



**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); an insolvency plan reduces the debtor's 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

#### 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

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.**

**§ 335 InsO**

**§ 336 InsO**

**§ 338 InsO**

**§ 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?**

*Under § 165 InsO, the insolvency administrator is entitled to dispose of collateral forming part of the insolvency estate by way of a court auction or a sequestration. This applies to immovables.*

*Under § 166 InsO, the insolvency administrator is entitled to dispose of movable collateral if it is in his possession. **How about § 166(2) InsO?***

*Under § 173 InsO, 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.*

mostly correct (3 marks)

Question 2.3 [maximum 3 marks]

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

*Upon the opening of insolvency proceedings, executory contracts are not wound up. This means that the partner to the contract does not need to continue to fulfil their obligations under the contract. Once the contract is assumed by the insolvency practitioner, however, both parties to the contract are obliged to fulfill their obligations. The insolvent entity need only fulfill its obligations to the extent that the counterparty provides consideration. The counterparty's claim against the insolvent entity has preference over other claims against the insolvency estate.*

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*).**

*An insolvency plan can be submitted by either the insolvency administrator or debtor (§ 218 InsO). It is also possible for the creditors at the creditors' meeting to ask the insolvency administrator to submit an insolvency plan (§ 157). Once the creditors do so, the insolvency administrator must submit an insolvency plan within a reasonable period of time (§ 218(2)). An insolvency plan must be submitted to the insolvency court.*

*Once an insolvency plan has been submitted, the insolvency court will determine whether it has been submitted by the correct party, and whether the rules governing the contents of an insolvency plan have been followed. The norms of the InsO require*



*that the insolvency plan has two parts: a declaratory part and a constructive part (§ 219).*

*In the declaratory part, the plan must describe the measures taken to create the basis for the envisaged establishment of rights held by the parties to the proceedings (§220). It must contain 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.*

*The constructive part of the insolvency plan contains the actual structure of how parties' legal positions will be transformed (§ 221). The insolvency plan must separate parties 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; (4) persons with a participating interest in the debtor where their share or membership rights are included in the plan; and (5) the holders of rights resulting from intra-group third-party guarantees (§222(1). Within each group, all parties must be given equal rights under the insolvency plan (§ 226(1)). If equal rights are not given to all parties within a group, their unanimous consent must be obtained (§226(2)).*

*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 (§223(2)). The insolvency plan must specify the same in respect of ordinary creditors (§224). As for subordinate creditors, their claims are deemed to be waived unless otherwise provided in the insolvency plan (§225). 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 (§225a).*

*At this stage, the court is able to refuse the plan ex officio. Other than considering whether the relevant provisions have been complied with, the court will consider whether the claims provided for under the constructive plan manifestly cannot be satisfied. If the debtor has submitted the plan, the court will refuse the plan if it obviously has no chance of being accepted by the parties to the proceedings (§231).*

*Assuming the plan is not refused, the court will docket a meeting to discuss the voting rights of parties and to vote on the plan called the "discussion and voting meeting". This meeting must be docketed within one month (§235). All creditors impacted by the plan are entitled to vote. Creditors who are not impacted by the plan are not entitled to vote (§237). For the plan to be approved, all groups must approve the plan. This means that, within each group, a majority in number and value vote in favour of the plan (§244). In other words, more than half the voting members must approve of the plan, and the combined value of their claims must be more than half the total value*

*of claims for the group. It is also necessary for the debtor to consent to the plan, but 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 (§247).*

*It is also possible for a voting group to be considered to have approved a plan even though the necessary majorities were not achieved. This is known as a "cross-class cram-down". If 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, and most of the groups have achieved the necessary majorities, the plan will be considered approved (§245).*

*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) (§250). At this stage, it is also possible for a party to make request for minority protection if they are likely to be placed at a disadvantage by the plan. However, it is possible for the plan to provide for funds to be made available to compensate such parties. Where these funds have been made available, the request will be rejected (§ 251).*

*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.***

***Does I have a claim against R?***

Since 10 June 2022, D was illiquid as it was unable to pay its mature debts (§ 17(2) InsO). Pursuant to § 15a InsO, R was required to file a request for the opening of insolvency proceedings without delay once D became illiquid. At the latest, R was required to file a request for the opening of insolvency proceedings by 1 July 2022 (three weeks after 10 June 2022). Insolvency proceedings were only opened on 1 September 2022. It is not clear when the directors filed the request to do so, but I assume that it was no more than 30 days before 1 September 2022. This falls after the 1 July 2022 deadline. Pursuant to §15b InsO, R was prohibited from making payments on D's behalf after 10 June 2022 unless the payments were consistent with the due care of a prudent and conscientious manager. §15b(2) provides that 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. However, this is qualified by §15b(3), which provides that payments made after the deadline for opening insolvency proceedings (1 July 2022 in this case) are generally not consistent with the due care of a prudent and conscientious manager. In this case, there is nothing to suggest that the EUR 10,000 payment was made in the ordinary course of business - in fact, the loans were long overdue which means that D's business was able to continue even without repaying the loans. In any case, the EUR 10,000 payment was made after 1 July 2022 and, as mentioned, §15b(3) provides that such a payment is generally not consistent with the due care of a prudent and conscientious manager. Thus, the EUR 10,000 payment was prohibited by §15b InsO.

The question that follows is whether I can recover this prohibited payment from R. §15b(4) provides that those 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. Accordingly, he is liable to refund the sum of EUR 10,000 to the insolvency estate and I may claim this sum from him.

Does S have a claim against R?

S is a creditor of D. Any claim that it has against D will lie in the insolvency proceedings. As for R, however, S could potentially have a claim if it can show that R fraudulently misled S into believing that D was not illiquid, and that D contracted with S on this basis. §823(2) BGB provides that a person who commits a breach of statute that is intended to protect another person is liable to provide compensation to the other party for the damage arising therefrom. § 263 StGB (the relevant norm is § 15a InsO, not § 263 StGB) prohibits a person from damaging the assets of another by causing or maintaining an error under false pretenses or distorting or suppressing true facts with the intention of obtaining an unlawful pecuniary benefit for themselves or a third party. Here, S was undoubtedly under the impression that D was not illiquid when it agreed to sell D the car with payment due on 5 August 2022. If it was aware that D was illiquid it would certainly have insisted on immediate payment. 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. To conclude, S has a claim against R if it can show that R was aware of its misapprehension that D was solvent, and deliberately refrained from correcting this such that S would agree to selling the car to D without immediate payment.*

12 marks

in all: 45 marks

**\* End of Assessment \***