



**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); it is for the creditors to decide on a plan.

Question 1.2

**Which of the following securities is entitled to separation?**

**(a) Suretyship.**

**(b) Mortgage (*Grundschild*).**

**(c) Retention of title.**

**(d) Pledge.**

correct

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 is (b); transactions avoidance enhances the estate

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); a submission is an enforcement order under § 794(1) No. 5 ZPO.

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: 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.**

The German norms regulating cross-border insolvency issues in relationships between Germany and the United Kingdom are as follows:

- Germany's international insolvency law is regulated by §§ 335 *et seq* Insolvenzordnung (Insolvency Regulation, **InsO**) to the extent no bi-or multilateral agreements apply.<sup>1</sup>
- Whilst international jurisdiction is not explicitly regulated, Germany applies the principle that the international jurisdiction is to be accepted if the regional jurisdiction within a country is accepted.<sup>2</sup> Additionally, §§ 3 and 4 InsO, read in conjunction with §§ 12 *et seq* Zivilprozessordnung (Code of Civil Procedure, **ZPO**), apply which means that if through this principle, jurisdiction of a certain court is confirmed, that country's court will then also have international jurisdiction.<sup>3</sup> Per § 3 InsO, the

<sup>1</sup> Prof Dr Reinhard Bork, *Module 6B Guidance Text – Germany*, September 2022, p 40.

<sup>2</sup> *Idem*, p 41.

<sup>3</sup> *Ibid.*

regional court in which the debtor has its centre of economic activities, or its registered office, has jurisdiction.<sup>4</sup>

- § 335 InsO establishes the principle that the *lex fori concursus*, being the law of the state in which proceedings were opened, is applicable.<sup>5</sup>
- However, §§ 336 *et seq* InsO provide exceptions to the *lex fori concursus* principle. For example, § 336 states that the effects of an insolvency proceeding over a contract concerning a right in rem to an immovable object, or a right to use an immovable object, are subject to the laws of the state in which the object is situated.<sup>6</sup> Furthermore, § 337 of Regulation 593/2008 (Rome I) provides exceptions applicable to employment contracts, whilst § 338 deals with exceptions in relation to set-off and transaction avoidance.<sup>7</sup>
- Germany also follows the principle of universality (Universalitätsprinzip) with respect to proceedings opened in the Germany, which means that the effects of an insolvency proceeding are also binding in all other countries.<sup>8</sup>
- In the event a foreign proceeding, such as a United Kingdom proceeding, attempted to gain recognition in Germany, such recognition would be automatic, unless:<sup>9</sup>
  - The courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law;
  - Recognition would lead to a result which is manifestly incompatible with major principles of German law, particularly in cases of incompatibility with fundamental rights (*ordre public*).

Notably, the EU Regulation 2015/848 would not apply with respect to issues arising after the United Kingdom ceased being a member of the European Union. The UNCITRAL Model Law on Cross Border Insolvency would also not apply as Germany has not adopted it.

**correct (3 marks)**

**Question 2.2 [maximum 4 marks]**

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

After the opening of insolvency proceedings, an insolvency practitioner is generally entitled to dispose of a company's or debtor's assets.

The disposition of secured goods in particular is regulated by §§ 165 *et seq* InsO and is thereby in part the responsibility of the creditor, and in part the responsibility of the insolvency administrator, subject to certain restrictions.<sup>10</sup>

It is important to note that generally speaking, pursuant to § 89 InsO, an automatic stay is in place as soon as insolvency proceedings are opened, which means creditors are prevented from enforcing their claims (including through realisation).<sup>11</sup> Nonetheless, by virtue of §§ 49 *et seq* and 165 *et seq* InsO, § 89 does not affect the enforcement of security rights which

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Idem*, p 42.

<sup>8</sup> *Idem*, p 41.

<sup>9</sup> *Idem*, p 41, citing § 343(1) Insolvency Regulation (**InsO**).

<sup>10</sup> *Idem*, p 9.

<sup>11</sup> *Idem*, p 17.

provide for a right to separate satisfaction given these are rights *in rem*.<sup>12</sup> As such, enforcement of such rights are still possible in an insolvency proceeding to the extent §§ 165 *et seq* InsO enable a creditor to realise the value of their security.<sup>13</sup>

In particular:

- Per § 49 InsO, in the case of immovables, if the contracting party does not partake in auctioning, then the insolvency practitioner can dispose of the goods.<sup>14</sup>
- Per § 173 InsO, in the case of movable objects in the creditor's possession, the creditor's right to realise such object remains unaffected, unless a court determines otherwise.<sup>15</sup>
- § 165 InsO stipulates that an insolvency administrator may initiate auctions or sequestrations of immovables even if such immovables are subject to a right to separate satisfaction.<sup>16</sup>
- Per §166 InsO, an insolvency practitioner may dispose of a movable item to which a creditor has a right to separate satisfaction without restriction, if the item is in the insolvency practitioner's possession.<sup>17</sup> The insolvency practitioner is entitled to use the collateral so long as the financial interests of the secured creditor are not impacted.<sup>18</sup> The impact on the secured creditor can be avoided by the insolvency practitioner if he or she pays damages or offers substantive security.<sup>19</sup> **How about § 166(2) InsO?**

Additionally, per §160(1) (sentence 1) of InsO, the insolvency administrator has to seek the approval of the creditor's committee if he or she intends to make a disposition of a particularly important nature.<sup>20</sup> This includes the disposition of an enterprise, one of its operations, a warehouse in its entirety, and so forth.<sup>21</sup> In this case, the creditors' committee has to approve when the disposition is to be made to someone who has particular interests, such as relatives of the debtor, or creditors entitled to separate satisfaction.<sup>22</sup>

However, note that in the event of pre-insolvency proceedings, the disposition of collateral is unrestrictedly up to the debtor.<sup>23</sup>

**mostly correct (3 marks)**

**Question 2.3 [maximum 3 marks]**

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

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<sup>12</sup> *Idem*, p 9.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid*.

<sup>16</sup> <<[https://www.gesetze-im-internet.de/englisch\\_inso/englisch\\_inso.html#p0791](https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html#p0791)>>, accessed 4 June 2023.

<sup>17</sup> Bork, *supra* note 1, p 17.

<sup>18</sup> *Idem*, p 18, citing § 240 ZPO.

<sup>19</sup> *Idem*, p 18.

<sup>20</sup> *Idem*, p 35.

<sup>21</sup> *Idem*, citing § 160(2) (No 1) InsO.

<sup>22</sup> *Idem*, citing §162.

<sup>23</sup> *Idem*, P 35.

If a mutual contract has not been completely performed by the debtor and the other party at the date of the opening of insolvency proceedings, both claims to fulfilment lose enforceability.<sup>24</sup>

However, in these circumstances, the insolvency practitioner can choose fulfilment of the executory contract per § 103 InsO. The legal consequence of this is that both claims become enforceable again.<sup>25</sup> If this occurs, the creditor's claim must be satisfied in full from the insolvency estate,<sup>26</sup> but only if assets were added to the estate by the counter-party after the opening of the insolvency proceedings.<sup>27</sup> Otherwise, the back-dated debts of the debtor only need to be fulfilled on a *pro rata* basis.<sup>28</sup>

In the event the insolvency administrator chooses not to fulfil the contract, the other party can register its claim in the insolvency schedule, which will then be satisfied on a *pro rata* basis.<sup>29</sup>

**correct (3 marks)**

**in total: 9 marks**

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

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

Under German law, there are two ways in which a debtor can restructure or be rescued. The first is within ordinary insolvency proceedings, whilst the second is at the pre-insolvency stage. **The task was only to explain the rules for the insolvency plan, not for the restructuring plan.**

*Restructuring as part of ordinary insolvency proceedings*

Certain elements of the existing German insolvency proceedings are designed for restructuring. In particular, the "Protective Umbrella Procedure", called Schutzschirmverfahren in German, is governed by § 270 InsO and lays the groundwork for a restructuring preparation procedure within the application stage of insolvency.<sup>30</sup>

**The rules on insolvency plans apply independent of the protective umbrella procedure under § 270d InsO. They are regularly part of normal insolvency proceedings.**

Insolvency proceedings must still be commenced in the ordinary way pursuant to § 16 InsO, and an insolvency practitioner will be appointed. The ordinary insolvency proceedings rules still apply, with the main exception that an insolvency plan will be considered instead of moving to bankruptcy or liquidation.

The objective of the Protective Umbrella Procedure is to give the debtor up to three months under the umbrella of protection of the court and the preliminary insolvency practitioner, to prepare for restructuring in self-administration, so that the restructuring can then be executed quickly upon the opening of proceedings in a pre-packaged fashion.<sup>31</sup> However,

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<sup>24</sup> *Idem*, p 18.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Idem*, p 23, citing § 55(1) (No 2) (alternative 1) InsO.

<sup>27</sup> *Idem*, p 24, citing § 105 (sentence 1) InsO.

<sup>28</sup> *Idem*, p 24, citing § 38 InsO.

<sup>29</sup> *Idem*, p 23, citing § 103(2) (sentence 1) InsO.

<sup>30</sup> *Idem*, p 13.

<sup>31</sup> *Ibid*.

this procedure is only available where a debtor is threatened with ~~mere~~likely inability to pay debts or overindebtedness. In other words, if a debtor is already substantively insolvent, restructuring is only possible in formal insolvency proceedings where the insolvency deems it appropriate, rather than through the Protective Umbrella Procedure within the application stage of insolvency proceedings.<sup>32</sup>

If the Protective Umbrella Procedure is granted, the debtor has the ability to draw up an insolvency plan.<sup>33</sup>

If a debtor has not requested or failed to be granted a Protective Umbrella Procedure, it is still possible for a restructuring plan to be considered as part of the ordinary insolvency proceedings. **Indeed!** This will occur if the insolvency practitioner considers that restructuring is the best available option, notwithstanding that the debtor is already insolvent. In this case, the insolvency practitioner can submit an insolvency plan instead (and the liquidation proceedings may be converted to restructuring/rescue proceedings).<sup>34</sup>

The rules applicable to insolvency plans, whether submitted by a debtor or insolvency practitioner, are effectively the same.

The insolvency plan, which must have two parts, must be submitted to the insolvency court.<sup>35</sup> **Here you start presenting the required information.**

The first part must summarise the information necessary for the parties entitled to vote to form informed decisions.<sup>36</sup>

The second part must determine how the insolvency plan will transform and affect the legal position of the parties involved.<sup>37</sup> In order to achieve this, the parties must be divided into groups with differing legal statuses in accordance with § 222 (1) (sentence 2) InsO, which stipulates that a distinction must be made between:<sup>38</sup>

- (a) Creditors entitled to separate satisfaction if their rights are impacted by the plan;
- (b) Ordinary creditors per § 38 InsO;
- (c) Each class of subordinated creditors;
- (d) Persons with a participating interest in the debtor where their share or membership rights are included in the plan.

All parties within each group must be offered equal rights, unless all parties agree otherwise.<sup>39</sup>

If the plan has prospect of success, the insolvency court will then forward the plan to the creditors' committee, and subject to who submitted the plan, either the insolvency administrator or the debtor, and lay it out for their inspection.<sup>40</sup>

The plan then requires the consent of creditors, for the purpose of which the court will determine a discussion and voting meeting.<sup>41</sup> Creditors whose rights would be impacted by the plan are entitled to vote in line with the groups determined as set out above, as well as

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<sup>32</sup> *Idem*, p 14.

<sup>33</sup> *Idem*, p 18.

<sup>34</sup> *Idem*, p 34.

<sup>35</sup> *Idem*, p 36, citing § 219 InsO.

<sup>36</sup> *Idem*, p 36, citing § 220 (2) InsO.

<sup>37</sup> *Idem*, p 36, citing § 221 (sentence 1) InsO.

<sup>38</sup> *Idem*, p 36.

<sup>39</sup> *Idem*, p 36, citing § 226 InsO.

<sup>40</sup> *Idem*, p 36.

<sup>41</sup> *Idem*, p 36 citing § 235 InsO.

shareholders of the debtor.<sup>42</sup> Whilst all groups must vote for approval of the plan, it is sufficient if there is a majority in numbers and value within each group.<sup>43</sup>

§ 245 InsO contains a 'cross-class cram down' exception to the above requirement in that acceptance may be presumed if the following three requirements are met:<sup>44</sup>

- (a) The members of such group are not likely to be disadvantaged by the plan compared to their situation without the plan;
- (b) The members of such group participate to a reasonable extent in the economic value devolving on the parties under the plan, which means that no lower ranking creditors participate in the proceeds unless all higher-ranking claims are fully satisfied (this is also referred to as the "absolute minority rule");
- (c) The majority of the voting groups have backed the plan with the necessary majorities.

Once the creditors have approved the plan, the debtor and the court must approve the plan.<sup>45</sup> However, in the event the debtor disapproves, this is irrelevant if he or she is not disadvantaged by the plan compared to his or her situation without the plan.<sup>46</sup>

The court will only approve the plan if the correct procedure has been followed, and if no votes have been 'bought'.<sup>47</sup>

Once the order approving the plan becomes final, its effects become binding on all participants, even those who objected to the plan and those who are not participating in the insolvency proceeding.<sup>48</sup>

However, minority protection is possible if the person filing the request for protection opposed the plan writing and is likely to be disadvantaged by the plan compared with their situation without a plan.<sup>49</sup> In order to avoid jeopardising the implementation of the plan, the plan can provide for funds to compensate for any disadvantage, in which case the impacted party is banned from opposing the plan.<sup>50</sup>

The plan may include a debt-to-equity swap to reduce the debtor's liabilities.<sup>51</sup>

### *Pre-insolvency restructuring under the StaRUG*

Separate from the ability to restructure under the ordinary insolvency rules, it is also possible for a debtor to restructure at a pre-insolvency stage where the debtor is in a financial state of imminent inability to pay. In this situation, the Act on the Framework for Stabilisation and Restructuring of Enterprises (**StaRUG** or Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen), is available for entrepreneurs of all kinds, irrespective of whether they are natural persons or legal entities.<sup>52</sup>

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<sup>42</sup> *Idem*, p 36, citing §§ 237 *et seq* and § 238a InsO.

<sup>43</sup> *Idem*, p 36 citing § 244 InsO.

<sup>44</sup> *Idem*, p 37.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Idem*, p 37, citing § 250 InsO.

<sup>48</sup> *Idem*, p 37.

<sup>49</sup> *Idem*, p 37, citing § 251 InsO.

<sup>50</sup> *Idem*, p 38.

<sup>51</sup> *Idem*, p 38, citing § 225a InsO.

<sup>52</sup> *Idem*, p 33.

The StaRUG offers various instruments, including court proceedings for the voting on a restructuring plan, the preliminary examination by the court of questions relevant for the confirmation of a restructuring plan, a court-ordered moratorium, the confirmation of a restructuring plan by the court and the appointment of a restructuring mediator.<sup>53</sup>

A debtor does not have to use all the above tools but can instead ask for tailor-made court assistance to support the restructuring efforts.<sup>54</sup>

In order to commence restructuring proceedings under the StaRUG, a debtor can simply initiate out-of-court negotiations with the creditors required for restructuring.<sup>55</sup> The Court will only be involved in providing the debtor with the necessary instruments once the debtor requests the Court's assistance.<sup>56</sup>

Where actions under the StaRUG do not prevent the debtor from becoming substantively insolvent, those pre-insolvency proceedings must be stopped.<sup>57</sup> In this situation, both debtor and creditors can then apply for ordinary insolvency proceedings pursuant to § 16 InsO. In a pre-insolvency restructuring, the debtor can apply for a moratorium under § 49 StaRUG, which if successful, would result in the court granting an order which stays all individual enforcement, and if applied for, hinders secured creditors from realising collateral (this being a stabilisation order).<sup>58</sup>

In a StaRUG proceeding, a restructuring practitioner or monitor can only be appointed if:<sup>59</sup>

- (a) Consumers, small, medium-sized or micro-enterprises are involved as creditors; or
- (b) The moratorium or restructuring plan covers (nearly) all creditors.

Similar rules as to the insolvency/restructuring plan under ordinary insolvency proceedings apply to a restructuring plan under the StaRUG. The key difference is that under the StaRUG, the debtor only can present a restructuring plan, in which affected creditors can then be divided into several groups.<sup>60</sup> Additionally, unless all affected creditors agree, the plan needs to be approved at a creditors' meeting which requires a majority of 75% of all affected claims in each group, as well as the confirmation of the court.<sup>61</sup> As with an insolvency plan in ordinary insolvency proceedings, a cross-class cram down is possible, although there are minor exceptions to the absolute priority rule mentioned above.<sup>62</sup>

Restructuring loans with respect to loans acquired by the debtor may be covered by the restructuring plan under the StaRUG.<sup>63</sup> Should the restructuring fail and insolvency proceedings ensue, the loan does not enjoy any preferential ranking, but its granting and collateralisation is not challengeable in subsequent insolvency proceedings pursuant to § 90 StaRUG so long as it is regulated in a court-confirmed restructuring plan.<sup>64</sup>

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<sup>53</sup> *Idem*, p 19.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Idem*, p 34.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Idem*, p 38, citing § 9 StaRUG.

<sup>61</sup> *Idem*, p 38, citing § 60 StaRUG.

<sup>62</sup> *Idem*, p 38 citing §§ 26 *et seq* StaRUG.

<sup>63</sup> *Idem*, p 35.

<sup>64</sup> *Ibid*.

StaRUG contains no special rules on executory contracts, but provides for norms which have the effect of depriving ipso facto clauses of their effect as well as hindering creditors during a moratorium to terminate contracts.<sup>65</sup>

Whilst the StaRUG does not contain any rules on transaction avoidance, the StaRUG protects transactions contained in a restructuring plan in subsequent insolvency proceedings.<sup>66</sup>

Directors are required to consider the interests of the general body of creditors, and to conduct the restructuring with the care of a diligent and conscientious manager.<sup>67</sup> Failure to do so may result in personal liability under § 43 StaRUG.<sup>68</sup>

Per § 2(4) StaRUG, intra-group third-party security may be included in the restructuring plan.<sup>69</sup>

**Excellent!**

**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.***

*The insolvency administrator's claim*

Pursuant to § 15b InsO, if payments are made by a limited liability company after the reason for insolvency has become apparent, the directors are obliged to replace the assets to the estate, on the basis that the payments were not made with the care of a reasonable businessman.<sup>70</sup> Based on the facts, it appears that R, on behalf of D, which is a limited liability company, paid EUR 10,000 to the bank in repayment of a loan. While a date for payment is not provided, it can be assumed that the payment was made by R after the reason for insolvency has become apparent. As such, the insolvency administrator will have a claim against R for the replacement of the EUR 10,000 payment to the estate. However, R could argue that § 15b InsO ought not to apply as the bank debt needed to be repaid and in order to avoid insolvency proceedings, and therefore the payment was not made without the care of a reasonable businessman. Such argument would be unlikely to be successful as based on the facts, it appears that R may have, or at the very least, ought to have been aware that D was insolvent on 10 June 2022, but continued trading and incurred further

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<sup>65</sup> *Idem*, p 38.

<sup>66</sup> *Idem*, p 39.

<sup>67</sup> *Idem*, p 40.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Idem*, p 30.

debt. The payment to the debt can therefore unlikely be said to have been made with the care of a reasonable businessman.

The insolvency administrator would also have a claim against R for any payment made to S for the car. However, based on the facts, it appears that R has failed to pay S, notwithstanding that R and S agreed a payment date of 5 August 2022.

Additionally, the insolvency administrator could raise R's failure to request the opening of insolvency proceedings within the required time frame. Pursuant to § 15a InsO, a director is required to request the opening of insolvency proceedings no longer than three weeks after the occurrence of inability to pay debts (cash flow insolvency/illiquidity) or six weeks after the occurrence of balance-sheet insolvency (overindebtedness).<sup>71</sup> Pursuant to the facts provided, D has been unable to pay its debts since 10 June 2022, but insolvency proceedings were only opened on 1 September 2022. It is unclear who requested the opening of proceedings, or on what date. However, if R as director of D failed to request these within the time frame of three weeks as stipulated above due to its illiquidity, whether willfully or negligently, R may have to pay damages or be subjected to a period of imprisonment or a fine in accordance with § 823(2) of the German Civil Code (Bürgerliches Gesetzbuch, **BGB**) and § 15a InsO.<sup>72</sup> **Yes, but only to disadvantaged creditors, not to the estate/IP.**

Failing the above, the insolvency practitioner may be able to oppose and 'claw back' the EUR 10,000 payment to the bank on the basis that it was a vulnerable transaction, given transactions made before the opening of insolvency proceedings can be contested if they were made to the disadvantage of the creditors, subject to a reason to contest being satisfied.<sup>73</sup> **Transactions avoidance leads to claims against the recipient (B), not the director (R).** Generally speaking, a transaction disadvantages the general body of creditors if it reduces the amount of proceeds that can be paid to the ordinary creditors.<sup>74</sup> Given the payment of EUR 10,000 to the bank here reduces the proceeds that can be paid to D's ordinary creditors, a disadvantage is likely made out.

Pursuant to § 132 InsO, transaction that immediately disadvantage insolvency creditors may be contested if the debtor was already illiquid and the creditor was aware of the illiquidity or an application to open insolvency proceedings.<sup>75</sup> Given the debt owed to the bank was long overdue, the bank ought to have been aware that D was illiquid. Therefore, the avoidance ground under § 132 InsO may be satisfied, and the insolvency administrator may be able to avoid the transaction. The bank would then have to reconstitute the EUR 10,000 to D's estate.

#### *S' claim with respect to the car purchase price*

Based on the facts, it appears that S transferred the title of the car to D, with possession possibly to follow once payment of the EUR 16,000 was received. There does not appear to be any retention of title in play, which would allow S to remain the legal owner of the car until D has paid the whole purchase price of the goods.

Ordinarily, transfer of title would result in a non-accessory security right.<sup>76</sup> If this had occurred, S would be the secured creditor, who holds title to the ownership of the car in a fiduciary capacity.

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Idem*, p 24, citing § 129(1) InsO.

<sup>74</sup> *Idem*, p 24.

<sup>75</sup> *Idem*, p 25.

<sup>76</sup> *Idem*, p 6.

However, given the title of the car has been transferred to D, and the facts are unclear on whether or not D has possession of the car, it does not appear that S has any security rights over the car. As such, S does not have a right to separation of the retained goods from the insolvency estate in order to satisfy his or her claim.

As such, the ordinary rules with respect to the treatment of contracts upon insolvency under InsO will apply.

Generally speaking, contracts are wound up in insolvency proceedings, which means that the other party must fulfil its obligations.<sup>77</sup> However, if the party yet to fulfil its obligation is the debtor, those debts will only be satisfied by the insolvency practitioner on a *pro rata* basis pursuant to § 38 InsO.<sup>78</sup> Whilst the facts do not specify exactly what D's and S' respective obligations with respect to the sale and purchase of the car were, it can be assumed that S has fulfilled its obligations by transferring title of the car. As such, it is only D who has failed to fulfil its obligation by failing to pay the EUR 16,000 by the agreed payment date of 5 August 2022. However, it is unclear whether S will be provided with the full EUR 16,000, as the claim against D will only be paid on a *pro rata* basis. It therefore depends on the amount of assets in D's estate.

Additionally, S could raise a claim against R on the basis R misled S over the cash flow/illiquidity of D, and that S only sold the car to D on the basis that the price of the car would be able to be paid. Pursuant to §§ 826 and 823(2) BGB, read with StGB § 263,<sup>79</sup> this may be construed as fraudulent behaviour by the court, which may lead to personal liability on R's behalf towards S. **Correct is § 823(2) BGB in connection with § 15a InsO.**

**10 marks**

**in all: 41 marks**

**\* End of Assessment \***

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<sup>77</sup> *Idem*, p 23.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Idem*, p 31.