

**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 Insolvenzordnung (InsO) sets out the reasons when insolvency proceedings can be opened in relation to a debtor.

The reasons to open insolvency proceedings are: (i) a debtor’s inability to pay their debts as they fall due (cash flow insolvency) pursuant to §17(2) InsO; (ii) overindebtedness (balance sheet insolvency) pursuant to §19 InsO; and (iii) a debtor’s imminent inability to pay debts pursuant to §18 InsO.

In the case of cash flow insolvency, insolvency is generally presumed where the debtor has stopped payment of its debts pursuant to §17(2) InsO.

In the case of balance sheet insolvency, overindebtedness exists where the debtor’s assets do not cover the debtor’s obligations to pay over a 12 month period pursuant to §19(2) InsO.

In the case of a debtor’s imminent inability to pay debts, a debtor is deemed to be faced with imminent insolvency if it is likely that the debtor will be unable to meet existing obligations to pay over a forecast period of 24 months pursuant to §18(2) InsO.

**Question 2.2 [maximum 4 marks]**

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

The InsO applies to all debtors (both natural and legal persons) in relation to the liquidation and restructuring of insolvent entities.

Whilst the StaRUG also applies to all debtors (both natural and legal persons) it is not an insolvency statute, rather it is a pre-insolvency framework which provides debtors with instruments that can be used for a restructuring without having to open formal proceedings under InsO.

The StaRUG transposes the 2019 EU Restructuring Directive (which requires EU member states to adopt a pre-insolvency framework) into German law

The StaRUG offers various instruments as an alternative to formal insolvency proceedings, such as court proceedings for the voting on a restructuring plan, a court-ordered moratorium, the confirmation of a restructuring plan by the court and the appointment of a restructuring mediator.

The tools available under StaRUG can be used separately or jointly which allows the debtor to request specific, tailored assistance in order to assist with its restructuring.

**Question 2.3 [maximum 3 marks]**

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

Pursuant to §103 InsO where a mutual contract was not performed in full by the parties on the date when insolvency proceedings were opened, the contract is not automatically terminated and the insolvency administrator may perform the contract in the place of the debtor and claim the consideration from the other party.

If the administrator refuses to perform the relevant contract, the other party can claim for non-performance as a creditor of the insolvency estate and this claim will be satisfied on a pro rata basis.

Pursuant to §108 InsO, a contract concluded by the debtor for a lease and tenancy of real estate continues to exist following the opening of the insolvency proceedings and continues for the benefit of the insolvency estate.

However, the insolvency administrator can also terminate the tenancy agreement by providing 3 months’ notice to the end of the month to the landlord under the tenancy agreement pursuant to §109 InsO.

Pursuant to §112 InsO, following the opening of insolvency proceedings, the landlord may not terminate the tenancy agreement or lease due to rent arrears which arose prior to the opening of insolvency proceedings or as a result of the deterioration of the debtor’s financial situation.

**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 is available in both insolvency proceedings under InsO (an insolvency plan) and in pre-insolvency proceedings under StaRUG (a restructuring plan).

The restructuring plan under StaRUG broadly mirrors the provisions relating to the insolvency plan under InsO (detailed below). However, there are some key differences. A summary of the differences between the insolvency plan under InsO and the restructuring plan under StaRUG is included at the end of this answer.

Insolvency Plan:

Only the debtor or an insolvency administrator can submit an insolvency plan under §218 InsO. The plan is submitted to the insolvency court which determines whether the statutory provisions for the plan have been followed. The plan consists of two parts under §219 InsO: (i) a summary of the information which is necessary for the relevant parties who can vote on the plan to be able to make informed decisions on the plan; and (ii) details as to how the plan will transform the legal positions of the parties involved.

The parties are separated into different groups depending on their legal status. Pursuant to §222 InsO, a distinction should be made between: (i) creditors entitled to separate satisfaction if their rights are encroached upon by the plan; (ii) ordinary creditors under §38 InsO; (iii) subordinated creditors; and (iv) those parties with an interest in the debtor where their share or membership rights are included in the plan. Within a group, all parties must be offered equal rights pursuant to §226 InsO.

Provided that the above conditions are met (and, where the plan has been submitted by the debtor, the plan has a prospect of success) the insolvency court will provide the plan to the creditors’ committee, insolvency administrator and the debtor for their review and comment.

Creditors vote in the groups determined by the second part of the plan and all creditors and shareholders whose claims are impacted by the plan are entitled to vote on the plan. All groups must vote to accept the plan for it to be approved. A a simple majority in value (i.e. more than 50% of the sum of the claims held by the creditors present and voting) and a majority in number (i.e. a majority of the members of the group) must be achieved in each group.

There is also a cross-class cram-down exception under §245 InsO which applies where the necessary majorities are not met but the following three conditions are satisfied:

1. the members of the dissenting group are not likely to be placed at a disadvantage under the plan compare to their situation without a plan (i.e. the relevant alternative);
2. the members of the group participate to a reasonable extent in the economic value under the plan; and
3. the majority of the voting groups have backed the plan with the necessary majorities.

The debtor must also consent to the plan pursuant to §247 InsO, however the debtor’s opposition is not relevant if they are not placed at a disadvantage by the plan compared against the debtor’s position in the relevant alternative.

The court must then approve the plan which requires the court to review whether the necessary procedure was followed and to ensure that no votes have been bought. A minority protection is also granted under §251 InsO if the person filing the request opposed the plan in writing or at the latest creditor meeting and that person is likely to be placed at a disadvantage by the plan compared with their position in the relevant alternative.

The plan can also provide for funds to compensate a disadvantage which prevents the impacted party from opposing the plan, such that they do not jeopardise the implementation of the plan.

Restructuring Plan:

The restructuring plan is also available in pre-insolvency proceedings under StaRUG and largely mirrors the provisions relating to the insolvency plan set out above, subject to some important exceptions.

Only a debtor can present a restructuring plan (as no insolvency officer is appointed to the debtor as the StaRUG is a pre-insolvency tool).

The restructuring plan requires the approval of a creditors’ meeting which requires a majority of 75% of all affected claims in each group (rather than 50% for an insolvency plan which only relates to those creditors present and voting).

Cross class cram-down is also available under the restructuring plan with some exceptions to the absolute priority rule (i.e. the rule that no lower ranking creditors participate in the proceeds unless all higher-ranking claims are full satisfied).

**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.

This answer deals with: (i) the sale of the lorry by B to W; (ii) the payment by X to B; and (iii) the payment by Y to B separately.

Sale of the lorry by B to W

The sale of the lorry by B to W occurred on 3 July 2021 when B, being aware of D’s substantive insolvency, terminated the loan facility between B and D and sold the lorry to W for EUR 20,000.

Pursuant to §140(1) InsO, the date of the transaction was 3 July 2021, being the date when the legal effects of the sale arise. The legal effectiveness of the transaction does not require registration in the land register, ship or ship building register or register of liens on aircraft and §140(2) InsO does therefore not apply.

The date of the transaction (3 July 2021) was therefore within 3 months of the application to open insolvency proceedings in respect of D (1 August 2021).

Pursuant to §130(1) InsO, the sale of the lorry (being a transaction facilitating an insolvency creditor (B) a satisfaction) may be contested if:

1. it was made during the last 3 months prior to the request to open insolvency proceedings;
2. the debtor was illiquid on the date of the transaction; and
3. the creditor was aware of this insolvency on this date.

Each of these 3 conditions are satisfied in relation to the sale of the lorry by B to W from the facts set out above.

However, §130 InsO does not apply where security rights (which are not challengeable themselves) are realised, where collateral is exchanged against other objects or where already existing security rights exceed the value of the collateral.

On the facts, B provided D with a loan facility of EUR 50,000 and D granted a security right to B over the lorry by transferring legal title to the lorry by way of security to B. By selling the lorry to W, B realised its security right. The value of B’s security right (EUR 50,000) also exceeds the value of the collateral (EUR 20,000). There is nothing in the facts above to suggest that B’s security right was challengeable in itself.

As a result, whilst the sale of the lorry satisfies the conditions of §130(1) InsO, the claim brought by I against B in relation to the sale of the lorry will not be successful as §130 does not apply in the case where B realises its security rights pursuant to the security granted by D to B. The mere realisation by B of its security right against D does not disadvantage the general body of creditors of B (they were disadvantaged by the creation of security in January 2020 however this is outside of the relevant period and cannot be challenged and the creditors cannot be disadvantaged again by the realisation of B’s security right).

The granting of the security over the lorry by D in favour of B (which facilitated the later sale of the lorry by B) could be contested if the security was granted by B with the intention of disadvantaging its other creditors (and B was aware of this) however there is nothing in the facts above to suggest this is the case. The relevant period for this ground of challenge is 10 years however this is reduced to 4 years in the case of §130 InsO.

Payment by X to B

The payment from X to B occurred on 5 July 2021 following B revealing the assignment by way of security granted by D in favour of B in January 2020 of all current and future receivables of D against its customers.

The payment from X was made in relation to goods purchased by X from D on 1 July 2021.

The assignment by D to B of the receivables owed by X to D did not become effective until 1 July 2021 as B’s security right cannot exist without the relevant security object or collateral (i.e. the payment obligation owed by X to D).

As a result, B’s security right was created on 1 July 2021 (within the period being 3 months prior to the application for insolvency proceedings in respect of D on 1 August 2021).

For the reasons set out above, I’s claim against B in relation to the payment made by X to B will not be successful as §130 does not apply in the case of a creditor exercising its security right.

Payment by Y to B

The payment from Y to B occurred on 10 September 2021 following B revealing the assignment by way of security granted by D in favour of B in January 2020 of all current and future receivables of D against its customers.

It is not clear from the facts when Y purchased the goods from D (i.e. whether the goods were purchased on 10 September 2021 or prior to this). The date of the purchase will determine when B’s security right comes into effect (as noted above, it is not possible for B’s security right to exist prior to the creation of the receivable).

It is assumed that the goods were purchased on 10 September 2021 (such that B’s security right came into effect on 10 September 2021) and payment was made by Y to B on 10 September 2021.

As a result, the creation of B’s security right and claim in relation to D occurred on 10 September 2021, following the opening of insolvency proceedings in relation to B in August 2021.

B’s claim in relation to the payment by Y is therefore not valid pursuant to §91 InsO which restricts the improvement of a creditor’s position after the opening of proceedings. As a result, all receivables created after the opening of proceedings belong to the insolvency estate of D and are not covered by B’s security right.

I would therefore be able to claim against B in relation to the payment of EUR 10,000 from Y to B.

**\* End of Assessment \***