



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 2022. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2022. 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

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: 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.

The German norms which regulate cross-border insolvency issues in relationships between Germany and the United Kingdom are:

- (1) §§ 335, 336, 338, 339 and 343 of the InsO; and*
- (2) §§ 3 and 4 of the InsO read with §12 et seq of the ZPO.*

correct (3 marks)

Question 2.2 [maximum 4 marks]

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

The disposition of secured goods may be done by the insolvency administrator or the creditors. The following individuals are entitled, under the InsO, to dispose of collateral after the opening of insolvency proceedings.

In relation to immovable objects:

- (1) Pursuant to § 165 of the InsO, the insolvency administrator may initiate with the competent court auctions or sequestrations of immovables forming part of the insolvency estate even if such immovables are subject to a right to separate satisfaction.*
- (2) Pursuant to § 49 of the InsO, creditors with a right to satisfaction from objects subject to execution into immovable objects are entitled to separate satisfaction under the provisions of the Act Governing Auctions and Sequestrations of Immovables.*

In relation to movable objects:

- (3) Pursuant to § 166(1) of the InsO, the insolvency administrator may realise a movable item to which he or she has a right to separate satisfaction without restriction if it is in his or her possession. **How about § 166(2) InsO?***
- (4) In the case of movable objects, pursuant to § 173(1) of the InsO, if the insolvency administrator is not entitled to realise a movable item or a claim subject to a claim to separate satisfaction, the creditor's right to realise such object remains unaffected. Pursuant to § 173(2), at the administrator's request and after hearing the creditor, the insolvency court may determine a period of time during which the creditor is required to realise the object. Upon expiry of such period of time the administrator is entitled to its realisation.*

partly correct (3 marks)

Question 2.3 [maximum 3 marks]

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

When insolvency proceedings are opened, executory contracts which are not yet fulfilled by either party to the contract are not wound up.

*Pursuant to § 103(1) of the InsO, if a mutual contract was not performed or not performed in full by the debtor and the other party on the date when the insolvency proceedings were opened, the insolvency administrator may perform such contract instead of the debtor and claim the other party's consideration. **How about § 55 InsO?***

In other words, if the insolvency practitioner assumes an executory contract, then both parties to the contract will fulfil the contract. In this case, the creditor's claim must be satisfied in full from the insolvency estate.

partly correct (2 marks)

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

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

A restructuring plan (or an Insolvenzplan or insolvency plan) may be submitted by the debtor or the insolvency administrator to the insolvency court. Submission by the debtor may be connected with a request to open insolvency proceedings. However, no account is taken of a plan which the court receives after the final creditors' assembly (§ 218(1) of the InsO). In addition, the creditors' meeting can also charge the insolvency administrator with the establishment of an insolvency plan (§ 157, sentence 2 of the InsO).

After the insolvency plan is submitted to the insolvency court, the court will determine whether the submitting party is authorised and whether the provisions over the contents of the plan have been followed. The plan must comprise two parts: a declaratory and a constructive part. It must also be accompanied by the attachments referred to in §§ 229 and 230 of the InsO (§ 219 of the InsO).

The declaratory part of the insolvency plan is governed by § 220 of the InsO, and provides the necessary information for parties entitled to vote to make informed decisions. In particular:

- (1) The declaratory part of the insolvency plan describes the measures taken or still to be taken after the opening of insolvency proceedings to create the basis for the envisaged establishment of rights held by the parties to the proceedings.*
- (2) The declaratory part 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. In particular, it includes a comparative calculation which sets out the plan's impact on the creditors' expected satisfaction. If the plan provides for the enterprise to continue, then when determining that expected satisfaction without a plan it is generally to be assumed that the enterprise will continue. This does not apply where the sale of the enterprise or its continuation in another form lacks the prospect of success.*
- (3) If the insolvency plan provides for interference with the rights of insolvency creditors resulting from intra-group third-party guarantees (under § 217 (2)), that presentation is also to include the situation of the affiliated enterprise providing the security and the plan's impact on that enterprise.*

The constructive part of the insolvency plan is governed by § 221 of the InsO, and must determine how the insolvency plan will transform the legal positions of the parties involved (§ 221, sentence 1). Thus, the parties must be formed into groups with differing legal statuses. Under § 221, sentence 2 of the InsO, distinctions must be drawn minimally between the following:

- (1) creditors entitled to separate satisfaction if their rights are encroached upon by the plan;*
- (2) the ordinary creditors according to § 38 of the InsO;*
- (3) each class of subordinated creditors; and*
- (4) persons with a participating interest in the debtor where their shares or membership rights are included in the plan.*

Further groups may be created if justified under the circumstances.

Generally, all parties to the proceedings within the same group must be offered equal rights (§ 226(1) of the InsO). However, § 226(2) of the InsO contains an exception under which any distinct treatment of the parties forming one group requires the consent of all the parties. In such a case, the insolvency plan is to be accompanied by each party's statement of consent. Under § 226(3) of the InsO, any agreement concluded by the insolvency administrator, the debtor or any other person and individual parties providing for an advantage not envisaged under the plan in consideration of such parties' conduct in votes or otherwise with respect to the insolvency proceedings is void.

In the case of a debtor-submitted plan, pursuant to § 231(1)(2) of the InsO, the insolvency court will refuse a debtor-submitted insolvency plan ex officio 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.

Once the above requirements are complied with, the insolvency court will forward it to the creditors' committee, the insolvency administrator and the debtor for their comments, in particular for a comparative calculation (§ 232(1) of the InsO). Moreover, the insolvency plan, together with its attachments and any comments received, is to be laid out for the parties' inspection in the registry of the court (§ 234 of the InsO).

The insolvency plan next requires the consent of the creditors. For this purpose, the court determines a discussion and voting meeting (§ 235 of the InsO). Voting commences in groups determined by the constructive part of the plan. Under § 237 of the InsO, the creditors who are entitled to vote are all those whose claims are impacted by the plan. Similarly, under § 238(a) of the InsO, the shareholders who are entitled to vote are those whose claims are impacted by the plan. In this regard, §§ 239-243 of the InsO set out various rules governing the voting process.

In addition, the debtor must also consent to the plan. Under § 247 of the InsO, the debtor's consent to the plan is deemed to have been given if the debtor does not oppose to the plan in writing at the latest in the voting meeting. However, the debtor's opposition is not relevant if he is not placed at a disadvantage by the plan compared with a situation without a plan (§ 237(2) of the InsO).

All groups must vote to accept the plan for it to be finally approved. In every group, a majority in value and a majority in number must be achieved. Under § 244(1) of the InsO, acceptance of the insolvency plan by the creditors requires that in each group:

(1) the majority of creditors with voting rights backs the plan; and (2) the sum of claims held by creditors backing the plan exceeds half of the same of claims held by the creditors with voting rights. It is necessary for all groups to approve the plan. If this fails, there are no means for individual groups to approve a plan whose effects are restricted only to that group.

Furthermore, § 245 of the InsO contains a “cross-claim cram-down” exception to the requisite majorities under § 244 of the InsO. § 245 of the InsO provides that even if the necessary majorities have not been achieved, a voting group is presumed to have accepted or consented to the insolvency plan if the following are met:

- (1) the members of such a group are likely not to be placed at a disadvantage by the insolvency plan compared with their situation without such plan;*
- (2) the members of such a group participate to a reasonable extent in the economic value devolving to the parties under the plan (which includes the absolute priority rule, i.e. that no lower ranking creditors participate in the proceeds unless all higher ranking claims are fully satisfied); and*
- (3) the majority of the voting groups have backed the plan with the necessary majorities.*

The court must finally approve the plan. The court tests whether the necessary procedure was followed and significantly, that no votes had been bought. In this regard, § 250 of the InsO provides that approval of a plan is to be refused ex officio if: (1) the provisions governing the contents and the procedural handling of the insolvency plan, as well as its acceptance by the consent of the parties to the proceedings and of the debtor were not complied with regarding an essential aspect and such deficiency cannot be remedied; or (2) acceptance of the plan has been effected by improper means, in particular by an advantage favouring one of the parties.

Moreover, minority protection is afforded through § 251 of the InsO. Under that provision, at the request of one of the creditors or, if the debtor is not a natural person, a person with a participating interest in the debtor, approval of the insolvency plan is to be refused if: (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 placed at a disadvantage by the plan compared with his or her situation without a plan. If the debtor is a natural person, section 245a applies accordingly.

However, to avoid jeopardising the implementation of the plan, the second part (constructive part) can provide for funds to compensate a disadvantage. In such cases, the impacted party is banned from opposing to the plan and instead, must claim for equalisation from these funds without this affecting the approval of the plan. In this regard, § 251(3) of the InsO provides that the request under § 251 is to be rejected if the constructive part 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. Whether the party to the proceedings is to receive compensation from such funds is not a matter for the insolvency proceedings.

As soon as the order approving the plan becomes final, its effects under the constructive part become binding on all participants and therefore, also binding on those who objected to the plan and those who are not participating in the insolvency proceedings (§§ 254(1) and 254b of the InsO).

Finally, as part of an insolvency plan, it may be agreed that the claims of the creditors can be transferred into equity in the company (i.e., a debt-to-equity swap) (see § 225(a) of the InsO). This would reduce the liabilities of the debtor.

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 claims against R

On the facts, D was unable to pay its mature debts since 10 June 2022. In this regard, § 17(2) of the InsO provides that debtors are deemed illiquid if they are unable to meet their mature obligations to pay, and that insolvency is generally assumed where a debtor has stopped payments. Thus, D may be said to have been insolvent since 10 June 2022.

It is stated that D, being represented by R, purchased a car from S on 5 July 2022. S transferred the title to the car to D and agreed on a purchase price of EUR 16,000 due to be paid on 5 August 2022. In other words, S is technically a creditor of D and not R, R had merely represented D in purchasing the car from S. Nevertheless, S may have a claim against R for fraudulently inducing S to contract with D. In this regard, § 826 of the BGB provides that a person, who, in a manner offending common decency, intentionally inflicts damages on another person, is liable to the other person to provide compensation for the damage. Moreover, § 823(2) (read with § 832(1)) of the BGB provides that a person who commits a breach of a statute that is intended to protect another person is liable to provide compensation to the other party for the damage arising therefrom.

Furthermore, § 263 of the StGB provides that whoever, 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 or imprisonment for a term not exceeding five years or a fine.

Thus, it may be argued that R had violated § 263 of the StGB in inducing S to sell the car to D by fraudulently representing that D was liquid or not insolvent as of 5 July 2022 and could pay for the car, even though D was illiquid since 10 June 2022. Alternatively, it could also be argued that S had only agreed to transfer title to the car to D first, and to receive payment one month after the purchase of the car on 5 July 2022, as S was under the mistaken impression that D was liquid and/or had the financial ability to pay EUR 16,000 for the car. It follows that R had committed a breach of a statute that is intended to protect S within the meaning of § 823(2) of the BGB, and is thus liable to provide compensation to S for the damage arising therefrom.

Therefore, if S can prove that he had only agreed to sell the car to D because R had fraudulently represented that D had the financial capacity to pay for the car, S may have a claim against R for fraud and may obtain compensation of up to EUR 16,000, being the loss suffered by S as a result of the sale of the car.

The correct solution is § 823(2) BGB in connection with § 15a InsO.

Whether I has claims against R

As noted above, in the present case, D was illiquid since 10 June 2022 pursuant to § 17(2) of the InsO. Thus, D may be said to have been insolvent since 10 June 2022.

Pursuant to § 15a(1) of the InsO, where a legal entity becomes illiquid or overindebted, the members of the representative body or the liquidators are required without delay to file a request for the opening of proceedings. The request is to be filed at the latest three weeks after the commencement of insolvency and six weeks after the commencement of overindebtedness. Pursuant to § 15a(4) of the InsO, whoever (1) does not file a request for the opening of proceedings or does not do so in good time or (2) does not correctly file a request, is punished with imprisonment for no more than three years or a fine.

*On the facts, R, being the only director of D, has an obligation to file a request for the opening of insolvency proceedings no longer than three weeks after the occurrence of inability to pay debts (*ie*, cash flow insolvency or illiquidity). In other words, R was obliged to request the opening of insolvency proceedings by 1 July 2022 at the latest, being 3 weeks after 10 June 2022. On the facts, insolvency proceedings were only opened for D on 1 September 2022. However, there is no conclusive evidence as to whether R had filed a request to open insolvency proceedings within 3 weeks after 10 June 2022. Nevertheless, even if it is shown that R had not filed a request to open insolvency proceedings within 3 weeks after 10 June 2022, the punishment for R*

under § 15a(4) of the InsO would be imprisonment or a fine that is presumably paid to the state, and not to I.

Turning to consider § 15b of the InsO, § 15b(1) of the InsO provides that the members of the representative entity and the liquidators of a legal entity who, under section 15a (1) sentence 1, are obliged to file a request may, following the commencement of insolvency or of overindebtedness of the legal entity, no longer make any payments on its behalf. However, this does not apply to payments which are consistent with the due care of a prudent and conscientious manager.

In this regard, § 15b(2) of the InsO further provides that payments made in the ordinary course of business, in particular those payments which serve to maintain business operations, are, subject to subsection (3), deemed consistent with the due care of a prudent and conscientious manager. During the period laid down in section 15a (1) sentence 1 and 2 within which a request is deemed to have been filed in good time, this applies only for as long as those obliged to file the request implement measures to permanently eliminate the insolvency or to prepare a request for insolvency with the due care of a prudent and conscientious manager. Payments made in the period between the filing of a request and the opening of proceedings are also deemed to be consistent with the due care of a prudent and conscientious manager if they were made with the consent of the provisional insolvency administrator.

Moreover, § 15b(3) of the InsO further stipulates that if the period laid down in § 15a(1), sentence 1 within which a request is deemed to have been filed in good time has elapsed and those obliged to file the request have filed no request, payments are generally not consistent with the due care of a prudent and conscientious manager.

As to the consequent penalties, § 15b(4) of the InsO stipulates that where payments are made contrary to subsection (1), those in the legal entity obliged to file a request are obliged to refund the payments made. If the legal entity's creditors have incurred little damage, then the obligation to refund payments made is limited to compensating for that damage. Where the refund or the compensation is necessary to satisfy the 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. Furthermore, any waiver on the part of the legal entity to claims to a refund or to compensation or a settlement with the legal entity concerning these claims is ineffective.

In the present case, R had paid Bank B EUR 10,000 on long overdue loan claims. Insolvency proceedings were opened on 1 September 2022. Whether I has a claim against R for the refund of EUR 10,000 paid to Bank B would depend on whether R had filed a request to open insolvency proceedings within three weeks of 10 June 2022. However, as mentioned above, more information is necessary to confirm this.

Assuming that it is shown that R had in fact filed a request to open insolvency proceedings under § 15a of the InsO, it may be argued that this payment was a

payment in the ordinary course of business that served to maintain business operations, and should thus be deemed consistent with the due care of a prudent and conscientious manager under § 15b(2) of the InsO. After all, it is not controversial that the repayment long overdue loan claims to Bank B would be a decision that is consistent with the due care of a prudent and conscientious manager, so as not to allow the over due loan claims to accumulate further interest. In this scenario, it would follow that I would have no claim against R for the refund of the EUR 10,000 paid to Bank B.

Assuming, on the other hand, that it can be shown that R did not file a request to open insolvency proceedings within 3 weeks after 10 June 2022 as required under § 15a of the InsO, § 15b(3) of the InsO (which § 15b(2) of the InsO is expressly subject) would apply. It would follow that the payment of EUR 10,000 to Bank B would not generally be consistent with the due care of a prudent and conscientious manager, even if it fell within the ambit of the exception in § 15b(2) of the InsO. Accordingly, the general prohibition under § 15b(1) of the InsO would apply, and R would not have been allowed to make the payment of EUR 10,000 to Bank B. Turning to the application of § 15b(4) of the InsO, as the payment of EUR 10,000 to Bank B was made contrary to § 15b(1) of the InsO, those in the legal entity obliged to file the request are obliged to refund the payments made. In this case, R as the only director of D was obliged to file the request to open insolvency proceedings.

Therefore, if it is proven that R did not file a request to open insolvency proceedings within 3 weeks after 10 June 2022 as required under § 15a of the InsO, I would have a claim against R for the refund of the EUR 10,000 paid to Bank B.

partly correct (8 marks)

in all: 40 marks

*** End of Assessment ***