



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 was answer (c)

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 was answer (b)

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

7 marks in total

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

[Insolvency is a state of financial distress in which a person or business is unable to pay their debts. The reason to open insolvency proceedings are inability to pay debts as they fall due, cash flow insolvency, illiquidity, overindebtedness and imminent inability to pay debts.]

Inability to pay debts as they fall due

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.

Imminent inability to pay debts

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 maturity

Overindebtedness

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 over the next twelve months.

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 pre-insolvency tool box of the StaRUG is available for entrepreneurs of all kinds, no matter whether they are natural persons or legal entities whereas an Insolvency proceedings can be opened over the estate of every natural persons only.

Under the StaRUG, the debtor may commence out-of-court negotiations with the creditors needed for restructuring. While for insolvency proceedings, there is an obligation to file insolvency proceedings.

As far as rescue attempts are conducted under insolvency proceedings, it is for the insolvency practitioner to decide whether liquidation or restructuring is the best available option. Conversion from corporate rescue to liquidation is therefore possible within the same proceedings. This is also true if self-administration has been ordered. On the other hand, where pre-insolvency rescue has been commenced, those proceedings must be stopped as soon as the debtor becomes substantively insolvent (unable to pay debts or over indebted). They are not automatically converted to insolvency proceedings. Hence, debtor and creditors can apply for ordinary insolvency proceedings. **On the other hand, imminent inability to pay debts is a prerequisite.**

Both corporate rescues as well as liquidation can be achieved through standard insolvency proceedings. If the rescue is not successful, then the company is liquidated within the same proceeding. While in the case of pre-insolvency restructuring proceedings, these must be terminated and regular insolvency proceedings ensue.

During the course of insolvency proceedings, the insolvency practitioner can apply for credit on the capital markets. The obligations arising from the credit agreement are considered expenses of the proceedings (debts of the insolvency estate) and therefore are satisfied from the insolvency estate directly after the costs of the insolvency proceedings. If the insolvency estate is insufficient to cover the costs of the debts that have arisen through the proceedings. then the insolvency administrator is personally liable towards the other contracting party, unless it was not foreseeable (the same applies for the manager in debtor-in possession insolvency proceedings). In pre-insolvency proceedings under the StaRUG, fresh money must be acquired by the debtor. Such restructuring loans can be part of the restructuring plan. If the restructuring attempt fails and insolvency proceedings ensue, the loan does not enjoy a privilege in ranking. However, granting and collateralisation of the loan is not challengeable in subsequent insolvency proceedings if it is regulated in a court-confirmed restructuring plan.

For pre-insolvency restructuring, the StaRUG does not provide for transactions avoidance but protects transactions contained in, or executing, a restructuring plan in subsequent insolvency proceedings..]

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?

[Contracts concluded by a debtor for the lease and tenancy of immovable or premises and the debtor's employment relationships continue to exist, but to the credit of the insolvency estate. This also applies in respect of rental and lease contracts concluded by the debtor as landlord or lessor relating to other effects assigned as a security to a third party which had financed their acquisition or production.

Tenancy agreements concluded by the debtor as tenant or lessee may not be terminated by the other party after the opening of insolvency proceedings has been requested:

1. because of default in the payment of tenancy or lease fees arising before the opening of the insolvency proceedings was requested,
2. because of deterioration in the debtor's financial situation.

While with regards to executory contracts, if the debtor and its other party fails to completely perform the mutual contract, at the date when the insolvency proceedings were opened, both claims to fulfillment lose their enforceability. **Yes, and the IP has the right to assume or to reject the executory contract**

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 made before the opening of insolvency proceedings can be contested if they were made to the disadvantage of the creditors and a reason to contest (avoidance ground) has been shown. A transaction disadvantages the general body of creditors if it reduces the amount of proceeds that can be paid to the ordinary creditors.

The avoidance grounds are listed in Section 130 *et seq* InsO. In summary, assets must be returned to the insolvency estate if they left it in close timing to the opening of the insolvency proceedings or under circumstances which justify their return, even if the third party has already relied on their disposition. The following are reasons to contest:

(1) A transaction granting or facilitating an insolvency creditor a security or satisfaction to which the opponent had a claim (so-called congruent coverage) is contestable if it occurred in the last three months before the application to open insolvency proceedings, the debtor was already cash flow insolvent/illiquid and the creditor was aware of this. If there has already been an application to open insolvency proceedings, then the knowledge of such an application is sufficient grounds to contest. Whether a transaction has been performed within the suspect period of three months prior to the application for insolvency proceedings must be decided by

applying Section 140 of InsO, which refers to the point in time where the transaction was perfected.

(2) A transaction granting an insolvency creditor security or satisfaction without his entitlement to such a security or satisfaction (so-called incongruent coverage) can be contested. The suspect period is also three months, but there are no subjective requirements (mental elements). The only additional prerequisite is the cash flow insolvency (inability to pay debts) of the debtor and, if the payment has been made during the last month before (or after) the application for insolvency proceedings, even this is not necessary,

(3) Transactions that immediately disadvantage insolvency creditors may be contested if the debtor was already illiquid and the creditor was aware of the illiquidity or of an application to open insolvency proceedings.

(4) A transaction made by the debtor in the last 10 years before the request to open insolvency proceedings may be contested if it was made with the intention to disadvantage creditors and if the other party was aware of the intentions of the debtor.

(5) A transaction at an undervalue performed by the debtor may be contested if it was made within four years of the request to open insolvency proceedings.

(6) Payments and securities granted to shareholders can be clawed back under alleviated conditions. All payments which have been made during the last year and all charges granted during the last 10 years prior to (or after) the application for insolvency proceedings are voidable. There are no further prerequisites especially no mental elements.

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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.

[Type your answer here]

0 marks

*** End of Assessment ***

30 marks in total