



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**.

Commented [DB1]: It would be nice if you followed the instructions – I had to do this for you.

ANSWER ALL THE QUESTIONS

Commented [H(2)]: Total marks 33.5/50

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

Commented [H(3)]: Total marks 9/10

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(4)]: 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(5)]: 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(6)]: 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.

Commented [H(7)]: 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.

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Question 1.6

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

(a) The exclusivity period is 1 year.

(b) The exclusivity period cannot be extended.

(c) The exclusivity period cannot be shortened.

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

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

Question 1.7

Commented [H(10)]: 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(11)]: 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(12)]: 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.

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QUESTION 2 (direct questions) [10 marks]

Commented [H(14)]: Total marks 7.5/10

Question 2.1 (2 marks)

Commented [H(15)]: Total marks 2/2

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

A Voluntary petition for Bankruptcy can be filed by a Debtor himself under any applicable chapter. In the petition the debtor must disclose all the assets and liabilities, but it need not be or claim to be an insolvent

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

Where as the Involuntary petition for Bankruptcy is filed by the Creditors under Chapter 7 and Chapter 11 only and the involuntary petition cannot be filed against a farmer, family farmer or a Non-Profit Organization. The number of creditors needed to file the petition is atleast 3 in case the number of creditors of the entity against which the petition is being filed is more than 12, else only one creditor is sufficient to file the petition. Needless to say that while filing the Involuntary Petition the creditor will have to demonstrate that the debtor is insolvent and has been unable to make payments.

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Question 2.2 (2 marks)

Commented [H(18)]: Total marks 2/2

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

An Act done in Violation of automatic stay tantamount to (i) Contempt of Court and (ii) is void/voidable.

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

Commented [H(20)]: Correct, 1 mark

Firstly after the violation the violating party may try to seek lifting of the stay prospectively or retrospectively, and in case the stay is not lifted then it may result in imposition of contempt sanctions against the stay violators, which may include payment of the debtors attorneys fees and taking affirmative actions to undo the effect of the violation.

Question 2.3 (3 marks)

Commented [H(21)]: Total marks 1/3

In what circumstances is a claim considered "impaired"? When is a holder of an impaired claim not entitled to vote on a proposed plan of reorganization and what happens instead?

A claim is considered Impaired when the resolution plan for the debtor (a) Alters the legal, contractual and equity rights of the creditor (b) when the payment made to the creditor is below the accepted claim amount OR even the 100% claim so paid is paid in deferment

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

Holder of an Impaired claim is not entitled to vote when the creditor is an INSIDER. Whereas a vote in favour of the plan be even one impaired (non-insider) class is sufficient to invoke the Cram Down and approve the plan.

Commented [H(23)]: Incorrect, the correct response is that a holder of an impaired claim that will receive nothing under the plan does not vote and is deemed to reject the plan

Question 2.4 (3 marks)

Commented [H(24)]: Total marks 2.5/3

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?

Transfers made on account of antecedent debt can be deemed as PREFERENTIAL TRANSACTIONS.

Commented [H(25)]: Correct, 1 mark

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

A debtor is presumed to be Insolvent on or during 90 days prior to the petition date in case of PREFERENTIAL TRANSACTIONS. Whereas a debtor is presumed to be insolvent or became insolvent due to CONSTRUCTIVE FRADULENT TRANSACTIONS

Commented [H(26)]: Partially correct, 1/2 mark, the correct response is preference

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

ACTUAL FRADULENT TRANSACTIONS proves that the debtor entered into these transactions to frustrate the creditors recoveries.

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

Commented [H(28)]: Total marks 13/15

Question 3.1 (3 marks)

Commented [H(29)]: Total marks 2/3

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

Before the Stern V Marshall case it was well settled that the Bankruptcy courts can issue final orders in issues of core proceedings, however in the Stern V Marshall case, the US Supreme Court upheld that "even in the core proceedings the bankruptcy court cannot issue final orders that invade Article III jurisdictions".

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

Commented [H(31)]: Correct, 1 mark, now a bankruptcy court can enter a final order on a challenge to a petition or on a core proceeding with the consent of the parties

In this case debtor has rebutted a bankruptcy claim, and had counterclaimed against the petitioner. Now, counterclaims is a subject of separate state court proceedings and a issue of core proceedings as well. So there were 2 parallel proceedings (one in Bankruptcy Court and other in State Court) running at same time, in such parallel proceedings US law says that the first judgement shall be binding on the parties. In this case the first judgement was given by the Bankruptcy Court (award of USD 400 Million) in favour of the debtor (this judgement was appealed in the district courts), whereas the State Court proceedings continued. Thereafter

the State Court Jury gave a verdict in favour of the Claimant (before the district court could dispose off the appeal).

Herein although the counterclaim is a core proceedings of the Bankruptcy Court and the Bankruptcy court judgement was the first , still the verdict of the state jury prevailed and it was held that the judgement of the bankruptcy court over a state law claim was unconstitutional.

Thereby the Stern V Marshall judgement complicated the domain of bankruptcy jurisdiction.

Question 3.2 (3 marks)

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

The foreign representative cannot invoke the "Avoidance Powers" of the Bankruptcy Code under a Chapter 15 proceeding. Therefore the Avoidance of Preferential and Fraudulent Conveyances cannot be invoked by the foreign representative under the chapter 15 proceedings.

The two ways in which the Avoidance transactions can be invoked are :-

- a) A Plenary proceedings under Bankruptcy code be initiated by the foreign representative after the foreign proceedings have been recognised under chapter 15 of the bankruptcy code
- b) The powers of avoidance can be invoked by the foreign representative in case proceedings under chapter 7 or Chapter 11 have been initiated by the creditors against the debtor even before the foreign proceeding was recognised by the US courts.

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?

In the US Non-Bankruptcy procedure , the Final Orders are the one which dispose of all the issues, no issue is left undecided in the final order, whereas Interlocutory order decides some issues/claims. Therefore the Final Orders can be appealed against as matter of right whereas the appeal of the Interlocutory order is possible only after the permission of the appellate authorities.

The appeals from the bankruptcy court orders are heard by the District Court of the district in which the bankruptcy court sits. The bankruptcy appeals are heard by the Bankruptcy Appellate Panel (BAP). The BAP consists of judges from the bankruptcy court of the particular circuit.

The orders of the District Court or BAP are thereafter appealed in Circuit Court of Appeals

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?

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

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

Commented [H(34)]: Correct, 1 mark, alternatively analogous claims under US or foreign law may be brought

Commented [H(35)]: Total marks 4/4

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

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 mark

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

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

Directors of Delaware Corporations owe a fiduciary duty of **loyalty** to the corporation and they must keep in mind the best interest of the corporation and they must take an **educated decision** for the best interest of the corporation. Therefore the directors are protected from liability of error of judgement by the Business Judgement Rule. The board of directors are always presumed to have acted in good faith on basis of reasonable information.

Commented [H(43)]: Correct, 1 mark

Commented [H(44)]: Correct, 1 mark, also called the duty of care

The Directors owe their duties to the **Corporation** and **Shareholders** and not to the **creditors** even in the circumstances where the corporation is insolvent/about to be declared insolvent.

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

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

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

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Question 4.1 [4 marks]

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

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

Gambling Corp is well within its right to initiate English Scheme of Arrangement. Since US Chapter 15 proceedings are based upon UNICTRAL Model Law, therefore the English Scheme of Arrangement shall be accepted as foreign proceedings by the US courts under Chapter 15.

Now the issue whether it will be recognized as Foreign Main or Foreign Non-Main proceedings will depend on the COMI (Centre of Main Interest) of the Debtor. However, the US courts do not have a stringent definition of COMI rather they consider the litmus test of DOMICILE as the main factor in deciding the principal place of business of a debtor.

To ascertain the COMI of the debtor, the factors which are considered by the US courts are (a) Location of Headquarters (b) Location of Management (c) Location of Primary Assets (d) Location of Creditors (e) Jurisdiction whose law will apply to most dispute.

Therefore in the present case, Gambling Corporation although has headquarters and principal place of business in Greece, it has important assets in various cities worldwide including in London. The bonds issued by Gambling Corp are also governed by the English laws. Therefore the role of England is substantial in the business and going concern status of the debtor, **thereby England can be considered as a COMI of the Debtor by the US courts.**

Commented [H(50)]: Unlikely, there is not enough evidence to rebut the presumption in favor of Greece. In that case, recognition as foreign main proceeding would be inappropriate, but recognition as foreign non-main would be proper because the London casino qualifies as the necessary establishment in the jurisdiction

Therefore the US courts will conclude that the English Scheme of Arrangement can be recognised as Foreign MAIN Proceedings and shall be entitled to the relevant reliefs.

Question 4.2 [5 marks]

Commented [H(51)]: Total marks 1/5

Oil Corporation is incorporated in Delaware and has its principal place of business in Texas. Oil Corp is facing a number of challenges to its business. First, ShipCo, one of its key customers, has filed a breach of contract lawsuit in Texas state court alleging that Oil Corp sold it contaminated oil that caused USD 1 billion in damage to ShipCo's container ships. Second, the US Department of Justice is investigating whether Oil Corp illegally purchased oil from countries subject to US sanctions. Third, Oil Corp. has missed a payment on its secured

loan from USA Bank, and USA Bank is threatening to foreclose on an Oil Corp refinery located in the Philippines. Fourth, because of all these distractions, Oil Corp has forgotten to pay rent on its Houston, Texas office space and its landlord is threatening to evict it. What would be the effect of Oil Corp filing a chapter 11 petition on each of these four situations?

On Oil Corp filing a Chapter 11 petition, the effect on various situations will be as under:-

- 1) **Shipco lawsuit for breach of contract-** The Oil Corp will reject the contract post initiation of Chapter-11 proceedings, thereby the Shipco becomes an unsecured creditor of Oilcorp to the extent of USD 1Billion (damages recoverable by Shipco from Oilcorp due to breach of the contract by Oilcorp). Shipco is deemed to be a pre-petition creditor
- 2) **Investigation of US Deptt of Justice-** Investigation by US Deptt of Justice is a criminal matter and not a financial/contractual matter and therefore the investigation shall be unperturbed/unhindered by the admission of chapter-11 proceedings
- 3) **USA Bank Foreclosure of Oil Refinery-** The USA Bank becomes a secured creditor with a secured charge on the Oil Refinery. Once the Chapter-11 proceedings are initiated, Oilcorp may either contemplate selling the Oil Refinery under 363 sale, without the permission of the creditor. Similarly the Creditor, ie USA bank may also "Credit Bid" the Oil Refinery when the same is being sold, whereby it offsets the secured loan from the price offered by it for purchase of the refinery
- 4) **Rent of the Houston, Texas office-** Oilcorp must decide within 120 days of the initiation of Chapter-11 proceedings whether it will retain the Houston office or not. In case the Houston Office is vacated by Oilcorp, then the rental dues till the date of initiation of Chapter-11 proceedings become the pre-petition unsecured credit against the Oilcorp. In case Oilcorp continues to be in possession of the Houston office (with or without informing the landlord) then the rental agreement is presumed to be assumed and the rental dues become the post-petition administrative expenses of the estate of resolution under chapter-11

Commented [H(52): Incorrect, the filing of the petition will bring the automatic stay into effect and will stay the lawsuit filed by ShipCo

Commented [H(53): Correct, 1 mark

Commented [H(54): The foreclosure would be barred by the worldwide automatic stay

Commented [H(55): Eviction proceedings would be barred by the automatic

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?

Various goals of Oilcorp to get the highest return for its plastic business, shall be achieved as under:-

- (i) **Assume and assign the Trademark License-** The Trademark License is an intellectual property right and it cannot be assumed and assigned without the concurrence of the Counterparty, ie Plastic Corp. The Intellectual Property Licensing law provides that the counterparty cannot be compelled to accept performance from a

Commented [H(56): Total marks 3/6

Commented [H(57): Correct, 1 mark

transferee. Therefore the assume and assign of the trademark "Interconnect" by Oilcorp to prospective buyer can only be done with the concurrence of Plastic corp

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

- (ii) **Reject the Patent Licenses and exclusive right to use-** Oilcorp is free to reject any contract/ license after the initiation of Chapter-11 proceedings. To reject the patent license giving rights to Plastic Corp to use the same, Oilcorp does not need any permission/ concurrence from Plastic Corp. On rejection of the license, the damages suffered by Plastic Corp becomes the pre-petition unsecured creditor of Oilcorp

Commented [H(59)]: Section 365(n) permits Plastic Corp to opt to continue practicing the patent, so the transferee cannot have exclusivity without the consent of Plastic Corp

- (iii) **Sell the Manufacturing Facility Free of USA Bank Lien-** Oilcorp can sell the manufacturing facility free of USA Bank lien as 363 sale under the Chapter-11 Bankruptcy. However the sale will materialise if the USA Bank decides NOT to give/place a "Credit Bid" on the Manufacturing facility. USA Bank is within its right to place a credit bid wherein it will first offset its secured debt of USD 500 Million against the Bid Price offered by the Bank , and thereafter pay the balance to the Oilcorp. Therefore the sale of manufacturing plant, the USA bank must desist from filing a Credit Bid.

Commented [H(60)]: Correct, 1 mark, the lien will then attach to the proceeds of the sale

*** End of Assessment ***