



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).**
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- 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

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

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: 10 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.

Please note: Sources I utilized throughout this exam, unless otherwise indicated, are *INSOL Module 6B Guidance Text Germany and Insolvenzordnung in German, 24. Auflage 2022, Beck-Texte.*

First, the EU Regulation 2015/848 is inapplicable in cross-border insolvency matters between Germany and the United Kingdom as it only applies in such matters between states that are member states of the European Union. The United Kingdom, since December 31, 2020, is no longer an EU member state. Generally, prior to the United Kingdom ceasing to be a EU Member State, the EIR applied. See Model 1 Guidance Text titled "Introduction to International Insolvency Law" at ¶ 6.4.3.1.

Second, the UNCITRAL Model Law is equally inapplicable as, in contrast to England and Wales, among others, Germany has not adopted the UNCITRAL Model Law.

The Insolvenzordnung (“InsO”), however, contains various paragraphs that apply in cross-border insolvency matters and address questions of international insolvencies. More specifically, Part 12, Sections 1 - 3 InsO govern international insolvency proceedings. These rules are binding as long as no other international agreement applies. As mentioned above, the UNCITRAL and EIR do not apply in international insolvency matters between the United Kingdom and Germany.

Part 12, Section 1, §§335 - 342 of the InsO sets forth general provisions (“General Provisions”) that apply in international proceedings implicating Germany, Section 2, §§343-353 of the InsO provides rules that apply in foreign insolvency proceedings, i.e., proceedings that were opened in another jurisdiction (“Foreign Proceedings”), and Section 3, §§354- 358 addresses questions that may arise in territorial proceedings (“Territorial Proceedings”).

The General Provisions address, among other things:

- **That the law of the state in which a particular proceeding was opened, apply: See §335 “lex fori concursus”;**
- **Contracts for immovable things (“Vertrag über einen unbeweglichen Gegenstand”) which provides certain exceptions to §335;**
- **Employment contracts, §337;**
- **Set-offs in §338;**
- **Contesting an insolvency, §339;**
- **Exercise of creditor rights, §341.**

Notable, the General Provisions do not explicitly address the question of “international jurisdiction.”

The rules regarding Foreign Proceedings address, among other things:

- **The automatic recognition of foreign proceedings, §343;**
- **The cooperation between courts, §348; and**
- **The enforcement of foreign decisions/judgments, §353.**

The rules contained in Section 3 address questions related to Territorial Proceedings, such as, among others:

- **Release of residual debt and insolvency plan §355;**
- **Secondary Proceedings, §356; and**
- **Cooperation between insolvency administrators, §357.**

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 an insolvency proceeding in Germany, the following parties are entitled to dispose of collateral if certain requirements are met.

- *The insolvency administrator;*
- *Secured creditor with properly perfected substantive security right.*

Part 4, Section 3 (§§165 - 173 of the InsO) addresses questions related to the right to separate satisfaction. Among other things, Section 3 contains rules related to the disposal of immovable things (§165 InsO), of movable things (§166 InsO), and the distribution of the proceeds (§170 InsO).

*With respect to the disposition of movable things, the following nuance must be considered. The question becomes whether the insolvency administrator or the secured creditor is entitled to the disposal, and associated realization, of the secured good. The answer depends upon, among other things, what security right is at issue and who is in possession of the particular asset to be realized. If the secured creditor is in possession, such creditor may pursue the disposal (§173(1)), but must then follow the requirements set forth in section §170(2) InsO (submit a certain amount to the estate). If the insolvency administrator, however, is in direct possession, the insolvency administrator may dispose of the asset and collect the proceeds (§166(1) InsO), but must also pay certain amounts to the estate (§170(1)). **How about § 166(2) InsO?***

Importantly, the above only applies to assets that belong to the insolvency estate. In contrast, if an asset does not belong to the estate, it will be removed from the mass and the creditor's claim satisfied in full. See §47 InsO. This applies, for example, to a creditor with a "retention of title" security if properly established.

mostly correct (3 marks)

Question 2.3 [maximum 3 marks]

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

In short:

- **Insolvency administrator has right to choose fulfilment;**
- **Non-debtor counterparty must continue to perform;**
- **Non-debtor counterparty may only have a right to receive payment on a pro rata basis, depending upon the type of contract. § 55 InsO should be mentioned here already.**

Upon the assumption of an executory contract (i.e., bilateral contracts with unfulfilled obligations by either party), certain legal consequences arise. Part 3, Section 2 of the InsO contains the applicable rules in §§103 et seq. InsO.

Most importantly, the insolvency administrator may choose whether it is advantageous for the estate to continue the fulfillment of a particular contract. If the insolvency administrator chooses performance, the non-debtor party is bound and

must perform, §103(1) InsO, but has then a right to payment of its claim in full. §55(1)(No. 2).

*On the other hand, the insolvency administrator might choose to reject a particular contract that, for example, might not serve the estate in a positive manner. The non-debtor party to the contract will then have a claim against the estate which might be satisfied on a *pro rata* basis.*

*§§104 et seq InsO contain special rules applicable to certain types of contracts, among others, employment contracts, tenancies and leases. With respect to these types of contracts, the insolvency administrator's right to choose fulfillment remains. However, for these types of contracts, even if the insolvency administrator chooses fulfillment, the non-debtor counterparties only have a right to get paid for back-dated debts on a *pro rata* basis. In the event assets were added to the estate post commencement of the insolvency proceeding, the non-debtor party has a right to fulfillment in full. See §105 InsO.*

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).

The rules applicable to a rescue/insolvency plan are set forth in Part 6, Section 1-3, §§217-269 InsO. Section 1 contains rules regarding the composition of a plan, section 2 rules regarding the acceptance and confirmation of a plan, and section 3 rules regarding the enforcement and monitoring of the confirmed plan.

Importantly, an insolvency plan is contractual in nature and will be negotiated between many parties-in-interest. It usually contains rules related to the distribution of proceeds to the various classes of creditors and the conclusion of the insolvency proceeding, among other things. See §217(1)(sentence 1) InsO. It can also address the treatment of equity holders of the debtor to the extent the debtor is a legal entity. See §217(1)(sentence 2) InsO. Rules set forth in a plan may diverge from the statutory rules set forth in the InsO. See §217(1)(sentence 1) InsO.

Section 1 (Composition of the Plan)

Section 1, §§217-234 InsO describe, among other things, who is eligible to submit/propose a plan. Pursuant to §218 (sentence 1) InsO, either the debtor or the insolvency administrator may propose a plan. The plan may already be proposed by the debtor in connection with the opening of the insolvency proceeding. §218 (sentence 2) InsO. Although the creditors' committee may not submit a proposed plan; it may request that the insolvency administrator submit a proposed plan and set forth the goals of the insolvency plan. See §157 (sentence 2) InsO. If the creditors'

committee does so, the insolvency administrator has to propose and submit a plan to the insolvency court within a certain time frame. §218(2) InsO.

Once a plan has been proposed in compliance with the above-mentioned rules, it will be submitted to and evaluated by the insolvency court. The insolvency court will determine whether the proposed plan complies with the rules and whether the submitting party was authorized to submit the plan.

A plan must consist of two parts - a declaratory and a constructive part. §219 (sentence 1) InsO. It must also contain the exhibits required under sections §§229 (list of assets, financial plan, etc. and 230 InsO (certain consent declarations, if applicable). See 219 (sentence 2) InsO.

Part 1 (declaratory part) must provide, among other things, parties entitled to vote with sufficient information to make an informed decisions as to how to vote. §220(2) (sentence 1). It must further sufficiently describe what has already been accomplished since the opening of the insolvency proceeding and what else is planned to be accomplished to carry out the goals of the plan and build the foundation. §220(1) InsO. Depending upon the goals in a case (restructuring, sale, liquidation), the plan might have to contain a comparison as to how the rights of parties-in-interest might be affected with or without the implementation of the plan. §220(2) (sentences 2-4) InsO. Part 2 must set forth details as to how the rights of various parties-in-interest will be changes and impacted by the plan. §221 (sentence 1) InsO.

With respect to Part 2, if the plan will impact groups with different claims/rights, various groups of creditors and parties-in-interest must be formed. §222(1) (sentence 1) InsO. The following groups might be formed, among others, depending upon the particularities of a given situations:

- "Creditors entitled to separate satisfaction if their rights are interfered with by the plan;*
- The non-lower-ranking creditors;*
- Each class of lower- ranking insolvency creditors, unless their claims are deemed to be waived under pursuant to section 225;*
- Those persons with a participating interest in the debtor where their share or membership rights are included in the plan;*
- The holders of rights resulting from intra-group third-party guarantees."*

See §222(1) (sentence 1) InsO. Source: Translation of InsO provided at https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html.

§222(3) InsO contains specific requirements should a plan provide for the treatment of employees who must build a separate group.

§§223- 225(a) InsO address the requirements for each of the above-mentioned groups.

Each holder of a claim within a group must be afforded equal rights. §226(1) InsO.

Once the plan is submitted to the Court for review, the court must within 2 weeks decide whether the plan complies with, among other things, the above mentioned-rules regarding the composition of the plan and the building of groups. §231((1). If

the court determines that the requirements have been met, it will forward the plan to the creditors' committee, the debtor, and the insolvency administrator (if debtor proposed the plan) for their review and comment. §232. The various parties have two weeks to comment on the plan. §232(3) InsO. The proposed plan will be available for the review by all parties at the court's registry. §234 InsO.

In some cases, debt-for-equity swaps might provide the right mechanism. Under a debt-for-equity swap, liabilities can be reduced. §225(a)(2) (sentence 1).

Part 2 - Acceptance and Confirmation of the Plan

Once finalized, the plan must be voted on as it needs the consent/support of the various parties-in-interest affected by the implementation of the plan. In preparation thereof, the Court sets a discussion and voting meeting as required by §235 InsO. Creditors and shareholders whose claims and rights are impacted by the execution of the plan, are entitled to vote. §§237 et seq InsO. Groups not affected by the implementation of the plan are not entitled to vote. §237(2) InsO.

§§237 - 238(b) set forth specific voting rights for various groups.

Pursuant to §244 InsO, certain necessary majorities must be reached so that the plan can be approved. More specifically, in each group "a majority of creditors with voting rights backs the plan; and the sum of claims held by creditors backing the plan exceeds half of the sum of claims held by creditors with voting rights." Source: https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html

In the event these voting requirements are not met within a group, §245 InsO might become applicable. Pursuant to §245 InsO, acceptance within a group is presumed if

- 1. the members of such a group are likely not to be placed at a disadvantage by the insolvency plan compared with their situation without such plan,*
- 2. the members of such a group participate to a reasonable extent in the economic value devolving to the parties under the plan, and*
- 3. the majority of the voting groups have backed the plan with the necessary majorities."*

Source: https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html

§§246& 246a InsO contain specific rules related to the acceptance of the plan by lower-ranking creditors and shareholders.

Lastly, the debtor must also consent to the implementation of the plan. See §247(1) InsO. The debtor's consent is deemed given, if the debtor does not oppose the plan within a specific time frame. §247(1) InsO. Even if a debtor opposed the plan, such opposition will be found to be irrelevant if it can be determined that the debtor is not placed in a disadvantage by the implementation of the plan compared to the debtor's position without the implementation of the plan. §247(2).

The court must then approve the plan. See §248(1) InsO. Prior to the approval of the plan, the court must first hear the position of the creditors' committee, if applicable, and the debtor. §248(2) InsO. In order to approve the plan, the court must determine

that all the above-mentioned rules with respect to the building of groups, voting, etc. have been followed and their requirements satisfied. See §250(1) InsO. In connection therewith, the court will pay particular attention to whether any of the votes have been "bought." See §250(2) InsO.

Depending upon the outcome of its review, the court will either approve or reject the plan and announce its decision. See §252(1) InsO.

Notably, the rights of minorities will be protected pursuant to §251 InsO. The rule provides that:

"(1) At the request of one of the creditor's or, if the debtor is not a natural person, a person with a participating interest in the debtor, approval of the insolvency plan is to be refused if

- 1. the person filing the request opposed the plan in writing or for the records at the latest in the voting meeting, and*
- 2. the person filing the request is likely to be placed at a disadvantage by the plan compared with his or her situation without a plan; if the debtor is a natural person, section 245a applies accordingly.*

(2) Such request is admissible only if the requesting party shows to the satisfaction of the court at the latest on the day of the voting meeting that they are likely to be placed at a disadvantage on account of the plan.

(3) The request is to be rejected if the constructive part provides for funds being made available in the event that a party to the proceedings shows to the satisfaction of the court that they will be placed at a disadvantage. Whether the party to the proceedings is to receive compensation from such funds is not a matter for the insolvency proceedings."

Source: https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html

Part 3, §§254 - 269(e) InsO - Enforcement and Monitoring of Approved Plan

Once approved, the Plan gains legal force and is binding on all parties. The applicable rules with respect to the enforcement and monitoring of the plan are set forth in §§254 - 269(e) InsO. Notably, when the plan becomes effective, it becomes binding on all participants and oppositions to the plan, among other things, are overruled. §254(1) and §254(b) InsO.

Once the plan is approved and it does not contemplate another procedure, the court will close the insolvency proceeding. §258(1) InsO.

Importantly, equity interests remain part of the estate; however, their interests will only be satisfied if there are sufficient proceeds that have already satisfied the creditors in previous groups. §39(1)(No.5).

A plan may further provide that its implementation must be monitored. See §260(1) InsO. That means, that, among other things, after the conclusion of the insolvency proceeding, the distribution to creditors will as well as the satisfaction of rights granted under the plan, will be monitored. §260(2) InsO.

StaRUG

Importantly, similar rules apply in pre-insolvency proceedings governed by the StaRUG. However, a few differences apply. Among them are the following:

- *Only the debtor may introduce a plan*
- *Either all creditors agree, or the plan must be approved by the creditors' meeting with a majority of 75% of all affected claims within each group and court confirmation. §25 and §60 StaRUG.*
- *Cram down is also possible §§26 StaRug.*

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.

- I. General Discussion (R's duty to open insolvency proceeding, his potential liability for not timely doing so, and payments made after the reason for insolvency became apparent)

R, as a director, failed to satisfy his duty of timely **filing for** opening an insolvency proceeding pursuant to §15(a) & §17 InsO. The company was unable to pay its matured debts (illiquid) since June 10, 2022. R's personal hopes for a turnaround are irrelevant. At the very least, he acted negligently, if not willfully, in not opening the proceedings within 3 weeks after the occurrence of illiquidity, hence by July 1, 2022. See § 15(a)(2). Directors who fail to comply with these requirements generally face fines and sometimes even imprisonment. See BGB § 823(2) with §15(a) InsO. **Why don't you apply this norm to the case?**

Moreover, pursuant to §15(b)(3) InsO, certain payments made by directors after the reason for insolvency is apparent (as here), those persons are deemed not to have been made with reasonable care and must be placed back into the estate. **Again: why don't you apply this norm to the case?**

Furthermore, certain transactions that have been made within the three months prior to the opening of the insolvency proceeding (the suspect period) might be contested/challenged by the insolvency administrator if they were made to the detriment of the estate and the creditor body at large. See §129(1) InsO. Such transactions/payments include, among others, payments, creating of security rights, claim waivers, the individual enforcement of set off of a claim. See §§130 et seq. InsO.

II. Bank Loan - Does I have a claim against R for EUR 10,000?

The insolvency administrator is charged with, among other things, the management of the insolvency estate, its possession and disposition. See §§ 80(1), 148(1), and 159 InsO. He must perform his or her duties in an independent manner, among other things.

*First, the fact pattern is devoid of any information regarding what kind of loan the Bank had with D. I assume for purposes of this question that it had a secured loan and that its security interest was properly perfected. **That's not admissible! Facts which are not mentioned in the question do not exist.** I further assume that the payment to the bank was also made prior to the opening of the insolvency proceeding on September 1, 2022.*

*The next question is whether the transaction regarding the bank loan is contestable. **This would only lead to claims against B, not against R!** R paid the bank \$10k on account of an overdue bank loan within the suspect period.*

*Here, the transaction could probably be contested on the grounds that it was a "congruent coverage" pursuant to §130(1). **If the loan was secured (as you incorrectly assume), then no transactions avoidance is possible, since there is no detriment to the general body of creditors (§ 129(1) InsO).** The transaction occurred within 3 months prior to the opening of the proceeding and satisfied a right to payment for the Bank, D was illiquid at the time, and Bank knew (or is assumed to have known as discussed below) of the financial condition (illiquidity) of D at the time of the transaction. §130(1)1. InsO. Although the fact pattern is devoid of any facts that let me conclude that the Bank had actual knowledge of D's illiquidity, pursuant to §130(2) and (3), Bank's knowledge can be assumed as the loan payments were long overdue (should have let Bank to conclude that D has financial issues) and Bank had a long standing relationship with D, so that §130(3) InsO should also be applicable (Bank's knowledge would be assumed).*

Even assuming (and again the fact pattern is unclear as to when exactly R paid the \$10,000 to Bank) R paid the Bank after the insolvency proceeding was opened, the results should not change. Pursuant to §130(1)2 InsO, a transaction is still contestable if it occurred after the commencement of the insolvency proceeding if the creditor, at the time of the payment, was aware of the illiquidity of the debtor. As explained above, even if the Bank did not have actual knowledge, its knowledge can be assumed pursuant to §130(2) and (3) InsO.

Assuming the requirement of §130 have been met and the transaction can be successfully contested, the Bank must return the \$10k to the estate. The estate's claim for restitution arises by force of law. As such, the requirements of §130(3) InsO are satisfied. As discussed above, R is personally liable as he failed to timely open the insolvency proceeding. As a result, I should have a claim against R for the \$10,000 R

paid to Bank within the suspect period. **No! Against R, only § 15b InsO can support I's claim.**

Further, assuming again that the bank loan is a secured loan, the bank might have an interest in certain, if not all, of D's assets (collateral). Although the moratorium stops any enforcement actions against D, Bank might have a right to "separate satisfaction" which might be enforceable. This discussion, however, would go beyond the call of the question as to whether I has a claim against R.

III. Purchase of the Car - Does S have a claim against R for EUR 16,000?

1. Type of Security Right - Transfer of Title By Way of Security (Sicherungseigentum)

Again, the fact pattern is devoid of any details as to what kind of security right S has. **Again, you are not allowed to invent any facts that are not contained in the question.** With the exception of a "retention of title," whose holder has a "right to separation," other security holder merely have a "right to separate satisfaction," which means that the asset is still part of the insolvency estate. Such holders have a right to get paid, preferential satisfaction up to the amount of the secured claim, ahead of other creditors who do not hold such a right. I do not believe that S holds a "retention of title" based on the facts provided, because (1), the car appears to be a one-time purchase rather than a continuous supply of goods and (2) S transferred title to the car to D. It sounds more like a "transfer of title by way of security."

Further, the moratorium that is established upon the opening of an insolvency proceeding prevent enforcement actions by creditors. As such, S cannot enforce its claim during the pendency of the insolvency proceeding.

What S might have is a right to realization of the car. The car is in D's possession and as such in the possession of the insolvency administrator. As such, it is the insolvency administrator's responsibility to realize the asset. This is regulated by §§ 165 et seq InsO.

As stated above in the answer to question 2.2, with respect to the disposition of movable things, the following nuance must be considered. The question becomes whether the insolvency administrator or the secured creditor is entitled to the disposal, and associated realization, of the secured good. The answer depends upon, among other things, what security right is at issue and who is in possession of the particular asset to be realized. If the secured creditor is in possession, such creditor may pursue the disposal (§173(1)), but must then follow the requirements set forth in section §170(2) InsO (submit a certain amount to the estate). If the insolvency administrator, however, is in direct possession, the insolvency administrator may dispose of the asset and collect the proceeds (§166(1) InsO), but must also pay certain amounts to the estate (§170(1)). The insolvency administrator would then have to realize the assets as described above. S then has a right to separate satisfaction as a secured creditor. Here, the car is in the possession of D, and therefore, in the possession of the insolvency administrator. See §148 InsO. As such, S is not entitled to direct payment

from R, but the insolvency administrator must dispose of the asset and pay S pursuant to the rules regarding a creditor's right to "separate satisfaction."

The transaction might further be contested pursuant to §131(1) InsO (incongruent coverage) as is was the creation of the security right that occurred during the suspect period. All requirements appear to be satisfied. This discussion, however, would also go beyond the question as to whether S has a claim against R.

Unfortunately, you fail to apply the only relevant norms: §§ 15a, 15b InsO.

2 marks.

IV. Conclusion

Bank Loan: For the reasons discussed in detail above, I should be able to prevail on a claim against R for the \$10,000.

Car Purchase: If S has a validly perfected security right, the insolvency administrator must realize the asset and S will have a right to separate satisfaction, i.e. payment of its secured claim ahead of other creditors. However, because the security right was granted within the three months prior to the opening of the insolvency proceeding, the transaction might also be contestable. However, because of the moratorium, S cannot directly enforce its claim against R.

In total = 36

* End of Assessment *