



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: 202122-336.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 “studentID” 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 **6 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

Who decides which person should be appointed as Insolvency Practitioner in ordinary liquidation proceedings?

- (a) The debtor.
- (b) The creditors' committee.
- (c) **The court.**
- (d) The court, but subject to a diverging decision of the first creditors' meeting.
correct was answer (d)

Question 1.2

Which of the following securities **does not** have an accessory nature?

- (a) Suretyship.
- (b) **Mortgage (*Grundschild*)**
- (c) Mortgage (*Hypothek*).
- (d) Pledge.
correct

Question 1.3

Which of the following **cannot** be decided by the first creditor' meeting (*Berichtstermin*)?

- (a) Verification of creditors' claims filed with the insolvency administrator.
- (b) Shut down of the business.
- (c) **Commissioning the insolvency administrator to develop an insolvency plan.**
- (d) Election of the final creditors' committee.
correct was answer (a)

Question 1.4

After the occurrence of balance-sheet insolvency (overindebtedness), **how long is the time period** before the directors or obliged to file for insolvency proceedings?

- (a) Three weeks.
- (b) One month.
- (c) Six weeks.
- (d) Two months.

correct

Question 1.5

Tax claims stemming from the period prior to the opening of insolvency proceedings:

- (a) enjoy super-priority even ahead of secured creditors.
- (b) qualify as expenses of the proceedings (liabilities of the estate).
- (c) rank as claims of ordinary creditors.
- (d) cannot be recognized in insolvency proceedings at all.

correct

Question 1.6

What is the **majority required** for the adoption of a pre-insolvency restructuring plan under the StaRUG?

- (a) 75% in sum regarding the claims of creditors present and voting.
- (b) 75% in sum regarding the claims of all affected creditors.
- (c) Simple majority in sum regarding the claims of creditors present and voting and simple majority of creditors (head count).
- (d) 75% of all affected creditors (head count).

correct

Question 1.7

Which court has jurisdiction to open insolvency proceedings?

- (a) *Amtsgericht*.
- (b) *Landgericht*.
- (c) *Oberlandesgericht*.

(d) *Bundesgerichtshof*.

correct

Question 1.8

Which of the following has a right to separation?

- (a) Banks.
- (b) Pledgees.
- (c) Tax authorities with statutory liens on the debtor's assets.

(d) Landlords after termination of the tenancy agreement.

correct

Question 1.9

How long is the compliance period (timeframe) for the discharge of residual debt?

- (a) Seven years.
- (b) Six years.

(c) Three years.

(d) One year.

correct

Question 1.10

Which of the following is a general prerequisite for transactions avoidance?

- (a) Substantive insolvency of the debtor.
- (b) Disadvantage for the general body of creditors.
- (c) Opponent's knowledge of the disadvantage of the general body of creditors.
- (d) Opponent is a creditor.

correct

8 marks in total

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

How is "insolvency" defined in the *Insolvenzordnung*?

Insolvency is defined as: (1) inability to pay debts as they fall due; (2) overindebtedness which refer to assets of debtor are insufficient to repay its present obligations; or (3) imminent inability to pay debts.

correct (3 marks)

Question 2.2 [maximum 4 marks]

Explain the relationship between pre-insolvency restructuring under the StaRUG and insolvency proceedings under the InsO.

Pre-insolvency restructuring is an alternative to insolvency proceedings if the debtors are entrepreneurs and imminent inability to pay debts but not yet substantially insolvent (overdebtedness or inability to pay debts when they fall due). During the process of pre-insolvency restructuring, if the debtor became substantively insolvent, the restructuring must come to an end, as the pre-insolvency restructuring would not transit to insolvency proceedings under the InsO automatically. Thereafter the creditors and debtors can apply to the court for ordinary insolvency proceedings.

correct (4 marks)

Question 2.3 [maximum 3 marks]

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

As per Section 103 of InsO, general rules on executory contract provides that the insolvency administrator has right to choose whether to complete the executory contract or not, if he chooses to complete the contract, the claims of the other party to the contract is fully satisfied by the insolvency estate. If the insolvency administrator chooses to give up the performance of the executory contract, the other party to the contract can claim for non-performance as insolvency creditor, and such claim is registered as debt under insolvency proceeding which will be repaid on pari-passu basis.

But there are special rules on tenancy agreements for real estate. As per Section 108(1) of InsO, contracts entered into by the debtor for the tenancy of real estate shall continue to exist, but to the credit of the assets involved in the insolvency proceedings.

Section 109(1) of InsO also provides that tenancy agreement for real estate entered into by the debtor as tenant may be terminated by the insolvency administrator with the 3-months legal period of notice irrespective of any agreed period of notice.

If the dwelling of the debtor is the subject-matter of the lease agreement, termination shall be substituted by the right of the insolvency administrator to declare that claims becoming due on expiry of the period as set out in the first sentence may not be claimed in the insolvency proceedings.

If the administrator terminates the said tenancy agreement under the first sentence, or if he makes the declaration under the second sentence, the other party may claim damages as a creditor of the insolvency proceedings for premature termination of such contract or in respect of the consequences of the declaration.

As per Section 109(2) of InsO, if the debtor had not yet entered into possession of the real estate when the insolvency proceedings were opened, the administrator and the other party may withdraw from such agreement. If the administrator withdraws from the agreement the other party may claim damages as a creditor of the insolvency proceedings for premature

termination of the agreement. Each party can request the other party to state whether it intends to withdraw from the agreement; if any party does not give statement within two weeks, their right to withdraw shall be lost.

correct (3 marks)

Excellent: 10 marks

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

Explain the rules in German insolvency law relating to transactions avoidance.

As per Section 129(1) of InsO, transactions entered into prior to the commencement of insolvency proceedings can be avoided if they were disadvantage to the creditors as the transactions diminish the estate which can be paid to the creditors and there is an avoidance ground which can be shown.

As per Section 130 of InsO, the said avoidance grounds include:

(a) transaction granting an insolvency creditor a security or satisfaction to which the said creditor had a claim, such transaction took place in the last three months prior to the application for insolvency proceedings, and at the time of transaction the said creditor was also aware that the debtor was cash-flow insolvent already. If at the time of transaction, the said creditor was aware that there was already an application for insolvency of debtor, such knowledge is sufficient. Whether the said transaction took place within three-months period is decided by the time the said security is perfected.

(b) transaction granting an insolvency creditor a security or satisfaction without the said creditor's entitlement to said security or satisfaction in the last three months prior to the application for insolvency proceedings, and at the time of transaction the debtor is cash-flow insolvent and unable to pay the debts, but the said creditor need not have any knowledge of financial situation of debtor. If the payment was made during last month before or after the application for insolvency proceedings, the requirement of cash-flow insolvent of debtor is unnecessary.

(c) transaction promptly cause direct disadvantage to insolvency creditors if at the time of transaction, the debtor was illiquid already, and the other party to the transaction have the knowledge of debtor's illiquidity or of an application for insolvency proceedings.

(d) transaction entered into by debtor within last 10 years prior to his application for insolvency proceeding, and debtor intended to enter into said transaction in order to cause disadvantage to creditors and the other party to the transaction have the knowledge of debtor's intention.

(e) undervalue transaction entered into by debtor within 4 years from the application for insolvency proceedings.

(f) Payments to shareholders within the last year before or after the application for insolvency proceedings; Charges issued to shareholders within last 10 years before or after the application for insolvency proceedings. The said shareholders need not have any mental requirements.

Any transaction successfully avoided, the third party receiving the debtor's asset shall reinstitute the asset to insolvency estate, even though they have relied on their disposition to change position. Such restitution claim arises automatically from the time of commencement of insolvency proceedings, rather than due to the insolvency administrator's declaration. The said third party receiving debtor's asset may contest that the said avoidance grounds did not

exist, or the facts of their case did not fulfil the requirements contained in avoidance grounds. The insolvency practitioners have the burden to prove the existence of avoidance ground and the facts of the case fulfil the relevant requirement thereof, but if the third party in question is the closely related party of the debtor, the burden of proof shift to the said third party.

Excellent: 15 marks

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

In January 2020, Bank (B) has granted debtor (D) a loan of EUR 50,000. Since B asked for security, D has assigned all her current and future receivables against her customers by way of security. Sixteen (16) months later, in May 2021, D is unable to pay her debts when they fall due. On 3 July 2021, insolvency proceedings are opened against D and IA is appointed as insolvency administrator. IA collects two receivables, both amounting to EUR 11,900 (including 19% VAT). The first claim is rooted in a service contract between D and X concluded in June 2020. D has rendered the services on 7 July 2020. The second claim stems from a contract which IA, who decided to maintain D's business, concluded with Z on 20 July 2021 and which IA performed on 16 August 2021. X and Z pay the consideration for the services rendered to them by IA. B demands surrender of these payments (together EUR 23,800) from IA.

Does B have a claim against IA? Test this based on the norms.

D has assigned all her current and future receivables against her customers by way of security to B in Jan 2020. However, as security rights cannot be established before the existence of security object, the future claims are not affected by the assignment of them by way of security, as when the security was established, the future claims was still not in existence. Thus, the first claim took place in June 2020, it will not be affected by the said assignment of current and future receivables by way of assignment which was established in Jan 2020 when at that time the first claim was still not in existence. **That's not correct: If the claim comes into existence after the assignment but before the opening of the insolvency proceedings, it will be covered by the assignment. The procedure then follows §§ 166(29), 171, 172 InsO.**

Besides, as per Section 91 of InsO, improvement of creditor's position after the commencement of insolvency proceedings is impeded. **This is relevant for the second, not the first claim.**

The second claim stems from a contract which was concluded on 20 July 2021. The insolvency proceeding for D was opened on 3 July 2021. Thus, the second claim took place after the opening of insolvency proceeding, and as per Section 91 of InsO, the second claim could not be covered by the said assignment of claims by way of security, otherwise the situation of the creditor B would be improved, and such improvement is impeded under Section 91. Therefore, it submits that B does not have a claim against IA.

7 marks

*** End of Assessment ***

40 marks in total