



**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 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 is (d); imminent illiquidity is a prerequisite for StaRUG restructuring

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: 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.**

These are the norms. International insolvency law is regulated by the norms under s 335 *et seq* InsO – these are binding unless bilateral or multilateral agreements apply. Here, Germany is a EU member state, so EU Regulation 2015/848 (“EIR”) is applicable. Specifically, Art 19 of the EIR stipulates that proceedings can only be recognized where their opening is binding – the court must have jurisdiction under Article 3 EIR and recognition of such proceedings would not violate *ordre public*. The EIR would govern cross-border insolvency issues between Germany and the UK, before Brexit.

After Brexit, these are the applicable norms. For insolvency proceedings opened in Germany, the principle of universality is followed – it prescribes that the effects of an insolvency proceeding are also binding in all other countries (s 335 InsO).

Insolvency proceedings in the UK will be not be recognized in Germany where (s 343(1) InsO):

1. The UK courts (which are the courts of the state where proceedings are opened) do not have jurisdiction in accordance with German law

2. Where recognition of proceedings would lead to a result that is manifestly incompatible with major principles of German law – particularly where it is incompatible with fundamental rights.

In respect of recognition of UK insolvency proceedings, this also follows the principle of universality.

**correct (3 marks)**

**Question 2.2 [maximum 4 marks]**

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

As to whether it is the secured creditor or the insolvency administrator who is responsible for carrying out the realization of the collateral, this depends on the type of asset and the type of security right in question as well as whether the insolvency administrator or the secured creditor is in direct possession of the asset. If the insolvency administrator is responsible for the realization of the asset, then the secured creditor can no longer enforce the security right.

The disposition of secured goods is regulated by s 165 *et seq* InsO – it is partly the responsibility of the creditor, and partly the responsibility of the insolvency administrator. This approach avoids scenarios where a creditor disposes of assets forming an important part of the debtor's business such that continuation of business activities is no longer viable.

Where there is a simple retention of title, it is the retainer of the title who can dispose of the collateral. The retainer of title has a right to the separation of the retained goods from the insolvency estate if the insolvency administrator rejects the satisfaction of the contract, and the price of the goods remains unpaid. This means that the retained goods are removed from the insolvency estate, leading to the creditor's claim being satisfied in its entirety: s 47 InsO.

Further, pursuant to s 166 InsO, the insolvency administrator can dispose of a movable item to which the creditor has a right to separate satisfaction without restriction if the movable item is in the insolvency administrator's possession. **How about § 166(2) InsO?**

**partly correct (3 marks)**

**Question 2.3 [maximum 3 marks]**

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

S 103 InsO provides that no winding up of executory contracts occurs after the opening of proceedings. If an insolvency administrator assumes an executory contract, both parties must fulfil their obligations under the contract, and the creditor's claim must be satisfied in full from the insolvency estate (s 55(1) (No 2) (alternative 1)).

If the insolvency administrator rejects the fulfillment of the claim, the contracting partner can register a claim for equalization to the insolvency schedule – this claim will be satisfied on a pro rata basis (s 103(2) (sentence 1)).

If the contractual performance under the executory contract is severable, the other party is not entitled to claim restitution for non-performance of its claim to the consideration of the part of services transferred to the debtor's assets before the insolvency proceedings were opened.



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 goal of *insolvenzplan* is to preserve the debtor's business as a going concern. It is usually initiated if a assessment of the debtor's financial position shows that restructuring has a good chance of success.

Corporate rescue through an *Insolvenzplan* is achieved through standard insolvency proceedings as German insolvency law contains no specialized procedures for corporate rescue.

An *Insolvenzplan* can only take place after insolvency proceedings have been opened. In this regard, the directors of a legal person (ie, a company) have an obligation to request the opening of insolvency proceedings no longer than three weeks after the occurrence of the inability to pay debts (cash flow insolvency/illiquidity) or six weeks after the occurrence of balance-sheet insolvency (over-indebtedness) (s 15a InsO). Failure to meet this obligation, either willfully or negligently, by the director, may result in liability for damages, a period of imprisonment, or a fine.

In order to open insolvency proceedings, it must also be shown that it is reasonably foreseeable that the insolvency estate can cover the costs of those proceedings (s 26(1) InsO, second sentence). If the insolvency estate cannot cover the costs of the proceedings, insolvency proceedings are not opened and the debtor is listed in a register to warn potential future creditors that a reason for insolvency exists.

If insolvency proceedings are opened, an insolvency administrator is appointed by the court. The insolvency administrator is entitled to remuneration for execution of his office and also for adequate expenses. The insolvency administrator decides whether liquidation or restructuring is the best option. It is also possible to convert from liquidation to corporate rescue within the same set of insolvency proceedings.

Either the debtor or the insolvency administrator is entitled to submit an insolvency plan (s 218(1) InsO (sentence 1)). The creditor's meeting may also charge the insolvency administrator with establishing an insolvency plan (s 157 InsO (sentence 2)). The plan must be submitted to the insolvency court which determines if the submitting party is an authorized one and whether the provisions governing the contents of the plan have been followed.

The plan must have two parts (s 219 InsO). First, a summary of the information necessary for the parties entitled to vote to form informed decisions (s 220(2) InsO). Second, a determination of how the insolvency plan will transform the legal positions of the parties involved (s 221 InsO), sentence 1). To accomplish this, parties must be formed into groups with differing legal statuses. A distinction must be made, minimally, between (s 222(1) InsO):

1. Creditors entitled to separate satisfaction if their rights are encroached upon by the plan;
2. Ordinary creditors (according to s 38 InsO);
3. Each class of subordinated creditors;
4. Persons with a participating interest in the debtor where their share or membership rights are included in the plan.

That said, further groups may be formed if the circumstances justify doing so. Within a group, all involved parties must be offered equal rights (s 226(1) InsO), although there is a possible exception in s 226(2) InsO which applies if all parties consent.

If these requirements are complied with, the insolvency court will forward it to the creditors' committee, the insolvency administrator and the debtor for their comments (s 232 InsO) and lay it out for their inspection (s 234 InsO). For debtor-submitted plans, there is a requirement that the plan has a prospect of success before the insolvency court forwards the plan: s 231 InsO.

The plan then needs the consent of the creditors. The court, for this purpose, determines a discussion and voting meeting (s 235 InsO). Voting is conducted in groups determined by the second part of the plan. Creditors whose claims are impacted by the plan are entitled to vote. This also applies to shareholders of the debtor under s 238a InsO. All groups must vote to accept the plan for it to be approved, and in every group, both a simple majority in value (this means that the accepting group members represent more than 50% of the sum of the claims held by the creditors present and voting) and a majority in number (this means that the majority of the members of the group accept the plan) must be achieved (s 244 InsO).

There is, however, a cross-class cram down provision contained in s 245 InsO. Insofar as the necessary majorities set out above are not reached, acceptance is presumed when the following three prerequisites are met:

1. The dissenting members of a group are likely not to be placed at a disadvantage by the plan compared with their situation without a plan;
2. The members of such a group participate, to a reasonable extent, in the economic value devolving on the parties under the plan (including the "absolute priority" rule);
3. The majority of the voting groups have backed the plan with the necessary majorities.

In addition, the debtor must also consent to the plan (s 247 InsO), although their opposition is irrelevant if the debtor is not placed at a disadvantage by the plan compared with a situation without a plan (s 237(2) InsO).

Finally, the court must approve of the plan. In doing so, the court considers whether the necessary procedure had been followed, and more importantly, that no votes had been bought (s 250 InsO). Approval of the plan is also subject to minority protection. A minority can request that the court refuse the insolvency plan, and such a request must be granted pursuant to s 251 InsO if: a) the person filing the request opposed the plan in writing or for the records at the latest in the voting meeting and b) the person filing the request is likely to be placed at a disadvantage by the plan compared to a situation where there is no plan.

The second part of the insolvency plan may make provision for funds to compensate a disadvantage – this measure reduces the risk that the implementation of the plan will fail. If such a provision is made, the affected party cannot oppose the plan and must claim equalization from these funds that are set aside: s 251(3) InsO.

An insolvency plan can reduce liabilities *via* an agreement on a debt-equity swap (s 225a InsO). There is, however, no particular provisions dealing with the role of equity in corporate rescue proceedings. The equity remains with the insolvency estate and shareholder loans are only paid out after the satisfaction of all other insolvency creditors: s 39(1) InsO.

Once the order approving the plan is made final, the effects under the constructive part (ie, the second part of the plan) become binding.

There are no provisions dealing with the role of equity in corporate rescue proceedings. The equity remains as part of the insolvency estate and the satisfaction of shareholder loans only occurs after the satisfaction of all other insolvency creditors.

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 do think S and I have claims against R. I will answer this in turn.

S claims against R

Pursuant to s 826 and 823(2) read with s 263 StGB **correct is § 823(2) BGB in connection with § 15a InsO**, all fraudulent behaviour towards a contracting party results in a liability towards that contracting party. This is made out in a case when a company's representatives mislead a contracting party over the cash flow insolvency/illiquidity of a company in order to secure credit – this results in the company representative incurring personal liability.

Here, D has been unable to pay its mature debts since 10 June 2022. Yet R went out and bought a car from S on 5 July 2022, with payment of EUR 16,000 to be made a month later on 5 Aug 2022. Arguably, R has, in entering this agreement, misled S into thinking that D can pay for the car, despite knowing that D does not even have the cash to pay off its mature debts.

In considering any potential claims S has against R, it must be noted that if S has already has pending proceedings against R, those proceedings will be interrupted (s 240, ZPO). S 89 InsO also provides that insolvency creditors cannot pursue enforcement proceedings against the insolvency estate or the debtor's other property during insolvency proceedings. It appears that s 89 InsO would apply to S in this case – the facts seem to indicate that S is not a secured creditor – it is merely an unsecured ordinary creditor with an obligational claim against R.

This means that S will have to participate in insolvency proceedings and file their claims, in writing, with the insolvency administrator. S must include the reason for and amount of the claim in their written notice, and copies of any documents evidencing their claims: s 174 InsO. The insolvency administrator will enter this claim into a schedule, which all participants have access to – these claims are verified at a meeting in accordance with their amount and rank: s 175 and 176 InsO. If there is no objection to the claim, it is formally included in the schedule. Any objection to a claim is assessed via a trial, and if the creditor prevails, the claim is included in the schedule.

I claims against R

D is a Limited Liability Company. Pursuant to s 15b InsO, if payments have been made by a Limited Liability Company after the reason for insolvency has become apparent, the directors of the company are obliged to replace the assets to the estate on the condition that the payments were not made with the care of a reasonable businessman. Here, the reason for insolvency has been apparent as early as 10 June 2022, which was when D was unable to

pay its mature debts. Yet R went ahead to pay bank B EUR 10,000 on its long overdue loan claims. I therefore has a claim against R, for the sum of EUR 10,000. **correct**

R may also be liable for failing to request the opening of insolvency proceedings. Directors are obligated to request the opening of insolvency proceedings no longer than 3 weeks after the company has become cash flow insolvent, or six weeks after the occurrence of balance-sheet insolvency. Cash flow insolvency (or illiquidity) applies when the debtor cannot pay their mature debts. While illiquidity cannot be presumed in a case of mere payment delay, this cannot continue beyond three weeks. Balance sheet insolvency (or over-indebtedness) refers to a situation where the debtor's assets no longer cover its existing obligations to pay, and the continuation of the business is no longer likely.

Here, D has been unable to pay its mature debts since 10 June 2022. R should have requested the opening of insolvency proceedings by 13 July 2022 at the latest. This was not done (either wilfully or through neglect). R may be liable to pay damages, and face jail time, or a fine. **Yes, according to § 823(2) BGB in connection with § 15a InsO; however, this is a claim of S, not of the estate/the IP.**

Apart from this, it is also a norm that a director of a company is under an obligation to exercise the care of a reasonable businessperson – therefore, if the representative of a company wastes or causes loss to the company's assets, they are liable for such loss caused by their wilful or negligent action. I could have a claim against R for negligence. For example, it must be questioned why R had decided to purchase a car from S, at a time when financial prudence was called for, given that D was already unable to pay its mature debts. It is arguable that R's action, in this regard, could amount to wilful or negligent action that wasted the company's assets.

Alternatively, I may challenge the payment to B, relying on the clawback provisions. **Transactions avoidance causes a claim against the recipient (B), not against R.** Transactions made before the opening of insolvency proceedings can be contested if they were made to the disadvantage of creditors and an avoidance ground can be established: s 129(1) InsO. We do not know exactly when R had paid B, but from the facts, it appears that this payment was made before insolvency proceedings were opened before 1 September 2022. From the facts, it appears that several grounds of avoidance are made out, most pertinently, s 132 InsO which states that transactions that immediately disadvantage insolvency creditors may be contested if the debtor was already illiquid and the creditor was aware of the illiquidity or of an application to open insolvency proceedings. Strictly speaking, this is not a claim against R, **indeed** but against B – if I is successful, B must make restitution to the insolvency estate. This action should be considered as an alternative to a claim that I brings against R.

**only partly correct (7 marks)**

**in all: 39 marks**

**\* End of Assessment \***