



**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 10/10

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

#### Question 1.1

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

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

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

#### Question 1.2

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

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

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

#### Question 1.3

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

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

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

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

**Question 1.4**

Commented [H(6): Correct, 1 mark

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

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

**Question 1.5**

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

- (a) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.
- (b) Because cramdowns do not require the consent of all classes, the plan of reorganization may not be fair and equitable to all impaired classes.
- (c) Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.
- (d) Class definition is rarely a battleground when a debtor tries to cramdown classes.
- (e) Dissenting creditors are not permitted to challenge the classification of a creditor supporting the cramdown.

**Question 1.6**

Commented [H(8): Correct, 1 mark

Which of the following statements about the plan exclusivity period is **true**?

- (a) The exclusivity period is 1 year.
- (b) The exclusivity period cannot be extended.
- (c) The exclusivity period cannot be shortened.

(d) During the exclusivity period, only a creditor may propose a plan of reorganization.

(e) During the exclusivity period, only the debtor may propose a plan of reorganization.

**Question 1.7**

Commented [H(9)]: Correct, 1 mark

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

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

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

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

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

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

**Question 1.8**

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

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

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

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

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

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

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

**Question 1.9**

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

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

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

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

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

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

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

**Question 1.10**

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

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

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

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

**Question 2.1 (2 marks)**

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

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

[A debtor commences a voluntary bankruptcy by filing a petition under the appropriate Chapter as in involuntary petition qualifying creditor/s shall file the petition.]

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

Voluntary petition may be filed under any applicable chapter of the Bankruptcy Code however involuntary petition can only be filed under chapter 7 or chapter 11.

For filing voluntary petition the debtor need not be or claim to be insolvent. Unlike voluntary petition, the creditors in their involuntary petition allege either the debtor is generally not paying debts as they become due or within 120 days of petition a custodian has been appointed or taken possession for the purpose of enforcing lien against less than substantially all of the property of the debtor.

Under voluntary petition, the debtor remains control of the business however under the involuntary petition the management may be divested of control over the business by filing a motion for appointment of interim trustee on an expedient basis.

Involuntary petition may be dismissed by the court where it is shown that the claim held by the petitioning creditor does not qualify and thus the debtor maybe entitled to damages.]

**Question 2.2 (2 marks)**

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

[Violation of stay, even if taken without notice of the filing of the petition, constitute:

- contempt of court, and
- the act is void or voidable.

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

Commented [H(19)]: Correct, 1 mark

Contempt sanctions against the stay violator may include payment of the debtor's attorney fees and requiring the violator to take affirmative acts to undo the effects of its violation.]

**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?

[The claim shall be considered impaired where the claim holder’s legal, equitable and contractual rights are altered]. Thus the claim holder may receive value as a percentage of the value of their claim or may be in an altered form. Delayed payment in full after the effective date of the plan is considered impairment.

Only impaired claims are allowed to vote on a plan. Therefore, a claim that is deemed unimpaired is not entitled to vote where the plan reverses contractual acceleration.

The plan may cure any monetary default and compensate the holder of damages.]

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

Commented [H(22)]: Impaired claims that will receive nothing cannot vote and are deemed to reject the plan

**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?

[Preferences arise where the debtor is paying a creditor for a pre-existing debt.]

Commented [H(23)]: Total marks 2/3

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

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

[A constructive fraudulent conveyance is proven by showing among other factors that the debtor was insolvent at the time of the transfer.]

Commented [H(25)]: Incorrect, insolvency can be a factor but is not required. The correct response is preference

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

[Actual fraudulent conveyance is proven where debtor made a transfer or incurred an obligation with actual intent to hinder, delay or defraud the creditors.]

Commented [H(26)]: Correct, 1 mark, previously jurisdiction was understood to depend on the core / non-core distinction

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

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

**Question 3.1 (3 marks)**

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

[In the matter of *Stern v Marshall*<sup>1</sup> the US Supreme Court held that bankruptcy court cannot issue final orders that invade Article III jurisdiction]. The bankruptcy courts are created by legislation under power granted to Congress by Article I of the US Constitution as adjuncts of

Commented [H(28)]: Total marks 2/3

Commented [H(29)]: Correct, 1 mark

<sup>1</sup> 564 US 462 (2011)

the district courts, established under Article III of the Constitution, with the same geographical divisions.

The judicial system in the US permits parallel proceedings in state and federal courts and that the first judgement issued is binding on the parties. In the cited matter the first judgement was issued by the bankruptcy court in favour of the debtor where parallel proceedings were on with state court. The decision of the bankruptcy court was appealed to the district court. Before the district court decision that eventually favoured the debtor, the state court ruled in favour of the claimant. The US Supreme Court held that the state court ruling was the first final judgement.

US Supreme Court has held in several of its orders that judges who have not been appointed pursuant to and with the protection of Article III cannot exercise jurisdiction over issues subject to Article III and such issues arising in bankruptcy proceedings are of nature involving statutory and contractual rights.

[The bankruptcy courts may exercise district court's delegated authority to enter final orders on a motion challenging the validity of a bankruptcy petition. They may issue final orders with the consent of the parties but proceedings where they lack constitutional authority they may issue a report and recommendation for review by the district court.]

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Commented [H(31)]: Correct, 1/2 mark

### Question 3.2 (3 marks)

Commented [H(32)]: Total marks 3/3

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

[Chapter 15 proceedings exclude from the rights granted to the foreign representatives the use of avoidance powers, preferences and fraudulent conveyances, provided by the Bankruptcy Code. However, these powers may be invoked in a plenary proceeding.]

Commented [H(33)]: Correct, 1 mark

Where bankruptcy proceedings were commenced prior to involvement of foreign representative, in such proceedings the foreign representative may seek to avoid pre-petition transactions under applicable US or foreign law that is consistent with practice in cases under section 304 of the Bankruptcy Code prior to enactment of chapter 15.

Commented [H(34)]: Correct, 1 mark

[In other circumstances the foreign representative, after recognition of foreign proceedings, may choose to commence plenary proceedings to access the Bankruptcy Code's avoidance powers where relief under other applicable laws is unsatisfactory.]

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

However, the scope of the plenary proceedings is limited to the debtor's US assets and shall be coordinated with the foreign proceedings.]

### Question 3.3 (4 marks)

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

[Final order **disposes all issues** leaving nothing further to be decided. Interlocutory order **resolves some of the issues** or claims.]

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

[Final order may be appealed **as a right**. Interlocutory orders may be appealed only with the **leave of the appellate court**. Orders extending the period of exclusivity may be appealed

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

Commented [H(40)]: Correct, 1/2 mark



against as a matter of right. The US Supreme Court in *Bullard v Blue Hills Bank*<sup>2</sup> held that the bankruptcy orders are a nature of resolving discrete dispute and thus are final orders for appeal purposes.

An appeal from bankruptcy court may go **directly to the court of appeals**, to its discretion of acceptance, where the bankruptcy court or district court certifies either (i) the appeal raises a question of law not having controlling decision, or (ii) immediate appeal may materially advance the progress of the case.]

Commented [H(41): Typically the appeal is heard by the district court or Bankruptcy Appellate Panel

### 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?

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[The directors owe a fiduciary **duty of loyalty** to the corporation's best interest and a **duty of care** in educated decision-making.

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Commented [H(44): Correct, 1 mark

The directors are protected from liability for errors of judgment by the **business judgment rule**. The rule presumes the board of directors have acted in good faith on the basis of reasonable information unless rebutted by showing gross negligence where the majority of the board was not reasonably informed, did not honestly believe that their decision was in the corporation's best interest or were not acting in good faith. However, the rule will not apply to a transaction where it is shown that the majority board is not disinterested and independent or where controlling shareholders are on both sides of the transaction.

The **director's duties** are owed to the **corporation** and to its **shareholders**.

Commented [H(45): Correct, 1 mark

Commented [H(46): Correct, 1 mark

Where the corporation was potentially insolvent or actually insolvent the directors continue to owe their duty to the corporation, its shareholders and **not to the creditors**. The Delaware Supreme Court in the matter of *Trenwick Am Litig Trust v Ernst & Young LLP*<sup>3</sup> observed that the "Delaware law imposes no absolute obligation on the board of a company that is unable to pay its bills to cease operations and to liquidate. Even when the company is insolvent, the board may pursue, in good faith, strategies to maximise the value of the firm."

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

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#### Question 4.1 [4 marks]

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.

<sup>2</sup> 135 S Ct 1686 (2015)

<sup>3</sup> 906 A.2d 168 (Del Ch 2006)

[For any foreign proceeding to be recognized under chapter 15 of the US Bankruptcy Code the foreign representative must establish that:

- foreign court or administrative proceedings were pending with respect to the debtor, and
- foreign representative was empowered to act by the proceedings.

Foreign proceedings have the following characteristics:

- a collective judicial or administrative proceeding in a foreign country;
- under a law relating to insolvency or adjustment of debt;
- assets and affairs of the debtor are subject to control or supervision of the foreign court; and
- the purpose is reorganisation or liquidation.

The English scheme of arrangement confirms to the characteristics of a foreign proceeding that may be recognised. However, recognition may be refused where if manifestly contrary to the US public policy.

The English scheme of arrangement would be recognised as a foreign non-main proceeding as its centre of main interest (COMI) is presumed to be at Greece where the business was incorporated and having principal place of business. Its assets are located over several jurisdictions. Other relevant factors include the location of majority of debtor's creditors or majority creditors who shall be affected by the relief or jurisdiction of law that shall apply to most disputes. Such information is not made available for consideration and thus is presumed that Gambling Corporation bonds and bond holders are spread over more jurisdictions and there may be many more disputes governed by other laws.

**Commented [H(50):** Correct, 1 mark, recognition as foreign main would require the COMI to be in England

**Commented [H(51):** Correct, 1 mark

Now to be recognised as foreign non-main proceedings the debtor shall have an establishment in England where it carries out non-transitory economic activity prior to the commencement of the chapter 15 proceedings. Gambling Corporation operates casinos and betting parlors in London. The activities are for economic purposes and are non-transitory in nature and thus the foreign proceedings shall be recognised under chapter 15 as a foreign non-main proceeding.]

**Commented [H(52):** Correct, 1 mark

#### **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 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 Corporation may prefer a Home Court, at Delaware where it is incorporated and thus can consolidate all its litigation with creditor claims.

Upon filing the chapter 11 petition, bankruptcy estate is created for of all debtors' property interest as on the date of the petition. The debtor-in-possession is free to continue to operate its business in the ordinary course.

### **Breach of Contract filed by ShipCo**

Executory contract is most commonly defined as “a contract is said to be executory if there are material underperformed obligations on both side”<sup>4</sup>

The ShipCo contract with Oil Corporation may be said to be executory as both parties may not have performed their obligations. The ShipCo allegation against Oil Corporation for having “sold it contaminated oil that caused USD 1 billion in damage to ShipCo’s container ships.” Thus Oil Corporation not performing its duties under the contract. Since the contract shall be a continuing contract, ShipCo would have to perform its duties under it.

There would be an automatic stay on all litigation on pre-petition claims.

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

Hence Oil Corporation, on filing of the petition, will be at liberty to assume, reject or assume and assign its executory contracts. It shall have to make a decision until the confirmation of its plan of reorganisation. If Oil Corporation elects to:

- Reject the contract. It would have deemed to have breached the contract immediately before the petition date, giving ShipCo an unsecured pre-petition claim in damages.
- Assume the contract. Oil Corporation shall cure the defaults and give assurances to ShipCo of its future performance. Post assumption Oil Corporation decides to reject the contract, ShipCo shall claim damages that shall become post-petition administrative expenses.
- Assume and assign the contract. Oil Corporation may transfer its right under the contract to a third party. The third party transferee shall provide adequate assurances to ShipCo for future performance.

### **US Department of Justice Investigation**

There is a worldwide automatic stay that comes into effect immediately on filing of the petition. However, there are certain statutory exceptions that include regulatory investigations. Oil Corporation and its Board would face any liability that arises from such investigations.

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

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

If there are criminal offenses against the debtor, the department may make a claim that will have priority of payments under administrative expenses. The claim shall be for “actual, necessary expenses” and “reasonable” professional fees incurred by a creditor that has participated in the prosecution of a criminal offence relating to the case or the business or property of the debtor.

### **Foreclosure by US Bank**

There is a worldwide automatic stay that comes into effect immediately on filing of the petition. Such actions include creation, perfection or enforcement of a lien against property of the estate on account of a pre-petition claim.

Commented [H(57)]: Correct, 1 mark

Oil Corporation may continue business operation in ordinary course and present a reorganisation plan by debtor during exclusivity period or negotiate with the creditors as a pre-packaged bankruptcy.

A debtor in possession can sell its property free and clear of creditor interests with court approval in a 363 sale. Oil Corporation may sell the property in ordinary course of business by meeting a two-pronged test of “vertical dimension” (the expectations of a hypothetical

<sup>4</sup> “Countryman Test”

creditor of the debtor) and the “horizontal dimension” (how business is conducted by other businesses similar to the debtor). The advantage is to attract a higher purchase price.

Where sale of property under lien is made, the creditor’s interest will attach to the proceeds of the sale and will receive priority in the distribution of those proceeds.

### **Non-payment of Rent on Office Space**

There is a worldwide automatic stay that comes into effect immediately on filing of the petition. [The office space is lease on non-residential property]. Oil Corporation would need to make a decision on the unexpired lease within 120 days of the order of relief with a possibility of extension by 90 days for a cause.

**Commented [H(58):** Eviction would be prohibited by the automatic stay unless the lease has expired pre-petition

Oil Corporation will decide to assume, reject or assume and assign its lease contracts. If Oil Corporation elects to:

- Reject the contract. It would have deemed to have breached the contract immediately before the petition date, giving landlord an unsecured pre-petition claim in damages.
- Assume the contract. Oil Corporation shall cure the defaults and give assurances to landlord of its future performance. Post assumption Oil Corporation decides to reject the contract, landlord shall claim damages that shall become post-petition administrative expenses. Under priority of payments up to two years of lease payments from the date of rejection.
- Assume and assign the contract. Oil Corporation may transfer its right under the contract to a third party. The third party transferee shall provide adequate assurances to landlord for future performance.]

### **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?

[A debtor in possession can sell its property free and clear of creditor interests with court approval in a 363 sale.] The sale is to be made in ordinary course of business and in the best interest of the estate as a whole.

**Commented [H(60):** Correct, 1 mark

**Commented [H(61):** Incorrect, a 363 sale is used when the sale is not in the ordinary course of business

The sale may include transferring of interests in key contracts that are required to operate the business even where they contain contractual restrictions on assignment or may lead to termination upon a bankruptcy filing. The value of the debtor’s ability to assign contracts is increased by the nullification of the *ipso facto* clauses (section 365(b)(2) of the US Bankruptcy Code) in contracts that permit termination or alteration in rights solely based on the fact that the debtor is insolvent or files for bankruptcy.

### Assignment of Trademark License

The trademark "Interconnect" licensed from Plastic Corp is an executory contract where Oil Corporation has right to assume, reject or assume and assign its rights under it. Thus Oil Corporation may assume and assign the contract by transferring its right under the contract to a third party. The third party transferee shall provide adequate assurances to trademark owner, Plastic Corp, for future performance.

**Commented [H(62):** Incorrect, because trademark law permits a licensor to refuse to accept performance from an assignee; therefore Plastic Corp's consent is required

### Rejection of Patents License

Under section 365(n) of the US Bankruptcy Code licensees of patents owned by the debtor are protected such that their licenses may not be terminated without their consent upon sale of the intellectual property. Oil Corporation will have to seek Plastic Corp consent for the sale. If Plastic Corp consents, breach of the contract by Oil Corporation, immediately before the petition date, shall give Plastic Corp an unsecured pre-petition claim in damages.

**Commented [H(63):** Correct, 1 mark

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

Any claim of Oil Corporation arising prior to the petition date is subject to permissible set-off against the claim of Plastic Corp.

### Sale of Manufacturing Facility

Oil Corporation, debtor in possession, can sell its property free and clear of creditor interests with court approval in a 363 sale. Oil Corporation may sell the property in ordinary course of business by meeting a two-pronged test of "vertical dimension" (the expectations of a hypothetical creditor of the debtor) and the "horizontal dimension" (how business is conducted by other businesses similar to the debtor). The advantage is to attract a higher purchase price. The sale should establish that it was made in ordinary course of business and in the best interest of the estate as a whole.

Where sale of property under lien is made, the creditor's interest will attach to the proceeds of the sale and will receive priority in the distribution of those proceeds.

**Commented [H(65):** Correct, 1 mark

**\* End of Assessment \***