



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

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.

§§ 335 *et seq* of the InsO (assuming that the insolvency issues have arisen after Brexit/ any applicable transition periods). Furthermore, §§ 343 and 352 of the InsO provide for the recognition of foreign judgements.

correct (3 marks)

Question 2.2 [maximum 4 marks]

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

Assuming that the underlying security rights are validly created under substantive law before the opening of insolvency proceedings, secured goods (i.e., collateral) can, in parts, be

disposed by the creditor (§§ 49, 173 of the InsO) and, in parts, by the insolvency administrator (§ 166 of the InsO). **You were expected to elaborate on §§ 165, 166 (1)/(2), 173 InsO.** With respect to the retention of title, the creditor has a right to separation of the retained goods from the insolvency estate if the insolvency administrator rejects satisfaction of the contract (with the consideration for such good not being paid).

only partly correct (2 marks)

Question 2.3 [maximum 3 marks]

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

If a mutual contract was not or not completely performed upon the opening of insolvency proceedings and the insolvency administrator chooses fulfilment (i.e., assumes the respective contract), both claims become enforceable again and the respective creditor's claim must be fully satisfied from the insolvency estate.

correct (3 marks)

in total: 8 marks

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

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

I understand that the question refers to the insolvency plan as stipulated in §§ 217 to 269 of the InsO ("Insolvenzplan" in German).

An insolvency plan is available in insolvency proceedings over the estate of (i) a natural person and (ii) a legal person/ corporate entity. Further it can be used as a tool to facilitate the restructuring (going concern) of the respective debtor or it can be used in proceedings aiming at the liquidation of a (non viable) debtor.

The insolvency plan can either be submitted by the debtor or the insolvency administrator (either by itself or at the request of the creditors' meeting) to the competent insolvency court.

As regards formalities, the insolvency plan must include two parts: (i) an informative part, equipping the parties which are entitled to vote on the plan with the information required to make an informed decision and (ii) a constructive part, explaining the legal consequences of the plan (i.e., if and how the legal position of the respective parties will be impacted by the plan (if sanctioned)). Therefore, different groups of creditors must be formed. The group formation is subject to the legal status of the creditor, including (a) creditors entitled to separate satisfaction, (b) ordinary/insolvency creditors, (c) subordinated creditors (including a differentiation between junior / senior etc. sub creditors (if applicable)), (d) "equity" creditors, where their share or membership rights are included in the plan. (a) – (d) reflect the mandatory classes, while further classes of creditors can be built, if applicable. Within the respective group, creditors must be treated equally.

If these criteria are met and the insolvency plan has the prospect of success, it will be delivered to the creditors' committee, the insolvency administrator and the debtor, in order to be

considered/ commented on by the same. If the plan is not likely to succeed (within the meaning of the InsO), it will be rejected by the insolvency court.

Next, the insolvency court determines a discussion and voting hearing, with the impacted creditors (including shareholders) voting on the plan within their respective classes. In order for the plan to be approved, in every group of creditors both a simple majority in value and a majority in number needs to be achieved. If the necessary majorities have not been reached in every class, the insolvency plan provides for a cross-class cram down, which is subject to three prerequisites, including, for instance, that the members of the dissenting group are not likely to be placed at a disadvantage with the plan being sanctioned as compared to their situation without the plan.

The debtor must also consent to the plan. However, if the plan is in its best interest (ie he is not placed at a disadvantage), the plan can be sanctioned regardless of its opposition.

Upon the court's sanctioning of the plan becomes final, the plan's legal effects (as explained in the constructive part) become binding.

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.

R, as the (sole) managing director of D, is obliged to request the opening of insolvency proceedings over the estate of D no longer than three weeks after the occurrence of D's inability to pay its debts (cash flow insolvency). Based on the above facts, R was obliged to file for the opening of insolvency proceedings on 24 June 2022 the latest (ie three weeks after D's inability to pay its mature debts). R failed to meet this obligation (negligently). On 5 July 2022 R repaid a portion of EUR 10,000 on an overdue loan to B. Assuming that a prudent businessman, acting with reasonable care, would have not made such payment, R is obliged to pay a sum of EUR 10,000 to the insolvency estate. The insolvency administrator I therefore has a claim against R in such amount. **Based on which norm?**

D entered into a sales contract with S, which has at the date of the opening of proceedings not been fully performed by the parties as the consideration for the car has not been paid. **Yes, but S has fully performed.** Upon the opening of insolvency proceedings, S's payment claims lose their enforceability vis-à-vis the insolvency estate. The insolvency administrator, however, has the option to choose fulfilment. **No, only if both parties have not fully performed.** In that case, the insolvency administrator is obliged to pay the purchase price to S with S receiving the EUR 16,000. Assuming that R acted fraudulently, and S suffered damages caused by the delay of payment, S may additionally claim such damages from R. Should the

insolvency administrator reject the fulfillment of the sales contract, S would file its payment claims with the insolvency administrator, receiving eventually a pro rata quota. Assuming that R acted fraudulently, he can claim (additional) damages from R. **Correct was § 823(2) BGB in connection with § 15a InsO.**

5 marks.

in all: 38 marks

*** End of Assessment ***