



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6B

GERMANY

This is the summative (formal) assessment for Module 6B on this course and must be submitted by all candidates who selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 6B. 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 Microsoft Word format, using a standard A4 size page and an 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.assessment6B]. An example would be something along the following lines: 202223-336.assessment6B. 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 "studentnumber" 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. The final submission date for this assessment is 31 July 2022. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 7 pages.**

ANSWER ALL THE QUESTIONS

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

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

Which statement about the insolvency administrator is correct?

(a) The insolvency administrator is appointed by the creditors' committee.

(b) The creditor's committee supervises the insolvency administrator.

(c) The insolvency administrator holds a public office.

(d) The insolvency administrator can decide on an insolvency / restructuring plan.

correct

Question 1.2

Which of the following securities is entitled to separation?

(a) Suretyship.

(b) Mortgage (*Grundschild*).

(c) Retention of title.

(d) Pledge.

Correct is (c); suretyship gives a right to separate satisfaction.

Question 1.3

Which of the following institutions does not have a positive impact in the insolvency estate?

(a) Contestation of transactions made before the opening of insolvency proceedings.

(b) Discharge of residual debt.

(c) Option to assume an executory contract according to § 103 InsO.

(d) Insolvency plan.

correct

Question 1.4

After the occurrence of inability to pay debts (illiquidity, cash-flow insolvency), how long is the time period before the directors are obliged to file for insolvency proceedings?

(a) Three weeks.

(b) One month.

(c) Six weeks.

(d) Two months.

correct

Question 1.5

How are wage claims of employees stemming from the period prior to the opening of insolvency proceedings ranked?

(a) They enjoy super-priority even ahead of secured creditors.

(b) They qualify as expenses of the proceedings (liabilities of the estate).

(c) They rank as claims of ordinary creditors.

(d) They cannot be recognised in insolvency proceedings at all.

correct

Question 1.6

What is the main idea of the StaRUG?

- (a) To enable creditors to force the debtor to restructure.**
- (b) To make restructuring possible where the debtor is neither unable to pay its mature debts nor imminently illiquid.**
- (c) To prepare the debtor company for successful restructuring within insolvency proceedings.**
- (d) To provide the debtor with a toolbox to pick from according to the needs in the case at hand.**

correct

Question 1.7

Which court has jurisdiction to decide on appeals against the decision to open insolvency proceedings?

- (a) Amtsgericht.**
- (b) Landgericht.**
- (c) Oberlandesgericht.**
- (d) Bundesgerichtshof.**

correct

Question 1.8

Which one of the following written instruments does not function as an enforcement order?

- (a) Court judgment.**
- (b) Written sales contract.**
- (c) Insolvency schedule.**
- (d) Submission to execution proceedings.**

Correct is (b); as for (c), cf. § 201(2) InsO

Question 1.9

Which of the following is not a reason for opening insolvency proceedings?

(a) Overindebtedness.

(b) Imminent overindebtedness.

(c) Illiquidity.

(d) Imminent illiquidity.

correct

Question 1.10

Which of the following is not an autonomous transactions avoidance ground?

(a) Congruent coverage.

(b) Transaction at an undervalue.

(c) Payment on a shareholder loan.

(d) Payment to tax authorities.

Correct

in total: 8 marks

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Which German norms regulate cross-border insolvency issues in relationships between Germany and the United Kingdom? You need merely name the norms.

Answer:

The German law follows the principle of universality since the *Bundesgerichtshof's* decision in 1985.

While the United Kingdom being a EU Member States, EU Insolvency Regulation applies.

After the Brexit, sections 335 and 343 of InsO applies.

correct (3 marks)

Question 2.2 [maximum 4 marks]

Who is entitled to dispose of collateral after the opening of insolvency proceedings?

Answer:

Sections 165, 166 and 173 regulated the disposal of collateral. Both the insolvency administrator and the secured creditor may dispose the collateral.

The insolvency administrator may realise the collateral if it is in his or her possession (movable item) or by initiating with competent court auctions (immovable item; **in this case, the IP may simply demand payment from the third party debtor). After deducting the cost of realization, the proceeds will be used to satisfy the creditor with a right to separate satisfaction.**

The creditor may also dispose the collateral. (This holds only true where § 166 InsO does not apply.**) Only a realized surplus exceeding the amount of the secured claim belongs to the insolvency estate. If insolvency administrator transfers an object or a claim, the creditor is to contribute an amount covering the costs of determination and disposal as well as turnover tax in advance to the insolvency estate using the proceeds gained.**

partly correct (2 marks)

Question 2.3 [maximum 3 marks]

What are the legal consequences if the insolvency practitioner assumes an executory contract?

Answer:

If the insolvency administrator chooses to assume an executory contract, the creditor's claim must be satisfied in full from the insolvency estate. It becomes a debts incumbent on the estate under section 55 of InsO. **How about the debtor's claim against the contractual partner?**

partly correct (2 marks)

in total: 7 marks

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

Explain the rules in German insolvency law relating to a restructuring plan (*Insolvenzplan*).

Answer:

Under section 218 of InsO, the debtor or the insolvency administrator can submit an insolvency plan, while the creditors' assembly can charge the insolvency administrator

with the establishment of an insolvency plan. The plan is to be submitted to the insolvency court.

The plan must have two parts - declaratory and a constructive part (section 219). The declaratory part surmises the information which is necessary for the parties entitled to vote to form informed decisions (section 220). The constructive part must determine how the insolvency plan will transform the legal positions of the parties involved (section 221).

The parties must be formed into different groups with different legal status, namely 1. the creditors entitled to separate satisfaction, 2. the non-lower-ranking creditors, 3. each class of lower-ranking insolvency creditors, 4. Persons with a participating interest in the debtor where their share or membership rights are included in the plan, 5. The holders of rights resulting from intra-group third party guarantees (section 222). All parties involved must be offered equal rights within a group (section 226).

If the plan is submitted by the debtor and the plan has the prospect of success, the insolvency court will forward it to the creditors' committee, the insolvency administrator, and the debtor for their comments (section 232) and lay it out for their inspection (section 234).

The plan then needs the consent of the creditors. The court determines a discussion and voting meeting (section 235). Voting commences in groups determined by the constructive part of the plan. The creditors entitled to vote are all those whose claims are impacted by the plan (section 237). The same applies to shareholders of the debtor as well (section 238a). All groups must vote to accept the plan for it to be finally approved. Both a simple majority in value and majority in number must be achieved in every group (section 244). There is a cross-class cram-down exception under section 245. Acceptance is presumed when the 3 prerequisites are met: the members of such a group are likely not to be placed at a disadvantage by the plan; they participate to a reasonable extent in the economic value devolving on the parties under the plan; the majority of the voting groups have backed the plan with the necessary majorities.

The debtor must also consent to the plan (section 247). However, the debtor's opposition is not relevant if he is not placed at a disadvantage by the plan.

The court must approve the plan after testing whether the necessary procedure was followed and that no votes had been "bought" (section 250). The plan becomes final and its effects under the constructive part becoming binding (section 254).

Minority protection has to be granted and the court may refuse the plan if 1. the person filing the request opposed the plan in writing or for the records at the latest in the voting meeting and 2. the person filing the request is likely to be placed at a disadvantage by the plan (section 251).

Funds can be provided to compensate a disadvantage. In that case, the impacted party is banned from opposing the plan and instead has to claim for equalisation from these funds without this impacting on the approval of the plan (section 251).

The satisfaction of shareholder loans occurs only after the satisfaction of all other insolvency creditors (section 39).

In pre-insolvency proceedings, similar rules apply. The debtor can present a restructuring plan in which affected creditors can be divided in several groups (StaRUG section 9). Unless all affected creditors agree, the plan needs the approval of a creditors' meeting which requires a majority of 75% of all affected claims in each group and the confirmation of the court. Cross-class cram down is possible with minor exceptions to the absolute priority rule.

Excellent!

in total: 15 marks.

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

Since 10 June 2022, D GmbH (D) is unable to pay its mature debts. However, R, the only director of D, hopes for a turnaround and continues trading. Represented by R, D buys a car from S on 5 July 2022. S transfers the title for the car to D and agrees on the purchase price of EUR 16,000 being due on 5 August 2022. Further, R pays bank B EUR 10,000 on long overdue loan claims. On 1 September 2022, insolvency proceedings are opened for D. As a consequence, S demands EUR 16,000 from R. The insolvency administrator, I, alleges to have a claim against R in the amount of EUR 10,000.

Do S and I have claims against R? Test this based on the norms.

Answer:

D is a limited liability company and is unable to pay its mature debts (illiquidity) since 10 June 2022. Under section 17(2) of InsO, debtors are deemed illiquid if they are unable to meet their mature obligations to pay. Insolvency is generally assumed. Under section 15a, R being the sole director of D is obligated to request the opening of insolvency proceedings no longer than 3 weeks after the occurrence of illiquidity (i.e. by 30 June 2022). However, R failed to do so. The insolvency proceedings are opened for D only on 1 September 2022. R is required to pay damages and face a period of imprisonment or a fine under section 15a of InsO and section 823 BGB.

After the reason for insolvency has become apparent on 10 June 2022, D bought a car from S on 5 July 2022 for EUR 16,000, which is due on 5 August 2022. It is an insolvent trading. However, D is a limited liability company. R being its sole director is generally not liable for the company's debts. And there is no general provision to allow S to get compensated from both D and R for the insolvent trading under the German law.

However, if S can prove that R has breached his director's duties (*R has breached his duties: § 15a InsO!*), says the duty of care and prudence when performing the transaction, S may be have a claim against R. There is no information about whether R did any fraudulent behaviour towards S while purchasing the car (*This is not necessary*). For example, if R misled S over the cash flow insolvency of D, R shall be personal liability to S (section 823 and 826 of BGB).

S may sue R for damages (16,000) under § 823(2) BGB in connection with § 15a InsO.

D also paid Bank B EUR 10,000 on long overdue loan after the reason for insolvency has become apparent (10 June 2022). Under section 15b, R being the sole director is obliged to file a request may, following the commencement of insolvency of D, no longer make any payments on its behalf unless it was made in the ordinary course of business with the due care of a prudent and conscientious manager.

Since payment was made to Bank B by D being a limited liability company after the reason for insolvency has become apparent, D is obligated to replace the assets to the estate unless he can prove that the payment was made with the care of a reasonable businessman. However, the payment was for a long overdue loan. It is hard to say it is a payment under ordinary course of business with the care of reasonable businessman, but a payment disadvantaging other insolvency creditor. The payment itself can be contested as vulnerable transactions. Therefore, R being the director is obliged to refund the payment made. I, the insolvency administrator, have a claim against R.

partly correct

10 marks

in all: 40 marks

* End of Assessment *