

**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 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. 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 **8 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**

How are the **competences** of a preliminary insolvency practitioner defined?

1. By the debtor.
2. By the creditors’ committee.
3. By statute.
4. By court decision.

**Question 1.2**

Which of the following securities has an **accessory** nature?

1. Suretyship.
2. Assignment by way of security.
3. Mortgage (*Grundschuld*).
4. Retention of tile.

**Question 1.3**

Choose the **correct** statement in order to complete the statement below:

Creditors who wish to **participate** in the insolvency proceedings must file their claims with the –

1. creditors’ committee.
2. creditors’ meeting.
3. insolvency practitioner.
4. court.

**Question 1.4**

Who has the **duty** to file for insolvency proceedings?

1. The directors of a Limited Liability Company (*GmbH*).
2. All debtors.
3. Legal persons only.
4. Entrepreneurs only.

**Question 1.5**

Choose the **correct** statement in order to complete the statement below:

Wage claims of employees stemming from the period prior to the opening of insolvency proceedings –

1. enjoy super-priority even ahead of secured creditors.
2. qualify as expenses of the proceedings (liabilities of the estate).
3. rank as claims of ordinary creditors.
4. cannot be recognised in insolvency proceedings at all.

**Question 1.6**

Who of the following is entitled to submit an **insolvency (restructuring) plan**?

1. Every creditor.
2. The insolvency practitioner.
3. The court.
4. The creditors’ committee.

**Question 1.7**

Which of the following circumstances is **not relevant** when establishing whether the local insolvency court (*Amtsgericht*) has jurisdiction?

1. Registered office.
2. Location of assets.
3. Place of residence.
4. Centre of economic activities.

**Question 1.8**

Choose the **correct** answer in order to complete the sentence below:

The rights of \_\_\_\_\_\_\_\_\_\_\_\_ cannot be affected by an insolvency plan.

1. employees.
2. shareholders.
3. banks.
4. creditors with a right to separation.

**Question 1.9**

How long is the compliance period (time frame) for the **discharge of residual debt**?

1. Seven years.
2. Six years.
3. Three years.
4. One year.

**Question 1.10**

How are **foreign insolvency proceedings** recognised in Germany?

1. By decision of the court.
2. By the insolvency practitioner.
3. By statute (by force of law).
4. By a decision of the creditors’ meeting.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 3 marks]**

How is “insolvency” defined in the *Insolvenzordnung* (InsO)?

The InsO defines insolvency as one of the following two financial conditions.

1. Inability to pay debts as they fall due, also known as cash flow insolvency or illiquidity. This condition occurs when the debtor lacks the financial means to pay its debts as they mature or has ceased making payments for three weeks, and this condition has become apparent to third parties.
2. Overindebtedness or balance sheet insolvency. This condition occurs when the debtor’s existing liabilities exceed the liquidation value of its assets and it becomes likely that the debtor’s enterprise will not continue beyond the next twelve months. This condition applies only to a legal entity, not to a natural person.

The financial condition known as imminent inability to pay debts is a pre-insolvency condition in which it is likely that the debtor’s income (and possibly assets) will be insufficient to pay debtor’s obligations, foreseeable over the next two years, as such obligations mature and must be paid. While this is a pre-insolvency condition, the condition does allow a debtor to apply for opening of insolvency proceedings.

**Question 2.2 [maximum 4 marks]**

What is the line of demarcation between restructuring under the StaRUG and restructuring under the InsO?

The StaRUG is statute governing pre-insolvency procedures, only available to a debtor that is in the financial condition known as imminent inability to pay debts. The StaRUG procedure must be terminated upon the substantive insolvency of the debtor.

Restructuring under the InsO, on the other hand, is an insolvency procedure available to debtors who are already in substantive insolvency.

**Question 2.3 [maximum 3 marks]**

Explain the special rules on tenancy agreements for real estate compared to the general rules on executory contracts.

Under section 562 of the German Civil Code, a tenancy agreement for real property creates a statutory pledge of the tenant’s assets in favor of the landlord.

In an insolvency proceeding, the general rules for executory contracts under the InsO require the insolvency administrator to decide whether to perform or reject each executory contract. If the Administrator elects to perform the executory contract, the counterparty must also perform and the Administrator is obligated to also perform, usually by paying the contract price for all obligations that arise after the opening of the insolvency proceedings. If the Administrator elects to reject the executory contract, the counterparty’s only recourse is to register its claim for contract damages in the insolvency schedules and be paid, if at all, pro rata with other general unsecured creditors.

Section 104 et seq of the InsO alters the above-described general rules, providing alternate provisions, for tenancy agreements and other specific types of contracts, such as employment contracts.

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

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

Under German law, a restructuring (or rescue) plan can apply to restructuring the debts of a natural person debtor or a debtor that is a legal entity. The plan can provide for restructuring of debts and/or liquidation of assets and disposal of the insolvency estate.

The restructuring plan is prepared by the insolvency Administrator or Debtor, if Debtor is a legal entity. The Plan must contain two relevant parts: (a) sufficient information for voting parties to make informed decisions; and (b) explanation of how the legal positions of the voting parties will be changed under the Plan. The Plan will also describe how the voting parties are grouped (or classified) according to shared legal rights. At a minimum, the following interested parties must be allocated to groups separate from each other: secured creditors; ordinary creditors; subordinated creditors; holders of equity in the Debtor.

Once prepared, the Administrator or Debtor submits the Plan to the Insolvency Court for review. If the Plan was submitted by the Debtor in a debtor-in-possession situation, the Court also reviews the Plan regarding the prospect for success. The Plan is then forwarded to the creditors’ committee, administrator, and debtor for final comments.

The final Plan is then sent to creditors for voting. Only creditor’s whose legal rights are affected by the Plan may vote on the Plan. Except for a cross-class cram-down discussed below, approval of the Plan requires that all classes of creditors, including affected equity holders, accept the Plan. For each class, acceptance occurs where more than 50% of the number of creditors approve the Plan and the class members, present and voting to approve the Plan, represent more than 50% of the sum of the claims in that class.

Even where a class fails to accept the Plan, a cross-class cram-down may provide for overall acceptance of the Plan and the binding of nonaccepting creditors. In this situation, a Plan will be deemed accepted under the following three conditions: (1) the members of the dissenting class will likely experience no disadvantage under the Plan that it would not experience in the absence of the Plan; (2) after application of the absolute priority rule, the members of the dissenting class will receive some meaningful distribution under the Plan; and (3) the majority of the other voting classes have accepted the Plan with the necessary majorities in number and value.

Importantly, the Debtor must also accept the Plan unless the Debtor is not placed at any disadvantage under the Plan.

The insolvency court reviews the Plan, voting procedures, and any other relevant information. Once the court approves the Plan, the Plan becomes binding on all creditors, regardless of their acceptance or rejection of the Plan.

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

In January 2020, Bank (B) granted debtor (D) a loan of EUR 50,000. Since B asked for securities, D transferred legal title on a lorry by way of security and had assigned all current and future receivables against its customers by way of security. Sixteen months later, in May 2021, D was unable to pay its debts when they fell due. On 3 July 2021, B, being aware of D’s substantive insolvency, terminated the loan contract and sold the lorry for EUR 20,000 to W. On 5 July 2021, B revealed the assignment to all customers of B and received EUR 15,000 from X, who bought goods from D on 1 July 2021 and who paid B the money he owed to D. On 1 August 2021, D applied for insolvency proceedings. B received another payment of EUR 10,000 from Y who bought goods from D on 10 September 2021. Five days later, the court opened insolvency proceedings and appointed I as insolvency administrator. I claims EUR 50,000 from B, arguing that the sale of the lorry and the payments of X and Y are subject to transactions avoidance (§§129 *et seq* InsO).

What are the various legal positions? Test this based on the norms.

Insolvency Administrator (I). I claims that the three-month reach-back period for avoidable transfers began on May 1, 2021, before the bank (B) terminated the loan contract and sold the lorry, before B received EUR 15,000 from D’s customer X and before B received EUR 10,000 from D’s customer Y. The seizure and sale of the lorry and the collection of D’s accounts receivable clearly reduced the assets and funds in D’s insolvency estate and harmed the estate’s general creditors. I seeks to avoid the seizure and sale of the lorry, and to recover the EUR 20,000 as the value of the lorry and to recover the value of D’s accounts receivable paid to B. I supports its claim by arguing that, at the time B seized and sold the lorry and collected the accounts receivable, B was aware of D’s substantive insolvency and the transfers occurred during the three month period before D’s application to open insolvency proceedings.

According to the facts, I seeks to recover a total of EUR 50,000 from B. I is overreaching because I may only recover the value of D’s property that was transferred (which totals EUR 45,000), not the value of the loan contract that was terminated.

Note: The loan contract that B terminated was not an executory contract to which I could decide whether to accept or reject. The loan contract was fully performed on the part of B, and only D’s repayment obligations remained so it was not an executory contract.

Bank (B). B responds that B held title to the lorry by way of security, which allowed B to repossess the lorry when D failed to timely repay the loan. B at all times held a secured claim to the lorry, and I may not avoid B’s seizure and sale of the lorry and, therefore may not recover the EUR 20,000 B received from W for the sale of the lorry.

With respect to the accounts receivable, B also claims that it was a secured creditor and, upon D’s failure to timely repay the loan, B was entitled to collect D’s accounts receivable from X and Y.

Insolvency Administrator (I). I responds that B’s security interest in the accounts receivable did not become effective until X and Y paid their respective obligations to D, which occurred after May 1, 2021, within the 3-months avoidance period. § 103 InsO. Moreover, Y’s payment occurred after the opening of insolvency proceedings as was therefore not covered by B’s security interest. § 91 InsO.

Analysis. According to the facts, no moratorium during the post-application period was requested by Debtor nor approved by the Court. The automatic moratorium commenced at opening of the insolvency proceedings. I is not able to avoid the seizure and sale of the lorry but should be able to avoid and recovery both the EUR 15,000 collected by B from X and the EUR 10,000 collected by B from Y.

**\* End of Assessment \***