



**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**.

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**ANSWER ALL THE QUESTIONS**

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

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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**

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)]: Incorrect, the correct response is (d)

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.

**Commented [H(13):** Incorrect, the correct response is (e)

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

**Commented [H(14):** Total marks 6.5/10

**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 does not require any evidence or allegation of insolvency, whereas an involuntary petition requires the creditor to allege either the debtor is not or is unable to pay its debts as they become due (*i.e.* balance sheet insolvent) or that within 120 days before the filing of the petition, a custodian other than a trustee receive or an agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property was appointed or took possession.

Involuntary proceedings can only be commenced under chapter 7 or chapter 11 and cannot be commenced under any other chapters (or against a farmer, family farmer or charity/non-profit). An involuntary petition requires a petitioning creditor (or at least three where there are 12 or more non-contingent/non-insider creditors). Conversely a debtor may commence proceedings in a voluntary petition.

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

**Question 2.2 (2 marks)**

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

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

Contempt of court

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

The act taken in violation of the stay is void/voidable.

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

**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 will be impaired where the debt owed is adversely affected by the proposed reorganization plan, *e.g.* by reducing the amount or lengthening the repayment period. By contrast an unimpaired claim is unaffected by the plan. A claim will be considered impaired

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unless the plan of reorganisation leaves the holder's "legal equitable and contractual rights unaltered" although under §1124 of the Bankruptcy Code provides that a claim will not be considered impaired where the plan reverses contractual acceleration by curing monetary default and compensating the holder for any damage. Similarly, after the effective date of the reorganization plan, a claim will be considered impaired where there is delayed payment in full.

Only **impaired classes** can vote on the reorganization by as of right.

**Commented [H(23)]:** An impaired class that will receive nothing under the plan does not vote and is deemed to reject the plan

Where a plan is subject to cramdown, only one non-insider impaired class needs to vote to accept the reorganization plan. Other holders of an impaired claim will therefore not be entitled to vote on the plan. This is designed to mitigate holdouts where an objective reasonable ("fair and equitable") offer is being proposed and where the other criteria for confirmation of a reorganization plan have been met as set out in §1129.

### Question 2.4 (3 marks)

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

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

**Preference/Avoidance Action**

**Commented [H(25)]:** Partially correct, 1/2 mark, the correct response is preference, and "avoidance action" is ambiguous because it may also apply to fraudulent conveyances

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

**Constructive Fraudulent conveyance.**

**Commented [H(26)]:** Incorrect, the correct response is preference

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

**Actual Fraudulent Conveyance**

**Commented [H(27)]:** Correct, 1 mark

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

**Commented [H(28)]:** Total marks 13.5/15

#### Question 3.1 (3 marks)

**Commented [H(29)]:** Total marks 2.5/3

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* held that even in core proceedings (*i.e.* Title 11/Bankruptcy Code cases), a bankruptcy court cannot issue a final order, where that final order impinges on Article III (of the US Constitution) jurisdiction. Under US law it is permissible for proceedings to run in parallel in state and federal courts and provides that the first judgment issued is binding on the parties.

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Bankruptcy judges are not Article III judges and therefore do not have judicial power under the Constitution reserved for Article III judges. Bankruptcy judges derive their authority from Article I, which provides for the legislative branch and federal bankruptcy laws. The issue was ultimately one of the separation of powers between the legislative branch and the judicial

branch and the issuing of final orders by the Bankruptcy Court in cases such as *Stern* violated that constitutional principle.

In essence the Bankruptcy court cannot issue a final order over a state law claim. The issuing for such a final order was held to be unconstitutional under Article III.

This has resulted in bankruptcy judges determining core proceedings (where they lack constitutional authority) by issuing a recommendation for review by the district court (see, *Executive Benefits Ins Agency v Arkison*). It is open for parties to consent to the bankruptcy court entering into final order under the Bankruptcy Rules.

Prior to *Stern* the 1984 amendments to the Bankruptcy Code provided the Bankruptcy Courts jurisdiction to resolve issues presented in core proceedings. This issue prior to *Stern* was not whether the Bankruptcy Courts had jurisdiction in core-proceedings to issue final orders, but rather on the distinction between core and non-core proceedings.

### 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?

Avoidance powers under §1521 are not available to a foreign representative. Therefore, the Bankruptcy Code's powers of avoidance of preference and in respect of fraudulent conveyances are not open to a foreign representative in Ch. 15 Proceedings.

Chapter 15 allows a foreign representative to utilise these avoidance powers in a plenary proceeding such (e.g. Ch7 or Ch11). Here upon recognition of the foreign proceedings under chapter 15, the foreign representative can then elect to commence a plenary proceeding under the Bankruptcy Code. Alternatively, the relief can be obtained where the debtor or creditors have commenced a proceeding prior to the foreign representative's involvement.

### 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?

An interlocutory order resolves a partial issue or point in a claim prior to the conclusion or final disposal of the claim (i.e. orders made while the case is ongoing), often these are procedural in nature.

Final orders, by contrast, dispose of all issues in a claim and leave no issues left to be determined.

Interlocutory orders are appealable only with leave of the appellate court, however final orders can be appealed as of right.

The procedure in bankruptcy proceedings mirrors this framework, save in instances of orders to extend the period of exclusivity to propose a plan which can be appealed as of right (28 US, §158(a)(2)). It should also be noted that an order in the bankruptcy court that resolves the entirety of the issues in dispute would be final for the purposes of an appeal, but may not be final in the constitutional sense (see, *Stern v Marshall*) where the parties have not contested to the bankruptcy court's jurisdiction.

Commented [H(31)]: Correct, 1/2 mark, also the bankruptcy court has jurisdiction to enter a final order on a challenge to a petition

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

Commented [H(33)]: Total marks 2/3

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

Commented [H(35)]: Correct, 1 mark, also the foreign representative can bring analogous claims under other US or foreign law

Commented [H(36)]: Total marks 4/4

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

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

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

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



As a general rule, appeals from the bankruptcy court are heard by the district court for the district in which they sit. In this regard the district judge will be randomly assigned and that same judge will thereafter be responsible for all future appeals in those bankruptcy proceedings. However, the First, Sixth, Eighth, Ninth and Tenth Circuit Courts have opted to have bankruptcy appeals heard by a Bankruptcy Appellate Panel (made up of bankruptcy judges from within the circuit).

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On occasion an appeal from the bankruptcy court may go directly to court of appeals where the bankruptcy or district court certifies that the appeal raises a question of law as to which there is no precedent or controlling decision of the circuit or US Supreme Court or the immediate appeal to the court of appeals may materially advance the progress of the case. It should also be noted that the court of appeals has discretion whether to accept a case so certified.

### 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?

Directors of Delaware corporations owe two primary fiduciary duties: i) the duty of loyalty to act in the company's best interests and a duty of care in educated decision-making (save for the protection provided by the business judgment rule). Within this includes the duties of good faith, oversight and disclosure.

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

In the ordinary course of business directors' duties are owed to the company and its shareholders (not to the creditors, even where the corporation is potentially insolvent). With regard to companies potentially insolvent the duties remain to the shareholders, the Delaware Supreme Court determined that directors do not owe duties to creditors when a company is operating in the "zone of insolvency" – in *North Am Catholic Educational Programming Foundation Inc. v Gheewalla* it was held that "[I]ndividual creditors of an insolvent corporation have no right to assert direct claims for breach of a fiduciary duty against corporate directors. Creditors may nonetheless protect their interest by bringing claims on behalf of the insolvent corporations..." It follows there is no equivalent in US law of the concept of wrongful trading or deepening insolvency (see, *Trenwick Am Litig Trust v Ernst & Young, LLP* – "Delaware law imposes no absolute obligation on the board of a company that is unable to pay its bills to cease operations and to liquidate. Even when the company is insolvent, the board may pursue, in good faith, strategies to maximise the value of the firm).

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

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

Where a company is actually insolvent the fiduciary duties extend to all the company's claimants this includes both shareholders and creditors, so while they must make decisions in the best interests of the shareholders, they must do so with the creditors in mind. So there is no right for a creditor to directly assert a claim for breach of fiduciary duty but they can bring a derivative action.

Further to the business judgment rule noted there is a rebuttable presumption that the directors acted in good faith. It can be rebutted by showing that the board were not reasonably informed and did not believe the decision was in the company's best interests or otherwise were not acting in good faith.

Although there still a duty of care, directors may be absolved from liability by the company's certificate of incorporation – this does not however apply to the fiduciary duty of loyalty which will subsist.

**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.

Under Chapter 15 an English Scheme of Arrangement could be granted where the requirements for recognition are met, *i.e.* the foreign representative establishes that he or she and the foreign court are empowered to act in the proceedings.

Under the Bankruptcy Code a "foreign proceeding" is defined as "a collective judicial or administrative proceeding in a foreign country... under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purposes of reorganisation or liquidation."

The definition is broad enough to cover a scheme of arrangement under part 26 of the Companies Act 2006, which is an insolvency proceeding subject to the supervision of the English court for the purposes of reorganisation.

Although the corporation's COMI is Greece, the scheme of arrangement proceedings commenced in England related to bonds governed by English law in addition to having a place of business in London. Additional factors that may make such proceedings foreign main proceedings include the location of the majority of the creditors or those who will be most affected by the relief sought. If the proceedings were classed as foreign main then Gambling Corp would be able to:

Commented [H(51)]: Correct, 1 mark, because the COMI is in Greece, foreign main recognition is not available

- i. apply for an automatic stay;
- ii. to operate business in the ordinary course by the foreign representative;
- iii. sell, transfer or use property outside the ordinary course of business
- iv. avoid post-petition transfers and perfections of security interests.

Equally as Gambling Corp has an establishment in England but other factors link it more closely to a jurisdiction outside England, the proceedings could be classed as foreign non-main proceedings. Upon recognition the above relief may be granted to Gambling Corp, but on a discretionary basis under 11 USC §1521. Where discretionary relief is sought in foreign non-main proceedings, the bankruptcy court must be satisfied that it is appropriate under US law for the assets to be administered in the foreign non-main proceedings (§1521). The discretionary nature of the relief for foreign non-main proceedings makes recognition as foreign non-main proceedings less protective than if they were granted as foreign main proceedings.

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

**Question 4.2 [5 marks]**

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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?

The effect of a Chapter 11 petition on Oil Corp would be as follows:

#### Breach of contract

The filing of a lawsuit in State court by OilCorp is not prohibited by the automatic stay that is afforded companies filing a chapter 11 petition, in such cases ShipCo will require approval from the Bankruptcy Court or agreement of the debtor before filing any counterclaim. However in the instant case as this would be a creditor (ShipCo) filing a lawsuit, the lawsuit would not be able to be brought as creditor enforcement proceedings are stayed automatically at the point in which the petition for Ch11 is commented and the proceedings filed as the automatic stay provides injunctive relief against creditor actions. It is however open to ShipCo to file a claim in the OilCorp's bankruptcy proceedings.

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

Commented [H(56)]: Partially correct, 1/2 mark, the lawsuit has already been filed on these facts, so its progress would be stayed by the petition

#### Sanctions Investigation

The automatic state is subject to a series of statutory exceptions in particular criminal proceedings and regulatory investigations (see, 11 USC §362). The US Justice Department's investigation concerning the purchase of oil from sanctioned countries will therefore fall outwith the ambit of the stay. The legislative rationale for this is that the public good is better served allowing these types of investigation to proceed and is therefor prioritises of the protections afforded to the debtor under the Bankruptcy Code.

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

#### Default on secured loan

Foreclosure on the Philippines refiners as a result of the default is prohibited as the automatic stay has worldwide effect meaning actions to control or foreclose on the non-US property securing the debt will be prohibited upon the filing of the Ch11 petition.

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#### Eviction from premises

Rent on property that the OilCorp continue to occupy post Ch11 petition will be paid as a post-petition expense of the administration and enjoys an administrative priority (this was not the case during the Covid-19 pandemic, per *In re Pier 1 Imports Inc.* but give the return to relative normality it is unlikely such rent would not enjoy administrative priority. OilCorp will be protected from eviction during the Ch11 process, however the landloed of the office space can evict OilCorp as a debtor-tenant from the property (as it is non-residential) where the lease over that commercial property has expired.

Commented [H(59)]: Partially correct, 1/2 mark, as the facts here do not indicate that the lease has expired before the bankruptcy, eviction proceedings would be barred by the stay

#### Question 4.3 [6 marks]

Commented [H(60)]: Total marks 3/6

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

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

- i) The Bankruptcy Code removes contractual restrictions on assignment to allow a debtor to achieve a potentially higher value for its assets than if such provisions were enforced. OilCorp can, in a 363 sale, generally assume and assign an executory contract, in the case of the trademark licence however (*i.e.* non-bankruptcy law) counterparty consent will be required as the trademark licence is not assignable absent the licensor's consent (See, for example *In re Trump Entertainment Resorts Inc* which held that federal law generally bans assignment of trademark licenses absent licensor consent). In this case Plastic Corp. as the counterparty cannot be compelled to accept performance from a transferee. OilCorp therefore may not be able to assume and continue performance of the pre-petition license without Plastic Corps consent. Some courts have held that a debtor may not assume an executory contract which it would not be permitted to assign (the hypothetical test) as set out above (this test is applied in the third, Fourth, Ninth and Eleventh Circuit); however the First Circuit has held that this provision will only be applicable where the debtor intends to assign the licence. Consent would be required in this case.
- ii) The decision to reject the patent licences must be based on the business judgment of OilCorp. Licences for patents are protected and cannot be terminated without consent of the owner debtor (Here OilCorp). However, in the inverse case, OilCorp can reject the contract (giving Plastic Corp an unsecured pre-petition claim for damages).
- iii) The sale of the manufacturing facility under section 363 provides for the sale of assets free and clear of all liens and other interests. This is subject to court approval but will also require creditor consent pursuant to section 363(f) "*an asset may be sold free and clear with creditor consent, where the creditor consent is disputed or where the value of the property exceeds the value of the interest, in such circumstances, a creditor's interest will attach to the proceeds of the sale and it will receive priority in the distribution of those proceeds.*"

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

Commented [H(63)]: Incorrect, section 365(n) protects licensees from termination of patent licenses by giving them the right to choose to continue to practice the patent following rejection, so exclusivity can only be achieved with the consent of Plastic Corp

Commented [H(64)]: Incorrect, section 363(f) permits sale without consent if the value of the property is above the value of the lien or in other circumstances

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

\* End of Assessment \*