



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 39.5/50

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

Commented [H(2): Total marks 8/10

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

Question 1.1

Commented [H(3): Correct, 1 mark

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

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

Question 1.2

Commented [H(4): Correct, 1 mark

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

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

Question 1.3

Commented [H(5): Correct, 1 mark

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

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

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

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

(e) None of the above.

Question 1.4

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

(a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.

(b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.

(c) A pre-pack debtor may spend as little as a single day in bankruptcy.

(d) The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.

(e) Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.

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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.

Commented [H(7): Correct, 1 mark

Question 1.6

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

(a) The exclusivity period is 1 year.

(b) The exclusivity period cannot be extended.

(c) The exclusivity period cannot be shortened.

Commented [H(8): Correct, 1 mark

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

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

Question 1.7

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

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

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

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

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

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

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

Question 1.8

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

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

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

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

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

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

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

Question 1.9

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

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

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

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

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

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

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

Question 1.10

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

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

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

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 may file a voluntary petition for bankruptcy (as per section 301 of the Bankruptcy Code) under any applicable chapter while a creditor may file an involuntary petition for bankruptcy under either Chapter 7 and 11 only, and cannot be commenced against a farmer, family farmer or non-profit corporation.

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Commented [H(16): Correct, 1 mark

In a voluntary petition, there is no requirement as to number of petitioner, while in an involuntary petition, the number of petitioning creditors required is dependent on how many non-contingent, non-insider creditor has – if less than 12 creditors, only 1 petitioner is required; if there are 12 or more creditors, at least 3 qualifying creditors must join in the petition.

An involuntary petition require the petitioning creditors to allege in the petition form either that the debtor is generally not paying its debts as they fall due, unless that are subject of a bona fide dispute as to liability or amount or that, within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or an agent appointed or authorised to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession – while there is no such requirement on the petitioner of a voluntary petition.

Question 2.2 (2 marks)

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

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

An act which is in violation of an automatic stay constitute contempt of court and is void or voidable, depending on the circuit in which the bankruptcy is pending due to a circuit split on this issue). In such circumstances, the violator would face contempt sanctions, which may include payment of the debtors' attorneys' fees and requiring the violator to take affirmative acts to undo the effect of its violation.

Commented [H(18): Correct, 1 mark

Commented [H(19): Correct, 1 mark

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 impaired when the plan leaves the holder's legal, equitable and contractual rights altered. Delayed payment in full after the effective date of the plan is also considered an impaired claim. Generally, only impaired classes have the right to vote on the plan.

An impaired claim holder would not be entitled to vote in a cram down of plan scenario. A plan may be confirmed by cramming down dissenting impaired classes. Besides that satisfying other requirements of a normal reorganisation plan, in order to use cram down, the plan must not discriminate unfairly and must be fair and equitable to non-consenting impaired classes. In other words, differential treatment of non-consenting classes must be based on reasonable grounds, be in good faith and must be necessary for the plan.

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

Commented [H(21): Correct, 1 mark

Commented [H(22): Incorrect, the holder may vote but the plan can be confirmed despite its vote against. A holder of an impaired claim that will receive nothing under the plan cannot vote and is deemed to reject it.

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?

Preference. The elements of a preference claim include (i) a transfer of an interest of the debtor in property, (ii) to or for the benefit of a creditor, (iii) for or on account of an antecedent debt owed by the debtor before such transfer was made, (iv) made while the debtor was insolvent, (v) made during the suspect period, (vi) which enables the creditor to receive more than it would have in a chapter 7 liquidator.

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?

Constructive fraudulent conveyance. Other elements of this cause of action include the debtor was unreasonably undercapitalized for the business or transaction it was engaged in or planned to be engaged in, the debtor intended to or believe it would incur debts beyond its ability to pay on maturity or the transfer was made to or for the benefit of an insider.

Commented [H(25): Incorrect, this is an optional element of constructive fraudulent conveyance but a mandatory element of a preference

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

Actual fraudulent conveyance. Other elements of this cause of action include the transfer or obligation was to an insider, the debtor retained possession or control of the property transferred after the transfer or before the transfer or obligation, the debtor had been sued or threatened with suit.

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

Commented [H(27)]: Total marks 13/15

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?

In 2011, the case of *Stern v Marshall* changed the law of bankruptcy court jurisdiction as the US Supreme Court held that even in core proceedings, a bankruptcy court cannot issue final orders that invade the jurisdiction of Article III of the US Constitution. Prior to the ruling of *Stern v Marshall*, the bankruptcy court judges were empowered to hear and determine only "core" proceedings while in "non-core" proceedings, the bankruptcy court judges may only hear the non-core proceedings if they are sufficiently related to a bankruptcy proceeding, but cannot make a final determination. In a non-core proceeding, a bankruptcy court judge may submit proposed findings of facts and conclusions of the law to the district court (which are subject to objections by parties) for the consideration of the district court who will make the final decision. The referral statute sets out a non-exhaustive list of core proceedings which include inter alia, matters concerning the administration of the estate, counterclaims by the estate against person filing claims against the estate, orders relating to obtaining credit and proceedings to determine, avoid or recover preferences.

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

Briefly, the case of *Stern v Marshall* concerned contradicting decisions reached by a bankruptcy court (who made an order in favour of the debtor) and a state court (who was deciding on the issue involved in the counterclaim and found in favour of the claimant). Although 28 USC 157 provides that a counterclaim is a core proceedings as to which a bankruptcy court can issue a final order, the US Supreme Court held that the bankruptcy court's issuance of a final order over a state law claim was unconstitutional under Article III of the US Constitution. Thus the decision of the state court, made via jury verdict was the first final judgment and was conclusive of the issues.

Subsequent US Supreme Court provided guidance on this matter and the position is such that a bankruptcy judge may determine a core proceeding over which they lack constitutional authority by issuing a report and recommendation for review by the district courts.

Commented [H(31)]: A bankruptcy judge can issue a final order on a challenge to a petition or on a core proceeding with consent of the parties

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 provisions in relation to avoidance powers on preference and fraudulent conveyance under the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding.

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

A foreign representative can obtain equivalent relief by commencing plenary proceedings such as those under chapter 7 and 11. The foreign representative may choose to commence a plenary proceeding under the Bankruptcy Code after obtaining recognition under chapter 15. Under such a plenary proceeding, the scope of the proceeding is limited to the debtor's assets within US and will be coordinated with the relevant foreign proceeding. A plenary proceeding could also be commenced by a foreign representative to gain access to the avoidance powers under the Bankruptcy Code where the statute of limitation applicable under other areas of law have expired or where the other relevant law does not permit claims for constructive fraudulent conveyance.

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

Commented [H(35)]: Specifically other US or foreign law could be invoked to obtain equivalent relief.

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?

A final order is an order which disposes of all issues while an interlocutory order resolve only some issues/claims. A final order may be appealed against as of right, while an appeal against an interlocutory order requires granting of leave by the appellate court.

Due to the nature of a bankruptcy proceeding, where the determination of an issue may have a broad applicability which affects the rights beyond just the direct parties of the proceeding (eg. may have effect on other future debtors' rights), the US Supreme Court held that a bankruptcy order resolving a discrete dispute is regarded as a final order for the purposes of filing an appeal.

In general, an appeal from the bankruptcy court is heard by the district court for the district in which they sit. The first appeal from a bankruptcy case will be heard by a randomly assigned judge, who will then generally hear all future appeals those bankruptcy proceedings. However, the First, Sixth, Eighth, Ninth and Tenth Circuits have elected to form Bankruptcy Appellate Panels (BAP) under 28 USC 158(b). Accordingly, in these said Circuits, an appeal from the bankruptcy court will be heard by the BAP.

In rare circumstances, an appeal from the bankruptcy court could go directly to the court of appeal (subject to the court of appeal decision to accept such a case), where the bankruptcy court or district court certifies that (i) the appeal raises the question of law which lack controlling decision of the circuit of US Supreme Court; or (ii) immediate appeal may materially advance the progress of the case.

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 of Delaware corporations owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in making educated decisions.

Note however, directors are protected from liability arising from or related to errors of judgement by the business judgment rule. Under the business judgment rule, there is a presumption that the board of directors have acted in good faith on the basis of reasonable information available. This presumption could be rebutted if it could be showed that a majority of the board were in fact not reasonably informed, did not honestly believe that their decision was in the corporation's best interest, or were not acting in good faith. If the presumption is not rebutted, directors will not be liable in the absence of a showing of gross negligence. The business judgment rule is inapplicable in scenarios where transactions had been approved by a board majority that is not disinterested and independent or a controlling shareholder is no both sides of the transactions. In such scenarios, the transaction will be void unless the entire fairness standard is satisfied.

Directors' duties are owed to the corporation and its shareholders, not to creditors. Even when a corporation is potentially insolvent or actually insolvent, where shareholders do not gain anything in bankruptcy, such directors' fiduciary duties are not owed to creditors, instead duties are to shareholders.

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

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

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

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

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

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

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

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

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

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

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

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

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

Commented [H(49)]: Total marks 11.5/15

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.

As a starting point, an English scheme of arrangement (SOA) could be granted recognition under US chapter 15. There is no requirement of reciprocity under chapter 15. In other words, US courts will grant recognition to foreign proceedings from countries that would not recognize US proceedings. On the facts, UK had also adopted the UNCITRAL Model Law on Cross-Border Insolvency and incorporated the same under Cross Border Insolvency Regulations 2006, thus UK courts would recognise US proceedings.

In order to apply for recognition of the English SOA, the foreign representative of Gambling Corp under the English SOA would have to file a petition in the US court. The foreign representative needs to satisfy the US court of the following in order to obtain a recognition order, requirements of which are regarded as minimal:

- (a) That a foreign court proceeding i.e. UK courts, in relation to the debtor is pending. In this regard, a "foreign proceeding" is defined under 101(23) Bankruptcy Code as "a collective judicial or administrative proceeding in a foreign country...under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation". The UK SOA would come within the said US definition of "foreign proceeding".
- (b) That the foreign representative is empowered to act by the proceeding.

It could be argued that the centre of main interests (COMI) of Gambling Corp is Greece since Greece is its country of incorporation and its principal place of business. This is in line with the general principle that a debtor's COMI is presumed to be its place of incorporation. If Greece is indeed regarded as the COMI of Gambling Corp, then the UK SOA would be deemed a foreign non-main proceeding.

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

However, Gambling Corp's foreign representative would want to argue that the UK SOA is a foreign main proceeding on the basis that the subject matter in UK SOA is a bond governed by the English law, thus the debtor's creditor that will be affected by the relief requested by the foreign representative will be located in the UK. Further, the UK will also be the relevant jurisdiction to determine any dispute arising from and related to the said bond. The fact that Gambling Corp also runs a casino i.e. a premise carrying out a non-transitory economic activity in the UK will further substantiate the proposition that UK SOA is a foreign main proceeding.

Commented [H(53)]: Incorrect, the choice of English law does not suggest that the creditors are located in England

Commented [H(54)]: This is an establishment, therefore qualifying for recognition as a 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?

Should Oil Corp proceed with filing a chapter 11 petition, an automatic moratorium in the form of worldwide automatic stay takes effect immediately upon filing of the petition, protecting property of the estate of Oil Corp from creditor enforcement actions in relation to pre-petition claims. During such breathing room, Oil Corp would be able to formulate a restructuring plan, negotiate with creditors and realise the value of its assets to enable repayment of its creditors following the priorities under the Bankruptcy Code.

We will assess below whether the automatic stay extend to the 4 situations affecting Oil Corp:

- (a) The suit filed by Ship Co which is still ongoing – This civil suit will be automatically stayed as it is litigation of a claim filed pre-petition, pursuant to 11 USC 362(a)(1).
- (b) US Department of Justice investigating the claim of illegal purchase of oils from countries subject to US sanctions – Since this is regarded as a regulatory investigation, the protection of the automatic of stay does not cover such investigation, pursuant to 11 USC 362(b).
- (c) Payment of loan to USA Bank – Once a petition is filed, the USA Bank will not be able to initiate any foreclosure proceedings against Oil Corp. It is then up to Oil Corp to come up with a reorganisation plan which will include this secured creditor's debt.
- (d) Payment of office rent to landlord – As a starting point, the automatic stay will not extend to protect Oil Corp from being evicted by the landlord (on the assumption that it is within the landlord's right to do so under the tenancy agreement). However, Oil Corp may try to argue that the stay should extend to prevent the landlord from evicting Oil Corp from its Houston office space as it is Oil Corp's principal office of business. Oil Corp may argue that allowing the landlord to evict Oil Corp would cause irreparable harm to the estate as Oil Corp may not be able to continue to operate its business in the ordinary course while carrying out the reorganisation plan which is necessary to ensure the success of a reorganisation plan.

The affected creditors (being Ship Co, USA Bank and the office landlord) may try to apply to court to lift the automatic stay. For example, USA Bank being a secured creditor, could argue that there is lack of adequate protection of its interest in the property of the estate of Oil Corp whereby the value of the Philippine Oil Refinery may decrease if the foreclosure proceeding is not initiate soonest.

Commented [H(55)]: Total marks 5/5

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

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

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

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

Commented [H(60)]: Correct, 1 mark, though eviction would be permitted if the lease term expired before the petition was filed

Question 4.3 [6 marks]

Oil Corp has filed for bankruptcy and is planning to sell its plastic manufacturing business through a 363 sale. The plastic manufacturing business operates under the trademark "Interconnect", which is licensed from Plastic Corp. Oil Corp has invented several patented processes for plastic manufacturing, which it licenses to Plastic Corp. The main manufacturing 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?

- (i) Under section 365 of the Bankruptcy Code, the trustee of Oil Corp may assume and assign the trademark license whereby Oil Corp's patent license under the contract between Oil Corp and Plastic Corp to be transferred to a third party. Such transferee must give the counterparty adequate assurances of future performance, under section 365(f). In order to do so, Oil Corp would need consent from Plastic Corp as the patent license involved substantive non-bankruptcy law (i.e. intellectual property licensing law). This is because the prohibition is on assumption or assignment, thus some courts have concluded that a debtor may not assume an executory contract that it would not be permitted to assign (known as the hypothetical test).
- (ii) Oil Corp will not be able to reject the patent licenses given to Plastic Corp so that the purchaser has exclusive right to use the trademark license because the licensees of patents owned by Oil Corp, Plastic Corp is protected whereby their licenses may not be terminated in connection with the sale of the patent. In order to do, Oil Corp would need the consent of Plastic Corp.
- (iii) Under section 363(f), Oil Corp (rather, its trustee) would be able to sell the manufacturing facility free and clear any interest, only if the applicable non-bankruptcy law in Dallas permits sale of the manufacturing facility; or the USA Bank who holds a lien over the facility must also provide its consent before the facility could be sold as required under section 363(f)(2); or the price at which the manufacturing facility is to be sold is greater than the aggregate value of all liens on the property (if there is any other lien), as provided under section 363(f)(3); or such lien interests is in bona fide dispute (section 363(f)(4)). However looking at the facts of the matter, assuming the lien is not being disputed, section 363(f)(4) would not be applicable.

Commented [H(61)]: Total marks 4.5/6

Commented [H(62)]: Correct, 1 mark

Commented [H(63)]: Partially correct, 1/2 mark, consent is required because trademark law permits a licensor to refuse to accept performance from an assignee

Commented [H(64)]: Correct, 1 mark, specifically under section 365(n)

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

Commented [H(66)]: Incorrect, the debtor in possession can exercise the powers of a trustee

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

*** End of Assessment ***