



**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 36/50

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

Commented [H(2): Total marks 7/10

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**

Commented [H(7): Correct, 1 mark

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**

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

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

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

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

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

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

**Question 1.8**

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

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

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

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

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

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

**Question 1.9**

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

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

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

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

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

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

**Commented [H(9)]:** Incorrect, the correct response is (a)

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

**Commented [H(11)]:** Incorrect, the correct response is (e)

**Question 1.10**

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

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

Commented [H(12)]: Correct, 1 mark

**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?

[Type your answer here

- (1) on the commencement: voluntary petition ("VP") the debtor may file the petition, whereas in the involuntary petition ("IP"), creditors usually file the petition;
- (2) coverage under the Bankruptcy Code, creditors may commence IP against eligible creditors under chapter 7 or chapter 11 and it cannot be commenced under any other chapters or against a farmer, family farmer or non-for profit corporation;
- (3) allegation of solvency: VP does not require allegation of solvency, while in IP the form requires the petitioning creditors to allege either that the debtor is generally not paying its debts as they become due, unless they are the subject of a bona fide disputes as to liability or amount of that "within 120 days before the filing of the petition, a custodian, other than a trustee, receiver, or an agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession;
- (4) foreign representative: a foreign representative of an estate in a foreign proceeding may commence an IP pursuant to chapter 7 or 11 against the debtor even if the foreign proceeding has not been the subject of a petition for recognition under chapter 15;
- (5) debtor in possession: in VP, the debtor is generally in possession, where in IP, the debtor may not be in possession if the purpose of the IP is to divest management of control over the business (the IP will be accompanied by a motion for the appointment of an interim trustee on an expedited basis]

Commented [H(15)]: Correct, 1 mark

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?

[Type your answer here

- (1) contempt of court; and
- (2) the relevant act could be declared void or voidable]

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?

[Type your answer here

Pursuant to section 101, Chapter 1, Title 11 Bankruptcy Code, claim means (a) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, or (b) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Pursuant to section 1124, Chapter 11, Title 11 Bankruptcy Code, impairment of claims or interests, a class of claims or interest is impaired under a plan unless, with respect to each claim or interest of such class, the plan:

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default –

(a) cures any such default that occurred before or after the commencement of the case or those which does not require to be cured;

(b) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

(c) reinstates the maturity of such claim or interest as such maturity existed before such default;

(d) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a non-residential real property lease, compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

(e) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest .

A holder of an impaired claim may not be entitled to vote or vote is disregarded when:

(1) when the plan reverses contractual acceleration by curing monetary default and compensating the holder for any damages

(2) the holder is an insider.

The unimpaired class or those mentioned above is deemed to accept 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?

[Type your answer here

Preferences]

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

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

Commented [H(22)]: An impaired claim that receives nothing is not entitled to vote and is deemed to reject the plan.

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?

[Type your answer here

Constructive fraudulent conveyances]

Commented [H(25)]: Incorrect, the correct response is preference

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

[Type your answer here

Actual fraudulent conveyances]

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

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

Commented [H(27)]: Total marks 11/15

#### Question 3.1 (3 marks)

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

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

[Type your answer here

Prior to the *Stern v Marshall* case, there were distinctions between "core" and non-core" matters and bankruptcy judges were allowed to hear and determine only core proceedings. On matters of "non-core" proceedings, the bankruptcy court may hear the "non-core" proceedings if they are sufficiently related to a bankruptcy proceedings. If a matter is a non-core and not within "related to" jurisdiction, the proper forum for the matter will depend on whether there is another basis for federal court jurisdiction; if not, the matter will have to be resolved in state court.

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

Pursuant to *Stern v Marshall* case 564 US 462 (2011), the US Supreme Court ruled that even in core proceedings, a bankruptcy court cannot issue final order that invade Article III jurisdiction. Under Article of the US Constitution, it empowers the courts (Supreme Court as well lower courts created by Congress) to handle cases or controversies under federal law, as well as other enumerated cases. ]

Commented [H(30)]: Correct, 1 mark, bankruptcy courts may now enter final orders on a challenge to a petition or on core matters with party consent

#### Question 3.2 (3 marks)

Commented [H(31)]: 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?

[Type your answer here

Section 1519, Chapter 15 of the Bankruptcy Code provides that:

(a) from the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(1) staying execution against the debtor's estate;

(2) entrusting the administration or realization of all or part of the debtor's assets located in the US to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstance, are perishable, susceptible to devaluation or otherwise in jeopardy; and



(3) any relief referred to in paragraph (3), (4) or 7 of section 1521(a).

...(d) the court may not enjoin a police or regulatory act of a government unit, including a criminal action or proceeding, under the said section.

Section 1521(7) , Chapter 15 of the Bankruptcy Code provides that upon recognition of a foreign proceedings, whether main or nonmain, where necessary to effectuate the purpose of Chapter 15 and to protect the assets of the debtor or the interest of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 547, 550, and 724(a).

Article 23 of the Model Law granted a foreign representative upon recognition of a foreign proceeding with respect to “actions to avoid acts detrimental to creditors” or the avoidance actions.

While Chapter 15 is closely following the provisions of the Model Law, it excludes from the rights granted to foreign representative the use of avoidance powers provided by the Bankruptcy Code. It has been interpreted that the restriction applies onto to the use of the Bankruptcy Code’s powers of avoidance of preferences and fraudulent conveyances, and not to bar a foreign representative from seeking to avoid pre-petition transactions under other applicable US or foreign law.

Commented [H(32)]: Correct, 1 mark

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

Pursuant to Section 1523(a) of the Bankruptcy Code, a foreign representative can invoke avoidance powers in a plenary proceedings such as Chapter 7 or 11.

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

The foreign representative may file first a recognition of the foreign proceeding under Chapter 15, and thereafter file for a plenary proceeding pursuant to either Chapter 7 or 11, which will give the foreign representative access to avoidance powers under the Bankruptcy Code.

In the Matter of: Condor Insurance Limited (in official liquidation), March 17, 2010, the Court of Appeal in reversing the judgment of the district court, ruled that while Section 1521(a) denied the liquidators the Bankruptcy Code’s avoidance powers absent a Chapter 7 or 11 filing, that did not mean Congress intended to deny them applicable foreign avoidance powers. Section 1521 (a)(7) did not exclude avoidance actions under foreign law. Chapter 15 did not constrain the federal court’s exercise of the powers of foreign law it was to apply. While concern over choice of law difficulties was not without some force, it did not counsel finding that foreign law was excluded. The liquidators were not seeking to mix and match foreign and US law – they only sought to apply foreign law. Congress did not intend to restrict the powers of the US court to apply the law of the country where the main proceeding was pending. Applying foreign law under Chapter 15 did not implicate the concerns driving reliance by US courts upon the law of foreign nations in defining domestic norms. It was a congressional implementation of efforts to achieve the cooperative relations with other countries essential to settled expectations. The court further added that Section 1521(a)(8) gave the bankruptcy court authority to permit relief under foreign avoidance law.]

### Question 3.3 (4 marks)

Commented [H(35)]: 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?

[Type your answer here

Interlocutory orders:

(a) resolve only some issues or claims; and

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

(b) cannot be appealed as a matter of right, except those orders extending the period of exclusivity to propose a plan, which can be appealed as of right.

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

Final orders:

- (a) those that dispose of all issues, leaving nothing further to be decided; and  
(b) may be appealed as of right.

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

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

Generally, appeals from bankruptcy court decisions are heard by the district court for the district in which they sit. The first appeal from a bankruptcy case will go to a randomly assigned judge, who will then generally hear all future appeals from those bankruptcy proceedings. In certain circuits, bankruptcy appeals are heard by Bankruptcy Appellate Panel, which is convened from the judges of the bankruptcy courts within the circuit. If there is further appeal required, appeal to the circuit court of appeal, and in rare circumstances directly to the court of appeals where the bankruptcy court or district court certifies that either that (i) the appeal raises a question of law as to which there is no controlling decision of the circuit or the US Supreme Court, or requires resolving conflicting controlling decisions, or (ii) immediate appeal may materially advance the progress of the case, and in which case the court of appeal has the discretion whether to accept a case so certified. ]

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

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

#### Question 3.4 (5 marks)

Commented [H(42)]: Total marks 2/5

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?

[Type your answer here

In the case of *Trenwick Am Litig Trust v Ernst & Young, LLP*, 906 A.2d 168 (Del Ch 2006), it was ruled that it has been a settled rule that in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.

Commented [H(43)]: Specifically, the directors owe duties of loyalty and care

Commented [H(44)]: Correct, 1 mark, also duties are owed to the corporation itself

The court also ruled that the board of directors' discretion in pursuing failed efforts to maximize corporate value was protected by the business judgment rule.

The Delaware Supreme Court has settled that directors do not, generally, owe duties to creditors when a company is operating "in the zone of insolvency" or indeed is actually insolvent, thus there is no equivalent under the US law of the concept of wrongful trading or deepening insolvency. ]

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

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

Commented [H(46)]: Total marks 11/15

##### Question 4.1 [4 marks]

Commented [H(47)]: 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.

[Type your answer here

Pursuant to Section 1515 of the Bankruptcy Code, a foreign representative may apply to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition. The petition for recognition shall be accompanied by (1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative, (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative, or (3) in the absence of evidence referred to in items (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative. In addition, the petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

Section 1502 of the Bankruptcy Code defines "foreign main proceedings" as foreign proceeding pending in the country where the debtor has the centre of its main interests; which "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment. A foreign proceeding is defined as a collective judicial or administrative proceeding in a foreign country.

On centre of main interest ("COMI"), is presumed to be its place of incorporation. The presumption is rebuttable and the following factors can be considered to determine COMI:

- (a) location of headquarters,
- (b) location of management,
- (c) location of primary assets,
- (d) location of a majority of debtor's creditors or a majority of the creditors that will be affected by the relief requested by the foreign representative, and
- (e) jurisdiction whose law will apply to most disputes.

Premises considered, I submit that the COMI of Gambling Corp is Greece because it is the place of incorporation and the principal place of business, and therefore the scheme of arrangement in London when petition to be recognized in the US will be considered as foreign nonmain proceeding.

On the other hand, it will be a foreign main proceeding by arguing that the COMI is London on the basis of the above-mentioned factors.]

#### 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?

[Type your answer here

- (a) on the breach of contract lawsuit in Texas, will be stayed on the basis of pre-petition claims;
- (b) US DOJ's investigation, will not be stayed because it is a statutory exception being a regulatory investigation;
- (c) on the USA Bank's threats to foreclose on an oil refinery located in the Philippines, will be stayed being an act to obtain possession or control of the property of the estate; and

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

Commented [H(49)]: In this case, the London casino would be the requisite establishment

Commented [H(50)]: Correct, 1 mark

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

Commented [H(52)]: Total marks 4/5

Commented [H(53)]: Correct, 1 mark, the stay that comes into effect on filing would stay the litigation

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

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

(d) threat of the landlord to evict from the office space, will generally be stayed unless the lease has expired, which is an exception to stay for non-residential property when the lease has expired]

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

**Question 4.3 [6 marks]**

Commented [H(57)]: 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?

[Type your answer here

The general rule is that a debtor in possession is free to use, sell or lease estate property in the ordinary course of business. Court decisions have developed to define a two-prong test on what "the ordinary course of business" mean. The tests are: (a) vertical dimension or the expectation of a hypothetical creditor of the debtor, and (b) horizontal dimension or how the business is conducted by other businesses similar to the debtor.

In a 363 sale, an asset may be sold free and clear with creditor consent, where the creditor interest is disputed or where the value of the property exceeds the value of the interest. In such circumstances, a creditor's interest will attach to the proceeds of the sale and it will receive priority in the distribution of those proceeds.

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

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

(1) for the trademark license, it requires the consent of the licensor (Plastic Corp) and the transferee will have to give the counterparty adequate assurances of future performance. Plastic Corp cannot, however, be compelled to accept performance from a transferee;

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

(2) for the patent license, Plastic Corp's consent is required pursuant to section 365(n) of the Bankruptcy Code; and

Commented [H(61)]: Correct, 1 mark, this is a function of substantive trademark law

(3) for the manufacturing facility, the consent of USA Bank is required pursuant to Section 363 of the Bankruptcy Code. The USA Bank may, however, "credit bid" by offsetting a portion of the purchase price of such property against the amount of its claim secured by the property.

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

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

Commented [H(64)]: In some circumstances, such as when the value exceeds the amount of the lien, sale without consent is possible, and the lien attaches to the proceeds

**\* End of Assessment \***