



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

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

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

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

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

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

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

## ANSWER ALL THE QUESTIONS

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

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

#### Question 1.1

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

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

#### Question 1.2

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

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

#### Question 1.3

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

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

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

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

(e) None of the above.

**Question 1.4**

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.

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**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**

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

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

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

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

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

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

**Question 1.8**

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

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

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

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

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

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

**Question 1.9**

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

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

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

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

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

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

**Question 1.10**

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

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

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**QUESTION 2 (direct questions) [10 marks]**

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**Question 2.1 (2 marks)**

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

The following are the differences between a voluntary petition for bankruptcy and an involuntary petition for bankruptcy –

- (a) a voluntary petition for bankruptcy is filed by a debtor whilst an involuntary petition for bankruptcy is filed by creditors against an eligible debtor;
- (b) a voluntary petition for bankruptcy can be filed under any applicable Chapter of the US Bankruptcy Code (Title 11 of the United States Code) ("Bankruptcy Code"). On the other hand, an involuntary petition for bankruptcy can only be filed under either Chapter 7 or Chapter 11 of the Bankruptcy Code;
- (c) an involuntary petition for bankruptcy cannot be filed against a farmer, family farmer or a corporation that is not a moneyed, business or commercial corporation (section 303(a) of the Bankruptcy Code);
- (d) a voluntary petition for bankruptcy requires no allegation of insolvency. On the other hand, in respect of an involuntary petition, petitioning creditors are required to allege either that –
  - (i) the debtor is generally not paying its debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount; or
  - (ii) within 120 days before the filing of the petition, a custodian, other than a trustee, receiver, or an agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

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

**Question 2.2 (2 marks)**

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

The potential consequences of a violation of the automatic stay are that the act taken in violation of the stay would constitute a contempt of court and depending on the circuit in which the bankruptcy proceeding is pending, the act would be void or voidable. These consequences would apply even if the act was taken without notice of the filing of the bankruptcy petition.<sup>1</sup>

However, parties in interest may apply to lift the stay to permit or validate an act that would be a violation of the automatic stay (section 362(d) Bankruptcy Code). In the event the party committing the act in violation of the automatic stay fails to obtain relief from the stay, there may be contempt sanctions imposed against the party. These sanctions may include payment of the debtor's attorneys' fees, taking affirmative actions to undo the effect of the violation and payment of a daily fine until the violation has been rectified (section 362(k) Bankruptcy Code).<sup>2</sup>

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**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 as "impaired", when the claim will not be paid in full or the legal, equitable and contractual rights of the claimant is altered. A holder of an impaired claim will not be entitled to vote on a proposed plan of reorganisation if the impaired class to which the holder of the claim belongs will not receive anything in the plan of reorganisation. Such an impaired class will be deemed to have rejected the plan of reorganisation (section 1126(g) Bankruptcy Code). Further, any holder of an impaired claim whose claim is subject to an objection is also not entitled to vote on the portion of the claim that is the subject of the objection (section 502(a) Bankruptcy Code).

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

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**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?

A preference claim.

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

A preference claim. On the other hand, for –

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(a) an actual fraudulent conveyance, that the debtor was insolvent or became insolvent shortly after the transfer was made could proof intent for an actual fraudulent conveyance; and

<sup>1</sup> Laura R Hall, *Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States, 2021/2022* (INSOL International 2021), page 22

<sup>2</sup> Laura R Hall, *Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States, 2021/2022* (INSOL International 2021), page 22

(b) a constructive fraudulent conveyance, one of the requirements is that the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer.

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

An actual fraudulent conveyance.

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

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#### Question 3.1 (3 marks)

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

Prior to the 1984 amendments to Title 28 of the United States Code ("28 USC"), the United States ("US") Supreme Court, in a series of decisions, held that judges of bankruptcy courts cannot exercise jurisdiction over matters subject to Article III of the US Constitution. 28 USC was then amended to include new jurisdictional provisions which granted jurisdiction over bankruptcy proceedings to district courts and permitted the district courts to refer the bankruptcy proceedings to the bankruptcy court of their district (28 USC, § 157).

28 USC, § 157 divided bankruptcy proceedings into core proceedings and non-core proceedings. Bankruptcy judges were only permitted to hear and determine core proceedings. In respect of non-core proceedings, bankruptcy judges may hear such proceedings if they are sufficiently related to a bankruptcy proceeding. However, absent consent of the parties to the proceeding, bankruptcy judges cannot make a final determination in a non-core proceeding. They can instead submit their findings to the district court for a final decision.

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While it appeared that 28 USC, § 157 settled the jurisdiction of bankruptcy courts, the US Supreme Court in *Stern v Marshall*<sup>3</sup> held that even if a matter was deemed as a core proceeding under 28 USC, § 157, a bankruptcy court lacks constitutional authority to enter a final order if the matter falls under the jurisdiction of Article III of the US Constitution. The US Supreme Court held that –

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*"Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision making if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III...When a suit is made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," Northern Pipeline, 458 U.S., at 90 (Rehnquist, J., concurring in judgment), and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts."<sup>4</sup>*

The US Supreme Court's decision in *Stern v Marshall* once again unsettled the question of jurisdiction of the bankruptcy courts. The Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") were subsequently amended to provide guidance on the subject matter jurisdiction of the district courts and bankruptcy courts. Pursuant to the amendments to the Bankruptcy Rules, a bankruptcy court may enter a final order if parties to the proceedings consent to the

<sup>3</sup> 564 US 462 (2011)

<sup>4</sup> 564 US 462 (2011)



final adjudication by the bankruptcy court (Rule 7008 Bankruptcy Rules). Upon parties' consent or non-consent, the bankruptcy court has the option to either –

- (a) hear and determine the proceeding;
- (b) hear the proceeding and issue proposed findings of facts and conclusions of law; or
- (c) take some other action

(Rule 7016(b) Bankruptcy Rules).

**Commented [H(32)]:** Correct, 1/2 mark, also the bankruptcy court has jurisdiction to adjudicate a challenge to a petition

### 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 foreign representative in a chapter 15 proceeding may not invoke the avoidance powers provided by the Bankruptcy Code namely, relief under sections 522, 544, 545, 547, 548, 550 and 724(a) of the Bankruptcy Code (section 1521(a)(7) Bankruptcy Code).

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The foreign representative has the following options to obtain relief equivalent to the avoidance powers under the Bankruptcy Code –

- (a) the foreign representative can seek to avoid pre-petition transactions under other applicable US or foreign law. US courts have generally interpreted section 1521(a)(7) of the Bankruptcy Code to only exclude the powers of avoidance of preferences and fraudulent conveyances under the Bankruptcy Code but not to bar a foreign representative from seeking to avoid pre-petition transactions under other applicable US or foreign law;<sup>5</sup> or
- (b) upon recognition of a foreign proceeding by the US courts, the foreign representative can, in a proceeding against the debtor under Chapter 7 or Chapter 11 of the Bankruptcy Code, invoke the avoidance powers under the Bankruptcy Code (section 1523(a) Bankruptcy Code).

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

### 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?

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The difference between interlocutory orders and final orders is that while interlocutory orders only resolve some issues or claims in a suit, final orders dispose of all issues and leave nothing further to be decided in the suit.

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

In respect of appeals, parties will need to obtain leave of the appellate court in order to appeal against an interlocutory order. On the other hand, there is no leave required for an appeal against final orders. The same framework applies to bankruptcy proceedings [28 USC, § 158 (a)(1) and § 158(a)(3)], save that, no leave is required for an appeal against interlocutory orders increasing or reducing the period of exclusivity to propose a reorganisation plan under section 1121(d) of the Bankruptcy Code [28 USC, § 158(a)(2)].

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

<sup>5</sup> *In re Condor Ins Ltd*, 601 F.3d 319, 329 (5<sup>th</sup> Cir 2010)

Direct appeals from bankruptcy court orders are usually heard by the district court for the district in which the bankruptcy court sits [28 USC, § 158(a)]. However, if the judicial council of a circuit establishes a bankruptcy appellate panel (“BAP”) service composed of bankruptcy judges of the districts in the circuit, appeals from the bankruptcy court may be heard by the BAP, provided all parties have consented [28 USC, § 158(b)(1)]. In respect of final orders, there is a further appeal from the district court or BAP to the circuit courts of appeal [28 USC, § 158(d)(1)].

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If the bankruptcy court, district court or BAP certify that –

- (a) the appeal involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
- (b) the appeal involves a question of law requiring resolution of conflicting decisions; or
- (c) an immediate appeal may materially advance the progress of the case or proceeding in which the appeal is taken,

and provided that the court of appeals authorises the direct appeal, an appeal from the bankruptcy court may go directly to the court of appeals [28 USC, § 158(d)(2)].

#### Question 3.4 (5 marks)

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What fiduciary duties do directors of Delaware corporations owe and to whom are the duties owed in the ordinary course of business? To whom are duties owed when the corporation is potentially or actually insolvent?

Directors of Delaware corporations owe a fiduciary duty of loyalty to act in the best interest of the corporation and a fiduciary duty of care in educated decision-making. The fiduciary duties are owed to the corporation and its shareholders but not to creditors of the corporation.<sup>6</sup>

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It must be noted that under the business judgment rule, directors of Delaware corporations are protected from liability for errors of judgment by the business judgment rule which provides for a rebuttable presumption that the directors acted in good faith on the basis of reasonable information. The directors will only be held liable if the presumption is rebutted or if it is shown that there was gross negligence on the part of the directors.<sup>7</sup> Further, the certificate of incorporation of a Delaware corporation may also eliminate or limit the personal liability of a director for breach of the fiduciary duty of care but not for a breach of the fiduciary duty of loyalty (section 102(b)(7) Delaware General Corporation Law).

When a Delaware corporation is potentially or actually insolvent, the fiduciary duties are still owed to the corporation and its shareholders and not to the creditors of the corporation.<sup>8</sup> Hence, even if directors continue to trade and incur liabilities when they know that the debts are unlikely to be repaid, the directors will not be held liable if they did not breach the fiduciary duties to the corporation and its shareholders.

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

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

<sup>6</sup> Laura R Hall, *Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States, 2021/2022* (INSOL International 2021), page 59

<sup>7</sup> Laura R Hall, *Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States, 2021/2022* (INSOL International 2021), page 59

<sup>8</sup> *North Am Catholic Educational Programming Foundation, Inc v Gheewalla*, 930 A.2d 92, 103 (Del 2007).

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

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**Question 4.1 [4 marks]**

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

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

In order for the English scheme of arrangement to be granted recognition under chapter 15 of the Bankruptcy Code, the requirements under section 1517(a) of the Bankruptcy Code must be satisfied. The requirements under section 1517(a) of the Bankruptcy Code and the discussion on whether the requirements are satisfied in the facts of the present case are set out below:

- (a) firstly, the foreign proceeding must be a foreign main proceeding or foreign non-main proceeding within the meaning of section 1502 of the Bankruptcy Code.

We must first determine if the English scheme of arrangement falls within the definition of a "foreign proceeding" under the Bankruptcy Code. Section 101(23) of the Bankruptcy Code defines "foreign proceeding" as a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. Being a court sanctioned restructuring of a debtor's debts, an English scheme of arrangement would satisfy the definition of a "foreign proceeding" under the Bankruptcy Code.

Next, the English scheme of arrangement must either be a foreign main proceeding or a foreign non-main proceeding within the meaning of section 1502 of the Bankruptcy Code.

Section 1502(4) of the Bankruptcy Code defines "foreign main proceeding" as a foreign proceeding pending in the country where the debtor has the centre of its main interests ("COMI"). Pursuant to section 1516(c) of the Bankruptcy Code, in the absence of evidence to the contrary, Gambling Corporation's registered office is presumed to be its COMI. The facts of the case state that Gambling Corporation is incorporated and also has its principal place of business in Greece. There is also nothing in the facts to rebut the presumption under section 1516(c) of the Bankruptcy Code. Hence, Gambling Corporation's COMI will be Greece. Since Gambling Corporation's COMI is Greece, the English scheme of arrangement would not be a foreign main proceeding.

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

The next question is whether the English scheme of arrangement could be a foreign non-main proceeding. Section 1502(5) of the Bankruptcy Code defines "foreign non-main proceeding" as a foreign proceeding other than a foreign main proceeding, pending in a country where the debtor has an establishment. "establishment" means any place of operations where the debtor carries out a non-transitory economic activity (section 1502(2) Bankruptcy Code). The facts of the case state that Gambling Corporation operates casinos and betting parlours in London. Gambling Corporation's activities in London are therefore not of a transitory nature and it is highly likely that

the courts will find that Gambling Corporation has an establishment in London. Hence, the English scheme of arrangement would fall within the definition of a foreign non-main proceeding under the Bankruptcy Code.

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Based on the above, once the English scheme of arrangement has been filed in the UK courts, the first requirement under section 1517(a) of the Bankruptcy Code would be satisfied.

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- (b) secondly, the foreign representative applying for recognition is a person or body.

Section 101(24) of the Bankruptcy Code defines "foreign representative" as a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

Hence, in order for this requirement to be satisfied, the petition for recognition under chapter 15 of the Bankruptcy Code must be made by the foreign representative of the English scheme of arrangement.

- (c) thirdly, the petition for recognition meets the requirements of section 1515 of the Bankruptcy Code.

In order for this requirement to be satisfied, the following elements under section 1515 of the Bankruptcy Code must be fulfilled –

- (i) the foreign representative of the English scheme of arrangement must apply to the US courts for recognition of the English scheme of arrangement by filing a petition of recognition;
- (ii) the petition for recognition must be accompanied by –
  - (A) a certified copy of the decision commencing the English scheme of arrangement and appointing the foreign representative;
  - (B) a certificate from the English courts affirming the existence of the English scheme of arrangement and of the appointment of the foreign representative; or
  - (C) in the absence of evidence referred to in (A) and (B) above, any other evidence acceptable to the US court of the existence of the English scheme of arrangement and of the appointment of the foreign representative.
- (iii) the petition for recognition must also be accompanied by a statement identifying all foreign proceedings with respect to Gambling Corporation that are known to the foreign representative; and
- (iv) the documents referred to in (ii)(A) and (ii)(B) above must be translated into English. The US courts may require a translation into English of additional documents.

Once all of the above requirements under section 1517(a) of the Bankruptcy Code have been satisfied, the English scheme of arrangement in respect of Gambling Corporation would be granted recognition under chapter 15 of the Bankruptcy Code as a foreign non-main proceeding (section 1517(b)(2) Bankruptcy Code).

**Question 4.2 [5 marks]**

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Oil Corporation is incorporated in Delaware and has its principal place of business in Texas. Oil Corp is facing a number of challenges to its business. First, ShipCo, one of its key

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

Upon the filing of a petition under chapter 11 of the Bankruptcy Code, a worldwide automatic stay will be imposed on any proceedings against Oil Corp and its property (section 362(a) Bankruptcy Code). However, the automatic stay will not apply to the proceedings set out in section 362(b) of the Bankruptcy Code.

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The breach of contract lawsuit filed by ShipCo against Oil Corp does not fall within the exceptions under section 362(b) of the Bankruptcy Code. Hence, the lawsuit by ShipCo will be stayed upon Oil Corp filing a chapter 11 petition unless ShipCo can obtain a relief from the automatic stay.

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Pursuant to section 362(b)(1) of the Bankruptcy Code, the filing of a chapter 11 petition does not operate as a stay of the commencement or continuation of a criminal action or proceeding against the debtor. Hence, the filing of the chapter 11 petition would not operate as a stay of the investigation and any subsequent criminal action by the US Department of Justice against Oil Corp for the illegal purchase of oil from countries subject to US sanctions.

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Upon the filing of a chapter 11 petition, the worldwide automatic stay under section 362(a) of the Bankruptcy Code will apply to automatically stay the foreclosure action by USA Bank on the Oil Corp refinery located in the Philippines. However, the automatic stay may be lifted, modified or conditioned by the courts on the request of USA Bank if USA Bank can prove that any of the following circumstances under section 362(d) of the Bankruptcy Code exists –

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- (a) there is lack of adequate protection of USA Bank's interest in Oil Corp's refinery in the Philippines, for instance, that the value of the refinery may decline during the course of the chapter 11 proceedings and result in USA Bank making less than a full recovery of the loan granted to Oil Corp. If it is found that there is lack of adequate protection of USA Bank's interest, the stay will be lifted unless Oil Corp can provide "indubitable equivalent" of the value that may otherwise be lost (section 361 Bankruptcy Code);
- (b) Oil Corp has no equity in the refinery and the refinery is not necessary for an effective reorganisation of Oil Corp;
- (c) the sole asset of Oil Corp is the oil refinery in the Philippines and Oil Corp has not within 90 days after the entry of the order for relief or 30 days after the court determines that Oil Corp is subject to section 362(d)(3) of the Bankruptcy Code (i) filed a plan of reorganisation; or (ii) made monthly payments at a non-default contract rate of interest; or
- (d) the court finds that Oil Corp's filing of the chapter 11 petition was part of a scheme to delay, hinder or defraud creditors that involved either –
  - (i) transfer of all or part ownership of, or other interest in, the refinery without the consent of USA Bank or court approval; or
  - (ii) multiple bankruptcy filings affecting the refinery.

Upon the filing of a chapter 11 petition, the automatic stay under section 362(a) of the Bankruptcy Code will prevent the landlord of Oil Corp's Houston, Texas office space from evicting Oil Corp unless the landlord can obtain a relief from the automatic stay.

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**Question 4.3 [6 marks]**

Commented [H(62)]: Total marks 5/6

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 question of whether Oil Corp can achieve each of the goals above without the consent of Plastic Corp and USA Bank are addressed in the respective parts below –

- (i) assume and assign the trademark license

The contract for the licence of the trademark "Interconnect" from Plastic Corp to Oil Corp would be an executory contract as there would be material unperformed obligations on the part of both Plastic Corp and Oil Corp under the contract. In the bankruptcy of Oil Corp, the ability to assume, reject or assume and assign such an executory contract would be governed by section 365 of the Bankruptcy Code.

Section 365(c) of the Bankruptcy Code provides that the trustee may not assume or assign any executory contract of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –

- (A) applicable law excuses a party, other than the debtor, to such contract from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract prohibits or restricts assignment of rights or delegation of duties; and
- (B) such party does not consent to such assumption or assignment.

Under US law, the assignment of trademark licences requires the consent of the licensor.<sup>9</sup> Hence, pursuant to section 365(c) of the Bankruptcy Code, Oil Corp cannot assume and assign the trademark licence without the consent of Plastic Corp.

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Commented [H(64)]: Correct, 1 mark

- (ii) reject the patent licenses so the purchaser has the exclusive right to use the patents

The contract for the licence of the patented processes for plastic manufacturing from Oil Corp to Plastic Corp would be an executory contract as there would be material unperformed obligations on the part of both Oil Corp and Plastic Corp under the contract. In the bankruptcy of Oil Corp, the ability to assume, reject or assume and

<sup>9</sup> *Re Trump Entertainment Resorts, Inc*, 526 BR 116 (Bankr D Del 2015)

assign such an executory contract would be governed by section 365 of the Bankruptcy Code.

Section 365(a) of the Bankruptcy Code provides that except as provided in sections 765 and 766 of the Bankruptcy Code and in subsections (b), (c), and (d) of this section 365 of the Bankruptcy Code, the trustee, subject to the court's approval, may assume or reject any executory contract of the debtor.

Oil Corp's rejection of the patent licenses does not fall within the exceptions stipulated in section 365(a) of the Bankruptcy Code. Hence, Oil Corp may reject the patent licenses without the consent of Plastic Corp.

However, even if Oil Corp can reject the patent licenses without Plastic Corp's consent, such rejection may not fulfill Oil Corp's goal of giving the purchaser of the plastic manufacturing business exclusive right to use the patents. This is because, in the event Oil Corp rejects the executory contract with Plastic Corp for the patent licenses, section 365(n) of the Bankruptcy Code provides Plastic Corp with the option to –

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Commented [H(66)]: Correct, 1 mark

- (a) treat the rejection as a termination of the contract and claim for damages against Oil Corp's estate; or
- (b) to retain its rights under the contract for the duration of the contract and for any period for which such contract may be extended by Plastic Corp as of right under the applicable law.

If Plastic Corp decides to retain its rights under the patent licenses contract, Plastic Corp may continue to use the patented processes in accordance with the terms of the patent licenses and pay all royalties due to Oil Corp under the contract (section 365(n)(2) of the Bankruptcy Code). Hence, until the expiry of the patent licenses granted to Plastic Corp, Oil Corp will not be able to achieve its goal of granting to the purchaser, exclusive rights to use the patents.

- (iii) sell the manufacturing facility free and clear of the USA Bank lien

A 363 sale would allow Oil Corp to sell its property free and clear of creditor interests only if either of the following conditions are met –

- (a) applicable non-bankruptcy law permits sale of such property free and clear of creditor interest;
- (b) the interested creditor consents to the sale;
- (c) the creditor's interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (d) the creditor's interest is in bona fide dispute; or
- (e) the creditor could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest

(section 363(f) of the Bankruptcy Code).

The facts of the case state that in order to secure its USD 500 million loan, Oil Corp has granted to USA Bank, a lien on the main manufacturing facility for Oil Corp's plastic business. Pursuant to section 363(f) of the Bankruptcy Code, Oil Corp will be able to

sell the manufacturing facility free and clear of the USA Bank lien without the consent of USA Bank only if Oil Corp can show that –

- (a) the price at which the manufacturing facility is to be sold is greater than the aggregate value of all liens on the manufacturing facility; or
- (b) there is a bona fide dispute in respect of USA Bank's lien on the manufacturing facility; or
- (c) USA Bank could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for the lien.

**Commented [H(67):** Correct, 1 mark, and the lien would attach to the proceeds

**\* End of Assessment \***