



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

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

Commented [H(1)]: Total marks 37/50

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

Commented [H(2)]: Total marks 6/10

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)]: 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)]: Correct, 1 mark

Question 1.5

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

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

Commented [H(7)]: Incorrect, the correct response is (c)

Question 1.6

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

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

Commented [H(8)]: Correct, 1 mark

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

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

Question 1.7

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

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

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

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

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

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

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

Question 1.8

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

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.

Commented [H(12): Incorrect, the correct response is (e)

QUESTION 2 (direct questions) [10 marks]

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

Question 2.1 (2 marks)

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

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

Voluntary bankruptcy may be commenced by the debtor by filing petition under section 11 of the Bankruptcy Code where debtor has its principal place of business or principal assets or where an individual lives. This requires the petition to be accompanied by number of schedules like list of assets and creditors and even the absence of the information does not inhibit the filing of petition as even a naked petition can be entertained. The necessary disclosures in terms of assets and liabilities, estimated funds etc need to be made but that does not mandate the debtor to be insolvent as the necessary pre-condition for the filing of Voluntary Petition. The Involuntary Petition can be filed either under chapter 11 or chapter 7 of the Bankruptcy Code of US but there are some exceptions like farmer, family farmer, non-profit organization etc. that are exempted from clutches of involuntary bankruptcy. The petitioning creditors need to allege that the debtor is not generally paying its dues as they become due unless they are subject to a bona fide dispute as to liability or amount or appointment of custodian etc. The debtor has 20 days to object to the petition and the trial happens consequently. The petition has to be filed by a minimum of three qualifying creditors (who have non-contingent liability, not having bona-fide dispute as to liability/amount and minimum liability of at least USD 15,775 exist) if the total number of creditors is more than 12 and alternatively, if the threshold of 12 creditors is not met, then only one creditor would be able to file the petition.

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Commented [H(16): Correct, 1 mark

Question 2.2 (2 marks)

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

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

Automatic stay applies to any property of the debtor's estate worldwide the moment filing is done and any act, even if committed in absence of notice of information regarding stay, would either be void or voidable if that contravenes the statutory provisions of the stay (different circuit courts have different precedents). Relief from the stay is mandated and if not taken then the stay violator will have to face contempt sanctions necessarily which includes payment of debtors' attorneys' fees. This also require the violator to specifically take such steps that would undo the effects of violation and thus put the debtor in a position before the violation happened.

Commented [H(18): Correct, 1 mark

Commented [H(19): Correct, 1 mark

The violator is thus required to maintain status-quo of the debtor's estate by taking some affirmative steps apart from paying coercive contempt sanctions which can even be in form of payment of daily fines until the stay violation is rectified.

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?

Creditors in Impaired Class suffer from alteration in their legal, equitable and contractual rights to their corresponding claims or interests. Therefore, the circumstances in which claim may be considered as impaired includes the affect over legal rights, equitable rights, contractual rights of the creditors. It is to be noted that only impaired classes have the right to vote on the plan as the unimpaired classes will be deemed to have accepted the plan and a class that receives nothing will be deemed to have rejected the plan.

It is statutorily mandated that the plan must be accepted by at least one impaired class disregarding the votes of insiders. By definition, A given class approves the plan if simple majority of the creditors in the class, holding at least two-third value of the claims in the class vote in favour of the plan. The entire class may be deemed unimpaired if the plan reverses contractual acceleration by curing any monetary default or compensating the holder for any damages/actual pecuniary losses or reinstating maturity of such claim or interest as it existed before the default etc. So, this situations disentitle the right to vote of the holder of an impaired claim.

Furthermore, the plan is mandated to be approved by at least one impaired class. So, all impaired classes are not required to necessarily approve the plan as the plan stands out to be approved by "cramming down" dissenting impaired classes. Provided, the cramdown must ensure that the plan does not discriminate unfairly as the differential treatment of the non-consenting impaired classes must have a fair and reasonable basis. The dissenters may challenge for the basis of classification for their own part instead and seek a fair and equitable treatment.

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 is a transfer of the debtor's property made during the suspect period and the such transfer need to be reversed or returned to the estate. The transfer is necessarily of an interest to or for the benefit of the creditor and requires that the cause of action must be based upon an antecedent debt owed by the debtor before such transfer was made. Therefore, it is only preference transaction which requires the payment in respect of antecedent debt.

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

The preference or the actual fraudulent conveyances and the constructive fraudulent conveyance, three of these transactions require that the debtor be presumed or proven to have been insolvent at the time of the transfer.

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

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

Commented [H(22)]: Incorrect, they still do vote in that scenario. However if the impaired claims will receive nothing under the plan they will not be able to vote and will be deemed to have rejected the plan

Commented [H(23)]: Total marks 2.5/3

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

In Preference, the debtor is either presumed to be insolvent either on or during the 90 days prior to the petition date for the purpose of determining the preference claims. In constructive or actual fraudulent conveyances, the debtor is required to be insolvent at the time or became insolvent as a result of the transaction or shortly after the transfer was made or the obligation was incurred.

Commented [H(25)]: Correct as to preference, 1/2 mark, but insolvency is not a required element of the other claims, though it can be an element in some certain circumstances

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

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

An actual fraudulent Conveyance require that the debtor be proven to have intended to frustrate the creditors' recoveries. It is mandated that the transfer was made with the actual intent to hinder, delay or defraud any entity (which includes the creditors') to which the debt was due. The debtor is mandated to be indebted and the intent is required to be proved circumstantially by reference to the "badges of fraud".

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

Commented [H(27)]: Total marks 13.5/15

Question 3.1 (3 marks)

Commented [H(28)]: Total marks 2.5/3

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

The jurisdiction over bankruptcy proceedings was granted to district courts and further district courts were provisioned to permit the reference of such proceedings to the bankruptcy court of their districts. This Referral statute was formed in response to the striking down of the jurisdictional provisions of the 1978 Bankruptcy Code as unconstitutional. This referral statute distinguishes between "core" and "non-core" proceedings and the exhaustive list of such core proceedings is enshrined. Bankruptcy Court has the exclusive jurisdiction to hear the core matters whereas the non-core proceedings are to be heard by bankruptcy court only if they are sufficiently related to a bankruptcy proceeding but the final order cannot be passed as the judges of bankruptcy court have not been appointed pursuant to and with the protections of Article III of constitution and thus only core matters were to be decided by them.

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

But then in STERN vs MARSHALL new complications arose and the new facts led to the emergence of new jurisdictional provisions. The claim has been filed against the debtor and there existed counter claim by the debtor in the same transaction and the statute provides that counterclaim is a core proceeding as to which bankruptcy court can issue final order. Interestingly, the bankruptcy court awarded USD 400 to the debtor but there existed parallel proceedings in respect of the counter claim before the state court. The bankruptcy court here though issued the first judgment while the state court's proceedings were still pending. Thereafter, while the pendency continued, the bankruptcy order got challenged before the district forum.

The state court meanwhile issued the judgement in favour of the claimant and against the debtor and the case when went to the Supreme Court, it was held that the bankruptcy court's issuance of final order over a state law claim was unconstitutional under Article III. The jury verdict by the state court was considered as conclusive as the original power vested with the state court over such issues.

Commented [H(30)]: Correct, 1 mark

It has been reiterated time and now that bankruptcy courts have delegated jurisdiction and thus they may determine core proceedings over which they lack constitutional authority by issuing a report and the recommendations for review by the district court. This case has led to the emergence of new practise in US where the parties state in their pleadings that they would

like to submit to the final orders by bankruptcy court or treat the orders of bankruptcy court as proposed findings of fact and conclusions of law.

Commented [H(31)]: Correct, 1/2 mark, also the bankruptcy court may determine challenges to petitions as final orders

Question 3.2 (3 marks)

Commented [H(32)]: Total marks 2/3

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

The foreign representative upon recognition of foreign main or non-main proceedings will be entitled to automatic and discretionary reliefs. Article 23 of the Model Law provides the power to foreign representative in respect of actions to avoid acts detrimental to creditors. The rights of foreign representative under chapter 15 have been restricted and excludes the right against the avoidance transactions that a domestic debtor or trustee has under chapter 7 or chapter 11 proceedings.

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

Now the equivalent relief may be obtained by foreign representative in two cases- 1) where the chapter 7 or chapter 11 proceeding has already been commenced by a local debtor prior to the involvement of foreign representative. 2) The foreign representative in rarer circumstances may commence plenary proceeding under chapter 7 or chapter 11 but the scope of such proceedings will then be limited to the debtor's assets in US and coordination with foreign proceedings will also be mandated.

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

The access to avoiding actions available to the domestic debtor or trustee would all the more be preferred by the foreign representative when the applicable laws are unsatisfactory to his concerns, for instance, where statute of limitation has expired or claims for constructive fraudulent conveyances are not provided for under the relevant statutes. Also, Section 363 provides the sale of assets outside the ordinary course free and clear of all liens and interests and thus facilitates improved recoveries and greater protection of purchasers. Foreign Representative generally get this relief in discretionary reliefs and are entitled automatically in foreign main proceedings. This sale will have to be coordinated with other proceedings and thus active involvement of foreign representative is required where approval by two courts is mandated.

Commented [H(35)]: Specifically, the foreign representative can bring claims under other applicable US or foreign laws

Question 3.3 (4 marks)

Commented [H(36)]: Total marks 4/4

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

Final orders are orders that dispose of all issues and are inherently appealable as a matter of right whereas interlocutory orders are not conclusively determining on issues and thus settles down only some of the issues or claims and leaves some others to be decided. These orders may be appealed but only with the leave of the Appellate court. Since the bankruptcy proceedings are aggregate of individual controversies it has been stated that a bankruptcy order resolving a discrete dispute shall be considered as final order for the purposes of appeals.

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

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

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

The appeals in bankruptcy cases are taken on the similar lines but simultaneously the constitutional finality of the order is also to be seen along with. For instance, if the bankruptcy court order resolves the entire issue in dispute and thus would be final and appealable for the purpose of the appeal but simultaneously its has to be checked that the order must be constitutionally final in the sense that parties should have consented to the

bankruptcy court's jurisdiction. Also the conversely holds true and the mere constitutional validity would not entitle the rights of appeal if the issues have not been resolved in its entirety.

The appeals from bankruptcy court are heard by district court for the district in which they sit. But in some circuits, there exists BAP i.e. Bankruptcy Appellate Panel convened from the judges of the bankruptcy panel. It is the discretionary right of the party to be heard either by BAP or by district court. Then appeal from the BAP or the district court goes to circuit court of appeals and it is only in rare circumstances that the appeal goes directly to circuit court and the rare circumstances has to be certified by the fact that there is a question of law involved or requires resolving conflicting controlling decisions or required for the material advancement of the case.

If the ruling by bankruptcy court was over a core proceeding and bankruptcy court had relevant authority then district court or BAP would review conclusions of law de novo apart from reviewing findings of fact for abuse of discretion and if the proceedings pertain to a non-core in the relevant jurisdictional extant, then district court or BAP review de novo findings of fact and conclusions to which the party has objected to. The order of district court or BAP would be reviewed by circuit courts de novo as to conclusions of law and abuse of discretion for findings of fact.

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?

Directors' liability generally falls within the domain of state law in which the entity is incorporated. Law of Delaware which is pre-eminent US jurisdiction for corporate law exhibits limited directors' liability than elsewhere in the world. Directors act in the fiduciary capacity and are presumed to be acting loyal to the best interests of the corporation and only owe a duty of care in decision making. They are protected from errors of judgement by the business judgment rule which states that the directors are presumed to have acted in good faith on the basis of the reasonable information.

Now the directors can be held liable as per the law of Delaware by rebutting this presumption that the director was not reasonable informed and did not act with honesty while making the decision and did not really believe that it is in the best interest of the corporation. They were not acting bona-fide. The liability needs to be fastened as the presumption lies in favour of Directors or else it has to be specifically shown that they acted with gross negligence of duties. The director may also be exculpated from liability for the breach of duty of care as per the certificate of incorporation of the entity but such exculpations are not extended to the breach of duty of loyalty. The entire fairness standard is applied and has to be satisfied for deciding upon the liability of directors.

The duties of directors are owed to the corporation and its shareholders and not to the creditors of the corporation. In cases where the corporation is actually or potentially insolvent, the duty would also exist towards the corporation and the shareholders. There does not exist any law in US for holding directors liable for wrongful trading or for deepening insolvency as the directors are free to operate and have limited and same liabilities even in the zone of insolvency. This is remarkable feature of US which has kept the liability of directors limited and thus strikes a deep sense of faith over the management of the corporation by assuming that they operate bona-fide to the best of their judgment and skills.

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

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

Commented [H(42)]: Correct, 1 mark

Commented [H(43)]: Total marks 5/5

Commented [H(44)]: Incorrect, this is a fiduciary duty

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

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

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

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

Commented [H(49)]: Total marks 10/15

Question 4.1 [4 marks]

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

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

Gambling Corporation has been incorporated and has its principal place of business in Greece and has its casinos and betting parlors in various US cities too. Since the corporation is governed by the laws of Europe where English schemes of arrangement are used as powerful tool of restructuring. It is assumed that all the preliminary requirements for submission to English scheme of arrangement has been fulfilled by the Corporation. Thus, it would be safe to conclude that since the principal place of business is in Greece and therefore, centre of main Interests (COMI) shall be ascertainable there itself.

Now proceedings when filed by foreign representative in US would be considered as foreign non-main proceedings on the basis of the premise that corporation has an establishment in US jurisdiction as it is carrying out a non-transitory economic activity in various US cities prior to the commencement of chapter 15 proceedings. SO, if the proceedings are to be recognised, they will be falling in the non-main proceeding head.

Now the scope of the recognition of proceedings is to be checked. The foreign representative must prove the following requirements to achieve recognition. 1) the court or administrative proceeding is pending with respect to the debtor 2) the foreign representative is empowered to act by the proceeding. Here, since the scheme of arrangement is a kind of administrative proceedings which fall under the criterion of the law relating to insolvency or adjustment of debt in which assets/affairs are controlled or supervised by a foreign court for the purpose of reorganization.

Since US law has kept the ambit wide enough to include the scheme of arrangement or receiverships under the head of foreign proceeding. No bar would exist in the recognition of foreign non-main proceedings in US. Also, the English scheme of arrangement must not be manifestly contrary to public policy. Though this exception is rarely obstructing the mere act of recognition but can certainly hamper the additional assistance or relief upon the grant of recognition of foreign non-main proceeding.

Question 4.2 [5 marks]

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

Commented [H(50): Total marks 2/4

Commented [H(51): Correct,1 mark

Commented [H(52): Incorrect, the location of the relevant establishment is in the jurisdiction where the foreign proceedings are pending, so the London casino is the relevant establishment.

Commented [H(53): Correct, 1 mark, specifically this is proper because foreign main proceedings are those where the COMI is in the jurisdiction of the foreign proceeding, and here the COMI is in Greece not England

Commented [H(54): Total marks 5/5

Since Oil Corporation (“debtor”) has its incorporation in Delaware and principal place of business in Texas. So, the debtor has now a choice for selection of venue for commencing the proceedings under chapter 11. On filing of plenary proceedings under this chapter, the effect is the operation of stay which creates and estate of all the debtor’s property interests a son petition date subject to certain exclusions. This moratorium stay protects the property from creditor enforcement mechanism but not everything gets impliedly covered and exempted from action under the guise of stay. The individual stances need to be examined for understanding the effect of filing of chapter 11 proceedings. The detailed analysis of each situation is presented below.

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

Situation 1: The law suit by Ship Co. (customer of the debtor) for recovery of damages for supply of contaminated oil and consequential damage to oil tanks would specifically be covered under the pre-petition claim and thus any litigation in terms of pre-petition claim would be falling under the scope of automatic stay. Filing of Chapter 11 would bring instant halt to these proceedings.

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

Situation 2: US department of Justice is investigating if the debtor had illegally purchased oil from other countries. Since regulatory investigations or criminal proceedings are subjected as exceptions to the operation of stay. These investigatory proceedings would not be therefore barred by the filing of chapter 11 proceedings as these forms an independent statutory exception. The main aim of the stay is the preservation of the debtors’ estate for the benefit of creditors and these regulatory investigations has a wider public purpose and thus stay must pave the way to wider public interest.

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

The breathing room to formulate the plan must be provided and in consonance of the same, the stay would be operating and extending beyond the boundaries of US and disallow the creditor to enforce the security interest. Though the Bank may get relief from the stay by showing lack of adequate protection or other defence available in the statute.

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

Situation 3: Since the debtor in this point has forgotten to pay rent on its office spaces and the constant threats from the landlords are being experienced. Now assuming that lease has not expired, the stay in that case would operate to prohibit any action by the creditor-landlord and thus landlord would not able to obtain any possession or control of the property back till the operation of stay. Any action taken by landlord in violation of stay would be taken as contempt of court and would be void/voidable (depending on the jurisdiction precedent). The debtor might show that the eviction from the unexpired leased property have the prospects of irreparable harm to the debtor and thus necessary protection be granted to him under the proceedings.

Commented [H(59)]: Correct, 1 mark

Question 4.3 [6 marks]

Commented [H(60)]: Total marks 3/6

Oil Corp has filed for bankruptcy and is planning to sell its plastic manufacturing business through a 363 sale. The plastic manufacturing business operates under the trademark “Interconnect”, which is licensed from Plastic Corp. Oil Corp has invented several patented processes for plastic manufacturing, which it licenses to Plastic Corp. The main manufacturing facility for the plastic business is in Dallas, and Oil Corp has granted a lien on the facility to USA Bank to secure its USD 500 million loan.

Oil Corp thinks it will get the highest return for the plastics manufacturing business if it can (i) assume and assign the trademark license; (ii) reject the patent licenses so the purchaser has the exclusive right to use the patents; and (iii) sell the manufacturing facility free and clear of the USA Bank lien. Can Oil Corp achieve each of these goals without the consent of Plastic Corp and USA Bank? Why or why not?

Oil Corporation filed for bankruptcy under chapter 11 and these proceedings would invest the debtor i.e. Oil Corporation with all the more power over its assets and property in the ordinary course of business without court or creditor interference. The option of selling plastic manufacturing business unit by debtor via 363 Sale would definitely bring more return because of the going concern basis and the transaction being out of court sale and being free and clear from creditor interests, a good-faith purchaser retains the property notwithstanding the subsequent sale reversals etc.

1) Assuming and Assigning Trademark License

Though the Code has done with away contractual restrictions on assignments so that higher prices may be procured by the debtors' assets but since this case involves a substantive non-bankruptcy law the consent of the counterparty must be obtained. Here, the trademark license "interconnect" is issued by Plastic Corp. in the name of debtor and the assignment of trademark to transferee/intended purchaser by the debtor would be validated only if Plastic Corp. agrees to accept the performance from the transferee/intended purchaser.

There are some counter opinions over the matter too. Some courts opine the applicability of hypothetical test wherein the debtor may not assume an executory contract that it would not be permitted to assign and whereas in some other circuits it is held that this provision applies only when the debtor actually intends to assign the agreement.

Also, the applicability of ipso-facto clauses might also change the scenario as the filing of bankruptcy would entitle the parties to seek termination and thus the ability of the debtor to assign the trademark license would also be affected.

2) Rejecting the patent license

Rejection of patent license by Oil Corporation must be based on the business judgment and here the debtor will have to prove that this rejection of patent would facilitate the reorganization of debtor while at the same time, Plastic Corp. must be ensured damages. Consent of plastic corp. is not required but the adequate compensation and protection of rights of interests would definitely be considered. The contract would not be treated as void hereunder and thus counterparty i.e. Plastic Corp. can retain whatever it has received under the pre-petition

3) Selling the manufacturing facility free and clear of Banks's lien

The manufacturing facility is located in Dallas and the said facility has been mortgaged with USA Bank for 500 million loan. Since the decision of selling the facility would not be an ordinary course transaction and for all non-ordinary course transactions, most commonly 363 sales of property, the debtor must prove the best of his business judgment t(in connection with which it owes a fiduciary duty to consider the interests of creditors). It is to be shown that it is in the best interest of estate as a whole and thus consent of USA Bank is absolutely mandated for undertaking such a transaction and the price aggregate must be greater than the amount of bank lien. Even Unsecured Creditors will also be closely monitoring the said transaction.

Here USA bank may also credit bid for the auction and thus offset the purchase price against the claim made.

*** End of Assessment ***

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Commented [H(63)]: Incorrect, as ipso facto clauses are ineffective in bankruptcy

Commented [H(64)]: Correct, 1 mark, but 365(n) allows Plastic Corp to continue to practice the patent so exclusivity is only possible with Plastic Corp's consent

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