



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 is (b); a plan reduces the liabilities and is therefore 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

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 is (b), since the opening decision comes from 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: 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 German law regulation of international insolvency law is provided for in §§335 *et seq* of the *Insolvenzordnung* (Insolvency Regulation) (“InsO”), which are binding where no bilateral or multilateral agreements apply.

In the context of insolvency proceedings opened in foreign jurisdictions, Germany follows the principle of universality - meaning that foreign proceedings are recognised in Germany.

Foreign proceedings are only not recognised in Germany where: (i) the courts in the jurisdiction where proceedings were opened do not have jurisdiction according to German law; (ii) recognition would lead to a result that is manifestly incompatible with significant principles of German law, especially basic rights. If these grounds for

exclusion are not presented, the German court must recognise the foreign proceedings.

*§§335 et seq of InsO also establishes the legal principle of *lex fori concursus*, pursuant to which the German court will accept that the law of the state in which the relevant foreign insolvency proceedings have been opened will be applicable (with some exceptions).*

correct (3 marks)

Question 2.2 [maximum 4 marks]

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

*The majority of security rights that exist pursuant to German law allow for a right to separate satisfaction (*Absonderungsrecht*) in insolvency proceedings. As a result, the security interest does not prohibit the secured asset(s) from forming part of the insolvency estate of the debtor - but the secured creditor does have the right to demand preferential satisfaction (to a maximum of the quantum of the secured claim that the secured creditor has against the debtor) out of the proceeds of realisation of the secured asset(s).*

The question of who is entitled to realise a secured asset - either the insolvency administrator acting for the debtor or the secured creditor acting for its own account - depends on the nature of the asset and the security right, as well as which of the parties is in direct possession of the asset. Where the insolvency administrator has responsibility for realising the asset, the secured creditor is not entitled to enforce its security interest.

*Secured creditors are not entitled to enforce their secured claims (pursuant to §89 InsO) other than for where there is a right to separate satisfaction (because a right to separate satisfaction is a right *in rem*). §§165 et seq of InsO regulates the realisation of assets by way of the enforcement of rights to separate satisfaction - albeit only to the limit necessary to allow the secured creditor to realise the value of the security.*

The realisation and sale of secured assets is partly the secured creditor's responsibility and partly the insolvency administrator's responsibility. The insolvency administrator may realise moveable items in their possession and claims assigned by way of security (pursuant to §166 InsO). Other moveable items (including those in a secured creditor's possession) may be realised by secured creditors (pursuant to §173 InsO). Immoveable items may be realised by secured creditors with a right to separate satisfaction (pursuant to §49 InsO).

The exception is for assets subject to a simple retention of title, in which case the assets may be separated from the insolvency estate (upon the insolvency administrator not

paying the purchase price for the relevant goods and thereby repudiating the relevant contract for sale and purchase). In such a case, the assets are removed from the insolvent estate and returned to the relevant creditor.

The analysis above is subject to any transaction avoidance rules for security interests created prior to the opening of the insolvency proceedings.

correct (4 marks)

Question 2.3 [maximum 3 marks]

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

The starting position is that, in insolvency proceedings, contracts are wound up - meaning that the contractual obligations should be fulfilled. However, in the case of executory contracts, the insolvency administrator may first elect to fulfil the contract or not.

If the insolvency administrator elects to assume the executory contract, the contract continues between the insolvent debtor and the counterparty.

The debts incurred by the debtor prior to the entry into insolvency proceedings only need to be paid on a pro rata basis (as between the relevant creditor and the other unsecured creditors - assuming that the counterparty to the executory contract is itself in an unsecured position).

The counterparty's claim against the debtor for all liabilities incurred by the debtor after the opening of insolvency proceedings must be fully paid out of the insolvency estate of the debtor.

To the extent that the creditor has added assets to the estate of the insolvent debtor after the opening of the insolvency proceedings, those obligations of the debtor must be met in full.

correct (3 marks)

in total: 10 marks

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

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

As an alternative to other restructuring, liquidation, and insolvency proceedings, debtors may avail themselves of a 'restructuring plan' or 'insolvency plan' (Insolvenzplan), which is modelled upon Chapter 11 of the U.S. Bankruptcy Code and provides for a debtor and other stakeholders (including the debtor's shareholders and creditors) to reach a mutual agreement for the management of the insolvency estate of the debtor. The restructuring plan is a corporate rescue proceeding that should be considered distinct from the pre-insolvency tools available under StaRUG. Its objective is to preserve the debtor as a legal entity. A restructuring plan may only be initiated where the debtor is not in formal insolvency proceedings, but it is an eligibility requirement that the debtor is at risk of imminent illiquidity.

Both natural and legal persons (of various kinds, including but not limited to public limited companies, partnerships limited by shares, and limited liability companies) are entitled to submit an insolvency plan. However, the meeting of the debtor's creditors may direct the insolvency administrator of the debtor to put together an insolvency plan.

The restructuring plan must be submitted to the insolvency court and must include the following components: (a) a declaration, with relevant justifications, as to how the plan will eliminate imminent illiquidity of the debtor and result in its financial stabilisation (including a breakdown of how the plan will impact affected creditors' prospects for repayment); and (b) constructive details as to how payment of certain claims will be treated (i.e., on a pro rata basis) and the waiver of outstanding parts of such claims. These elements should help creditors to make informed decisions as to the merits of the plan, based on the background information relating to the debtor and how the proposal will influence their positions.

Creditors will be grouped into different classes for the purposes of the restructuring plan, with creditors grouped together based on how the plan will influence their positions. Pursuant to §222(1) InsO, it is compulsory for the classes to, at the least, distinguish between: (a) creditors entitled to separate satisfaction of their security interests; (b) the ordinary creditors; (c) subordinated creditors; and (d) shareholders/members/owners of the debtor, where their ownership interests/rights are impacted. That is the minimum position; further classes may be formed as necessary. The critical element is that creditors in the same class must be offered equal rights by the plan.

Once the plan complies with the requirements above and, where the plan is submitted by a debtor (as opposed to an insolvency administrator), has a prospect of success (or risk refusal pursuant to §231 InsO), the insolvency court will provide the proposed restructuring plan to the creditors' committee, the debtor, and the insolvency administrator, for their review and comment.

The court convenes a meeting between those same parties, for discussion of the restructuring plan and voting in relation to it. Pursuant to §237 et seq InsO, all

creditors' with impacted claims are entitled to vote (and will do so in their classes), as are shareholders/members of the debtor (per §238 InsO).

In order to be approved, the restructuring plan must achieve the requisite threshold, which consists of every class approving the plan, where each class gives its approval if a majority of the creditors in that class, both in terms of number and in terms of value of claims, vote in favour. The only exception to that threshold is if a cross-class cram-down is applied pursuant to §245 InsO, pursuant to which the restructuring plan will be deemed approved by a dissenting class if: (a) the members of that dissenting class are not put at a disadvantage by the plan (compared to what their position would be without it); (b) the members of that dissenting class benefit, to a reasonable extent, from the economic value provided to creditors under the plan; and (c) the majority of classes have approved the plan in accordance with the requisite majorities. Per §247 InsO, the debtor must also give its consent to the plan (unless the debtor is not disadvantaged by the plan in comparison to the situation that would occur without a plan, in which case pursuant to §237 InsO any objection by the debtor may be ignored).

The court must also approve the plan, and will do so only if the mandatory rules have been followed and that no votes have been obtained with financial benefits that only grant an advantage to one creditor (or group of creditors) (see §250 InsO).

Finally, the plan may be subject to protection given to a minority dissenting creditor if such creditor has: (a) filed a request opposing the plan in writing or in the voting meeting; and (b) would likely be at a disadvantage under the plan compared to circumstances where the plan was not effected.

Following the above requirements being met, the court will issue an order approving the plan as final, and its treatment of the creditors will become binding - including on those creditors who voted against the restructuring plan.

Other impacts of the restructuring plan include a stay on creditors' enforcement and collateral realisation actions for a maximum of three months (or up to eight months, where the court's approval is still pending). Restructuring plans may provide for debt-for-equity swaps, allow the insolvency administrator to assume or repudiate executory contracts, allow for set-off and netting, and allow for the insolvency administrator to challenge vulnerable transactions pursuant to the relevant claw-back provisions.

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 first step is to establish the timeline of solvency (or insolvency for D GmbH ("D"). From 10 June 2022, D has been unable to pay certain of its debts that have matured. That inability to make payments when they fall due means that D was cash flow insolvent from 10 June 2022 onwards, satisfying the test for insolvency set out in §17 InsO.

A debtor may be presumed illiquid, for the purposes of determining whether such debtor is insolvent on a cash flow basis, if that debtor has ceased to make payments that are due and owing - meaning that it will be apparent to third parties that the debtor is unable to pay its debts and therefore illiquid.

Given D is unable to pay mature debts, it will be apparent to its creditors that they are not receiving payments that are due and owing, meaning that D will have been illiquid (or cash flow insolvent) since 10 June 2022.

Pursuant to §15a(1) InsO, it is a mandatory requirement of German law that a director (such as R) of a legal person (such as D) request that insolvency proceedings be opened in respect of that legal person within 3 weeks after the inability to pay debts first occurred. In this case, R should have sought to open insolvency proceedings in respect of D by no later than 1 July 2022. Given the insolvency proceedings for D were only opened on 1 September 2022, it is clear that R did not discharge this duty.

*Pursuant to §15b InsO **I guess you mean § 15a InsO**, the consequences for a director of failing to discharge that duty (whether the failure was wilful or negligent) include having to pay damages and incurring either a prison sentence or a monetary fine.*

Following the obligation (to make a request for the opening of insolvency proceedings) arising, pursuant to §15b(1) InsO the representatives of a debtor may no longer make any payments on its behalf except where those payments are consistent with the due care of a prudent and conscientious manager. Payments made in the ordinary course of business are generally deemed consistent with the due care of a prudent and conscientious manager (§15b(2) InsO) except where the period for filing for the opening of insolvency proceedings has expired (§15b(3) InsO).

Given R caused D to make payments after the request to open insolvency proceedings should have been made, R cannot be said to have been acting as a prudent and conscientious manager.

Where the relevant company is a Limited Liability Company, which D is, the payments made by the director after the insolvency has arisen are subject to the director, R, being obliged to replace the assets to the estate of D (provided that R was not acting as a prudent and conscientious manager).

*As a result, I has a claim against R for EUR 10,000, in order to replace the assets that R caused D to pay to bank B. I should also consider whether either (1) the transaction between D and S **There was no transaction from D to S** or (2) the payment from D to bank B are vulnerable transactions and could be challenged pursuant to relevant claw-back provisions. Transactions are generally capable of being contested if it is to the disadvantage of creditors and a reason to contest the transaction can be proven (§129 InsO). A transaction is to the disadvantage of creditors as a whole if it reduces the amount of assets available to creditors as a whole (which transaction (2), above, does). The reasons to contest transactions include all payments made in the year prior to the opening of insolvency proceedings, so I may be able to contest transaction (2), above. **Yes, but that gives I a claim against B, not R.***

*From the perspective of S, where a company representative such as R misleads a counterparty such as S (e.g., as to the solvency of D), such fraudulent behaviour may give rise to liability from R to S and S may indeed have a claim against R. The alternative is that S would have an ordinary, unsecured claim in the insolvency of D. **S has a claim against R based on § 823(2) BGB in connection with § 15a InsO.***

only partly correct.

7 marks

In all: 40 marks

* End of Assessment *