



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 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

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.

The *lex fori concursus* applies subject to the exceptions set out in §336 onwards:

- (1) The effects of insolvency proceedings on a contract relating to a right in rem in an immovable object or a right to use an immovable object are subject to the law of the state in which the object is situated. As regards an article entered in the register of ships and the register of ships under construction, as well as in the register of liens on aircraft, the law of the state under whose supervision the register is kept is relevant. (§336 InsO - Vertrag über einen unbeweglichen Gegenstand)**
- (2) The right of an insolvency creditor to set-off remains unaffected by the opening of insolvency proceedings if, in accordance with the law applicable to the**

debtor's claim, the creditor is entitled to set-off at the time of the opening of insolvency proceedings. (§338 - Aufrechnung)

(3) A transaction may be contested if the conditions for contesting insolvency are met under the law of the state in which proceedings were opened, unless the opponent of the contest demonstrates that the law of another state is relevant to the transaction and the transaction is by no means contestable in accordance with this law. (§339 - Insolvenzanfechtung)

This is only partly correct; the questions aims not only at the applicable law: 1 mark

Question 2.2 [maximum 4 marks]

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

Collateral is the security object to which a security rights attaches. The security right does not prevent the collateral from forming part of the insolvent estate and so does not prevent its realisation by the insolvency administrator in the insolvency proceedings. The debtor may not dispose of assets within the insolvent estate after the commencement of insolvency proceedings unless the same is specifically provided for in the context of an insolvency plan.

*Whether the insolvency administrator or the secured creditor is responsible for realising the asset depends on the type of asset, the nature of the security and whether the asset is in the creditor's possession. By §166 InsO, the insolvency administrator has an unrestricted right to realise an asset which is in their possession (**How about § 166(2) InsO?**) with some limited exceptions. An important major exception applies to assets which are of particular importance to the insolvency estate, for which the administrator must obtain permission (§160 InsO) **§ 160 InsO does not deal with collateral.***

*By §89 InsO, unsecured creditors with an obligational claim against the debtor ("insolvency creditors") are prohibited from executing in the insolvent estate after insolvency proceedings have commenced. The restriction does not apply to secured creditors with a claim *in rem* and does not therefore prevent the enforcement by secured creditors of right to separate satisfaction.*

By §173(1), if the insolvency administrator is not entitled to realise a movable item or a claim subject to a claim to separate satisfaction, the creditor's right to realise the same remains unaffected. The creditor can also be required to realise the asst within a certain period of time as determined by the Court, pursuant to §173(2) after which the administrator becomes entitled to realise the same.

*A party with a right to an asset pursuant to a right *in rem* or *in personam* is not an insolvency creditor and is not therefore subject to the same restrictions on dispositions*

of the insolvent estate for the simple reason that the asset does not form part of the estate (§47 InsO).

partly correct: 2 marks

Question 2.3 [maximum 3 marks]

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

Once the insolvency practitioner has assumed the contract, the other party must continue to perform obligations under the contract and the insolvency practitioner must satisfy the resulting claim under the contract in full.

The claim under the assumed contract is payable as a debt in the insolvency estate (§55(1)2. InsO) as long as the contract was performed after the insolvency proceedings were opened. Any claim for payment in respect of performance of a severable contract in the period before proceedings were opened is satisfied by way of a dividend on a pro rata basis (§105), namely the creditor becomes an "insolvency creditor" for the unpaid sums (§38).

By §104(1), in respect of delivery of goods or stock exchange price due to take place on a fixed date or within a fixed period after insolvency proceedings were opened, there may be no claim for specific performance and only claims for non-performance.

correct: 3 marks

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*).

*Natural persons (entrepreneurs and not consumers) and corporate bodies who are facing only imminent illiquidity may submit an insolvency plan to their creditors as an alternative to formal insolvency proceedings. **That's not correct: an insolvency plan is submitted in ordinary insolvency proceedings which can also be opened if the debtor is illiquid or overindebted.** Alternatively, the creditors meeting may decide to make the insolvency administrator responsible for drafting and submitting the insolvency plan.*

*The plan must contain a "declaratory" (*darstellend*) part and a "constructive" (*gestaltend*) part (§219). The plan must also be accompanied by a detailed list of assets and debts and the debtor's income and outgoings (§229).*

The declaratory part contains all the information required by the creditors and the Court to make an informed decision whether to approve the plan. It must also explain the steps that have been or will be taken in order to establish the rights of the parties involved. The constructive part sets out how plan, if approved, will change the legal rights of the parties involved.

The insolvency plan must distinguish between different groups of creditors as provided by §222(1) InsO, namely:

- (1) Those entitled to separate satisfaction. If the plan does not provide otherwise, those with a rights of separate satisfaction shall be entitled to satisfaction from objects subject to rights of separation. If it does provide otherwise, the plan must indicate the fraction by which those creditors rights are to be reduced (§223);*
- (2) Non-lower ranking creditors. The plan must set out the fraction by which their claims will be reduced and set out all other provisions pursuant to which they will be affected (§224);*
- (3) Separate classes of lower-ranking creditors (unless their rights are deemed waived under §225(1)). If their rights are not waived, the plan must indicate the fraction by which their rights are to be reduced, as under §224 (§225(1));*
- (4) The plan may form groups of creditors with equal rights and equivalent economic interests (§222(2));*
- (5) Employees claiming major amounts as creditors of the estate must form a separate group. Minor creditors (including employees claiming minor amounts) may form separate groups. (§222(3)).*

Within these groups, the parties must be offered equal rights (§226(1)), unless all parties involved provide a statement of consent to accompany the insolvency plan. In the absence of such consent, any agreement to provide an advantage to any particular party will be void (§226(2)).

The contents of the plan must comply with the provisions of InsO, particularly those relating to the insolvency groups. If they do not, and the defects are not corrected within a reasonable period of time, the insolvency court will refuse the plan. Similarly, if the plan has no prospect of being accepted by the creditor or if the constructive part of the plan has no prospect of being fulfilled, then the court will refuse the plan (§231(1)).

The court may also refuse a new plan on the request of the insolvency administrator with the consent of the creditors committee in certain circumstances (§231(1)):

- (1) If the debtor has previously submitted a plan which he or she has withdrawn after publication of the date of the discussion meeting;*
- (2) If the creditors have refused a previous plan;*
- (3) If the court has not confirmed a previous plan (§231(2)).*

The debtor has a right to appeal the court's decision to refuse the plan (§231(3)).

If approved, the insolvency court forwards the plan to the creditors committee, insolvency administrator (if the debtor submitted the plan) and the debtor (if the administrator submitted the plan) for their comments pursuant to §232(1). Official bodies, for example for trade or industry, may be invited to give comments (§232(2)). This is more likely to be of relevance if the debtor is a corporation with significant impact in a particular industry.

After the comments stage, the creditors must vote on the plan at a discussion and voting meeting (§235). The plan may be modified as a result of the discussion meeting (§240).

Voting rights take effect as set out in §77, namely those with undisputed claims have a voting right, no voting right is afforded to lower-ranking creditors, and those with disputed claims only have a voting right if the administrator and other voting creditors agree or the court so orders. Creditors may only vote insofar as their claims are impaired by the plan (§237(2)).

Each group with the right to vote does so separately (§243). For the plan to be accepted, in each group more than half of the creditors must back the plan and the value of the claims of the backing creditors must exceed half of the total value of the claims in that group (§244). §245 provides that a group shall be deemed to consent to the plan ("cross-class cram down") in three circumstances:

- (1) The plan would not disadvantage the creditors in comparison to the position if the plan were not approved;*
- (2) the creditors of the group participate to a reasonable extent in the economic value devolving on the parties under the plan;*
- (3) the majority of the groups have approved the plan.*

Further, whilst the debtor has a right to consent to the plan (which is deemed if he or she does not oppose the plan in writing or at the voting meeting), the consent is irrelevant if the debtor is not disadvantaged by the plan compared to the position if the plan were not approved and no creditor achieves an economic value exceeding the value of his claim under the terms of the plan (§247).

The plan then returns to court for its confirmation (§248), which requires the court to test that the proper procedure was followed (§250(1)) and acceptance of the plan has not been inappropriately obtained (§250(1)). A creditor may also ask the court to refuse a plan if the creditor formally opposed the plan and is placed at a disadvantage under the plan (§251).

Restructuring in pre-insolvency proceedings is governed by StaRUG (Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen (Act on the Framework for Stabilisation and Restructuring of Enterprises). StaRUG largely mirrors

the provisions of InsO in respect of the insolvency plan, with minor exceptions. Under StaRUG, only the debtor may submit the plan. The plan requires the approval of a creditors meeting which needs a 75% majority in each group of all claims affected by the plan, not just those of the creditors who are present and voting at the meeting (§25 StaRUG).

mostly correct: 14 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.

D is deemed illiquid if it is unable to meet its mature obligations to pay debts. This must be more than a mere payment delay, although a delay cannot continue beyond three weeks. Insolvency is also presumed as a rule if the debtor has stopped payments (§17(2) InsO). Therefore, by the time D agrees to buy a car on 5/7/23, D is deemed illiquid.

*R had a duty under §15a InsO to request that insolvency proceedings be opened no more than three weeks after the occurrence of D's inability to pay debts. Having failed to do so, R is liable to pay a fine or face imprisonment. It is likely that R could also be personally liable to pay damages to S arising as a consequence of R's failure to request insolvency proceedings or to inform S that D was insolvent at the time of the transaction, if S was not aware of the same. **Correct (§ 823(2) BGB in connection with § 15a InsO).***

*S, the owner of the vehicle, transferred title (**this excludes a retention of title clause, see below**) to the car to D and agreed to consideration for the car being paid later, on 5/8/23. D fails to make payment of the agreed sum and S demands that R make payment of the unpaid debt. The agreement is between S and the company, D, although R acts as agent for D. Therefore, any claim S has directly in respect of the non-payment by D for the vehicle is not a claim against R.*

*Under §107(2) InsO, if the debtor purchases a movable asset in which the seller has retained title (**not in this case**) and whose possession was transferred to the debtor by the seller, as happened here, the seller can require I, the insolvency administrator, to opt for performance or non-performance of the contract. However, I's declaration under §103(2) does not need to be given to S until a period of time after the report*

meeting without negligent delay. S may inform I that the vehicle is a depreciating asset and therefore require I to make a decision sooner (§107(2)).

The nature of the agreement for the sale of the vehicle is not specified. If the contract included a retention of title clause (**not in this case**), as is quite likely given the delayed consideration (**no, cf. above**), S will have remained the owner of the goods until such time as D paid the full purchase price, as the transfer of ownership of the vehicle will have been subject to a condition precedent that D would pay the full price for the car.

If there is a retention of title clause (**not in this case**), then S has a right to separation of the retained goods from the insolvency estate if the insolvency administrator rejects satisfaction of the contract and does not pay EUR 16,000 to S in respect of D's obligation to pay. In that case, the vehicle would not form part of the insolvent estate and S would not be classified as an insolvency creditor (§47). S's claim would be satisfied in its entirety (assuming that the value of the vehicle remains the same). It would be open to S to realise the asset and claim the entirety of the proceeds in satisfaction of his claim against D.

It is not clear whether D still has the vehicle in its possession. It is possible that S has a right to extended retention of title, which would extend to any future claim arising from any resale of the vehicle by D to a third party.

If S knew of D's insolvency as at 5/7/22, it is possible that the transaction could be void insofar as the contract between S and D creates a security, namely retention of title (**not in this case**). The security benefits S to the detriment of D's creditors because S would not rank as an insolvency creditor pursuant to §77. By §130(1), a transaction granting security to a creditor of the insolvency proceedings may be contested if it was made during the three-month period prior to the request to open insolvency proceedings and if the creditor was aware that the debtor was illiquid at the time of the transaction. D was illiquid as at the date of the transaction, which was within the relevant period. It is possible, therefore, that the granting of security to S by way of retention of title could be deemed void if S knew of D's illiquidity. **No, transactions avoidance requires a detriment to the general body of creditors which is not possible in the case of retention of title, since the asset was never part of the debtor's estate.** In that case, the security being deemed void, S would join the ranks of ordinary creditors and obtain payment for the vehicle *pari passu*.

D, represented by R, pays 10,000 EUR to B bank in respect of a loan. There is very little detail about the terms of that loan, which it can only be assumed was overdue from D to B. It is assumed that the dispute raised by I is that R paid B during the period after D was clearly illiquid and at a time at which such payment was liable to be overturned under the avoidance provisions.

By §15b, if payments were made by D after the reason for insolvency, here illiquidity, became apparent, R may be liable to repay that payment to I as insolvency administrator of D insofar as the payment were not made with the care of a reasonable

businessperson. If the payment was made in the ordinary course of business they might be considered as having been made with reasonable care. However here, the loan was long overdue. There is no indication that payment to B served to permit D to continue to trade for the benefit of D's creditors. R made the payment with full knowledge of D's illiquidity. In those circumstances, I is right to consider that he or she has a claim against R for repayment of the debt paid to B.

As to the amount of that repayment, it is unlikely that D would be liable to repay the entire sum of £10,000 to the estate. Under §15b(4), the obligation to reimburse is limited to the amount of damage to the insolvent estate. D was in any event liable to pay B and, as such, to reimburse the full amount of the loan in circumstances in which B would have obtained some repayment out of the estate would be excess compensation. It is not possible to ascertain an appropriate sum without further particulars.

The main points have been addressed; however, there are many mistakes.

9 marks

in all: 37 marks

*** End of Assessment ***