



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 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. 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 is (b); the insolvency administrator holds a private office.

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); a pledge 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

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 is (b); as for (d), cf. § 18 InsO

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: 7 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.

Ans:-

Germany has not adopted the UNCITRAL Model Law on Cross Border Insolvency. Questions of international insolvency are regulated in §§ 335 *et seq* InsO. § 335 InsO establishes the principle that the *lex fori concursus*, the law of the state in which proceedings were opened, is applicable.

International jurisdiction is not explicitly regulated. However, the principle is applied that the international jurisdiction is to be accepted if the regional jurisdiction within a country is accepted. Further, §§ 3 and 4 InsO, read with §§ 12 *et seq* ZPO, are to be applied. If, through this, the jurisdiction of, for example, a German court is confirmed, then it follows that the German courts also have international jurisdiction. Under § 3 InsO, the regional court in which the debtor has its centre of economic activities, or its registered office, has jurisdiction.

In my view, as the UK is no longer a member of the EU, European Insolvency Regulations won't be applicable directly.

correct (3 marks)

Question 2.2 [maximum 4 marks]

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

Ans:-

The disposition of secured goods is regulated by §§ 165 *et seq* InsO and is, in part, one of the responsibilities of the creditor and, in part, the responsibility of the insolvency administrator. This approach intends to avoid a scenario in which a creditor disposes of assets which form an important part in the debtor's business and the disposition of which makes the continuation of business activities unfeasible. **You were expected to elaborate on §§ 165, 166, 173 InsO.**

Disposition of assets can happen in following manner:-

i) By Insolvency Administrator: -

Upon the opening of insolvency proceedings, an insolvency administrator is appointed to manage and administer the debtor's assets. The insolvency administrator is responsible for overseeing the disposal of assets, including any collateral that is not subject to valid security interests.

ii) By Secured Creditors of debtor:-

Secured creditors who hold a valid security interest over specific assets of the debtor are entitled to enforce their collateral rights. They can dispose of the collateral in accordance with the terms of the security agreement and applicable law. The proceeds from the disposal are used to satisfy the secured debt and lastly,

iii) By Secured Creditors vs. General Insolvency Proceedings:-

If there are secured creditors with valid security interests, they are generally entitled to enforce their rights separately from the general insolvency proceedings. They can usually proceed with enforcing their security and disposing of the collateral outside of the insolvency estate.

partly correct (2 marks)

Question 2.3 [maximum 3 marks]

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

Ans:-

As regards executory contracts, if a mutual contract was not or not completely performed by the debtor and its other party at the date when the insolvency proceedings were opened, both claims to fulfilment lose their enforceability. The insolvency administrator then has the option to choose fulfilment, thereby making both claims enforceable again **That's not precise enough. What exactly does "enforceable" mean?**

partly correct (1 mark)

in total: 6 marks

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

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

Ans:-

The idea of having a restructuring plan can be called as "Protective Umbrella Procedure". This is so because this may result in saving a debtor from hardship arising out of insolvency proceedings. **"Protective Umbrella Proceedings" are special proceedings for the application stage of self-administration proceedings, cf. § 270d InsO.**

Rules for a Restructuring Plan under German law:- **Which rules are you referring to?**

The restructuring plan can be proposed if there is a possibility of rescuing the business and the debtor's assets. **Not necessary, see §§ 217, 231 InsO** The plan should outline how the company will be restructured to achieve financial stability and debt repayment.

i) Involvement of Creditors: -

Creditors play a crucial role in the restructuring plan process. The debtor must present the plan to the creditors for approval. Creditors are grouped into different classes based on the type and ranking of their claims.

ii) Majority Approval: For the restructuring plan to be accepted, it must be approved by the majority of creditors in each class. **That's not precise enough: majority in number and value!**The plan's approval also requires the consent of the insolvency court.

iii) Cross-Class Cram-Down: In some cases, if a class of creditors rejects the plan, the court may still approve it if certain conditions are met, allowing for a "cram-down" on that class. These conditions include that the plan must be accepted by at least one other class of creditors, and the dissenting class must receive a better (**no: not worse!**) outcome than in a hypothetical liquidation scenario.

iv) Content of the Plan: The restructuring plan should specifically include details on how the company will be restructured, including any necessary operational changes, debt rescheduling, asset sales, or equity investments.

v) Supervision and Implementation: Once the restructuring plan is approved, it is supervised and implemented under the oversight of the insolvency court and the appointed insolvency administrator.

vi) Legal Effect:

Upon approval, the restructuring plan becomes legally binding on all parties involved, including the debtor and all creditors, whether they voted in favour of the plan or not.

vii) Reversal/ cancellation of Insolvency Proceedings: If the restructuring plan is successfully implemented, the insolvency proceedings may be cancelled, and the debtor can continue its operations like before.

Above are a few rules in brief with regard to restructuring plans under German Insolvency law.

only partly acceptable

9 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.

Ans:-

In my opinion, only S can have a claim against R and not I.

About claim of S:

When D is unable to pay its mature debts and still R buys a car on credit for EUR 16,000 being due on 5th August, 2022.

When R was aware of the potential insolvency/ illiquidity issue of D and still he goes ahead and buys a car from S creating another liability for D.

So, this can be termed as R's malafide intention and hence, R can be personally held responsible for recovery of EUR 16000.

For EUR 10000 paid by R for long overdue claims, it has to be seen who is the creditor. If he/she is a related party to the D or R, I can file specific proceedings for return/ recovery of EUR 10000.

If such a creditor is not related to D or R and repayment is done in normal trading activity or as per agreement, it cannot be seen as a preferential, fraudulent transaction.

Here, one more thing needs to be looked into is whether there is any preference/ priority given to such a creditor for repayment of EUR 10000 loan amount. If that is the case, other creditors, I may call it as a preferential transaction and may also demand back such an amount to D.

There are also specific provisions/ clauses contained in Insolvency law which takes care of any wrongdoing, having malafide intention, to defraud creditors of the company etc, by directors/ representatives of the debtor and accordingly, necessary orders can be prayed for from the court.

Unfortunately, nothing of your answer meets the requirements: You were expected to elaborate on §§ 15a, 15b InsO. S has a claim under § 823(2) BGB in connection with § 15a InsO, I has a claim under § 15b InsO.

0 marks

in all: 22 marks

*** End of Assessment ***