



## **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 was answer (d)

### 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*?

A debtor is insolvent if there is illiquidity (they lack the necessary means of payment and as a result are constantly unable to meet a not inconsiderable number of the seriously requested monetary claims against them); imminent inability to pay their debts (it is likely they will be unable to meet their existing obligations); or overindebtedness (the debtors assets no longer cover its existing obligations to pay and the continuation of the enterprise is no longer highly likely).

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.

Insolvency Proceedings under the InsO are formal bankruptcy proceedings which are only opened upon application. They apply to individuals, consumers and businesses.

Proceedings under the StaRUG are an alternative to formal bankruptcy proceedings. **No** They are only open to natural persons **no** who are entrepreneurs. The StaRUG offers a number of instruments to help the debtor restructure in order to avoid the need for formal bankruptcy proceedings. The tools are available separately or jointly.

**Unfortunately, most of this is not correct and the most important point (debtor needs to be imminent unable to pay its debts but must not be actual unable to pay its debts)**

1 mark

### 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, executory contracts are wound up in insolvency proceedings – a party has to fulfil its obligations, though their claim against the debtor is only satisfied on a pro rata basis. However, for future obligations, these must only be performed if the insolvency administrator chooses to. If they do, the creditor's claim must be satisfied in full. **That's not sufficiently precise; you should start from the definition of executory contract and mention § 103 InsO.**

Leases are subject to special rules in the InsO. **Is § 103 InsO applicable?** The insolvency administrator may terminate them on three months' notice (unless a shorter period is available). If the premises are the dwelling of the debtor, the administrator may declare that rent falling due after the three-month notice period is not to be claimed as part of the insolvent estate.

1 mark

**5 marks in total**

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

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

Broadly, a transaction which was made before the opening of insolvency proceedings may be open to avoidance if it can be shown that it was to the disadvantage of the creditors, and that an avoidance ground exists in respect of that transaction, per InsO §129(1).

A transaction is considered to disadvantage the general body of creditors if it reduces the funds available to be paid to the ordinary creditors. So, for example, a payment or gratuitous transfer of assets, or the creation of security over an asset, will reduce the size of the overall pot available to the unsecured creditors.

Among the grounds of avoidance are:

- For a transaction **satisfying a claim or** creating a security in favour of a creditor, it must have occurred in the final three months before the application to open insolvency proceedings, the debtor was cash flow insolvent and the creditor was aware of this (InsO §130);
- For a transaction **satisfying a claim or** creating a security in favour of a creditor who was not entitled to one, the conditions are the same except there is no requirement to prove the creditor was aware of the insolvency – the timing and the fact that the debtor was insolvent are enough to succeed (InsO § 131); **regarding the last months prior to the application for insolvency proceedings, inability to pay debts is not necessary.**
- A transaction which immediately disadvantages creditors may be contested where the debtor was cash flow insolvent and the creditor was aware of this (InsO § 132);
- Where a transaction was made with the intention to disadvantage creditors and the other party was aware of this, it may be challenged so long as it was made within ten years before the request to open insolvency proceedings (InsO § 133);
- A transaction made at an undervalue may be contested if it was within four years of the commencement of the insolvency proceedings (InsO § 134); and
- Where the payment or security was granted to a shareholder in the debtor company, it may be clawed back. All payments made in the final year before insolvency, and all charges granted during the final ten years, may be voided without any need to meet any other prerequisites (InsO § 135).

A person who has received property from the debtor, the transfer of which has been successfully challenged, must return it to the insolvency estate. The aim is to restore the insolvency estate to the position in which it would have been had the challenged transaction never occurred. The claim for restitution is not reliant upon the insolvency administrator making any sort of declaration in order for the right to arise; it arises by operation of law alone (InsO § 143(1)).

In order to defend an action for restitution, the defending party must demonstrate that the necessary requirements were not met. In practice, this mostly involves demonstrating the mental element (i.e. usually the knowledge of insolvency) was not present. The burden of proof is normally upon the insolvency administrator to demonstrate all elements were present; however, this switches if the defending party is closely connected to the debtor. In these cases, the burden lies on the defending party to prove that the necessary elements were not present, rather than vice versa.

**13 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.

The Globalzession, or assignment of current and future receivables as security is a popular way of securing commercial debts in Germany. Although the assignation is by a single

agreement, the assignment does not affect a right until it exists; as such, each of the two transactions here falls to be considered separately.

The first claim, in relation to X, stems from a contract concluded some 11 months before the time D became unable to pay her debts and between 12 and 13 months before the date on which IA was appointed. The services were rendered a little over one month after the contract was concluded. Whether, under German law, the right was created on conclusion of the contract or on performance of the concurrent duty (i.e. D rendering services to X), in both cases the right was created more than three months prior to the application for insolvency proceedings. As such, the right is not open to challenge under InsO § 130. The responsibility is upon the Insolvency Administrator to realise the claims (per InsO § 161 **166(2)**) which has happened here. The IA can deduct a statutory figure to account for the costs of determining and realising the debt (InsO § 170) although, if this figure is substantially different than the statutory sums, the actual figure can be applied. In the present case, it seems unlikely that IA would have incurred much cost in realising the debt and so it is submitted that the actual figure (i.e. nil **"nil" is a bit too little, but your approach is acceptable**) would be appropriate, although this would be subject to confirmation. Under the same provision the IA may deduct any turnover tax which is due. This is stated to be 19%; as a result, the bank would be able to demand payment of EUR 10,000 from IA to account for the sum received from X, in the context of the bank's security. **Subject to reduction for costs**

In relation to the sum paid by Z, the right to this was created by contract dated 20 July 2021, which is some 17 days after insolvency proceedings were opened against D. As such, the creation of the right post-dates the insolvency. InsO § 91 prohibits the creation of security rights in objects forming part of the insolvency estate following the date on which insolvency proceedings are opened. As such, B has no right to the sums due from Z. Instead, the sums received would become part of the insolvency estate in which B would have to claim as an unsecured creditor.

**\* End of Assessment \***

**14 marks**

**40 marks in total**