



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6B

GERMANY_[INS 11]

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.

Recognition *it's not only about recognition!* of English proceedings in Germany is subject to the general rules either with respect to the recognition of foreign insolvency proceedings (§343 InsO) or, to if the proceedings qualify as court judgments in civil matters, to foreign court judgments (§328 German Code of Civil Procedure, ZPO). Otherwise, the substantive effects with English claims of a schemes of arrangement (or restructuring plans) are recognised in Germany under the conflict of law rules in the Rome I Regulation (see Article 2).

partly correct (2 marks)

Question 2.2 [maximum 4 marks]

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

The right to manage and dispose of the assets belonging to the insolvency estate (including collateral) is transferred to the insolvency administrator on the opening of proceedings. Generally the insolvency administrator would be entitled to dispose of collateral after the opening of insolvency proceedings, with the exception of debtors-in-possession (§270 InsO).

Secured creditors with a right to separate satisfaction may also be entitled to dispose of collateral after the opening of proceedings. A right to separate satisfaction is the right to demand preferential satisfaction up to the amount of the secured claim out of the proceeds of the realisation of the specific asset over which there is a collateral (§49 and §165 InsO).

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?

*An insolvency practitioner has the option of assuming an executory contract (§103 InsO). If the insolvency practitioner elects 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 (§105 InsO). As for the services rendered during the course of the insolvency proceedings stemming from the insolvency practitioner assuming the executory contract, the creditor's claim must be satisfied in full from the insolvency estate (§55(1) InsO). **How about the debtor's counterclaim?***

partly correct (2 marks)

in total: 4 marks

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

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

The insolvency plan proceedings (Insolvenzplan) seek to preserve the business of the debtor as a going concern. The Insolvenzplan may be prepared prior to and submitted together with the filing for insolvency, or it can be developed by the debtor or the insolvency administrator after the opening of insolvency proceedings.

*The **Insolvenzplan** should be submitted to the insolvency court. The plan should include information which is (a) necessary for the parties entitled to vote to form informed decisions; and (b) explains how the plan will affect the legal positions of the parties involved.*

*Under §§ 222 (1) InsO, the following groups should be identified and distinguished in the **Insolvenzplan**: a) the creditors entitled to separate satisfaction if their rights are encroached upon by the plan; (b) the ordinary creditors, according to § 38 InsO; (c) each class of subordinated creditors; (d) persons with a participating interest in the debtor where their share or membership rights are included in the plan. Further groups may be introduced if it is justifiable, as long as parties within each group share equal rights.*

Consent of creditors

*The **Insolvenzplan** requires creditors' consent, which is solicited in a discussion and voting meeting. Voting is carried out in the groups established above, and the creditors entitled to vote are those whose claims are impacted by the plan. Shareholders of the debtor may vote pursuant to § 238 InsO. A simple majority in value and a majority in number in each voting group is necessary for the plan to be approved. That said, § 245 InsO contains a "cross-class cramdown" exception where the following three requisites are met: (a) the members of such a voting group are not likely to be placed at a disadvantage by the plan compared with their situation without the plan; (b) the members of such a voting group receive an adequate return from the assets; and (c) the majority of the voting groups have backed the plan. If, however, the creditors' voting groups do not approve the plan, there are no means for an individual voting group to approve a plan which pertains only to itself.*

Debtor's consent

*The **Insolvenzplan** also requires the debtor's consent, but this may be displaced if he is not placed at a disadvantage by the plan compared against the regular insolvency proceedings.*

Court's approval

The restructuring plan should also be approved by the court. The court applies the tests which assess whether they have abided by the correct procedure without any tampering of the creditors to induce a positive vote. In addition, the court considers whether minority protection needs to be granted. This is granted where the person filing the request opposed the plan in writing (or some other record) in the latest voting meeting and the person filing the request is likely to be placed at a disadvantage by the plan compared against the regular insolvency proceedings.

correct (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

No, S cannot bring a direct claim against R based on the contract for sale of the car as that contract was concluded with D. S will also not be able to bring a direct claim against D due to the automatic moratorium which sets in upon the commencement of insolvency proceedings (§89 InsO). S may claim against the insolvency estate for the purchase price of the car that was due on 5 August 2022 (§38 InsO), by filing the claim in writing with I and handing over supporting evidence. I then includes the claim in the insolvency schedule which will be verified.

If it may be shown that R misled S over D's cash flow situation, then S may be able to bring a direct claim against R (§§8236 and 823(2) BGB read with StGB §263. S may consequently seek damages against R without having to file a claim with I or waiting for the remaining proceeds from the claim.

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 grounds on which to bring a claim against R. First, I may commence an action against R on the basis that he failed to request for the opening of insolvency proceedings no longer than three weeks after the occurrence of an inability to pay debts (i.e., cash flow insolvency) (§15a InsO). D was unable to pay its debts since 10 June 2022 and R was obligated to request to open insolvency proceedings within three weeks by 1 July 2022. R will have to pay damages and face a period of imprisonment or a fine if he wilfully did not comply (BGB §823(2) read with §15a InsO).

This is a claim of S, not of the estate/of the IP.

On the assumption 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. R, as 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 (§15b(3) InsO). Under

§15b(4) InsO, R 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

*In relation to the payment of EUR 10,000 to B, I may bring a claim against R under §130 InsO to contest the transaction granting I satisfaction because the payment made to B was made one month before the commencement of insolvency proceedings on 1 September 2022 and D had not been able to pay the debts by then - if B was aware of this, then the sum ought to be claimed from B. **No, a claim from transactions avoidance is directed against the recipient B, not against R.***

8 marks

in all: 37 marks

* End of Assessment *