed plan has been voted in favour by a simple majority of the creditors, holding at least two-thirds of the value of claims, or where there has been cramdown of dissenting creditors in their class or the plan has been accepted by one impaired class<sup>25</sup>, disregarding the votes of insiders and plan has complied with the provision of the Bankruptcy code. However, when the plan has complied with statutory priority and the plan is fair and equitable and has complied with the provisions of the USC, the plan is confirmed subject to section 1129 of the 11 USC.

Under section 1129 of 11 USC, the court must determine that the plan is:

- (a) Feasible and not rely on speculative or improbable events to be capable of execution. For example, if the plan is based on the assumption that a key commodity price is X, the plan will not be feasible if the prevailing price at the time of confirmation is one-half of X;
- (b) Not be likely to be followed by liquidation or the need for further financial reorganization (unless that liquidation or reorganization is provided for in the plan);
- (c) Comply with the requirement of the Bankruptcy code for the formulation of a plan;
- (d) Accepted by one impaired class, disregarding the votes of insiders, unless there is no impaired class; and
- (e) Except where different treatment is elected by a holder of a claim, provided for the cash payment on the effective date or deferred cash payments equal to allowed amounts of all administrative priority claims.<sup>26</sup>

Confirmation however provides a dissenting creditor or other party in interest an opportunity to have its grievances heard.<sup>27</sup> ]

#### Question 2.4 (3 marks)

Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:

- (1) Which cause of action applies only to transfers made on account of antecedent debt?

[ The cause of action applicable only to transfers made on account of antecedent debt is referred to as "preference claim". Preference is a transfer of the debtor's property made in a suspect period before the petition date that must be returned to the estate if it exceeds the amount the recipient would have received in a Chapter 7 liquidation had the transfer not been made.<sup>28</sup> No need for fault of either the debtor or the recipient in connection with the payment having been made, and the recipient creditor suffers no penalty other than return of the transfer.<sup>29</sup> The rationale for the avoidance of preference is that it is intended to equalise treatment of similarly situated creditors and disincentivize a race to collect from a distressed debtor. The recipient of a preference that is avoided has an unsecured claim under section 502 (h) of 11 USC for the valued returned to the estate. Transfers made on account of

**Commented [H(22)]:** Incorrect, a holder of an impaired claim cannot vote if their claim will receive nothing under the plan; they are deemed to reject.

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

<sup>23</sup> 11 USC, *ibid*.

<sup>24</sup> See, Guidance Text *ibid*, p 37.

<sup>25</sup> See, 11 USC, s 1129(a)(10).

<sup>26</sup> See, Guidance Text *ibid*, p 40.

<sup>27</sup> *Idem*.

<sup>28</sup> See, 11 USC, s 547. See also *Idem*, p 50.

<sup>29</sup> *Idem*.

antecedent debt which constitute an element of preference under section 547(b)(2) of 11 USC to constitute a voidable preference, the transfer must have been made "for or on account of an antecedent debt owed by the debtor before such transfer was made". Preferences only arise where the debtor is paying a creditor for a pre-existing debt. A contemporaneous exchange of value is not a preference. Furthermore, a prepayment for goods and services cannot be a preference because debt, if any, is not incurred until the debtor receives the product and owes more than it has paid.<sup>30</sup> The USC looks to applicable non-bankruptcy law to determine when a debt arose and when a transfer of an interest in the debtor's property occurred.<sup>31</sup> Where a payment is made after a creditor provides goods or services, the payment is "for or on account of an antecedent debt". Unless one of the statutory defences in section 547(c)(3) and (c)(5) applies, where a debtor grants a lender a security interest in his assets to secure an existing debt, the security interest is a transfer of property "for or on account of an antecedent debt". In that case, the transfer in such a situation occurs when the security interest is perfected under applicable state law.<sup>32</sup> The Bankruptcy code does not define a "debt" although a "claim" is broadly defined in section 101(10)(A) to include any right to payment, whether reduced to judgment, liquidated, fixed, contingent, matured, disputed, legal equitable, secured or unsecured.<sup>33</sup>

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

[The cause of action that requires that the debtor be presumed or proven to have been insolvent at the time of the transfer is referred to as "a **fraudulent conveyance**" under section 548 of 11 USC which can be constructive fraudulent conveyance or actual conveyance. A constructive fraudulent conveyance is proven by showing that the debtor received less than reasonably equivalent value in exchange for a transfer or incurrence of obligation and one of the following additional factors was present;

- The debtor was insolvent at the time of or became insolvent as a result of the transaction;
- The debtor was unreasonably undercapitalised for the business or transactions it was engaged in or planned to engage in;
- The debtor intended to or believe it would incur debts beyond its ability to pay on maturity;
- The transfer was made to or for the benefit of an insider, or the debtor incurred an obligation under an employment contract with an insider outside the ordinary course of business.<sup>34</sup>

The recipient of an actual or constructive fraudulent transfer may however retain the property received or enforce the obligation created if it took for value (to the extent of the value provided) and in good faith unless the transfer is otherwise avoidable as a preference, statutory lien, or unperfected securities interest.<sup>35</sup> In addition to the provisions of the Bankruptcy code, applicable non-bankruptcy law, such as a state and foreign fraudulent conveyance laws, may be invoked by the debtor in possession or trustee by virtue of section 544(b) of the 11 USC. Such laws may have longer look-back periods (six years from transfer

**Commented [H(25)]:** Incorrect, while insolvency can be an element of a constructive fraudulent transfer, it is an essential element of a preference claim

<sup>30</sup>Idem, p 51.

<sup>31</sup> See, *Ogden v Big Sky Motors Ltd (In re Ogden)*, 314 F. 3d 1190, 1200 (10<sup>th</sup> Cir 2002) (Citing *Raleigh v Illinois Dept. of Revenue*, 530 US 15, 20 (2000) (the basic federal rule in bankruptcy is that state law governs the substance of debts).

<sup>32</sup> Elizabeth J. Futrell, Jones, Walker, Waechter, Poiteevent, Carrere & Denegre, Preferences and preference Defenses. [www.joneswalker.com/images/content/1/1/v2/1140/264](http://www.joneswalker.com/images/content/1/1/v2/1140/264). Accessed 1/4/2022.

<sup>33</sup> Idem.

<sup>34</sup> Guidance Text *ibid*, p 57.

<sup>35</sup> Idem. See also s 548(c) 11 USC.

or two years from discovery in New York, for example) and may not be subject to extra territoriality limitations.<sup>36]</sup>

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

[The cause of action that requires that the debtor be proven to have intended to frustrate creditors' recoveries is referred to as "actual fraudulent conveyance" under section 548 of the 11 USC. An actual fraudulent conveyance is proven by showing that the debtor made a transfer or incurred an obligation "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became...indebted."<sup>37</sup> A debtor may expect to become "indebted", as used in this provision, when it anticipates liability under a money judgment, settlement, penalty or similar obligation arising from violation of State or Federal securities laws or fraud, deceit, or manipulation in the sale of a registered security.<sup>38</sup> Intent may be proven circumstantially, by reference to "badges of fraud" developed in State fraudulent transfer law.<sup>39]</sup>

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

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

Commented [H(27)]: Total marks 12/15

#### Question 3.1 (3 marks)

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

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

[ The decision in *Stern v Marshall* changed the law of bankruptcy court jurisdiction and authority to enter a final order in the following ways; By the decision of the Supreme Court, Bankruptcy Judges may now determine a core proceeding over which they lack constitutional authority by issuing a report and recommendation for review by the district court<sup>40</sup>, the same procedure as in non-core proceedings, or, with the consent of the parties, may issue final Orders.<sup>41</sup> The said position of the Supreme Court have also been effected and implemented by the Bankruptcy Rules which now requires litigants to state in their pleadings whether they consent to the entry of final Orders Judgment by the Bankruptcy Court<sup>42</sup>, and by permitting 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 facts and conclusions of law.<sup>43</sup>

Commented [H(29)]: Correct, 1/2 mark, they may also enter a final order on a challenge to a petition

The *Stern v Marshall* case<sup>44</sup> stem up from the concept of the relationship between the district court and the Bankruptcy Court and the impart of other federal laws on bankruptcy cases. The Supreme Court of the US, in a series of decisions, has held that judges who have not been appointed pursuant to and with the protections of Article 111 of the US Constitution, cannot exercise jurisdiction over matters subject to Article 111. Because the issues that arise in and relate to bankruptcy proceedings involve statutory and contracts rights that otherwise would be within the jurisdiction of Article 111 courts, the Supreme Court struck down the jurisdictional

Commented [H(30)]: Just FYI, we write Article 3 with three capital letter "i"s as Roman numerals

<sup>36</sup> Idem.

<sup>37</sup> See, 11 USC, s 548(a).

<sup>38</sup> Idem, s 548(e)(2).

<sup>39</sup> See, Guidance Text *ibid*, p 56.

<sup>40</sup> See, *Executive Benefits Ins Agency v Arkinson*, 134 S.ct. 2165 (2014); Guidance Text, *ibid*, p 18.

<sup>41</sup> See, *Wellness Int'l Network Ltd v Sharif*, 135 Sct 1932 (2015).

<sup>42</sup> Failure to comply with this requirement, a court may deem the non-compliant party to have consented to its exercise of jurisdiction. See e.g, *Delawary Bankruptcy Local Rules 7008-1*.

<sup>43</sup> Fed R Bankr. P 8018.1

<sup>44</sup> 564 US 462 (2011).

provisions of the 1978 Bankruptcy code as unconstitutional.<sup>45</sup> However, in reaction to the Supreme Court decisions, new jurisdictional provisions under sections 157 and 1334 (specifying which cases a bankruptcy judge “may hear and determine”)<sup>46</sup> were enacted to grant jurisdiction over bankruptcy proceedings to district courts and permit district courts to refer such proceedings to the bankruptcy courts of their district. Under the referral Statute, section 157<sup>47</sup> creates a distinction between “core” and “non-core” matters, and permits bankruptcy judges to hear and determine only core proceedings. The Statute contains a non-exhaustive list of core proceedings, which is set forth in the margin.<sup>48</sup> As to non-core proceedings, the bankruptcy court may hear the non-core proceedings if they are sufficiently related to a bankruptcy proceeding, but cannot make a final determination; instead, it submits proposed findings of facts and conclusion of law to the district court, to which interested parties may object, for the district court final decision.<sup>49</sup> At the outset of each motion or pleading, parties must state whether the matter at issue is core or non-core, so that the bankruptcy court can determine the scope of its jurisdiction and power to render final order or judgment.<sup>50</sup> The referral Statute also provides a procedure by which a district court may withdraw the reference of its jurisdiction to bankruptcy court at its discretion. Withdrawal of the reference is mandatory if the proceeding involves substantially questions under Federal Statutes other than the Bankruptcy code. Withdrawal of the reference is also commonly sought on the basis that the issue is one for which the US Constitution grants the right of jury trial right, though filing a proof claim in bankruptcy has been held to be a waiver of the jury trial right and submission to the jurisdiction of the bankruptcy court<sup>51</sup>. Although bankruptcy courts may conduct jury trials with party consent, this is exceedingly rare; at least one party will usually prefer withdrawal of the reference to the district court to obtain a different judge, or at least one with experience conducting a jury trial.<sup>52</sup> Following the 1984 amendments of the Bankruptcy code, the

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

<sup>45</sup> See, Northern Pipeline Construction Co. v Marathon Pipeline Co, 458 US 50 (1982).

<sup>46</sup> See, Kevin M. Lewis, *ibid*, p 3 n 26. See also Guidance Text *ibid*, p 16 n28.

<sup>47</sup> 28 USC.

<sup>48</sup> The Core proceedings include, but are not limited to-

- (A) Matters concerning the administration of the estate;
- (B) Allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under Chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury, tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
- (C) Counterclaims by the estate against persons filing claims against the estate;
- (D) Orders in respect to obtaining credit;
- (E) Orders to turn over property of the estate;
- (F) Proceedings to determine, avoid, or recover preferences;
- (G) Motions to terminate, annul, or modify the automatic stay;
- (H) Proceedings to determine, avoid, or recover fraudulent conveyances;
- (I) Determinations as to the dischargeability of particular debts;
- (J) Objections to discharges;
- (K) Determination of the validity, extent, or priority of liens;
- (L) Confirmations of plans;
- (M) Orders approving the use or lease of property, including the use of cash collateral;
- (N) Orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
- (O) Other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
- (P) Recognition of foreign proceedings and other matters under chapter 15 of title 11.

See, 11 USC, s157(b)(2).

<sup>49</sup> See, Guidance Text, *ibid*, p 17, n 32.

<sup>50</sup> *Idem*.

<sup>51</sup> *Idem*.

<sup>52</sup> *Idem*.

bankruptcy Courts' jurisdiction to resolve issues presented in core proceedings seemed well established, and thus intense focus was placed on the core/non-core distinction. Hence, the 2011 decision of the Supreme Court in *Stern v Marshall* came as shocking to bankruptcy Practitioners when it held that, even in core proceedings, a bankruptcy Court cannot issue final Orders that invade Article 111 jurisdiction. In the said case, a bankruptcy claim had been filed against the debtor and the debtor counter-claimed. At the same time, the issues in the Counter-claim were the subject of separate state Court proceedings. US law permits parallel proceedings in state and federal courts, and provides that the first, awarding USD 400 Million to the debtor, but the State Court case continued while the bankruptcy judgment was appealed to the district court. The State court jury verdict in favour of the claimant issued before the district Court's judgment affirming 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 111. Thus, the jury verdict was the first final judgment and was conclusive of the issues.<sup>53]</sup>

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### Question 3.2 (3 marks)

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

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[The provisions of the Bankruptcy code that may not be invoked by a foreign representative in a Chapter 15 proceeding] are Chapter 12 and Chapter 13 provisions and provisions relating to certain persons who may not be subject to Chapter 7 proceedings, US citizens or permanent residents eligible to be debtors under Chapter 13, and entities subject to proceedings under the securities investor protection Act of 1970 or the Stockbroker or commodity broker provisions of Chapter 7 proceedings.<sup>54</sup> Chapter 12 provisions are applicable to adjustment of debts for family farmers or fisherman with regular income while Chapter 13 provisions are applicable to adjustment of debts for individual with regular income.<sup>55</sup>

Commented [H(34)]: The correct answer is the avoidance provisions applicable to preferences and fraudulent transfers, but the foreign representative may obtain equivalent relief under applicable US or foreign law or by commencing a plenary proceeding under chapter 7 or 11

The provisions of the Bankruptcy code that may be invoked by a foreign representative in a Chapter 15 proceeding are provisions of the code dealing with businesses. These provisions are provisions of Chapter 7 and Chapter 11 respectively with the exceptions mentioned above. Chapter 7 proceedings entail the appointment of a trustee to take control of the estate, collect and liquidate property (which may include prosecuting claims the estate possess against others) and distribute the proceeds to creditors in accordance with statutory priorities.<sup>56</sup> Chapter 11 is a US innovation in restructuring- the worldwide automatic stay of any proceeding against the debtor or its property, provides breathing space for a debtor to continue operating more or less in the ordinary course of business and work with its key constituencies to propose a plan of reorganization that will adjust its debts.<sup>57</sup> A foreign representative of an estate in a foreign proceeding may commence an involuntary Chapter 7 or Chapter 11 petition against the debtor even if the foreign proceeding has not been the subject of a petition for recognition under Chapter 15 of title 11 USC.<sup>58</sup>

However, the two ways that the foreign representative can obtain equivalent relief are by proving or showing upon recognition of the proceeding as a foreign proceeding under section

<sup>53</sup> Idem.

<sup>54</sup> See, 11 USC s 1501(c).

<sup>55</sup> Idem, ss 1201 and 1301.

<sup>56</sup> See, Guidance Text, *ibid*, p 8.

<sup>57</sup> Idem.

<sup>58</sup> Idem, p 11. See also 11 USC s 303(b)(4).

1515 and that the foreign proceeding is either a foreign main proceeding or a foreign non main proceeding. A foreign main proceeding is a “foreign proceeding pending in the country where the debtor has the Centre of its main interests” and a foreign non main proceeding is “a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment”.<sup>59</sup> To the extent no evidence is submitted to the contrary, the debtor’s registered office or habitual residence is presumed to be its COMI.<sup>60</sup> While, “establishment” is defined in Chapter 15 as “any place of operations where the debtor carries out a non-transitory economic activity.”<sup>61</sup>]

**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?

[Interlocutory and final Orders under the US Bankruptcy Code constitutes the decisions made by the Bankruptcy Courts in a bankruptcy proceeding. However, the distinction between interlocutory and final orders is a subject or matter falling under the US non-bankruptcy procedure. Under the US non-bankruptcy procedure, interlocutory orders resolve only some issues or claims, whereas final orders are those orders that dispose of all issues, leaving nothing further to be decided. Interlocutory Orders may be appealed only with leave of the appellate court, while final orders may be appealed as of right. This same framework is applicable in bankruptcy proceeding, except that orders extending the period of exclusivity to propose a plan are appealable as of right.<sup>62</sup> It is however to be noted that, the distinction between interlocutory and final orders can be an elusive one where a court resolves not simply claims between two parties, but an issue of broad applicability, such as the post-petition interest rate applicable to the debtor’s obligations.<sup>63</sup> Recognizing the unique nature of bankruptcy proceedings as “an aggregation of individual controversies,” the US Supreme Court, in the case of *Bullard v Blue Hills Bank*<sup>64</sup>, has held that a bankruptcy order resolving a discrete dispute is a final order for appeals purposes<sup>65</sup>. An Order that is Constitutionally final because the bankruptcy court had authority to enter it is not final for purposes of appeals if it does not resolve the entire issue in dispute. On the other hand, an Order that resolves an entire dispute and therefore 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<sup>66</sup>.

Generally, appeals from bankruptcy court Orders are heard by the district court for the district in which they sit. The first appeal from bankruptcy case will go to a randomly assigned judge, who will then generally hear all future appeals from those bankruptcy proceedings<sup>67</sup>. In certain Circuits<sup>68</sup>, bankruptcy appeals are heard by a Bankruptcy Appellate Panel (BAP), convened from the judges of the bankruptcy courts within the circuit. In those circuits, a party has the option to request that the appeal be heard by the district court instead. From the district Court or BAP, there is a further appeal of right (assuming the initial order was one from which an appeal of right was available) to the circuit court of appeals. In rare situations, an appeal from

<sup>59</sup> See, 11 USC s 1502(4) and (5). See also Peter M. Gihuly, Kimberly A. Posin... p 89.

<sup>60</sup> *Idem*, s 1516(c). See also *Idem*, p 118.

<sup>61</sup> *Idem*, s 1502(2). *Idem*, p 125.

<sup>62</sup> See, 28 USC, s 158(a)(2). See also *Idem*, p 19.

<sup>63</sup> See Guidance Text, *Idem*.

<sup>64</sup> 135 Sct 1686 (2015).

<sup>65</sup> See, Guidance Text, *ibid*.

<sup>66</sup> *Idem*.

<sup>67</sup> *Idem*, p 20 n 42.

<sup>68</sup> The First, Sixth, Eight, Ninth and Tenth Circuits have elected pursuant to 28 USC, section 158(b), to form Bankruptcy Appellate Panels. See, *Idem*.

Commented [H(35)]: Total marks 4/4

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

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

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

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

a bankruptcy court may go directly to the court of appeals, where the bankruptcy court or district court certifies that either 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 decisions, or (2) immediate appeal may materially advance the progress of the case<sup>69</sup>. The Court of Appeal however has discretion whether to accept a case so certified<sup>70</sup>.]

### 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?

[Generally, Director's liability is a matter for State law of the State of Incorporation<sup>71</sup>. Under the law of Delaware<sup>72</sup>, directors owe a fiduciary duty of loyalty to the Corporation's best interest and a duty of care in educated decision-making. Nevertheless, directors are protected or shielded from liability for errors of judgment by the "business judgment rule". Under the business judgment rule, the Board of Directors is presumed to have acted in good faith on the basis of reasonable information. Except that this presumption can be rebutted only by showing that a majority of the board in fact were not reasonably informed, did not honestly believe that their decision was in the Corporation's best interest, or were not acting in good faith. Unless however the presumption is rebutted, the directors will not be liable in the absence of a showing of gross negligence.<sup>73</sup> In addition, directors may be exculpated by a corporation's certificate of incorporation from liability for breach of the duty of care (but not breach of the duty of loyalty).<sup>74</sup> Nevertheless, the business judgment rule does not apply where a transaction is approved by a board majority that is not disinterested and independent or a controlling shareholder is on both sides of the transaction. In such situations, the transaction will be void unless the entire fairness standard is satisfied.<sup>75</sup>

The directors' fiduciary duties are owed to the Corporation and its shareholders in the ordinary course of business, and not to creditors. Similarly, the said directors' duties are owed to the corporation and its shareholders even when the corporation is potentially or actually insolvent. This position or principle was settled and put to rest by the Delaware Supreme Court case of North Am Catholic Educational Programming Foundation, Inc v Gheewalla<sup>76</sup>, where it held that "[i]ndividual 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 insolvent corporation..."<sup>77</sup>

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

#### Question 4.1 [4 marks]

<sup>69</sup> See, *ibid*, s 158(d). See also Guidance Text, *ibid*.

<sup>70</sup> *Idem*.

<sup>71</sup> See, Guidance Text, *ibid* 59.

<sup>72</sup> Del Gen Corp L.

<sup>73</sup> *Ibid*.

<sup>74</sup> Del Gen Corp L, s 102(b)(7).

<sup>75</sup> *Ibid*.

<sup>76</sup> 930 A. 2d 92, 103 (Del 2007).

<sup>77</sup> Guidance Text, *idem* n 182.

Commented [H(42)]: Total marks 5/5

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

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

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Commented [H(48)]: Total marks 11/15

Commented [H(49)]: Total marks 3/4



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

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

[ The English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding. The English scheme of arrangement is a form of insolvency proceeding used for the reorganization of solvent or insolvent company where the company enters a scheme of arrangement with its creditors and that becomes binding on all creditors upon approval. The scheme of arrangement is regulated under Part 26 of the UK Companies Act 2006. The procedure to enter into the scheme under part 26 of the Act is usually court led and commenced with an application to the court. It is aimed at achieving collective benefits of all creditors of the company with the company retaining possession. It is a form of business rescue of a going concern with debts challenges.

The English scheme of arrangement qualifies as a foreign proceeding under section 101(23) of title 11 USC. This is so because the scheme has all the characteristics of a foreign proceeding as defined by section 101(23) of the US Code. The characteristics set out by the section for a proceeding to qualify as a foreign proceeding include the following;

- (a) There must be an existence of a proceeding;
- (b) That is either judicial or administrative;
- (c) That is collective in nature;
- (d) That is in a foreign country;
- (e) That is authorised or conducted under a law related to insolvency or the adjustment of debts;
- (f) In which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and
- (g) Which proceeding is for the purpose of reorganization or liquidation.<sup>78</sup>

In relation to characteristic (a), the court in the case of *In re Betcorp Ltd*<sup>79</sup> have held that in the context of corporate insolvencies, the hallmark of a "proceeding" is a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets. A court filing is not required in order to be considered a proceeding.<sup>80</sup> The English scheme of arrangement is made pursuant to part 26 of the UK Companies Act 2006 which is a statutory framework that constrains companies actions in the UK and regulate the final distribution of the company's assets in the UK.

In relation to characteristic (b), it has been said that this criterion is generally relatively easy to satisfy where a proceeding is found to exist.<sup>81</sup> The English scheme of arrangement is a judicial proceeding which is usually court led to enter, and commenced with application to the court.

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<sup>78</sup> See, 11 USC s 101(23).

<sup>79</sup> 400 B.R 266, 278 (Bankr. D. Nev. 2009).

<sup>80</sup> See, Peter M. Gilhuly, Kimberly A. Posin, and Adam E. Mala testa of Letham & Watkins LLP, *Bankruptcy Without Borders: A Comprehensive Guide to the First Decade of Chapter 15*, *ABI LAW REVIEW* [Vol. 24: 47] p 90.

<sup>81</sup> *Idem*. See also *In re Irish Bank Resolution Corp. (In Special Liquidation)*, 2015 U.S. Dist. LEXIS 101600, at 9-10 (finding an Irish proceeding administrative or judicial in nature where the majority of tasks to be undertaken by the Special Liquidators and Minister of Finance are administrative in nature, any creditor may seek a ruling of the High Court with respect to any question arising in the Irish proceeding, and procedures applicable to the

In relation to characteristic (c), the English scheme of arrangement is collective in nature as all creditors of the company are treated equitably through the treatment of similarly situated creditors in the same way while maximizing the value of the debtor's assets for the benefit of all the creditors.<sup>82</sup>

In relation to characteristic (d), the English scheme of arrangement under the relevant fact is an applicable proceeding London; UK, a foreign country outside of the United States of America<sup>83</sup>.

In relation to characteristic (e), English scheme of arrangement is authorised under part 26 of the companies Act, 2006 which act is related to insolvency and adjustment of debts.<sup>84</sup> This requirement does not however necessarily require the debtor to be insolvent or to contemplate use of any insolvency laws to adjust its debts.<sup>85</sup>

In relation to characteristic (f), English scheme of arrangement is usually subject to the English Court. The procedure to enter the scheme is court led. Creditors who oppose the scheme can also seek review through the English court. Section 1502 defines "foreign court" as "a judicial or other authority competent to control or supervise a foreign proceeding".<sup>86</sup>

Finally, in relation to characteristic (g), English scheme of arrangement is for the purpose of reorganisation of solvent or insolvent companies in the UK as provided under part 26 of the companies Act 2006.

However, the English scheme of arrangement having satisfied the requirement of section 101(23) as a foreign proceeding, the Foreign Representative in order to comply with the requirement for the recognition under Chapter 15 of the US code, must file a petition for recognition in accordance with the provisions of section 1515<sup>87</sup> and 1517 and prove that the foreign proceeding is either a foreign main proceeding or a foreign non main proceeding. A foreign main proceeding is "foreign proceeding pending in the Country where the debtor has the centre of its main interest" and a foreign non main proceeding is "a foreign proceeding, other than a foreign main proceeding, pending in a Country where the debtor has an

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liquidation of the debtor are identical to those of any other corporate liquidation pursuant to 231 of Ireland's Companies Act of 1963).

<sup>82</sup> See, In re Ashapura Minechem Ltd., 480 B.R. at 136-37.

<sup>83</sup> In re Betcorp (supra) at 281 (debtor's wind up proceeding was located in a foreign country where the special resolution commencing the proceeding was made at a meeting in Australia, the debtor operated under the provisions of Australian law and the liquidators authorised to act for the debtor were appointed pursuant to Australian law and were citizens and residents of Australian).

<sup>84</sup> This UK Companies Act 2006 satisfy 101(23) of 11 USC.

<sup>85</sup> See, Peter M. Gilhuly, Kimberly A. Posin, and Adam E. Mala testa of Letham & Watkins LLP, *ibid*, p 92.

<sup>86</sup> See, *idem*. See also 11 USC s 1502(3).

<sup>87</sup> Section 1515 USC provides that; "(a) A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition (b) A petition for recognition shall be accompanied by – (1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative; (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representatives; or (3) in the absence of evidence referred to in paragraph (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative. (c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative. (d) The documents referred to in paragraphs (1) and (2) of subsection (b) shall be translated into English. The Court may require a translation into English. The Court may require a translation into English of additional documents.

establishment".<sup>88</sup> While a 'centre of main interest' is not defined under the US Code, it however uses the concepts of domicile, principal place of business, and location of assets in determining jurisdiction and venue.<sup>89</sup> A debtor's COMI is presumed to be its place of incorporation, but this is rebuttable.<sup>90</sup> Relevant factors in the COMI analysis include;

- (1) Location of Headquarters;
- (2) Location of management;
- (3) Location of primary assets;
- (4) 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
- (5) Jurisdiction whose law will apply to most disputes.<sup>91</sup>

In the case of *Morning Mist*<sup>92</sup>, it was held that, a debtor's COMI should be ascertainable by its creditors or other third parties on the basis of objective evidence.<sup>93</sup> Similarly, an establishment is defined under section 1502(2) of the USC, to mean "any place of operations where the debtor carries out a non-transitory economic activity", prior to the commencement of Chapter 15 proceedings. Like COMI, the concept of establishment is another legal concept imported from European Insolvency law via the Model law.<sup>94</sup> In the case of *Bear Stearns*<sup>95</sup>, the US Bankruptcy court held that the Cayman Islands could not be the COMI for a Cayman-incorporated hedge fund because the fund was an "except" company, licensed on the basis that it would not be in operations in the Cayman Islands. The court also found that the Cayman liquidation could not be recognised as a non-main proceeding because the debtor had had no establishment there prior to its Insolvency.<sup>96</sup>

In conclusion, the English scheme of arrangement could be granted recognition under US Chapter 15 as a foreign non main proceeding, since the Gambling Corporation is incorporated and has a principal place of business in Greece but only operates casinos and betting parlour in London where the scheme is rooted and among the international cities it has only establishments as defined by section 1502(2) of 11 USC.]

**Commented [H(50):** Correct, 1 mark, as England is not the COMI it cannot be recognized as a foreign main proceeding

**Commented [H(51):** Correct, 1 mark, this is likely to be its COMI

**Commented [H(52):** Correct, 1 mark, the London casino would be the requisite establishment

#### Question 4.2 [5 marks]

**Commented [H(53):** Total marks 4/5

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

<sup>88</sup> See *ibid*, s 1502(4) and (5) respectively.

<sup>89</sup> Guidance Text *ibid*.

<sup>90</sup> *Idem*.

<sup>91</sup> *Idem*. See also *In re Sphinx, Ltd* 351 BR 103, 117 (Bankr SDNY 2006).

<sup>92</sup> 714 F. 3d at 134.

<sup>93</sup> See Guidance Text, *ibid*.

<sup>94</sup> *Idem*, n 201.

<sup>95</sup> 374 BR 122 (Bankr SDNY 2007).

<sup>96</sup> See Guidance Text, *ibid* p 62. This position of the case has however resulted in the shifting of COMI in the US in bad faith, and existing case law permits a US bankruptcy court to deny recognition where it finds that the debtor's COMI was manipulated in bad faith. See Norton Rose Fullbright, letter to Representatives Marino and Cicilline and Senator Grassley and Feirstein (Jan 14, 2019) (responding to National Bankruptcy Conference letter and citing caselaw). See n 205 Guidance Text.

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?

[Oil Corp filing a Chapter 11 petition automatically creates an estate consisting of all of Oil Corp's property interest wherever located and by whomever held it as of the petition date, subject to certain exclusions for individual debtors. By Section 541 of 11 USC, such exclusions permit individual debtors to protect certain property from being used to satisfy creditors' claims<sup>97</sup>. The filing of Chapter 11 petition which is a form of bankruptcy proceeding under 11 USC, affords Oil Corp several immediate benefits, which the most important, is the stay it creates for the protection of property of the estate from creditor enforcement actions with respect to pre-petition claims.<sup>98</sup> The stay prevents creditors from undertaking "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case."<sup>99</sup> The stay also prohibits creditors from taking any action against the debtor or property of the estate.<sup>100</sup> The stay under the USC, is a worldwide automatic stay and provides the debtor breathing room to formulate a restructuring plan, negotiate with creditors and realise the value of its assets in an orderly process culminating in the payment of creditors' claims in accordance with the priorities set out in the Bankruptcy code.<sup>101</sup>

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

The scope of the automatic stay has also been described as extremely broad.<sup>102</sup> It applies to any interference with the property of the estate anywhere in the world. Specifically, it prohibits:

- (a) Litigation on pre-petition claims;
- (b) Enforcement of pre-petition judgment against the debtor or property of the estate;
- (c) Any act to obtain possession or control of property of the estate;
- (d) Creation, perfection or enforcement of a lien against property of the estate on account of a pre-petition claims;
- (e) Any attempt to collect on pre-petition claims (including through demand letters or call);
- (f) Set off of any pre-petition debt against any pre-petition claim.<sup>103</sup>

Any action taken in violation of the stay even if taken without notice, constitutes a contempt of court and such action is void or voidable (depending on the circuit in which the bankruptcy is pending due to a circuit split on opinion on this issue).<sup>104</sup> However, parties in interest may seek to lift the stay prospectively to permit or retroactively to validate an act that could otherwise be a stay violation. Neglect or failure to obtain relief from the stay may result in the imposition of sanction of contempt against the stay violator, which may include payment of the debtor's attorney's fees and requiring the violator to take affirmative acts to undo the effect of its violation.<sup>105</sup>

The stay nevertheless, only applies to property of the estate. It does not apply after the property in question is removed from the estate by sale or abandonment. Also, in exceptional situations the stay may be extended to cover third parties or their property under the court's equitable powers. By section 105(9) of 11 USC, "the court may issue any order, process, or

<sup>97</sup> See, Guidance Text, *ibid* p 21 n 48.

<sup>98</sup> See, 11 USC s 362(a)(1).

<sup>99</sup> *Idem*, s 362(a)(6).

<sup>100</sup> This is however subject to certain exceptions like criminal investigation etc. See, *idem*, s 362(b)(1) and s 362(b)(2)(y).

<sup>101</sup> See *ibid*, p 22.

<sup>102</sup> *Idem*.

<sup>103</sup> *Idem*. See also *ibid*, s 362(a).

<sup>104</sup> *Idem*.

<sup>105</sup> *Idem*. The US Supreme Court however recently held that the stay only prohibits affirmative acts that change the status quo of the estate's property. See, *City of Chicago v Fulton*, 529 US 140 (2021) where a car that was impounded before the debtor's bankruptcy petition was filed may remain impounded but where the court imposed coercive contempt sanctions of a daily fine to be paid until the stay violation has been rectified.

judgment that is necessary or appropriate to carry out the provisions of this title".<sup>106</sup> Furthermore, since the automatic stay is an injunction against creditor action, the non-bankruptcy test for the grant of injunctive relief must be satisfied by showing the prospect of irreparable harm to the estate. A showing that the estate has an interest in property of a third party is sufficient for the automatic stay to apply by its own terms (this is because the estate consists of all interests in property), without satisfying the injunction standard.<sup>107</sup>

The stay is however subject to the following statutory exceptions:

- (1) Criminal proceedings;
- (2) Regulatory investigations;
- (3) Family law matters such as custody, child support and divorce (except that distribution of marital property is stayed);
- (4) Exercise of rights under a financial contract;
- (5) Exercise of rights under commodity, forward, or security contract;
- (6) Exercise of right under a swap agreement;
- (7) Eviction of a debtor-tenant from non-residential property where the lease has expired;
- (8) Termination of educational accreditation or licensing.<sup>108</sup>

In relation to the relevant facts in the first situation, the breach of contract lawsuit filed by Shipco, one of Oil Corp key customers, in Texas State Court alleging that Oil Corp sold it contaminated oil that caused USD 1 Billion in damage to Shipco's container ships, upon the filing of a Chapter 11 petition by Oil Corp, will automatically be stayed. This is so because the lawsuit is a non-bankruptcy judicial proceeding which by the provisions of section 362(a)(1) of 11 USC, upon the filing of the Chapter 11 petition stays the commencement or continuation of all such non-bankruptcy judicial proceedings against the debtor (in this case Oil Corp).<sup>109</sup>

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In relation to the relevant facts in the second situation, the investigation by the US Department of Justice of whether Oil Corp illegally purchased oil from countries subject to US sanctions will not be affected by the automatic stay resulting from the filing of Chapter 11 petition by Oil Corp. This is because by the provisions of section 362(b)(1) of 11 USC, an automatic stay resulting from filing of Chapter 11 petition is excepted from staying the commencement or continuation of a criminal action or proceeding against the debtor (in this case Oil Corp). The US Department of Justice is the office in charge of commencement or continuation of criminal action or proceeding against individuals and corporate bodies in the United States. They are therefore exempted from the effect of automatic stay upon filing of bankruptcy petition under the US bankruptcy code by a debtor.

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With respect to the relevant facts in the third situation; the threat by USA Bank to foreclose on an Oil Corp refining located in the Philippines because Oil Corp missed a payment on its secured loan from USA Bank, will be affected by the automatic stay by Oil Corp filing a Chapter 11 petition. This is so because by the provision of section 362(a)(6) of 11 USC, creditors are precluded upon filing of a bankruptcy petition under the US Code from undertaking "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title" (the US Code). The payment sought to be claimed by the USA Bank's threat of foreclosure arose before the filing of the Chapter 11 petition by Oil Corp. The effect of the automatic stay therefore affects the threat of foreclosure on an Oil Corp refinery located in the Philippines by the USA Bank. The USA Bank is therefore precluded under section 362(a)(6) of 11 USC from any act to collect, assess, or recover such missed payment of its loan from Oil Corp which however arose before Oil Corp filing of Chapter 11 petition.

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<sup>106</sup> Guidance Text Ibid.

<sup>107</sup> Idem.

<sup>108</sup> Idem, p 23. See also *ibid*, s 362(b).

<sup>109</sup> See, Kevin M. Lewis, *ibid* p 6. See also *Soares v Brocton Credit Union* (In re Soares) 107 F. 3d 969, 973 (1<sup>st</sup> Cir. 1997).

In relation to the relevant facts of the fourth situation, the threat of Oil Corp's landlord to evict Oil Corp for forgetting to pay rent on its Houston, Texas Office space because of distractions cannot be stayed by Oil Corp filing Chapter 11 petition. By the relevant facts, the rent is presumed to have expired and the property is a non-residential property. By the provision of section 362(b) of 11 USC<sup>110</sup>, automatic stay upon filing of Chapter 11 petition does not stay eviction of a debtor-tenant from non-residential property where the lease has expired. The stay resulting from Oil Corp filing Chapter 11 petition does not affect Oil Corp's landlord from evicting Oil Corp from its Houston, Texas Office space. The eviction threat can be executed without hinderance under the US Code even upon filing Chapter 11 petition by Oil Corp.]

**Commented [H(58):** Incorrect, the rent is unpaid but it does not say that the term (e.g. 1 year) of the lease has expired, so eviction would be barred by the automatic stay

#### **Question 4.3 [6 marks]**

**Commented [H(59):** Total marks 4/6

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?

[The powers of Oil Corp under the US Code as a debtor in possession or trustee to deal in the estate property depends on whether the case is under Chapter 7 or Chapter 11, transaction is in the ordinary course of business and whether the interest of another in the property is affected.

Oil Corp, as a debtor-in-possession in Chapter 11 proceedings, operating with the protection of the automatic stay, has in some senses more power over its affairs than it had pre-petition. Oil Corp can mostly deal with its property in the ordinary course of business without court or creditor interference and can sell its property free and clear of creditor's interests with court approval in a 363 sale. By virtue of section 363(f), an asset maybe sold free and clear with creditor consent, where the creditor interest is disputed or where the value of the property exceeds the value of the interest. In situations such as that, a creditor's interest will attach to the proceeds of the sale and it will receive priority in distribution of those proceeds. It also a "home court" in which to consolidate litigation of creditor claims relating to those interest.<sup>111</sup>

Chapter 11 was however promulgated to allow a debtor in possession to continue to operate its business in the ordinary course while carrying out an organization and/or financial restructuring, but is now commonly used as vehicle for the sale of substantially all of the debtor's assets, either to a strategic purchaser or a successor corporate entity. The benefit of using Chapter 11 over Chapter 7, for this process include the following;

- (1) That the purchase price is likely to be higher because of the ability to continue operating the business during the bankruptcy proceedings;
- (2) Both the debtor and potential purchaser may also prefer a 363 sale over an out of court sale because the bankruptcy sale is free and clear of creditor interest<sup>112</sup>; and

<sup>110</sup> Guidance Text *ibid*, p 23.

<sup>111</sup> *Idem*, p 26.

<sup>112</sup> See, *Ibid*, s 363(f).

- (3) A good faith purchaser may retain the property notwithstanding a subsequent reversal of court approval for the sale on appeal<sup>113</sup> ;
- (4) The debtor can transfer its interest in key contracts that are required to operate the business (such as supply and employment contracts), even where they contain contractual restrictions on assignment or purport to terminate upon a bankruptcy filing. This is provided under section 365(c) and (e) of the 11 USC. However, where the property includes personal information collection pursuant to a privacy policy that would bar its transfer, section 363(b)(1) provides for appointment of a consumer privacy ombudsman to oversee the terms of transfer.<sup>114</sup>
- (5) Licensees of patents and copyrights owned by the debtor are protected such that their Licenses may not be terminated in connection with the sale of the intellectual property without their consent.<sup>115</sup>

A debtor in possession is free to use, sell or lease estate property in “the ordinary course of business”, however this term is not defined by the Bankruptcy Court. Court decisions have nevertheless developed a two-prong test that considers the “vertical dimension” (how business is conducted by other businesses similar to the debtor).<sup>116</sup> A particular transaction is in the ordinary course only if both prongs of the test are met. Sophisticated parties dealing with a debtor will insist on a 363 sale if there is any question as to the status of the transaction, but this test will be easily satisfied for small, routine sales of the debtor’s inventory<sup>117</sup>. It is important to note however, that debtor’s right to deal with property in the ordinary course does not trump provisions requiring adequate protection of other’s interests in estate property.

Specifically, ordinary course of business is not sufficient authorization for debtor to use cash collateral for the debtor’s financial accounts that are subject to security interests. As a result of this reason, among the first day motions typically filed is a cash collateral motion for authorization for the debtor to use cash collateral to pay the expenses of administering the estate.<sup>118</sup> Adequate protection of the interests of the secured parties is nearly always required, as the debtor’s use of cash indisputably removes assets that would otherwise be available to satisfy secured creditors (but equally are necessary to the continued operation of the debtor’s business).<sup>119</sup>

For non-ordinary course transactions however, most commonly 363 sales of property, a debtor in possession must establish that it is proposing the transaction in its business judgment (in connection with which it owes a fiduciary duty to consider the interests of creditors) and that the transaction is in the best interests of the estate as a whole.<sup>120</sup>

While no particular procedure for 363 sales is specified by the Bankruptcy code, the practice in large cases for significant sales is to conduct an auction with a “stalking horse” bidder. The debtor (sometimes with the assistance of a financial advisor or investment banker) will market the property and invite interested parties to conduct due diligence, ultimately leading to negotiation of proposed transaction documents with a single party. Upon court approval of these documents, this party’s bid becomes the stalking horse for the auction, which another bid must exceed in price or terms to be selected as highest and best offer. Because the

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<sup>113</sup> *Idem*, s 363(m).

<sup>114</sup> See *ibid*, p 26.

<sup>115</sup> See *ibid*, s365(n).

<sup>116</sup> See, *In re Dant & Russell, Inc*, 853 F. 2<sup>nd</sup> 700 (9<sup>th</sup> Cir 1988). See also *ibid*, p 27.

<sup>117</sup> *Idem*.

<sup>118</sup> *Idem*.

<sup>119</sup> Notwithstanding the character of the funds as cash collateral, a creditor may not be entitled to adequate protection in connection with their use if it is over secured, particularly by other, non-cash assets of the estate that cannot be sold without court approval. See, *Idem*.

<sup>120</sup> *Idem*.

stalking horse bidder invests substantial time and expense in this process, it is typically paid a “break fee” if another bid is selected at the action. If no other qualified bids are received, the auction will be cancelled and the stalking horse bid accepted.<sup>121</sup>

Similarly, a creditor holding a security interest in property that is to be sold may “credit bid” by offsetting a portion of the purchase price of such property against the amount of its claim secured by the property.<sup>122</sup> For instance, a bank holding a USD 100,000 Mortgage on a piece of real property may bid USD 150,000 to purchase the property, but pay only USD 50,000 in cash to the estate. The ability to use secured claim in this way creates a market in secured claims against the estate, so a prospective purchaser of the property may purchase the mortgage from the bank at a discount because of the borrower’s distress, but credit bid the full value of the claim.<sup>123</sup> However, because credit bids diminish the value that comes into the estate, unsecured creditors may challenge credit bids if the value of the secured claim is in doubt.

In relation to the relevant facts in question 4.3(1), Oil Corp cannot achieve the goal of getting the highest return for the plastics manufacturing business if it assumes and assign the trademark licence without the consent of the Plastic Corp. In the case of *In re Trump Entertainment Resort, Inc*<sup>124</sup>, the court have held that “[F]ederal trademark law generally bans assignment of trademark licenses absent the licensor’s consent”. Plastic Corp is the Licensor of the trademark “interconnect” which Plastic manufacturing business operates under, and by virtue of the said case, Oil Corp, cannot assume and assign the trademark licence without the consent of Plastic Corp, the Licensor.

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As for the USA Bank, it consent is not required by Oil Corp to assume and assign the trademark licence which Plastic manufacturing business operates under. This is because, USA Bank does not have a Licensor’s right in the trademark licence and therefore prevented by the Bankruptcy code to restrict Oil Corp assumption and assignment of the trademark to enable Oil Corp to achieve a higher value or return for the plastic manufacturing business. USA Bank consent may only be required where Oil Corp intends to enter into a contract to make a loan or other financial accommodation.<sup>125</sup> The interest of USA Bank in the relevant facts can be taken care of by Oil Corp through compensations or provision of adequate assurance that Oil Corp will promptly compensate USA Bank upon the assumption and assignment of the trademark license.<sup>126</sup>

In relation to the relevant facts in question 4.3(ii), Oil Corp cannot reject the patent licenses to allow the purchaser has the exclusive right to use the patents without the express consent of Plastic Corp and USA Bank who are Licensees of the patent rights. This is so because the rights of Plastic Corp and USA Bank in relation to the patent licence contracts are protected by section 365(n) of title 11 USC.<sup>127</sup> By the section<sup>128</sup>, Plastic Corp and USA Bank possess the right to determine how to treat the rejection of the patent licenses executory contract by Oil Corp. Plastic Corp and USA Bank may however elect to treat the patent license contract as terminated by such Oil Corp rejection if such rejection by Oil Corp amounts to such a breach as would entitle Plastic Corp and USA Bank to treat such contract as terminated by virtue of its own terms, applicable non-bankruptcy law, or an agreement made by Plastic Corp and

Commented [H(62)]: Correct, 1 mark, though USA Bank is not a licensee

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<sup>121</sup> Idem.

<sup>122</sup> Idem. See also *ibid*, s 363(k).

<sup>123</sup> Idem.

<sup>124</sup> 526 BR 116 (Bankr D Del 2015).

<sup>125</sup> See, *ibid*, s 365(c)(2).

<sup>126</sup> Idem, s 365(b)(1)(B).

<sup>127</sup> Such licenses may not be terminated in connection with the sale of the Intellectual Property without the consent of the Licensee.

<sup>128</sup> *Ibid*, s 365(n)(1)



USA Bank with another entity;<sup>129</sup> or Plastic Corp and USA Bank may elect to retain their rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable non-bankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract of the patent licenses.<sup>130</sup> Where however, Plastic Corp and USA Bank elects to retain their rights in the patent license agreement, Oil Corp must allow them to exercise such rights,<sup>131</sup> and provide to them any license of the patent in their custody of Oil Corp<sup>132</sup>, and not interfere with the right of the patent under the patent contract.

In relation to question in 4.3 (iii), Oil Corp cannot sell the manufacturing facility free and clear of the USA Bank lien without the express consent of the USA Bank even if Oil Corp is a debtor in possession. This is so because the facility it proposed to sell is a type of property in the estate that cannot be sold in the ordinary course of business as it requires Oil Corp in the event of such consideration, to be in a fiduciary duty to consider the interest of USA Bank<sup>133</sup> and the best interest of the estate if it intends to sell the facility. The UCC however will usually be closely involved in scrutinizing such proposed transactions and is authorised to retain financial advisors at the estate's expenses to assist the debtor in this type of sale.<sup>134</sup> The advisors may in practice, conduct an auction with a "stalking horse" bidder in this kind of significant sales since there is no particular procedure specified under the Bankruptcy Code for 363 sales. Further, USA Bank may also credit bid due to its lien on the facility by offsetting a portion of the purchase price of the facility against the amount of its claim secured by the facility.<sup>135</sup>

**Commented [H(64):** Incorrect, as you note above, it can be sold without consent if the value exceeds the amount of the lien and the lien attaches to the proceeds

**\* End of Assessment \***

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<sup>129</sup> Idem, s 365(n)(1)(A).

<sup>130</sup> Idem, s 365(n)(1)(B).

<sup>131</sup> Idem, s 365(n)(2).

<sup>132</sup> Idem, s 365(n)(3)(A).

<sup>133</sup> Ibid, Guidance text, p 26.

<sup>134</sup> Idem, p 27.

<sup>135</sup> Ibid, s 363(k).