



**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 10/10

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

**Question 1.1**

Commented [H(3): Correct, 1 mark

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

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

**Question 1.2**

Commented [H(4): Correct, 1 mark

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

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

**Question 1.3**

Commented [H(5): Correct, 1 mark

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

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

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

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

(e) None of the above.

**Question 1.4**

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

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

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

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

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

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

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**Question 1.5**

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

(a) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.

(b) Because cramdowns do not require the consent of all classes, the plan of reorganization may not be fair and equitable to all impaired classes.

(c) Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.

(d) Class definition is rarely a battleground when a debtor tries to cramdown classes.

(e) Dissenting creditors are not permitted to challenge the classification of a creditor supporting the cramdown.

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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.

Commented [H(8): Correct, 1 mark

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

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

**Question 1.7**

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

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

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

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

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

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

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

**Question 1.8**

Commented [H(10)]: Correct, 1 mark

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

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

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

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

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

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

**Question 1.9**

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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.

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

**QUESTION 2 (direct questions) [10 marks]**

**Commented [H(13)]:** Total marks 8/10

**Question 2.1 (2 marks)**

**Commented [H(14)]:** Total marks 1/2

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

One difference between voluntary and involuntary petition is that voluntary petition requires no allegation of insolvency whilst involuntary petition requires the petitioning creditors to allege either that the debtor is generally insolvent i.e. not paying its debts as they fall due or that a custodian (other than a trustee, receiver, or an agent) 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, took possession of that property or appointed to take charge.

**Commented [H(15)]:** Correct, 1 mark, whereas a voluntary proceeding is filed by the debtor

Voluntary proceedings are commenced by filing a voluntary petition under any applicable chapter. A list of assets and creditors are to be filed with a voluntary petition, but even if they are absent, a "naked" petition is sufficient to invoke the automatic stay and commence a case under the Bankruptcy Code.

On the other hand, involuntary proceeding can only be commenced under either a Chapter 7 or Chapter 11. Involuntary petition form requires the number of petition creditors will depend on the number of creditors the debtor has. For example, if the debtor has 12 creditors or fewer, only one creditor is required to file an involuntary petition. If the creditors have 12 creditors or more, at least three qualifying creditors must join in the petition.

**Question 2.2 (2 marks)**

**Commented [H(16)]:** Total marks 2/2

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

Rules surrounding automatic stay is contained in Chapter 3 section 362 of the US Bankruptcy Code ("section 362"). Violations to the automatic stay (even if the violator did not receive notice of the filing of the petition) are considered contempt of court and is void or voidable.

**Commented [H(17)]:** Correct, 1 mark

**Commented [H(18)]:** Correct, 1 mark

Under paragraph k (1) of section 362, violation of the automatic stay will result in the violator (not acting in good faith) to pay for actual damages, including costs and attorneys' fees and may also recover punitive damages (in appropriate circumstances). The violator is also

required to take affirmative acts (that change the status quo of the estate's property) to undo the effect of its violation.

**Question 2.3 (3 marks)**

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

A claim is considered impaired when the claimant is getting less than 100% of their claims and the claimant's legal, equitable and contractual rights are altered.

Only impaired creditors can vote on a reorganization plan. The holder (of an impaired claim) must not be an insider in order to vote on the acceptance of a plan, unless there is no impaired class.

The plan is considered approved if majority of the creditors (holding at least two-thirds of the value of claims in the class or amount of interest) votes in favour of the plan. An unimpaired class is deemed to have accepted the plan and an impaired class who receives nothing is deemed to have rejected the plan.

Commented [H(19)]: Total marks 2/3

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

Commented [H(21)]: Correct, 1 mark, so the impaired claim that receives nothing is not entitled to vote

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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?

An antecedent debt is a legally enforceable obligation to pay the debt provider with money or property. It is consistent with the element of a preference claim. It cannot be avoided where the recipient contemporaneously gave the debtor new value (section 547 of Chapter 5 of the US Bankruptcy Code).

Commented [H(23)]: 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?

One way this can happen is when the debtor made preferential payments to an entity / individual that results in that entity / individual being unable to receive payments of what they are owed due to the debtor becoming insolvent as a result of that transfer (section 548 of Chapter 5 of the US Bankruptcy Code).

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

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

An actual fraudulent conveyance is proven where a debtor made a transfer or cause an action that gives rise to an obligation with the intention to stop, delay or defraud any entity to which the debtor became indebted (section 548 of Chapter 5 of the US Bankruptcy Code).

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

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**Question 3.1 (3 marks)**

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

The US law permits parallel proceedings in state and federal courts and provides that the first judgment issued is binding on the parties.

In *Stern v Marshall* 564 US 46(2011), a bankruptcy claim was filed against the debtor and the debtor counterclaimed (considered the core proceeding), which was subject to two separate state court proceedings. The bankruptcy court issued its first judgment which was awarded to the debtor. This was appealed to the district court (core proceeding). There was a separate (non-core) proceeding held in state courts while the appeal was taking place. The state court issued a verdict in favour of the claimant prior to the conclusion of the proceeding in the district court. The US Supreme Court held that putting subsequent ruling made by the district court over the verdict made by the state court would be unconstitutional under Article III therefore the judgment made by the state court was considered final and conclusive.

This case provided ruling by the Supreme Court that even in core proceedings, the bankruptcy court cannot issue final order that invade Article III.

**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?

Chapter 15 is a procedure which results in foreign proceedings being recognize in the US and enables coordination of US and the foreign proceeding. It starts when a foreign representative of a debtor files a petition to the US Bankruptcy Court. Filing the petition does not automatically invoke a stay in proceedings; this power is only obtained once a foreign main proceeding is recognized and this is only limited to assets that are in the US.

A foreign representative can only invoke the Bankruptcy Code avoidance powers given to insolvency practitioners ("IP") under chapter 7 and 11 as per section 1523 (a). These would be proceedings that have been commenced by either a debtor or its creditors prior to the involvement of the foreign representative.

**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?

Final orders are those that dispute of all issues, leaving nothing further to be decided, whereas interlocutory order may be appealed may be appealed only with leave of the appellate court.

The Bankruptcy Court can make an order constitutionally final, but it is not considered final by the appeal court if it does not resolve the entire issue and therefore can be appealed. On the other way, an order that issued with the entire issue being resolved may not be considered final if parties of the issue have not consented to the Bankruptcy court.

A final order is one where both the Bankruptcy Court and the Appellate Court:

- Resolved all issues of disputes; and
- All parties have consented to the courts.

**Commented [H(28):** Correct, 1 mark. Before the decision, bankruptcy jurisdiction was understood to depend on the core / non-core distinction. Now, a bankruptcy court may enter a final order on a challenge to a petition and on a core proceeding with consent of the parties

**Commented [H(29):** Total marks 1.5/3

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

**Commented [H(31):** Partially correct, 1/2 mark, the foreign representative can also commence a plenary proceeding limited to US assets after the chapter 15 recognition, and may also bring analogous claims under other applicable US or foreign law

**Commented [H(32):** Total marks 1/4

**Commented [H(33):** Correct, 1/2 mark, and such an order can be appealed of right

**Commented [H(34):** Correct, 1/2 mark, and such an order does not resolve all issues in the case

**Commented [H(35):** Depending on the circuit, an appeal from a bankruptcy court decision typically goes to either the district court or to the Bankruptcy Appellate Panel



Another difference between interlocutory and final orders is one where a court resolves not comply claims between two parties, but an issue of broad applicability, such as the post-petition interest rate applicable to the debtor's obligations.

An interlocutory order may be:

- Appealed which divest the court's power to alter its judgment and does not stay its affect; and
- The stay pending appeal may be obtained from the bankruptcy court, if it is not granted by the appellate court on a timely manner.

#### 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?

Director's fiduciary duties have the company and its shareholders to the forefront ahead of creditors, even in situations where the company is potentially insolvent. The Delaware Supreme Court does not recognize duty owing to creditors even if the company is either (i) presumed insolvent or (ii) actually insolvent.

The directors of Delaware companies (based on Delaware law) the directors owe the following fiduciary duties:

- Duty of loyalty to the corporation's best interest; and
- Duty of care in decision making.

It is assumed to have acted *bona fide* if they can prove that they made decisions and actions based on reasonable information available at the time, however this can be rebutted if majority of the board were not reasonably informed and did not believe that action taken by directors was for the best interest of the company.

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

##### Question 4.1 [4 marks]

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

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

Before the revision of the type of foreign proceeding exist, the centre of main interest ("COMI") and establishment must be reviewed.

The presumed rule in the US Bankruptcy Court is that a debtor's COMI is the place of its incorporation, but this can be rebutted. Other factors reviewed when determining COMI are as follows:

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

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

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

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

Commented [H(42)]: Total marks 12.5/15

Commented [H(43)]: Total marks 4/4

- Location of headquarters;
- Location of management;
- Location of primary assets;
- Location of majority of debtor's creditors; and
- Jurisdiction with the most disputes.

On the other hand, establishment is a location where the debtor carried out non-transitory economic activity prior to the commencement of the chapter 15 proceedings.

Facts that are included in the case study on Gambling Corporation ("Gambling") are as follows:

- Location of incorporation is Greece;
- Principal place of business is Greece; and
- Operates in Athens, Las Vegas, London and Macau.

Another piece of information provided is that Gambling have bonds that is governed by English law. It is unclear where the bond is located. In the absence of this information, we can conclude that Gambling's COMI is in Greece and has establishment in England, the US and Macau.

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

The next question of whether a foreign proceeding can be recognized as a foreign main or foreign non-main should be explored in the following:

- Foreign main proceedings are proceedings that have been commenced in a location where debtor has its COMI.
- Foreign non-main proceeding is recognized if the debtor only has an establishment in the place where the proceeding was opened.

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

The above definitions are in line with the classification contained in Article 17 of the UNCITRAL Model Law.

Gambling only has an establishment in London, England therefore the opening of an English scheme of arrangement constitutes characteristics of a foreign non-main procedure.

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

A foreign proceeding may be recognised by the US Bankruptcy Court if the foreign representative can show that the proceeding is (consistent with Article 2 of the UNCITRAL Model Law):

- a collective judicial or administrative proceeding in a foreign country - scheme of arrangement;
- proceeding is pending – Gambling scheme of arrangement is pending;
- under a law relating to insolvency – English insolvency law;
- subject to a control or supervision by a foreign country – English court; and
- For the purpose of reorganization or liquidation – restructuring of bonds.

The English scheme of arrangement meets the above definition therefore the US Bankruptcy Court should be able to recognize the proceeding as a foreign non-main proceeding once the IP files the application under Chapter 15.

#### Question 4.2 [5 marks]

Commented [H(48)]: Total marks 3.5/5

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?

Oil Corporation ("Oil") is considering filing for chapter 11 petition. Chapter 11 in the US Bankruptcy Court (the "Court") cover reorganization proceedings.

Once a chapter 11 is filed in the Court, it will provide some breathing space for Oil as it grants worldwide automatic stay. This will protect Oil against creditor proceedings. Section 362 outlines the basis and effects of the automatic stay. Automatic stay is granted from the date of the filing for the commencement of chapter 11.

Commented [H(49)]: Correct, 1 mark

Each four issues will be assessed separately, and chapter 11 relief will be referenced below:

#### Creditor action – breach of contract

ShipCo (a creditor) filed a lawsuit against Oil for a breach of contract whereby, the creditor alleged that oil sold is contaminated which resulted in damage to their container ships. This can be treated as an executory contract (one which contains material unperformed obligations on both sides).

Filing for chapter 11. Oil has stay relief until 120 days from the date the petition was filed. Relief will continue to be available to Oil until the reorganization plan with ShipCo has been agreed upon (before the 120 days period) or upon ShipCo requesting to lift the stay.

Commented [H(50)]: Partially correct, 1/2 mark, the pre-petition lawsuit would be stayed, but note that the time periods you are referring to are for exclusivity to file a plan and do not limit the duration of the stay

#### US Department of justice – illegal purchase of oil

Oil is currently being investigated by the US Department of Justice ("DOJ") for illegal purchase from countries that are US sanctioned.

Unfortunately for Oil, the automatic stay is subject to statutory exceptions which include regulatory investigations. Further, the stay relief is an injunction against creditors actions and does not hinder the DOJ from exercising their powers to investigate the issue.

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

#### USA Bank (Secured) – missed payment

Oil has missed a payment on its secured loan from USA Bank which resulted in a threat made by USA Bank to foreclose their refinery located in the Philippines.

Assuming USA Bank has full security over the refinery in the Philippines, Oil has to file a plan within 90 days or made monthly payments, otherwise, the stay will be lifted to permit USA Bank to foreclose on the refinery or pursue other non-bankruptcy remedies.

Commented [H(52)]: Partially correct, 1/2 mark, the stay would block foreclosure and whether to lift the stay would depend on a number of factors including those you list, which is separate from the duration of the exclusivity period

#### Landlord – unpaid rent

A landlord in Texas threatened Oil to be evicted as Oil failed to pay rent of its office space.

Similar to stay relief condition from ShipCo, Oil has stay relief until 120 days from the date the petition was filed. This period can be extended to 90 days with the consent of the landlord.

Commented [H(53)]: Partially correct, 1/2 mark, as noted above these time periods don't apply to the stay

Relief will continue to be available to Oil until the reorganization plan with the landlord has been agreed upon (before the 120 days period or the extended period) or upon landlord requesting to lift the stay.

#### 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?

A debtor can sell its property without court or creditor interference if the sale is in the ordinary course of business.

Each proposal is assessed separately below:

#### Trademark license

Counterparty consent is required where substantive non-bankruptcy law provide that the counterparty cannot be compelled to accept performance from a transferee (section 365). This is explored in *Re Trump Entertainment Resorts, Inc*, 526 BR 116 (Bankr D Del 2015), whereby the conclusion is that trademark law generally bans assignment of trademark licences without the licensor's consent.

In order for Oil Corp ("Oil") to be able to assume and assign the trademark license, Oil must seek consent from Plastic Corp ("Plastic").

#### Patent license

Patent licenses owned by the debtor are protected such that their licenses may not be terminated in connection with the sale of the intellectual property without their consent (section 365 (n)). In *Jaffe v Samsung Electronics Co, Ltd* 737 F.3d 14 (4th Cir 2013), the court denied recognition of termination of US patent licences as a matter of public policy under section 1506.

This will depend on what is in the license i.e. if the facts does not go against public policy. If the rejection of patent license does not affect public policy, Oil can reject the patent license and assign the patents to the purchaser.

#### Manufacturing company

The sale of the manufacturing company is not in the ordinary course of business therefore it must seek approval from the court under section 363.

Under section 363, a property can be sold if it is free and clear of creditor interest with court approval. Under section 363(f), an asset may be sold free and clear with creditor consent,

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

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

Commented [H(58)]: Incorrect, 365(n) applies in all chapter 11 cases whereas in Jaffe public policy was relevant because it was a chapter 15 case. As noted above, the licensee has the right under this section to continue to practice the patent and therefore its consent would required for the purchaser to have exclusivity

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 distribution of those proceeds.

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

The main manufacturing facility for the plastic business has granted a lien on the facility to USA Bank to secure its USD 500 million loan, the creditors interest is not in dispute therefore the sale must exceed the USD 500 million (plus any accrued interests) in order to abolish the requirement of consent from USA Bank. If this is achieve, Oil can sell the manufacturing company with court's approval but USA Bank must have priority from the sale.

**\* End of Assessment \***