



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

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

9 marks in total

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

How is “insolvency” defined in the *Insolvenzordnung*?

As per the Insolvency law, Insolvency proceedings can be opened if there is

1. Cash flow insolvency
Debtor has stopped payments of debt which is falling due
2. Imminent insolvency
Debtor will be unable to make payments on debt falling due in next 2 years
3. Balance sheet insolvency
Debtor's assets are insufficient to cover liability and hence continuation of enterprise is highly unlikely.

Following are the extracts of relevant sections of the insolvency law which defines each type of insolvency.

Section 17- Insolvency

1. The debtor shall be deemed illiquid if he is unable to meet his mature obligations to pay. Insolvency shall be presumed as a rule if the debtor has stopped payments.

Section 18- Imminent Insolvency

1. The debtor shall be deemed to be faced with imminent insolvency if he is likely to be unable to meet his existing obligations to pay on the date of their maturity.
2. If in the case of a legal person, or of a company without legal personality, the request is not filed by all members of the board of directors, all general partners or all liquidators, subsection (1) shall only apply if the person or persons filing the request are empowered to represent the company or the partnership.

Section 19-Overindebtedness

1. Overindebtedness shall exist if the debtor's assets no longer cover his existing obligations to pay, unless it is highly likely, considering the circumstances, that the enterprise will continue to exist. As regards claims in respect of the restitution of shareholder loans or claims deriving from legal transactions corresponding in economic terms to such a loan, for which the creditors and the debtor have agreed, in accordance with section 39 subsection (2), that they shall rank lower behind the claims set out in section 39 subsection (1), nos. 1 to 5 in the insolvency proceedings, consideration shall not be given to the obligations under the first sentence.
2. If none of the general partners of a company without legal personality is a natural person, subsections (1) and (2) shall apply mutatis mutandis. This shall not apply if the general partners include another company with a natural person as general partner.

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.

The StaRUG provides debtor in crisis with a set of instruments which can be used for restructuring without having to open formal insolvency proceedings under the InsO. StaRUG offers a toolbox of instruments intended to facilitate preparing and implementing the restructuring plan.

Eligible Debtors –

Insolvency proceedings under InsO can be initiated if the debtor is either cash flow illiquid, balance sheet illiquid or imminent illiquidity to occur.

Any debtor can use StaRUG to restructure with only one condition that the debtor is NOT cash flow illiquid. **But the debtor needs to be imminent unable to pay its debts**

Court's involvement --

Insolvency proceedings under InsO are closely monitored by court. Approvals of the courts are also required for specific purposes.

Under StaRUG, debtor can start out-of-court negotiations with creditor and only approach court for assistance to use some necessary instruments such as moratorium.

Moratorium --

As soon as insolvency proceedings are opened under InsO, automatic moratorium comes into force.

For proceedings under StaRUG, debtor can only apply for moratorium if there is an imminent illiquidity.

Conversion of corporate rescue to liquidation –

As per InsO, insolvency practitioner determines if liquidation or restructuring is best of course action and the process accordingly continues within InsO.

Under StaRUG process needs to be stopped once the debtor becomes insolvent and application (either by creditor or debtor) needs to be made for initiation of liquidation under InsO.

Appointment of Insolvency practitioner -

In InsO, court appoints an insolvency practitioner to either take full charge of the company's operation or just to monitor the restructuring process (debtor in possession).

In StaRUG, a restructuring practitioner can be appointed only where consumers or small, medium or micro enterprises are involved as creditors or where the moratorium or restructuring plan covers all (nearly) creditors.

Sale of assets outside normal course of business--

In InsO, the insolvency administrator required approval from creditor committee for sale of assets.

In StaRUG, there is no restriction on the debtor for any sale.

Post commencement financing (DIP financing) --

In InsO, any post commencement financing by insolvency administrator considered expense of Insolvency and enjoys priority.

IN StaRUG, any post commencement financing is possible but will not enjoy any priority of insolvency process is started later.

Proof of claim –

Creditors need to submit proof of claim in InsO process to the insolvency administrator. No specific rules of such submission in StaRUG

Approval of restructuring plan –

In InsO, the plan needs to be approved by each class of creditors with majority in number and value and subsequent confirmation by the court.

In StaRUG, the plan needs to be approved by 75% of all affected claims in each group and subsequent confirmation by the court.

Cram down is possible in both process under similar conditions.

Executory contracts--

In InsO, insolvency administrator has the right to decide to continue or discontinue executory contracts.

In StaRUG, there is no such power/rule.

3 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?

Generally on executory contract, the insolvency administrator has the right to choose to fulfil the contract OR cancel the contract.

1. If insolvency administrator chooses to fulfil the contract, any amount payable by estate must be paid in full.
2. If insolvency administrator chooses to cancel the contract, the other party can claim damages and becomes insolvency creditor with pro rata claim on estate.

In contrast, following rules that apply on tenancy agreements for real estate

1. Section 108- Continuity of Certain Continuous Obligations

Contracts concluded by the debtor for the lease and tenancy of immovables or premises (as landlord) shall continue to exist, but to the credit of the insolvency estate. The same is applicable for lease contracts to other effects assigned as a security to a third party who had financed their acquisition or production. However, only the insolvency administrator can act for and on behalf of the insolvent tenant

2. Section 109 - Debtor's Status as Tenant or Lessee

Contract by the debtor as tenant or lessee may be terminated by the insolvency administrator without regard to the agreed term of the contract or an agreed exclusion of a right to the legal period of notice. The period of notice shall be three months to the end of the month unless another shorter period is applicable. If the lease is w.r.t to dwelling of the debtor then termination shall be replaced by the right of the insolvency administrator to declare that claims becoming due on expiry of the period. If not, the other party can claim damages due to premature termination.

3. Section 110 - Debtor's Status as Landlord or Lessor

If the lease fees are assigned to third party before the insolvency, the validity of such assignment shall be limited to tenancy or lease fees to be received for the current/next month of the opening of the insolvency proceedings. An assignment under contract shall be deemed equivalent to a transfer effected by way of execution. Set-off by other party is allowed.

correct (3 marks)

9 marks in total

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

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

The rules in German insolvency law relating to transactions avoidance can be found in chapter 3 section 129 to 146. Following are few key rules

1. Transaction made prior to opening of the insolvency proceedings and is disadvantaging the insolvency creditors may be contested by the insolvency administrator. **§ 129 InsO**
2. Security or satisfaction granted to an insolvency creditor maybe contested if
 - a. Transaction occurred 3 months prior to the request for opening of insolvency proceedings was made. Debtor was illiquid on the date of transaction and creditor was aware of insolvency OR
 - b. Transaction was done after the request for opening of insolvency proceedings was made and creditor was aware of the insolvency at the date of transactionMargin security are excluded from this.
Related person to debtor is assumed to be aware of the insolvency.
3. Security or satisfaction granted to an insolvency creditor without entitlement to such security maybe contested if
 - a. Transaction was done during the last month prior to the request to open insolvency proceedings or after such request
 - b. Transaction was done within the second or third month prior to the request to open insolvency proceedings, and the debtor was illiquid on the date of the transaction
 - c. Transaction was done within the second or third month prior to the request to open insolvency proceedings, and the creditor was aware of the disadvantage to the insolvency creditors arising from such transaction on its date.Related person to debtor is assumed to be aware of the disadvantage to the insolvency creditors
4. Any legal transaction by debtor constituting direct disadvantage to insolvency creditors may be contested if
 - a. The transaction was done during the last 3 months prior to the request to open insolvency proceedings, if the debtor was illiquid on the date of such transaction, and if the other party was aware of such insolvency on this date, or
 - b. The transaction was done after the request to open insolvency proceedings, and if at the time when the legal transaction was made the other party was aware of such insolvency or of the request to open insolvency proceedingsRelated person to debtor is assumed to be aware of the disadvantage to the insolvency creditors
5. Transaction made by debtor in last 10 years prior to the request for opening of insolvency proceedings or after such request with an intention to disadvantage creditors maybe contested if the other party was aware of the intention.
6. An onerous contract entered by debtor with related person within last 2 years prior to the request for opening of insolvency proceedings or after such request with an intention to disadvantage creditors maybe contested.
7. A gratuitous benefit (unless usual casual gift) granted by the debtor may be contested unless it was made earlier than four years prior to the request to open insolvency proceedings. A gratuitous benefit occurs where the recipient of the benefit is not entitled

to receive any payment or other consideration from the debtor but nevertheless receives something.

8. Transactions which grant security for or satisfy a claim to repay a shareholder loan are voidable. Security granted to a shareholder is voidable if it was granted within the period of ten years leading up to the insolvency petition or was granted after the petition was filed at court. The repayment of a shareholder loan is voidable if it was repaid during the twelve months leading up to the presentation of the petition for insolvency or if it was paid after such petition. A transaction entered by a company within the year prior to the filing of the petition for insolvency to satisfy a third party's claim to repayment of a loan may be challenged if a shareholder had granted security for or given a guarantee for such claim. This also applies to payments made towards claims of equivalent economic effect.
9. Transaction through which part or all of a silent partner's interest was restituted to him or accrued losses was waived can be contested if it was done during the last year prior to the request to open insolvency proceedings. Unless reason to open insolvency proceedings became existent only after the agreement.
10. Related person or person with close relationship with debtor is defined as
 - a. For natural person debtor -- Spouse, civil partner, the ascendants or descendants of the debtor, persons living in the debtor's household, a legal person or a company without legal personality if the debtor or related person are members
 - b. For legal person debtor – Members, general partners, shareholders with >25% shareholding, any person with personal relationship with aforementioned
11. The insolvency administrator may refuse performance of an obligation in consideration of a benefit under a transaction subject to contest.
12. A transaction shall be deemed performed on the date when its legal effects become existent.
13. Any property of the debtor sold, transferred or relinquished under the transaction subject to contest must be restituted to the insolvency estate.
14. If the recipient of a benefit under a transaction subject to contest restitutes the property received, his claim shall revive.
15. A transaction may be contested against the heir or other comprehensive legal successor of the other party to such transaction under certain conditions.

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.

B was granted security 16 months prior to debtor being insolvent and in exchange of a loan of EUR 50,000. Hence this transaction will not fall under avoidance transaction under section 130-134. Therefore, B has a valid security i.e. assignment of all current and future receivables of the debtor and thus a valid secured claim against debtor's estate.

Assignments provide the assignee with a claim against the insolvency administrator for preferential satisfaction from the proceeds of the assigned rights (section 51). Thus, B can demand priority payment from IA from the proceeds of receivables assigned to B.

Once insolvency proceedings have been opened against the debtor, its assets from then on will not fall under "future assets" under any security agreement. Hence all receivables created after opening of insolvency proceedings are part of the estate and not covered by the assignment right given to B. **§ 91 InsO**

Receivable from X was created on 7th July 2020 (day when service was delivered to X). This is well before the insolvency commencement date i.e. 3rd July 2021. Thus, B has a valid claim over receivables from X. **But IA is entitled to realise the claim (§ 166(2) InsO)**

In contrast, receivable from Z was created on 16th August 2021 (day when service was delivered to Z). This is well after the insolvency commencement date i.e. 3rd July 2021. Therefore, B does NOT have a valid claim over receivables from Z.

Section 171 allows IA to deduct the cost of determination (4% of proceeds), cost of disposition (5% of proceeds) and VAT from the proceeds of the receivables. Only the remainder amount is available for the secured creditor i.e. B.

In view aforementioned, B's claim against IA is as follows –

Eur	Total Amount	VAT @ 19%	Costs of determination @4%	Costs of disposition @5%	B' claim
Receivable from X	11,900	2261	476	595	8,568
Receivable from Z	11,900	2261	476	595	
Total	23,800	4,522	952	1,190	8,568

This table is difficult to understand. IA may subtract 19% VAT (= 1,900 €) and from the netto amount of 1,000 € another 9% cost (= 900 €). Hence, the remainder to be paid to B is 9.100 €

B is only able to recovery part of its loan amount. If there are no more receivables left to be monetized, then B's remainder claim of Eur 41,432/- will be treated as ordinary creditor claim and form part of schedule of claims and will have pro rata claim on the insolvency estate (Section 190)

11 marks in total

*** End of Assessment ***

44 marks in total