



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); 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 is (b); assuming an executory contract is beneficial for 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 is (c)

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 is (d); imminent illiquidity is a prerequisite for StaRUG proceedings

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 is (b), since the opening decision is made by an *Amtsgericht*

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: 5 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 UK ceased being part of the EU. Since the UK is outside the EU it is regulated by §§335 et seq InsO as international insolvency law. UK insolvency proceedings are considered foreign insolvency proceedings are recognized in German via §343(1) InsO as foreign insolvency proceedings. UK judgements are recognized in German via §343(2) InsO.

correct (3 marks)

Question 2.2 [maximum 4 marks]

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

*The disposal of the collateral is dependent on the type of collateral and all types of collateral can form part of the insolvency estate even secured ones, but the right of separate satisfaction is still applicable.¹ The disposal of secured goods is the responsibility of the secured creditor² and the insolvency administrator.³ **How about §§ 166(2), 173 InsO?** If the insolvency administrator is charged with disposal of collateral, the secured creditors no longer have that right but still have the right for separate satisfaction. This means that the realized assets will be used to fulfill their debt to the value of their debt. Unsecured goods form part of the insolvency estate and thus are disposed off by the insolvency administrator who realizes the assets.⁴*

partly correct (2 marks)

Question 2.3 [maximum 3 marks]

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

*Personal/Consumer bankruptcy and corporate liquidation: Once the insolvency practitioner assumes an executory contract, the other party's (creditor) claim must be fulfilled in full from the insolvency estate.⁵ On assuming the contract the other party is required to fulfil the obligations under the contract.⁶ The backdated debts from the executory contract are fulfilled on a *pro rata* basis unless added to the insolvency estate after the opening of the insolvency proceedings.⁷*

*Corporate rescue: The rules under § 103 InsO discussed above are applicable but can be circumvented under §119 InsO. **This is not correct: § 119 InsO applies to all kinds of proceedings and hinders the circumvention of § 103 InsO!***

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*).

¹ InsO, §§ 49, 50 and 51 (No 1).

² InsO, §49.

³ InsO, §§ 165 and 166(1).

⁴ InsO, § 89.

⁵ InsO, § 103.

⁶ InsO, § 103.

⁷ InsO, § 129 (sentence 1).

The restructuring plan is one of the rescue tools available to individual and companies.⁸ The aim of the essay is to identify who can commence a restructuring plan, what procedures and required to commence and implement a restructuring plan.

A restructuring plan can be applied to qualifying debtors.⁹ Under German law all legal persons can be debtor, which includes individuals and various legal entities, such as public limited companies, limited liability companies. Not all debtors qualify to utilize restructuring plan, the debtors are either illiquid, in imminent insolvency or overindebtedness.¹⁰ The debtors are considered illiquid if they are unable to pay due debt.¹¹ Debtors in imminent insolvency are unable to pay future debt, usually debt that is due within a forecasted period of 24 months.¹² Overindebtedness is where the debtor's assets are less than their liability.¹³ Once the threshold is achieved by the debtor, restructuring plan can be utilized.

The restructuring plan is available only once the insolvency proceedings have been commenced.¹⁴ There are two intentions as to why a restructuring plan can be used.¹⁵ One is for rescue purposes and the other for disposal or liquidation of the debtor. A debtor or an insolvency administrator are eligible to submit to the court a restructuring plan.¹⁶ The court ensures that the right procedures are followed in creating and approving the plan.¹⁷ It is the role of the court to check whoever is submitting the restructuring plan is authorized to do so.

The restructuring plan must contain two things. The first part is the declaration part and the second part is the construction part.¹⁸ The declaration part contain relevant information which is essential for the relevant creditors to make informed decisions. The information includes comparisons of projected outcome on utilizing the restricting plan compared to utilizing other insolvency proceedings such as liquidation.¹⁹ The constructive part states the legal impact to the rights of the affected parties, for example, a creditor debt is being converted into equity or shares are being consolidated, among others.²⁰ The courts must be satisfied the declaration and constructive parts are both present and the content are as per the law.

Essentially the 1st submission of the restructuring plan to the court is for the courts to see if it complaint with the law. Once the court are satisfied with the restricting plan, parties affected by the restricting plan must be informed by whoever commenced

⁸ InsO, § 217(1).

⁹ InsO, § 217 (1) and (2).

¹⁰ InsO, §§ 17/ 18 and 19

¹¹ InsO, § 17 (2).

¹² InsO, § 18 (2).

¹³ insO, §19(2).

¹⁴ InsO, § 217.

¹⁵ InsO, § 217.

¹⁶ Inso, § 218(1).

¹⁷ InsO, § 218.

¹⁸ InsO, §§ 220 and 221

¹⁹ InsO, § 220 (2).

²⁰ InsO, § 221.

submitted the restricting plan. It is a requirement the affected parties vote for the restricting plan.²¹ For voting to occur the relevant creditors and shareholders are divided into the following categories, but further categories can be formed where it is justifiable to do so:²²

- 1. The creditors entitled to separate satisfaction if their rights are affected;*
- 2. Ordinary creditors;*
- 3. Each class of subordinate creditors; and*
- 4. Various categories of affected shareholders.*

*The creditors vote for the restricting plan in their categories which are pre-approved by the court in a discussion and voting meeting.²³ Approval requires each group approves the restructuring plan. Approval requires in each group more than 50% majority on value and 75% **no: more than 50%** or more in number of the relevant parties vote to approve the plan.²⁴ The minority members can fill to the courts to oppose the plan but must show that they will be placed at a disadvantage with the plan than they would be without it.²⁵*

There are situations where some groups of relevant parties do not approve the plan, cross class cram down may be applicable.²⁶ The cross-class cram down where is consent is presumed even on the dissenting classes is applicable if 3 conditions are present.²⁷ Firstly, the dissenting class are not likely to be placed in a worse position by the plan. Secondly, dissenting group members participation requires that the higher-ranking claims be fully satisfied before the claims of lower ranking parties. Finally, majority of the voting groups have approved the plan. Once all 3 conditions are met, dissenting groups are bound by the restructuring plan.

Cross-class cram down and majority approval may have negative effect where the will of the majority is imposed on the minority. The restructuring plan has minority protection in place. It is the courts duty to access voting has been carried out properly and that votes have not been 'bought'.²⁸ If the courts accept the minority members claim the plan does not go ahead. However, if the plan is accepted as voted by the relevant parties it becomes binding per the terms in the constructive part.

In conclusion, the plan is a useful tool to deal with the insolvent estate or save the business. For it to work the correct procedure need to be followed which the court supervises. The relevant parties affected by the plan are required to vote either to approve or disapprove it.

²¹ InsO, § 222.

²² InsO, § 222(1)

²³ InsO, §235.

²⁴ InsO, §244.

²⁵ InsO, § 251.

²⁶ InsO, § 245.

²⁷ InsO, § 245 (1).

²⁸ InsO, § 250.

very good: 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.

Opening of insolvency proceedings

*I can bring a claim against R on behalf of D's insolvent estate for the delay to commence insolvency proceedings.²⁹ D became illiquid on 10 June 2022, that is, unable to pay matured debt.³⁰ R as the sole director of D had 3 weeks from 10 June 2022 to **apply for the opening of** open the insolvency proceedings and 1 September 2022 is past that date.³¹ R will be liable to pay damages and faces a period of imprisonment if he willfully or negligently delayed the commencement of the insolvency proceedings which I has to prove.³² R as defense can state that they were trying to turn the business around hence did not commence insolvency proceedings which might not be sufficient to remove liability. Therefore, R is likely liable to pay the estate of D damages caused by continuing to R's activities and face a prison sentence. **Based on which norm? If you apply § 15a InsO (see your fn. 29), damages are to be paid to the creditor (S), not to the estate. And § 15b InsO (which you do not mention) is not a claim for damages.***

The buying of the car from S still to pay EUR16,000 but is title transferred.

*The contract is between D and S hence R does not have a direct obligation to S for the EUR16,000. On commencement of insolvency, I is put in charge of D's insolvency estate.³³ The contract between S and D is an executory contract where S has fulfilled their obligation to transfer the title to the car but D has not fulfilled its obligation of payment. I can choose to perform the obligation to pay the outstanding amount of money and if that is the case the money will be paid from the insolvency estate.³⁴ **No, I does not have this choice because S has already fulfilled his obligations.** If I refuses to pay the money, S can register a claim for equalization to the insolvency schedule*

²⁹ InsO, §§ 15a(1) and 17; and BGB, § 823(2) .

³⁰ InsO, § 17.

³¹ InsO, § 15a(1).

³² InsO, §15a; and BGB, § 823(2).

³³ InsO, §80(1).

³⁴ InsO, § 103(1).

which will be paid on a *pro rata* basis.³⁵ I can sue R for damages of EUR16,000 because they either bought the car willfully or negligently when the company was already in state that it could not meet its already existing obligations.³⁶ **No, this is a claim of S, based on § 823(2) BGB in connection with § 15a InsO.**

The repayment of EUR10,000 to B.

As discussed earlier, D is illiquid and as such payments from 10 June hence payment were not meant to be made to B.³⁷ The payment was made before the commencement of insolvency proceedings and it can be contested by I.³⁸ Transactions avoidance is directed against the recipient (B), not against R. The EUR10,000 reduced the amount available to D's general body of creditors.³⁹ I has two options to contest the repayment to B⁴⁰ or make R liable for to repay the loss of the EUR 10,000.⁴¹ If I tries to contest the repayment of the loan in order to for the money to be returned to D, it may be difficult to prove that B was aware of the illiquidity of D.⁴² Hence, it is better for I to go after R for their role in the repayment. For R to be liable it must be shown he willingly or negligently repaid the loan.⁴³

mostly incorrect (2 marks)

in all: 28 marks

* End of Assessment *

³⁵ InsO, § 103(2)(sentence 1)

³⁶ InsO, §15a; and BGB, § 823(2).

³⁷ InsO, §18.

³⁸ InsO, § 129(1).

³⁹ Ins, § 129(1).

⁴⁰ Ins, § 132 (1).

⁴¹ InsO, §15a; and BGB, § 823(2). **No, correct is § 15b InsO.**

⁴² InsO, § 132.

⁴³ InsO, §15a; and BGB, § 823(2).