



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

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). An insolvency plan reduces the debtor's liabilities and is therefore positive 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

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: 9 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.

International insolvency law under Germany is regulated by §§ 335 et seq InsO. These include:

(a) § 335 InsO;

(b) § 336 InsO;

(c) § 337 InsO;

(d) § 338 InsO;

(e) § 343 (1) InsO

correct (3 marks)

Question 2.2 [maximum 4 marks]

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

The starting position is that the debtor loses the right to manage and dispose of the insolvency estate the opening of proceedings in the event of an insolvency proceeding, as provided under § 80 InsO.

The default position is that an insolvency administrator is entitled to dispose of collateral after the opening of insolvency proceedings as provided under § 165 InsO. This power to dispose of collaterals applies to immovables. As for movable collateral, § 166 InsO allows the insolvency administrator to dispose of movable collateral if it is in his possession. (How about § 166(2) InsO?) § 173 InsO then provides that where the insolvency administrator has no right to dispose of collateral (eg. for movable collateral not in the insolvency administrator's possession), the creditor is entitled to dispose of it.

Further, where the debtor has requested a debtor-in-possession proceeding and this has been approved by the insolvency court, the debtor will be able to take on the role of the insolvency administrator, and this would include disposing of collaterals, as provided for under §§ 270 *et seq* InsO.

Nearly correct (3 marks)

Question 2.3 [maximum 3 marks]

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

*§ 103 InsO prescribes that after the opening of proceedings, no winding up of an executory contract occurs, and that the contracting parties only fulfil the contract if the insolvency administrator so chooses and once assumed, the creditor's claim must be satisfied in full from the insolvency estate. In this situation, the back-dated debts of the debtor need only to be fulfilled on a *pro rata* basis and the obligations need only be fulfilled in full as far as assets were added to the estate by the counter-party after the opening of the insolvency proceedings: 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 debtor or the insolvency administrator can submit an insolvency plan: see § 218(1) InsO. Alternatively, the creditors may, at the creditors' meeting, ask the insolvency administrator to

submit an insolvency plan: see § 157 *InsO*. Once the creditors do so, the insolvency administrator must submit to the insolvency court an insolvency plan within a reasonable period of time: § 218(2) *InsO*. Once submitted, the court will then determine whether the plan has been submitted by the correct party, and whether the rules governing the contents of an insolvency plan have been followed.

There are 2 parts to an insolvency plan: a declaratory part and a constructive part: see § 219 *InsO*. The declaratory part summarises the information which is necessary for the parties entitled to vote to make an informed decision. In particular, the plan must describe the measures taken to create the basis for the envisaged establishment of rights held by the parties to the proceedings, including all information concerning the bases for and effects of the insolvency plan which would be relevant to the parties and the court in deciding whether to approve the plan: see §220 *InsO*.

The second part, which is the constructive part, contains the actual structure of how parties' legal positions will be transformed: see § 221 *InsO*. This requires that the parties be separated into the following groups: (1) creditors entitled to separate satisfaction if their rights are interfered with by the plan; (2) ordinary creditors; (3) each class of subordinate creditors; and (4) persons with a participating interest in the debtor where their share or membership rights are included in the plan: see §222(1) *InsO*. Within each group, all parties must be given equal rights under the insolvency plan: see § 226(1) *InsO*. If equal rights are not given to all parties within a group, their unanimous consent must be obtained: see §226(2) *InsO*.

Unless otherwise stated in the insolvency plan, the insolvency plan does not affect the rights of creditors entitled to separate satisfaction to achieve satisfaction from their security. Where the insolvency plan does reduce their rights, it must specify the fraction by which their rights are reduced, the period of respite for their claims, and which other provisions are binding on them: see § 223(2) *InsO*. The insolvency plan must specify the same in respect of ordinary creditors: see § 224 *InsO*. As for subordinate creditors, their claims are deemed to be waived unless otherwise provided in the insolvency plan: see §225 *InsO*. If the insolvency plan provides otherwise, the same must be specified in respect of the subordinate creditors. It is possible for the insolvency plan to provide that creditor's claims are converted into share or membership rights in the debtor: see §225a *InsO*.

When these requirements are complied with and, in the case of a debtor-submitted plan, the plan has the prospect of success (see § 231 *InsO*), the insolvency court will forward it to the creditors' committee, the insolvency administrator, and the debtor for their comments (see § 232 *InsO*) and lay it out for their inspection: see § 234 *InsO*. At this stage, the court may refuse the plan *ex officio*. In addition, the court will also consider whether the claims provided for under the constructive plan manifestly cannot be satisfied. The court will also refuse the plan if there is obviously no chance of being accepted by the parties to the proceedings: see § 231 *InsO*.

Once the court has determined the plan will not be refused, the court will docket a meeting to discuss the voting rights of parties and to vote on the plan within one month: see § 235 *InsO*. This is called the "discussion and voting meeting". All creditors impacted by the plan are entitled to vote, while those not impacted by the plan are not entitled to vote: see § 237 *InsO*.

Approval of the plan is only reached when *all* groups have given their approval. For this to happen a majority in number and value within each group must vote in favour of the plan: see § 244 *InsO*. It is also necessary for the debtor to consent to the plan. However, the debtor's opposition will be deemed irrelevant if he is not placed at a disadvantage by the plan and no creditor receives under the plan economic value that exceeds their claim: see § 247 *InsO*.

There are also “cross-class cram-down” mechanisms which are applicable to push the plan to be approved, even if the necessary majorities were not achieved. This would be achieved where most of the groups have achieved the necessary majorities, and the members of a group: (1) are not likely to be placed at a disadvantage as compared to their situation if the plan does not go ahead; and (2) participate to a reasonable extent in the economic value devolving to the other groups: see § 245 InsO. Where this is so, the plan will be considered approved.

Following approval by the creditors, the court must approve the plan. The court will consider whether the necessary procedure was followed and whether the voting process was proper (ie., no creditors were given advantages outside the plan in exchange for their votes of approval): see § 250 InsO. At this stage, it is also possible for a party to seek minority protection if they are likely to be placed at a disadvantage by the plan. Where, however, the plan has provided for funds to be made available to compensate such parties, the request will be rejected: see § 251 InsO.

Once the order is given approving the insolvency plan, the plan becomes binding on *all* parties, including those who opposed the plan and those not involved in the insolvency proceedings.

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's claim against R

I may have a claim against R in so far as: (a) R failed to file a request to open insolvency proceedings in time; and (b) R's payment of EUR 10,000 to bank B is concerned.

Following D's illiquidity, R was required to file a request for the opening of insolvency proceedings without delay pursuant to § 15a InsO. Since D was illiquid on 10 June 2022, R was required to file a request for the opening of insolvency proceedings by 1 July 2022 (this being three weeks after 10 June 2022). Insolvency proceedings were only opened on 1 September 2022. Assuming that R filed the insolvency proceedings after 1 July 2022, R would have failed to meet this obligation, either wilfully or negligently, and he will have to pay damages and face a period of imprisonment or a fine: see § 823(2) BGB read with §15a InsO. **These rules apply in relation to the creditor (S), not in relation to the estate (I).**

Further, since D is a public limited company, it is prohibited from making payments after 10 June 2022 (the date of its illiquidity), unless the payments were consistent with the due care of a prudent and conscientious manager: see §15b InsO. Moreover, payments made in the ordinary course of business, such as those which serve to maintain business operations, are deemed consistent with the due care

of a prudent and conscientious manager, although any payments made following the opening of insolvency proceedings would not be consistent with the due care of a prudent and conscientious manager: see §§15b(2) and 15b(3) InsO. On the facts, nothing suggests that the EUR 10,000 was made in the ordinary course of business. On the contrary, the EUR 10,000 relate to loans that were long overdue. This means that D's business was able to continue even without repaying the loans. Moreover, this payment was made after 1 July 2022.

Accordingly, the EUR 10,000 payment was prohibited by §15b InsO and thus I can take action against R to reclaim such payment. In particular, directors who are obligated to file a request to open insolvency proceedings are obliged to refund payments made in contravention of §15b. As the only director of D, R was obliged to open insolvency proceedings by 1 July 2022 and did not. Following this, he made a payment that was not consistent with the due care of a prudent and conscientious manager.

S's claim against R

S may have a claim against R for fraudulent trading. It is accepted that all fraudulent behaviour towards a contracting party leads to a liability towards that party: see §§ 826 and 823(2) BGB read with § 263 StGB. No, it's much easier: § 823(2) BGB in connection with § 15a InsO.

In the present case, as a representative of D, R may have misled S, the contracting party, over the cash flow insolvency/illiquidity of D to secure the purchase of the car on credit terms. If this is so, then R may be personally liable to S for misleading S. Much of this, however, depends on what was communicated between S and R. If S has not asked or made inquiries as to the solvency or liquidity of D, then there is no reason for R to have informed S about the financial status of the company, such that no misrepresentation could have occurred. However, it is more likely that when S agreed to sell the car to D, S was under the impression that D was not illiquid, which explains why S agreed to sell D the car with payment due on 5 August 2022. If S was aware that D was illiquid it would certainly have insisted on immediate payment. Further, if it can be shown that R was aware of S's misapprehension regarding D's solvency, and that he maintained this error in order to obtain a pecuniary benefit for D (the car), then R was in breach of § 263 StGB. Pursuant to § 823(2) BGB, he is therefore liable to compensate S for the damage arising from his breach.

6 marks

in all: 39 marks

*** End of Assessment ***