



**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

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: 10 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 to 358 of the German Insolvency Code ("InsO") regulate cross-border insolvency issues between Germany and the UK. As UK is no longer part of the EU, the EU Regulation 2015/848 does not apply.**

Correct (3 marks)

Question 2.2 [maximum 4 marks]

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

**Insolvency administrators and secured creditors with a right to separate satisfaction. A right to separate satisfaction means that while a creditor will not**

**be able to prevent the collateral from being legally part of the insolvency estate, he/she will have the right to demand preferential satisfaction up to the amount of the secured claim out of the proceeds of the specific asset's realisation.**

**Pursuant to §89 InsO, "insolvency creditors" may not execute into the insolvency estate or the debtor's property once insolvency proceedings have commenced. Accordingly, in so far as secured creditors are insolvency creditors in relation to their secured claims, they will no longer be able to enforce their claims. That being said, §§49 et seq and §165 et seq InsO provide that property that is subject to a right of separate satisfaction may nonetheless be realised, notwithstanding the opening of insolvency proceedings. This is a function of the separation principle, which provides that the contractual agreement on the creation of the security right (as a matter of property law) must be distinguished from the underlying contractual security agreement. It therefore follows from §§49 et seq and §165 et seq InsO that §89 does not affect the enforcement of security rights which provide for a right to separate satisfaction since these are rights *in rem*, rather than obligational rights. §165 InsO governs the realisation of assets subject to the right of separate satisfaction. It should be noted that enforcement proceedings by secured creditors in relation to such assets are legally possible only to the extent to which these provisions enable the creditor to realise the value of their security. **You were expected to elaborate on §§ 165, 166(1)/(2), 173 InsO.****

partly correct (1 mark)

Question 2.3 [maximum 3 marks]

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

**§103 InsO gives an insolvency practitioner the option of assuming an executory contract. If the insolvency practitioner chooses to do so and contract performance is severable, the creditor will be deemed an insolvency creditor for the amount of its claim corresponding to the services rendered prior to the commencement of insolvency proceedings (see §105 InsO), *ie*, this portion of the claim will be satisfied on a *pro rata* basis. As for the services rendered during the course of the insolvency proceedings (as a result of the insolvency practitioner assuming the executory contract), the creditor's claim must be satisfied in full from the insolvency estate, pursuant to §55(1) InsO. **How about the debtor's counterclaim?****

partly correct (2 marks)

in total: 6 marks

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



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

**Both the debtor (whether a natural person or company) and each creditor have the right to apply for the opening of insolvency proceedings. Where a creditor is the applicant, the creditor will also have to prove their legal interest in the opening of insolvency proceedings, their claim, and their reason for opening proceedings to the satisfaction of the court.**

**Insolvency proceedings can only be opened if the debtor is cash flow insolvent, imminently cash flow insolvent, or balance sheet insolvent. To open insolvency proceedings, it must also be reasonably foreseeable that the insolvency estate will be able to cover the costs of the proceedings (§26(1) InsO). Once proceedings are opened, the court will appoint an insolvency administrator pursuant to §56 InsO.**

**Either the debtor or insolvency administrator can submit an insolvency plan (§218(1) InsO), though the creditor's meeting may also charge the insolvency administrator with establishing an insolvency plan (§157 InsO). The insolvency plan must be submitted to the insolvency court, which will then determine whether the submitting party is authorised and whether the contents of the plan comply with the relevant provisions. Per §§219 to 221 InsO, the plan must have (a) a declaratory part that states the information necessary for parties entitled to vote to form informed decisions; and (b) a constructive part that states how the insolvency plan will transform the legal positions of the parties involved. For this purpose, the parties must be divided into groups with differing legal statuses. Pursuant to §222 InsO, a distinction must be drawn between (at least):**

- (a) Creditors entitled to separate satisfaction if their rights are interfered with by the plan;**
- (b) Ordinary creditors, as defined in §38 InsO;**
- (c) Each class of subordinated creditors, unless their claims are deemed waived pursuant to §225 InsO;**
- (d) Persons with a participating interest in the debtor where their share or membership rights are included in the plan; and**
- (e) Holders of rights resulting from intra-group third-party guarantees.**

**Within a group, all parties must be offered equal rights (§226(1) InsO). In the case of a debtor-submitted plan, the plan must also have a prospect of success (§231 InsO). Once these requirements are complied with, the insolvency court will forward the plan to the creditors' committee, the insolvency administrator and the debtor for their comments and inspection (§§234-235 InsO).**

**The creditors then have to consent to the plan. For this purpose, the court will docket a discussion and voting meeting (§235 InsO). Voting is done in groups determined by the constructive part of the plan, and the creditors entitled to vote are all those whose claims are impacted by the plan (§237 *et seq*). The**

**same applies to shareholders of the debtor (§238a InsO). In order for the plan to be approved, all groups must vote in favour of it and there must be a simple majority in value and number in every group (§244 InsO). That said, §245 InsO contains a cross-class cram-down provision - under this provision, even if the necessary voting majorities are not reached, acceptance is presumed if:**

- (a) The members of such a group are likely not to be placed at a disadvantage by the plan compared with their situation without a plan;**
- (b) The members of a such a group participate to a reasonable extent in the economic value devolving to the parties under the plan; and**
- (c) The majority of the voting group have backed the plan with the necessary majorities.**

**The debtor's consent is also needed (§247 InsO), though the debtor's opposition is not relevant if he/she is not placed at a disadvantage by the plan compared to a situation without a plan (§237(2) InsO).**

**Finally, the court must approve the plan. The court will look at whether the necessary procedure was followed, and ensure that no votes were "bought" (§250 InsO). In addition, a minority can request that the court refuse the insolvency plan if (a) the person filing the request opposed the plan in writing or for the record at the latest in the voting meeting; and (b) the person filing the request shows that he/she is likely to be placed at a disadvantage by the plan compared to the situation without a plan (§251 InsO). To avoid this, the constructive part of the plan can provide for funds to compensate a disadvantage, in which case the impacted party will be banned from opposing the plan (§251(3) InsO).**

**As soon as the order approving the plan becomes final, the constructive part of the plan becomes binding. There are no provisions on the role of equity in insolvency plans, and so it can be agreed that claims of creditors be converted into equity in the company.**

**In pre-insolvency situations, similar rules apply under the StaRUG. The main differences are that only the debtor can present a restructuring plan, and unless all affected creditors agree, the plan needs the approval of creditors holding 75% of all affected claims in each group and the confirmation of the court. Cross-class cram down is also possible with minor exceptions for the absolute priority rule.**

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.

**Whether S has a claim against R for EUR 16,000**

S will not be able to bring a direct claim against R based on the contract for sale of the car, since that contract was concluded with D. S will also not be able to bring a direct claim against D, given that the commencement of insolvency proceedings triggers an automatic moratorium that prevents creditors from enforcing their claims (§89 InsO). S will instead have a claim against the insolvency estate for the purchase price of the car that was due on 5 August 2022 (§38 InsO). S will have to file this claim in writing with I, including the reason for and amount of claim and any documents evidencing the claim. I will then enter S' claim into the insolvency schedule, which will be verified during the verification meeting. Assuming S's claim is accepted, S will likely receive a distribution from the insolvency estate based on the available assets.

However, S may be able to bring a direct claim against R if it can be shown that R misled S over the cash flow situation of D (eg, by representing that D was solvent when it was in fact unable to pay its debts): §§8236 and 823(2) BGB read with StGB §263. In that case, S may be able to directly claim against R for damages, without having to go through the process of filing a claim with I. **S's claim against R is based on § 823(2) BGB in connection with § 15a InsO!**

**Whether I has a claim against R for EUR 10,000**

Yes, I has several grounds on which to bring a claim against R. First, I may claim against R on the basis that R failed to request for the opening of insolvency proceedings in a timely manner. Directors are obligated to request for the opening of insolvency proceedings no longer than three weeks after the occurrence of an inability to pay debts (ie, cash flow insolvency) or six weeks after the occurrence of balance sheet insolvency (§15a InsO). In the present case, since D was unable to pay its debts since 10 June 2022, R was obligated to request to open insolvency proceedings by 1 July 2022. If R is found to have wilfully or negligently failed to do so, R will have to pay damages and face a period of imprisonment or a fine (BGB §823(2) read with §15a InsO). **This is a claim of S, not of the estate/of the IP.**

Further, assuming that R paid EUR 10,000 to B out of D's assets, R may also be liable to refund that money into the insolvency estate. Under §15b(3) InsO, a director who fails to file a request to open insolvency proceedings within the

*stipulated time, and who continues to make payments on the company's behalf, is deemed to have made the payments without the due care of a prudent and conscientious manager. Under §15b(4) InsO, the director will be obliged to refund the payments made, or to at least compensate the company's creditors if the creditors have suffered little damage. **Correct***

*Separately, I may also bring a claim against R under §130 InsO in relation to the payment of EUR 10,000 to B. §130 InsO provides that a transaction granting an insolvency creditor satisfaction may be contested if (a) it was made during the three months prior to the request to open insolvency proceedings; (b) the debtor was illiquid on the date of the transaction; and (c) the creditor was aware of the insolvency on this date. In the present case, conditions (a) and (b) are satisfied. The payment to B was made approximately one month before the opening of insolvency proceedings on 1 September 2022, and D had been unable to pay its debts by that date. The key question is whether B was aware of D's insolvency at this date. If I is able to show such knowledge, the sum of EUR 10,000 paid to B must be returned to the insolvency estate. **No, a claim from transactions avoidance is directed against the recipient B, not against R.***

*Finally, if a director wastes or otherwise causes loss to the company's assets, he/she is liable for such loss caused through wilful negligent actions, as directors are under an obligation to exercise the care of a reasonable businessperson: §43 GmbHG and §93 AktG. **Correct***

8 marks

in all: 39 marks

\* End of Assessment \*