



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

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

10 marks in total

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

"Insolvency" can take 3 forms in the *Insolvenzordnung*:

- Inability to pay debts as they fall due, also known as cash flow insolvency or illiquidity – this is where a debtor consistently lacks the funds to pay a considerable number of its creditors and payments are delayed by more than 3 weeks;

- Imminent inability to pay debts – this is where, taking into account both liabilities which will mature within 2 years and sources of income which are likely to be available to the debtor, it remains “predominantly likely” that the debtor will be able to pay its debts when due; and
- Overindebtedness, also known as balance sheet insolvency – this is where the liabilities of a debtor are greater than its assets.

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 alternatives to formal bankruptcy or insolvency proceedings to individuals and companies who have not yet reached the point of bankruptcy/insolvency but anticipate that they will do so imminently. **You could be more precise here: imminent insolvency is a prerequisite, actual inability to pay debts an obstacle to StaRUG proceedings.** These alternatives can take the form of rescue proceedings by way of restructuring plans, restructuring mediators, monitors (these can only be appointed where creditors comprise certain small enterprises or where a proposed moratorium or restructuring plans affects all creditors), moratoriums (these are not automatic and must be applied for) and examination or confirmation by a court of various issues in connection with restructuring plans. By their very nature, the options made available through StaRUG are necessarily pre-insolvency solutions. Another point to note is that a debtor has a choice as to whether to make use of StaRUG, and nothing prevents a debtor from seeking out of court agreements with creditors before eventually applying to court for the assistance provided by StaRUG.

Under the InsO, rescue provisions apply to corporate entities only, once these have become substantively insolvent as per the definition discussed in question 2.1 above. In contrast with the approach seen in relation to StaRUG, both debtors and creditors can apply to start insolvency proceedings and, once proceedings are open, it becomes the responsibility of the appointed insolvency practitioner to decide on which insolvency route is the most appropriate in the circumstances – whilst StaRUG is aimed at rescue, insolvency proceedings under the InsO can result in either the restructuring of an entity or its insolvent liquidation. The start of insolvency proceedings triggers an automatic moratorium and the court then appoints an insolvency practitioner, whose duties and responsibilities are set out in the InsO, to oversee the proceedings. The various provisions of InsO relating to executory contracts, set-off and netting in connection with financial contracts, vulnerable transactions, supply agreements and the disclaiming of onerous contracts all have the debtor’s substantive insolvency as a starting point and therefore only become available once insolvency proceedings under the InsO have been started. Finally, once insolvency proceedings have commenced, any pre-insolvency rescue steps which had been taken under StaRUG must terminate and the preferential status of certain priority claims found under the InsO has no equivalent in StaRUG.

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?

Normally, contracts automatically terminate upon the start of insolvency proceedings. **That’s not correct. They are only terminated if the statute says so (e.g. § 115 InsO).** Executory

contracts (in which neither party has fully fulfilled its obligations) do not terminate automatically, but the insolvency practitioner decides whether to reject the contract (in which case “the other party shall be entitled to its claims for non-performance only as an insolvency creditor” (section 103(2) InsO) and such claims will be satisfied on a pro-rata basis) or to perform the contract (in which case the insolvency practitioner “replaces the debtor and claims the other party’s consideration” (section 103(1) InsO) and the creditor’s claims are satisfied in full from the insolvency estate).

By contrast, leases of real estate “continue to exist, but to the credit of the insolvency estate” (section 108(1) InsO) and may be terminated by the insolvency practitioner regardless of any provisions to the contrary contained within the lease agreement itself. Whether or not the insolvency practitioner chooses to terminate a lease, the landlord’s claims are only satisfied on a pro-rata basis “as an insolvency creditor” and if the lease relates to the debtor’s residence then “termination shall be replaced by the right of the insolvency administrator to declare that claims [...] may not be asserted in the insolvency proceedings” (section 109(1) InsO). Finally, where the landlord is a creditor, they are not permitted to terminate the lease (section 112 InsO).

2 marks

8 marks in total

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

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

“Transactions avoidance” refers to the notion that certain transactions entered into by a company may be rendered void, as though they had never taken place, after a company is substantively insolvent. This can be beneficial for the company’s creditors as, if a transaction is avoided, assets may be returned to the company’s insolvency estate for distribution to the creditors. The avoidance grounds (there are also general prerequisites, § 129 InsO) include the following:

- transactions granting security to, or repaying, an insolvency creditor may be vulnerable and subject to avoidance if they took place up to 3 months prior the start of the insolvency proceedings at a time where the creditor in question was aware that the debtor was insolvent;
- transactions granting security to, or repaying, an insolvency creditor who was not entitled to such security or repayment may be avoided if they took place up to 3 months prior the start of the insolvency proceedings (at a time where the debtor was insolvent), or if they took place one month before of after the application for insolvency proceedings (even if the debtor was not in fact insolvent at the relevant time);
- transactions whereby a creditor receives a form of benefit which immediately puts other creditors at a disadvantage, if they took place when that creditor knew that the debtor was insolvent or that insolvency proceedings had been applied for;
- transactions made up to 10 years prior to the beginning of insolvency proceedings if the relevant creditor knew that such transactions were made for the purpose of disadvantaging other creditors;
- transactions where an asset is gifted to a third party, or sold for significantly less than its market value, if that transaction took place within 4 years of the start of insolvency proceedings; and
- payments made to shareholders of a debtor company one year before of after the start of insolvency proceedings, and securities granted to shareholders of a debtor company ten years before of after the start of insolvency proceedings, may also be voidable.

If a transaction is successfully challenged, then the insolvency estate of the debtor must be put back in the position it would have been in if the transaction had never taken place – usually this means that (with a few exceptions encompassing assets forming part of a debtor’s personal household, clothing and specialist work equipment) property has to be returned or security must be discharged. We can see from the above list that the overarching principle is that any transactions which put the insolvency creditors at a disadvantage can be challenged. To emphasise this general principle, it is relevant to note that even third parties who may have purchased an asset in good faith are not protected from the above claw-back provisions.

14 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.

Here we will assume that the security was validly created, and that X was duly notified of the assignment. The security was created outside the 3-month period during which security interests can be reviewed and challenged, therefore we will assume that the creation of this security cannot be avoided.

In relation to the service contract within D and X, this will be subject to the assignment by way of security in favour of B as a future receivable – it did not exist at the time the security agreement was created, however as soon the service contract was entered into it became part of B’s security package. The services were duly rendered therefore we can safely assume that this is not an executory contract. Although B pursuant to the right of separate satisfaction, does not have the right to demand that the receivable be separated from the insolvency estate, its status as a secured creditor enables B to demand preferential satisfaction out of the proceeds of that receivable. B can only demand satisfaction up to the amount of its secured claim – here, this is EUR 50,000 and the EUR 11,900 collected by IA in connection with the service contract with X can therefore be claimed by B. **No, there are reductions concerning VAT (1,900 €) and costs (900 €) according to §§ 166(2), 170, 171.**

The contract entered into with Z, however, is not subject to the security interest in favour of B even though, technically, it can also be said to be a “future receivable” to the extent that it was created after entry into the security agreement. This is because that contract was created after the start of insolvency proceedings and, under section 91 InsO, “After the opening of the insolvency proceedings rights in objects forming part of the insolvency estate cannot be acquired with legal effect even if such acquisition of rights is not based on the debtor’s transfer or effected by way of execution”. This means that B’s position cannot be improved by the grant of additional security after the beginning of insolvency proceedings. As a result, the EUR 11,900 representing the receivable under the contract with Z form part

of the insolvency estate for distribution to the insolvency creditors, and not part of the security package from which B' as a secured creditor, can demand satisfaction.

The consequences for B are that it can be paid EUR 11,900 by IA in connection with the service contract with X but does not have a claim to the EUR 11,900 in connection with the contract with Z, leaving B with a balance of EUR 38,100 as a secured creditor.

12 marks

*** End of Assessment ***

44 marks in total