



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

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

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

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

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

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

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

**ANSWER ALL THE QUESTIONS**

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

Commented [H(2): Total marks 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**

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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**

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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**

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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.

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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**

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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**

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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**

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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]**

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**Question 2.1 (2 marks)**

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

A voluntary petition for bankruptcy is commenced by the debtor (e.g. Chapter 11 proceedings are usually commenced voluntarily by the debtor). An involuntary petition is commenced by a creditor.

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

**Question 2.2 (2 marks)**

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

Two potential consequences of a wilful violation of the automatic stay in bankruptcy proceedings are:

1. liability for losses flowing from the violation, for example, legal fees incurred by a party to proceedings wrongfully brought in violation of the automatic stay, or compensation for loss and damage suffered by a party who was unable to exercise its rights in violation of an automatic stay; and
2. court imposed sanctions for contempt of court, which may include a fine.

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**Question 2.3 (3 marks)**

Commented [H(19)]: 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?

Pursuant to USC 11, §1124(1), a class of claims is impaired if the plan of reorganization alters the legal, equitable or contractual rights of the holders (even if the alteration improves those rights). A class may be deemed unimpaired, however, where the plan cures a default and compensates the holder for any damage suffered as a result of reasonable reliance on the underlying contractual provision or law (§1124(2)).

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Commented [H(21)]: Not sure where you are getting this

A holder of an impaired claim is not entitled to vote on a proposed plan when the class is crammed down under §1129(b). The procedure is intended to combat the problem of impaired classes of creditors holding out, and thereby effectively vetoing the plan. Pursuant to §1129(b) the court may approve the plan using the cram down procedure (i.e. even though the voting threshold has not been reached for every impaired class) as long as:

1. the other requirements of §1129(a) are met (i.e. all requirements except §1129(a)(8));
2. at least one impaired class must have voted to accept the plan; and
3. the plan does not "discriminate unfairly" and is "fair and equitable" with respect to the dissenting class(es). Factors relevant to the requirement to be fair and equitable are particularized at §1129(b)(2).

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#### Question 2.4 (3 marks)

Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:

(1) Which cause of action applies only to transfers made on account of antecedent debt?

A preference (USC 11, §547).

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

A constructive fraudulent conveyance (USC 11, §548(b)).

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

An actual fraudulent conveyance (USC 11, §548(a)).

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

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##### Question 3.1 (3 marks)

**Commented [H(28):** Total marks 3/3

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

The Supreme Court in *Stern v Marshall*, 131 S. Ct. 2594 (2011) considered whether the bankruptcy court had jurisdiction under 28 USC §157(b)(1) and (2)(c) to enter judgment on a common law counterclaim for tortious interference. The Court concluded that the bankruptcy court had no such jurisdiction. The essential reasoning of the Supreme Court was that, as the bankruptcy court is established by ordinary statute and not under Article III of the US Constitution, and therefore the judges in the bankruptcy court have not been appointed pursuant to and in accordance with the constitutional protections and assurances of independence attendant on Article III, the constitutional principle of the separation of powers requires that the bankruptcy court's jurisdiction be limited to a delegated authority to enter a final order on a motion challenging the validity of a petition.

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**Commented [H(30):** Correct, 1/2 mark

The judgment represents a further curtailment of the bankruptcy court's jurisdiction, which had already been narrowed by 1984 amendments to the Bankruptcy Code to cover only "core matters" (where core matters included counterclaims by the estate against creditors).

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Going forwards, a bankruptcy court may still make substantive findings about a counterclaim, but those findings will not bind the parties unless (1) they so agree, or (2) the bankruptcy court issues a report and recommendation for review by the relevant district court and the district court enters judgment to that effect (Fed R Bankr P 8018.1).

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### Question 3.2 (3 marks)

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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?

Pursuant to 11 USC, §1521(a)(7) avoidance actions are not available to a foreign representative in Chapter 15 proceedings (i.e. relief under 11 USC §§522, 544, 545, 547, 548, 550 and 724(a)).

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The foreign representative may, however, obtain equivalent relief under state law (e.g. by a fraud claim) or foreign law (e.g. pursuant to a contractual governing law clause). The foreign representative may also obtain equivalent relief by commencing plenary proceedings under Chapter 7 or 11 following recognition of the foreign proceedings (11 USC, §1523(a)).

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

### Question 3.3 (4 marks)

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

Final orders are orders which dispose of all issues, leaving nothing further to be decided. Final orders may be appealed as of right.

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

Interlocutory orders, by contrast, resolve only some issues or claims in the proceedings. Interlocutory orders may be appealed with leave of the appellate court, with the exception of orders extending the period of exclusivity to propose a plan, which are appealable as of right (28 USC, §158(a)(2)). The Supreme Court held in *Bullard v Blue Hills Bank* 135 S Ct 1686 (2015) that a bankruptcy order resolving a discrete dispute is a final order for appeals purposes.

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Commented [H(41)]: Correct, 1/2 mark

Generally, appeals from bankruptcy court orders, whether final or interlocutory orders, are heard by the relevant district court. The First, Sixth, Eighth, Ninth and Tenth Circuits have elected to form Bankruptcy Appellate Panels (BAP), however, pursuant to 28 USC §158(b). As a result, direct appeals from bankruptcy court orders in those circuits will be heard by the relevant BAP and not by the district court.

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

### Question 3.4 (5 marks)

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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?

In Delaware, directors owe fiduciary duties of care and loyalty (from the Latin *fiduciarus*, meaning in trust or entrusted). The essence of a fiduciary obligation is that the director gives his full loyalty to the corporation and acts in the corporation's best interests (above his own

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



interests and those of any other person). The overarching duties of care and loyalty give rise to a range of subsidiary duties, including duties of good faith, oversight and disclosure.

The duty of care requires informed, deliberative decision-making taking into account all material information which is reasonably available to the director. The duty of loyalty requires independent and disinterested action (i.e. free of any conflict of interest, except a possible benefit as a shareholder), in good faith, with an honest belief that the action is in the best interests of the corporation and its shareholders.

Directors in Delaware generally enjoy the protection of the Business Judgment Rule (BJR), which is a rebuttable presumption that, in making any decision, a director has complied with his or her fiduciary duties. The burden is on the plaintiff to rebut the presumption by showing that the director was not reasonably informed, or had no honest belief that he or she was acting in the corporation's best interests, or acted in bad faith (e.g. by consciously disregarding a known duty). Absent the plaintiff successfully rebutting the BJR presumption, a director will not be liable unless he or she is shown to have been grossly negligent. In certain circumstances, more rigorous standards of enhanced scrutiny, compelling justification or entire fairness may have to be satisfied by directors to avoid a breach of duty or liability.

Both in the ordinary course of business and when the company is potentially or actually insolvent, directors in Delaware owe their fiduciary duties to the company and its shareholders. This stands in contrast to some other common law jurisdictions, which have found that directors' fiduciary duties to shareholders end with the onset of insolvency, on the basis that the shareholders no longer have any real economic interest in the affairs of the company after that point. It should be stressed that directors in Delaware owe no fiduciary duties to creditors, even "in the zone of insolvency" or upon actual insolvency (*North American Catholic Educational Programming Foundation, Inc v Gheewalla*, 930 A.2d 92, 103 (Del 2007)).

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

Commented [H(49)]: 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.

An English scheme of arrangement is within scope of "foreign proceeding" as defined by 11 USC, §101(23). Therefore, the central question in this case is whether the English scheme constitutes "main" or "non-main" foreign proceedings. These concepts are defined at 11 USC, §1502(4)-(5). In summary, a main proceeding is one in a jurisdiction where the debtor has its center of main interests (COMI) and a non-main proceeding is one in a jurisdiction where the debtor has an establishment. If the debtor has neither its COMI nor an establishment in the jurisdiction of the foreign proceeding, recognition will not be granted under Chapter 15 (see e.g. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund* 374 BR 122 (Bankr SDNY 2007)).

The concept of COMI is derived from European Union law and is not a US notion. It has been imported directly from the UNCITRAL Model Law on Cross-Border Insolvency 1997 (Article 2(b)). COMI is to be determined at the date of the filing of the US recognition petition, not the

commencement of the foreign proceedings which are the subject of the petition. 11 USC, §1516(c) creates a presumption that the place of incorporation is the COMI, but that is expressed to be rebuttable (“In the absence of evidence to the contrary...”). The factors which the court weighs in deciding where the debtor’s COMI is located should be ascertainable by third parties on the basis of objective evidence (*Morning Mist Holdings Ltd v Kryz (In re Fairfield Sentry Ltd)*, 714 F.3d 127, 133-134 (2d Cir 2013).

Guidance on the factors which might be relevant to the determination of COMI can be found in *In re Sphinx Ltd*, 351 BR 103 (Bankr SDNY 2006), which concerned a dispute over recognition of Cayman Islands insolvency proceedings which turned on whether those proceedings were main or non-main (at 117). The court observed at 117 that the Bankruptcy Code “provides considerable but not complete direction... The Bankruptcy Code does not state the type of evidence required to rebut the presumption that the COMI is the debtor’s place of registration or incorporation. Various factors, singly or combined, could be relevant to such a determination: the location of the debtor’s headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor’s primary assets; the location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.” The court cautioned that these factors should not be applied “mechanically”, but interpreted “in light of chapter 15’s emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor’s value”. Foreign case law on the application of COMI may also be taken into account by the US courts, pursuant to 11 USC, §1508 (e.g. in *In re Sphinx*, the court considered the *Eurofood* decision of the European Court of Justice).

Establishment is defined in the Model Law (Article 2(f)). This definition has been transposed almost verbatim into US law at 11 USC, §1502(2), which provides that “establishment” means any place of operations where the debtor carries out a non-transitory economic activity.

Applying those definitions to the facts of this case, the court will presume that Gambling Corp’s COMI is in Greece, because that is its place of incorporation (§1516(c)). It seems improbable that the presumption would be rebutted in circumstances where Gambling Corp’s principal place of business is also in Greece. For this reason, I exclude the possibility of recognition of the English scheme as a foreign main proceeding. The COMI is in Greece.

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Commented [H(53)]: Correct, 1 mark

Consequently, in order to obtain recognition of the English scheme, the foreign representative must show that Gambling Corp has an establishment in England and Wales. The question states that Gambling Corp operates casinos and betting parlours in London, among other international locations, and that Gambling Corp’s corporate bonds are governed by English law. It is possible that the latter might arguably reflect an economic connection with England and Wales sufficient to constitute an establishment, but such a loose interpretation of “establishment” would not be consistent with the international approach to non-main proceedings, particularly the European Union approach which was adopted in the Model Law itself and which requires, at Article 2(d) of the Model Law, “human means and goods or services” to be used in the territory of the establishment. Fortunately it is not necessary to determine the sufficiency of the English law bonds, because Gambling Corp’s operational activities in London are likely enough to prove that Gambling Corp does have an establishment in England and Wales. The operation of the casino(s) in London will be a matter which is provable by objective evidence (i.e. the casino premises, insurance and regulatory/compliance documentation, employment and/or subcontractor contracts, worker uniforms, UK bank account(s) and/or other financial commitments, perhaps UK promotional materials such as billboards in London). Moreover, these are matters which will be readily ascertainable by third parties.

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Does this evidence satisfy the requirement of non-transitory economic activity in England and Wales? The question does not explain how long the London operation has been running, so further instructions would be required on this. If the London operation has been running for more than 3-6 months, there would in my view be a strong case that Gambling Corp has an establishment in England and Wales which would entitle the foreign representative to have an English scheme recognised in the US.

**Commented [H(55):** Specifically it will be recognized as a foreign non-main proceeding

#### Question 4.2 [5 marks]

**Commented [H(56):** Total marks 5/5

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?

#### A: Civil proceedings in progress in Texas

11 USC, §362(a)(1) imposes a worldwide automatic stay on *inter alia* "the...continuation...of a judicial...action or proceeding against the debtor that was ... commenced before the commencement of the [bankruptcy petition]". Accordingly, ShipCo's civil claim must be stayed upon the filing of the Chapter 11 petition.

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

#### B: DOJ investigation

I assume for the purpose of answering this question that contravening US sanctions is a criminal offence in the US. If that is correct then the filing of a Chapter 11 petition would have no impact on the DOJ's investigation and any subsequent prosecution. This is because 11 USC, §362(b)(1) exempts the commencement or continuation of a criminal action or proceeding against the debtor from the automatic stay under §362(a).

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

#### C: Foreclosure in the Philippines

The automatic stay under 11 USC, § 362(a) has worldwide effect and stops all foreclosure actions and lawsuits (unless it falls under an exemption, e.g. a swap agreement; the exceptions do not appear to be applicable to USA Bank's position). For this reason, USA Bank would not be able to foreclose on Oil Corp's refinery in the Philippines following the filing of a Chapter 11 petition. This conclusion is consistent with the aim of Chapter 11 proceedings, which is to give a debtor time and ability to restructure its business to facilitate a clean start.

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#### D: Texan eviction proceedings not yet commenced

The automatic stay under 11 USC, § 362(a) also prevents new proceedings being commenced. For this reason, the landlord would not be able to commence eviction proceedings against Oil Corp following the filing of a Chapter 11 petition.

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#### Question 4.3 [6 marks]

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

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

A: Trademark license assignment

Oil Corp may assign the trademark license if it obtains the consent of the license counterparty, Plastic Corp. 11 USC, §365(a) permits the assumption and assignment of executory contracts, however §365(c)(1) prevents the assignment of contracts whose applicable law excuses the non-debtor contracting party from accepting performance from an entity other than the debtor. The Court of Appeals for the Seventh Circuit in *In re XMH Corp*, 647 F.3d 690 (7<sup>th</sup> Cir. 2011) relied on the applicable law exception in laying down a “universal rule” that a trademark license may not be assigned to a third party without the licensor’s consent. (See similarly the Delaware case of *In re trump Entertainment Resorts, Inc*, 526 BR 116 (Bankr D Del 2015)).

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

B: Patent licenses rejection

Oil Corp may reject the patent licenses without Plastic Corp’s consent, however it may yield little benefit from such action. In *Mission Product Holdings, Inc v Tempnology, LLC (Tempnology)*, 139 S. Ct. 1652 (2019), the Supreme Court held at 1666 that:

“under Section 365, a debtor’s rejection of an executory contract in bankruptcy has the same effect as a breach outside of bankruptcy. Such an act cannot rescind rights that the contract previously granted. Here, that construction of Section 365 means that the debtor-licensor’s rejection cannot revoke the trademark license.”

Accordingly, while rejection would expose Oil Corp to liability for breach of contract, it would not bring the patent license agreement to an end. It would therefore not achieve Oil Corp’s goal of giving the purchaser of the patents the exclusive right to use them. Oil Corp would be better advised to negotiate an amendment to the patent license agreement which brings about the early termination of the agreement.

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Commented [H(66)]: Correct, 1 mark

C: Manufacturing facility sale

Oil Corp is able to sell the manufacturing facility under 11 USC §363(f) free and clear of USA Bank’s lien in any of the following circumstances:

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1. the applicable non-bankruptcy law permits sale of such property;
2. USA Bank consents;
3. USA Bank’s interest is a lien and the price at which the facility is to be sold is greater than the aggregate value of all liens on the facility (in most jurisdictions in the US, aggregate value is interpreted as meaning aggregate face value, not economic value);
4. USA Bank’s interest is in *bona fide* dispute; or

5. USA Bank could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of the lien.

Thus it will be seen that the consent of USA Bank to the sale of the facility is not essential, as long as one of the other conditions listed above applies. Therefore, if the sale price of the facility exceeds USD 500 million plus the value of any other liens on the facility, the court would likely approve the sale even if USA Bank objects. Clearly, however, a sale with USA Bank's consent pursuant to §363(f)(2) would be the most straightforward route. If the facility is sold then USA Bank's interest will attach to the proceeds of sale.

Commented [H(68)]: Correct, 1 mark

**\* End of Assessment \***