



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 is (d); imminent illiquidity is a prerequisite for StaRUG proceedings.

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.

The norms are contained in § 335 et seq InsO (or, more specifically § 335 to 338 InsO), § 343 InsO and Article 19 EIR. These are:

- *For insolvency proceedings opened in Germany, the principle of universality, which prescribes that the effects of an insolvency proceeding are binding in all other countries.*
- *For foreign proceedings, these will also follow the principle of universality, but is also subject to § 343 (1) InsO, where a foreign proceeding will not be recognized only if (1) the courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law; (2) where recognition would lead to a result manifestly incompatible with major principles of German law. Proceedings will otherwise be recognized absent these grounds for exclusion.*

correct (3 marks)

Question 2.2 [maximum 4 marks]

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

- Pursuant to § 165 InsO, the *insolvency administrator* may dispose of collateral forming part of the insolvency estate by way of a court auction or a sequestration. **Yes, but in competition with the secured creditor.** This applies to immovables.
- Pursuant to § 166 InsO, the *insolvency administrator* is entitled to dispose of movable collateral if it is in his possession. **How about § 166(2) InsO?**
- Pursuant § 173 InsO, the creditor may dispose of the collateral where the insolvency administrator has no right to dispose of collateral. An example of this is for movable collateral not in the insolvency administrator's possession)

partly correct (2 marks)

Question 2.3 [maximum 3 marks]

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

*The legal consequences are set out in S 103 et seq InsO. When insolvency proceedings are opened, executory contracts are not wound up and the insolvency practitioner may decide whether to assume the contract. Where an executory contract is assumed, the claim under the contract becomes enforceable and the creditor's claim must be satisfied in full from the insolvency estate (s 55(1) (No 2) (alternative 1)). The back-dated debts of the debtor need only 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 (S 105 (sentence 1)). The counterparty's claim against the insolvent entity has*

correct (3 marks)

in total: 8 marks

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

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

This essay will cover the steps and notable rules relating to the establishment of the plan (per Part 6 Division 1 of the InsO), the court's acceptance and approval of the plan

(per Part 6 Division 2 of the InsO), and the implementation and continued monitoring of the plan (Part 6 Division 3 of the InsO).

Commencement

Who may commence a restructuring plan: The restructuring plan can may be submitted by either the insolvency administrator or the debtor (§ 218 InsO). The creditors may direct the insolvency administrator to submit the plan at the creditors' meeting (§ 157); and an insolvency administrator so charged must submit an insolvency plan within a reasonable period of time (§ 218(2)). An insolvency plan must be submitted to the insolvency court.

Procedural Requirements

Once an insolvency plan has been submitted, the insolvency court determines whether the rules governing the contents of an insolvency plan have been followed. The insolvency plan is required to have 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(1)). It must contain "all the other information concerning the bases for and the effects of the plan which are relevant to the decision by the parties to the proceedings to approve the plan and for its approval by the court" (§220(2)).*
- *The constructive part of the insolvency plan determines how the plan will transform the parties' legal positions (§ 221); further, the plan may stipulate that the insolvency administrator is authorised to take the measures necessary to implement it and to correct any obvious errors it contains. 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) non-lower-ranking creditors; (3) each class of lower-ranking 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)). Parties within each group are to be accorded equal rights under the insolvency plan (§ 226(1)); but distinct treatment of the parties forming one group will require the consent of all parties within that group (accompanied by a statement of consent) (§ 226(2)).*

The insolvency plan must be accompanied by the attachments referred to in § 229 (the Survey of the Debtor's Assets listing values of the assets and obligations which would stand opposite each other in the event the plan becomes effective, expenses and earnings to be expected during period of creditor's satisfaction, etc) and § 230 (which

cover further details such as a debtor's statement of willingness to continue the enterprise where relevant),

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).

Pursuant to § 231 InsO, the court may refuse the insolvency plan ex officio on the following grounds:

- if the provisions governing the right to submit a plan and its contents, in particular regarding the forming of groups, are not complied with, and the submitting party is unable to remedy such deficiency or does not remedy it within a reasonable period determined by the court;*
- if a plan submitted by the debtor obviously has no chance of being accepted by the parties to the proceedings or approved by the court; or*
- if the claims provided for the parties under the constructive part of a plan submitted by the debtor manifestly cannot be satisfied.*

Such refusal may be appealed against (§ 231(3)).

Voting and approval

Should the plan not be refused, the insolvency court will forward the plan to the following parties for "comments" on the plan and a "comparative calculation" (§ 232(1)): the creditors' committee and the works council and the representative body for executive staff; the debtor (if the administrator submitted the plan); and the administrator (if the debtor submitted the plan). The official representative body of industry, trade, the craft or of agriculture competent for the debtor may also be given an opportunity to comment on the plan (§ 232(2)). The period for comments is not to exceed two weeks (§ 232(3)).

The insolvency plan may, at the request of the debtor or insolvency administrator, order a suspension of realization and distribution of the insolvency estate to the extent the continued realisation and distribution of the insolvency estate impairs implementation of the insolvency plan which has been submitted (§ 233).

The court will also docket a meeting to discuss the plan and the voting rights of the parties on the plan. This meeting is not to be docketed later than one month (§235(1)). Voting commences in groups which were set out and determined in the constructive

part of the plan. Creditors whose claims are not impaired by the plan are not entitled to vote (§237(2)). For the plan to be approved, in each group of creditors, the majority of creditors with voting rights must vote in favour of the plan; and the sum of claims held by creditors backing the plan exceeds half of the sum of claims held by the creditors with voting rights (§ 244).

A cross-class cram down is also possible in the context of the voting meeting. Acceptance of the plan may be presumed (in the event the necessary majorities are not reached where (1) the members of a group 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 (3) the majority of the voting groups have backed the plan with the necessary majorities (§245).

It is also necessary for the debtor to consent to the plan ((§ 247), but the debtor's opposition is 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.

Finally, the court must also approve the plan. The court will consider whether the necessary procedure was followed and whether "acceptance of the plan has been effected by improper means, in particular by an advantage favouring one of the parties", such as vote buying (§250). A creditor or a person with a participating interest in a debtor who is not a natural person may request for minority protection. This may be done where (1) the person filing the request opposed the plan in writing or for the records at the latest in the voting meeting, and (2) the person filing the request is likely to be likely to be placed at a disadvantage by the plan (§ 251). The effect of this request is a refusal of approval of the insolvency plan, though the request is to be rejected if the constructive part of the plan provides for funds being made available in the event that a party to the proceedings shows to the satisfaction of the court that they will be placed at a disadvantage (§ 251(3)).

Once the order is given approving the insolvency plan, this will be announced at the voting meeting as soon as possible (§ 252). The plan becomes binding on all participants, 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.

The starting point is to consider D illiquid since 10 June 2022 since that is point it was unable to pay its mature debts (§ 17(2)). It was therefore incumbent on R as director of D to file a request for the opening of insolvency proceedings within three weeks, i.e., 1 July 2022 (§ 15a(1)). It is not clear if this timeframe was met, though it is noted that insolvency proceedings were opened on 1 September 2022. Should the request be made out of time, R may be liable to be punished with imprisonment for no more than three years or fined (§ 15a(4); 15a(5)).

Whether I has a claim against R

R is prohibited under § 15b(1), upon the commencement of insolvency, to make any payments on D's behalf. The debt undertaken of EUR 16000 in favour of S and the payment of EUR 10,000 to B may thus be subject to scrutiny (assuming that the loan to B is owed by D to B, which fact is not entirely clear). Notably, however, the § 15b(1) prohibition does not apply to payments which are "consistent with the due care of a prudent and conscientious manager", and it would be on R to show that the payments he had made after 10 June 2022 were congruent with such care - one such instance would be where the payments were made in the ordinary course of business and to maintain business operations (§ 15b(2)). Payments made after the time period to file a request for insolvency proceedings are "generally not consistent with the due care of a prudent and conscientious manager" (§ 15b(3)).

Those in D obliged to file a request (such as R) are obliged to refund any payments made in contravention of § 15b(1). In relation to the payment to B, it should be noted that where the refund or the compensation is necessary to satisfy the subject-legal entity's creditors, the obligation is not ruled out on account of the fact that payment was made on the basis of a decision taken by one of the legal entity's bodies. On the present facts, I's alleged claim against R for the EUR 10,000 paid to B is likely to be valid given that there are no facts to suggest that this payment was consistent with the notion of a prudent and conscientious manager; in fact, these loans were "long overdue" and were unlikely to be made as part of D's ordinary business. The period of limitations for a claim under § 15b(1) is five years (unless D is listed - the period of limitation would be 10 years).

correct

*Another means which the Insolvency Administrator could explore is to contest the payment to B **This would only lead to claims against B, not against R!** via § 130 InsO, the 'congruent coverage' ground. Here, a transaction granting or facilitating an insolvency creditor a security or satisfaction may be contested on either of these two*

*grounds: (1) if it was made during the last three months prior to the request to open insolvency proceedings, if the debtor was illiquid on the date of the transaction, and if the creditor was aware of the insolvency on this date; or (2) if it was made after the request to open insolvency proceedings, and if the creditor was aware of the debtor's insolvency on the date of the transaction, or of the request to open insolvency proceedings (note here also § 130(2) InsO, where awareness of circumstances necessarily indicating insolvency or a request to open insolvency proceedings is considered equivalent to awareness of insolvency or of the request to open insolvency proceedings). The three month timeframe under § 130 InsO appears to be met on the present facts; though *when* the transaction occurs is ultimately defined by § 140.*

Alternatively, Insolvency Administrator could consider § 133, where transactions made by debtors in the last 10 years before the request to open insolvency proceedings may be contested if made with the intention to disadvantage creditors and if the other party was aware of the intentions of the debtor. The suspect period is four years if a creditor received coverage (such as congruent coverage discussed above). There is nothing on the facts to suggest such intention, however. Should Insolvency Administrator succeed, then B must retribute the payments to the insolvency estate, and the estate should be returned to the state in which it would have been.

A final provision the Insolvency Administrator could consider is § 43 of the GmbHG, the relevant sub-sections of which provide that:

“(1) The directors are required to conduct the company’s affairs with the due care of a prudent businessperson.

(2) Directors who breach the duties incumbent upon them are jointly and severally liable to the company for any damage arising.”

If it can therefore be shown that R had deviated from his duties in failing to make timely payment at an earlier stage (or in making such payments after clear illiquidity), then R may be made to compensate the company (or in this case, the insolvent estate) to extent of damage caused.

correct

Whether S has a claim against R

On the opening of insolvency proceedings, an automatic stay comes into force, such that creditors are prevented from enforcing their claims (§ 89 InsO). S’s claim against D will lie in insolvency proceedings.

However, where it can be shown that R had acted fraudulently toward S (for instance, where R misled S over the cash flow insolvency or illiquidity of D to secure credit), R may be personally liable for such fraud (per §826 of the BGB). R may also be liable for criminal fraud (§263 of the StGB - “[w]hoever, with the intention of obtaining an

unlawful pecuniary benefit for themselves or a third party, damages the assets of another by causing or maintaining an error under false pretences or distorting or suppressing true facts incurs a penalty of imprisonment for a term not exceeding five years or a fine.”). Liability under this provision may also lead to liability for compensation from R to S under §823 of the BGB, which provides:

“(1) A person who, intentionally or negligently, unlawfully injures the life, limb, health, freedom, property or some other right of another person is liable to provide compensation to the other party for the damage arising therefrom.

(2) The same duty is incumbent on a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it is possible to violate it also without fault, then liability to compensation only exists in the case of fault.”

*On the facts, it could well be that S was suffering from a misapprehension of D’s solvency (given that the purchase was made after the point of illiquidity). 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. **Fraud is not necessary, since the claim is based on § 823(2) BGB in connection with § 15a InsO!***

7 marks

in all: 38 marks

* End of Assessment *