



**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 is (c); a pledge gives a right to separate satisfaction

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); transactions avoidance enriches 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: 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.**

*Cross-border insolvency issues is regulated by §§ 335 et seq Insolvenzordnung (Insolvency Regulation, InsO). Those norms are binding insofar as there are no bilateral agreements or multilateral agreements between Germany and the United Kingdom on cross-border insolvency issues. § 335 establishes the principle that the *lex fori concursus*, the law of the state in which proceedings were opened, is applicable. This principle is subject to the exceptions in § 336 InsO, which provide that the effects of an insolvency proceeding over a contract concerning a right *in rem* to an immovable object, or a right to use an immovable object, are subject to the laws of the state in which the object is situated. For contracts of employment, § 337 InsO provides that Regulation 593/2008 (Rome I) applies, while set-off and transactions avoidance are provided for in §§ 338 et seq InsO.*

correct (3 marks)

Question 2.2 [maximum 4 marks]

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

*After the opening of insolvency proceedings, the debtor loses the right to manage and dispose of the insolvency estate, including collateral. Powers of disposition are instead vested in the court-appointed insolvency administrator - an independent natural person who is suited to the case at hand, particularly experienced in business affairs and independent of both the creditors and the debtor.*

*The above applies unless the debtor has requested debtor-in-possession proceedings, which is approved by the insolvency court. The debtor-in-possession would then take on many of the roles of the insolvency administrator, including the power to dispose of collateral, under the supervision of an insolvency monitor (*Sachwalter*) appointed by the insolvency court.*

**You were expected to elaborate on §§ 165, 166(1)/(2), 173 InsO**

0 marks

Question 2.3 [maximum 3 marks]

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

*If the insolvency administrator assumes an executory contract, then under § 55(1) (No 2) (alternative 1) InsO, the creditor's claim must be satisfied in full from the insolvency estate. However, even when the insolvency administrator assumes an executory contract, the back-dated debts of the debtor need only be fulfilled on a *pro rata* basis. 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 (§105 (sentence 1) InsO). **What about the debtor's counterclaim?***

*§§ 104 et seq InsO contain specialized provisions intended to apply to specific types of contract, and there are alternative provisions for tenancies and leases over immovable objects, contracts of employment and for the expiration of mandates.*

partly correct (2 marks)

in total: 5 marks

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



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

Overview of rules

The rules relating to a restructuring plan (*Insolvenzplan*) are encapsulated in the *Insolvenzordnung*. The *Insolvenzordnung* prescribes a single and unitary insolvency proceeding, irrespective of whether its aim is liquidation or restructuring and whether the debtor is a natural or legal person, a consumer or trader. Within these proceedings, certain elements are specifically designed for restructuring. Notably, the “Protective Umbrella Procedure” (*Schutzschirmverfahren*) governed by §270d InsO lays the groundwork for a restructuring preparation procedure within the application stage of insolvency. If the debtor has to apply for formal insolvency proceedings on the basis of imminent inability to pay debts or balance-sheet insolvency, and applies for the protective umbrella procedure, the objective of the procedure is to give such a debtor up to three months, under the umbrella of the protection of the court and the preliminary Insolvency Practitioner (insolvency monitor, *Sachwalter*), to prepare the restructuring in self-administration, so that it may be quickly executed in a pre-packaged fashion upon the opening of proceedings.

The *Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen* (Act on the Framework for Stabilisation and Restructuring of Enterprises) (StaRUG) also offers various instruments, in particular court proceedings for the voting on a restructuring plan, the preliminary examination by a court of questions relevant for the confirmation of a restructuring plan, a court-ordered moratorium, the confirmation of a restructuring plan by the court and the appointment of a restructuring mediator. These tools can be used separately or jointly, so that the debtor can ask for tailor-made court assistance to support the restructuring effort.

Under the StaRUG, the debtor may also commence out-of-court negotiations with the creditors needed for restructuring, and reach an agreement where the creditors partially waive their right to satisfaction, thereby averting the reason for insolvency. It is sufficient for the creditors to declare themselves prepared to forego enforcement of their claims for a certain period of time so that the debtor’s illiquidity is averted, *ie*, the debtor is no longer not able to meet his or her mature obligations to pay (§17(2) (sentence 1) InsO).

However, there are limitations on the debtor’s ability to invoke support from the courts. The courts will only intervene with court mechanisms upon application by the debtor; and even then, certain requirements must be met. For example, a consumer insolvency proceeding can only be opened if it is proven that the debtor’s attempt to reach an out-of-court agreement with his creditors on the clearance of debts has failed. In this way, the court only intervenes when the debtor and creditors are unable to agree on the *Insolvenzplan*. Similarly, it is only possible for the debtor to request a protective umbrella procedure if he or she is not yet substantively cash flow insolvent / illiquid, to avoid the debtor making use of the prohibition on execution and attempting to restructure without formal proceedings.

## Procedure

*A restructuring plan (*Insolvenzplan*) can be considered as an alternative to formal bankruptcy when insolvency proceedings are opened. Insolvency proceedings are opened only upon application by either the debtor or a creditor. Where a creditor applies for insolvency proceedings to be opened, the creditor must prove that they have a legal interest in the opening of insolvency proceedings, and their claim and the reason for the opening of proceedings must be presented to the satisfaction of the court. The reasons to open insolvency proceedings are inability to pay debts as they fall due / cash flow insolvency / illiquidity, overindebtedness / balance sheet insolvency, and imminent inability to pay debts. The latter reason can only be invoked by a debtor himself, while overindebtedness is only a reason for legal persons or partnerships where no natural person is personally liable. It must also be reasonably foreseeable that the insolvency estate will be able to cover the costs of those proceedings according to § 26(1) (sentence 2) InsO.*

*Where the debtor is only imminently illiquid, he or she can apply for a moratorium under §49 StaRUG and ask for a court order which stays all individual enforcement and hinders secured creditors from realizing the collateral (stabilization order).*

*An insolvency administrator is appointed by the court in accordance with §56 InsO. The court appoints an independent natural person who is suited to the case at hand, particularly experienced in business affairs and independent of both the creditors and the debtor. The role of the insolvency administrator is to manage the insolvency estate, and is subject to supervision of the insolvency court. In StaRUG-proceedings, a restructuring practitioner (monitor) can be appointed only where consumers or small, medium-sized, or micro-enterprises are involved as creditors, or where the moratorium or the restructuring plan covers (nearly) all creditors.*

*Conversion from liquidation to restructuring and *vice versa* is also possible under German insolvency laws. It is for the insolvency administrator to decide whether liquidation or restructuring is the best available option. Where pre-insolvency rescue or restructuring has been commenced, those proceedings must be stopped as soon as the debtor becomes substantively insolvent (unable to pay debts or overindebted). They are not automatically converted to insolvency proceedings, until and unless the debtor and creditors apply for ordinary insolvency proceedings.*

***That's much to general. You were expected to elaborate on the details as regulated in §§ 217 et seq. InsO.***

3 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.**

*S and I do have claims against R. However, the extent to which they can prosecute and recover their claims is governed and constrained by German insolvency law.*

#### S's claim

*S is a creditor of D as D owes S the purchase price of the car (EUR 16,000). However, S will not be able to enforce this claim against D following the opening of insolvency proceedings on 1 September 2022 for two reasons. First, an automatic stay has come into force since 1 September 2022, preventing creditors from enforcing their claims (§ 89 InsO). Second, S would not be able to enforce its claim as a creditor by including it in the schedule for the filing of creditors' claims (§175 InsO). This is because S's claim would be opposed by either the insolvency administrator or another creditor. D bought the car from S on 5 July 2022 when D was already unable to pay its mature debts and illiquid. D's purchase of the car falls within the avoidance grounds listed in §§130 et seq InsO - in particular, it is a transaction granting an insolvency creditor a satisfaction within a period of three months before the opening of insolvency proceedings for D. Since D is cash flow insolvent and is unable to pay its debts, D's purchase of the car can be contested, along with S's claim for EUR 16,000. **Certainly not: D has not payed anything to S; hence, nothing can be avoided.***

*S may therefore enforce its claim against R personally on the ground that R is liable to S for R's fraudulent behaviour (*Bürgerliches Gesetzbuch* (Civil Code) (BGB), §§826 and 823(2) read with StGB, §263). S may argue that R misled S over D's cash flow insolvency and illiquidity to secure a credit, which leads to personal liability on R's part. Moreover, R was under an obligation to exercise the care of a reasonable businessperson (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (Limited Liability Companies Act) (GmbHG) § 43 and AktG, § 93). Therefore, to the extent that R negligently or wrongfully thought that D could continue trading and caused D to buy the car as the result, R would be personally liable for the loss caused through such wilful or negligent actions.*

**No, S has a claim based on § 823(2) BGB in connection with § 15a InsO.**

#### I's claim

*I's claim against R is based on R's failure to request the opening of insolvency proceedings and R's repayment of EUR 10,000 to bank B even while D is illiquid. Under § 15a InsO, R was obligated to request the opening of insolvency proceedings no longer than three weeks after the occurrence of D's inability to pay debts on 10*

*June 2022. However, R wilfully failed to do so as he was hoping for a turnaround and even paid bank B. Under BGB § 823(2) read with InsO § 15a, R is liable to pay damages of EUR 10,000 (being the amount paid to bank B while D was illiquid) **Yes, but liable to a disadvantaged creditor, not against the estate/IP** and also faces a period of imprisonment or a fine. Since D is a Limited Liability Company, R is obliged to replace EUR 10,000 to the estate, on the condition that the payments were not made with the care of a reasonable businessman (§ 15b InsO). **That's correct** I will likely be able to show that R did not pay bank B with the care of a reasonable businessman, given that R wilfully caused D to repay bank B despite knowing of D's illiquidity. A reasonable businessman in R's position would have ceased trading and sought legal advice, and would have then requested the opening of insolvency proceedings as prescribed by § 15a InsO. Accordingly, I does have a claim against R in the amount of EUR 10,000.*

7 marks

in all: 23 marks

\* End of Assessment \*