



## 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: **[studentnumber.assessment5D]**. An example would be something along the following lines: 202021IFU-314.assessment5D. **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 “studentnumber” 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 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. 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**

How are the competences of a preliminary insolvency practitioner defined?

- (a) By the debtor.
- (b) By the creditors' committee.
- (c) By statute.
- (d) By court decision.**

correct

#### **Question 1.2**

Which of the following securities has an accessory nature?

- (a) Suretyship.**
- (b) Transfer of title by way of security.
- (c) Mortgage (*Grundschild*).
- (d) Retention of title.

correct

#### **Question 1.3**

Creditors who wish to participate in the insolvency proceedings must file their claims with

- (a) The creditors' committee.
- (b) The creditors' meeting.
- (c) The insolvency practitioner.**
- (d) The court.

correct

#### Question 1.4

Who has the duty to file for insolvency proceedings?

- (a) The directors of a Limited Liability Company (*GmbH*).
- (b) All debtors.
- (c) Legal persons only.
- (d) Entrepreneurs only.

Correct was answer (a), cf. § 15a InsO.

#### Question 1.5

Wage claims of employees 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

Who of the following is entitled to submit an insolvency (restructuring) plan?

- (a) Every creditor.
- (b) The debtor.
- (c) The court.
- (d) The creditors' committee.

correct

#### Question 1.7

Which of the following circumstances **is not** relevant for the local jurisdiction of an insolvency court (*Amtsgericht*)?

- (a) Registered office.
- (b) Location of assets.
- (c) Place of residence.
- (d) Centre of economic activities.

correct

### Question 1.8

The rights of which group **cannot** be affected by an insolvency plan?

(a) Employees.

(b) Shareholders.

(c) Banks.

(d) Creditors with a right to separation.

Correct was answer (d), since employees are treated like all other ordinary creditors.

### Question 1.9

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

(a) Seven years.

(b) Six years.

(c) Three years.

(d) One year.

Correct (German law has meanwhile be changed to three years; however, six years is what was still stated in the guidance text).

### Question 1.10

How are foreign insolvency proceedings recognised in Germany?

(a) By decision of the court.

(b) By the insolvency practitioner.

(c) By statute (by force of law).

(d) By a decision of the creditors' meeting.

correct

8 marks

## QUESTION 2 (direct questions) [10 marks]

### Question 2.1 [maximum 3 marks]

Which rules regulate cross-border insolvency law in Germany (only list the norms)?

The rules regulating cross-border insolvency law in Germany are:

- Set out in section 335 et seq of the Insolvency Statute of 1994 (known as *Insolvenzordnung* and hereafter referred to as 'InsO'), which apply in the absence of any agreements between the States from which the parties originate;
- As between European Union Member States, the EU Regulation 2015/848;

The norms are:

- That foreign insolvency proceedings are recognized in Germany, provided (1) the foreign court had jurisdiction in accordance with German law and (2) recognition would not lead to a result that would be manifestly incompatible with major principles of German law (especially fundamental rights).
- Separate proceedings in Germany are not required for the recognition of the foreign proceedings.
- Foreign judgments can be recognized in Germany under sections 343 and 352 InsO.
- In relation to German proceedings sought to be recognized in non-EU Member States, German law applies the principle of universality under which the effects of the German proceeding are to be binding in the foreign jurisdiction.

correct

3 marks

### Question 2.2 [maximum 4 marks]

Explain the principle of publication in German law on security rights: which security rights are made public (and how) and which are not?

The existence of security interests must be made known to third parties to ensure that creditors may enforce them. In Germany, the principle of publication/publicity applies in place of any central collateral registry for security interests.

Security rights in moveables are provided for under the principle as follows:

- Security interests over assets in the form of security ownership / assignment are not required to be publicized. An exception to this is registered inland vessels, which above a certain size must be registered in the Ship Register.
- Security interests over assets in the form of pledges:
  - Over tangibles, must be publicized by way of transfer of possession;
  - Over claims, must be publicized by way of notification of the debtor;
  - Over rights other than claims, need not be publicized; and
  - Over certain intellectual property rights, may (but do not have to) be publicized by way of registration.

Security interests over immovable assets occurs by virtue of the requirement to be registered in the Land Register. This applies equally to ships and planes.

correct

4 marks

### Question 2.3 [maximum 3 marks]

What is and what happens at a "verification meeting" (*Prüfungstermin*)?

The purpose of a verification meeting is to determine whether claims filed by creditors in the insolvency proceeding ought to be admitted to the registered schedule of claims. Those creditors who do not have secured claims must submit their claim to be verified at the verification meeting. Verified claims are added to the schedule on a pro-rata basis. If a claim is disputed by either a creditor or the insolvency administrator, then court proceedings are required to determine the claim. Otherwise, they are admitted to the schedule of claims which, after termination of the insolvency proceedings, the creditor may enforce against the debtor without restriction.

correct

3 marks

in total: 10 marks

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

Explain the rules in German insolvency law relating to executory contracts.

Section 103 InsO governs executory contracts in the context of insolvency proceedings. It specifies that if a mutual contract was not completely performed by the debtor and the other party when the insolvency proceedings were opened, the insolvency administrator may perform the contract as if it were the debtor and claim the full consideration from the other party. If the administrator elects not to perform the contract, then the other party may claim for the debtor's non-performance only as an insolvency creditor (that is, on a pro-rata basis with other unsecured creditors). The other party may give notice to the insolvency administrator requiring him or her to advise, without negligent delay, whether he or she will perform the contract on behalf of the debtor. If the insolvency administrator does not advise his or her intent in a timely manner, he or she may not insist on performing the contract him/herself.

One extraordinary feature of the rules, set out in section 105, is that even where the insolvency administrator elects to perform the contract in place of the debtor, the debtor's debts to the other party under the contract are fulfilled only on a pro-rata basis. Only those assets accumulating to the insolvent estate are required to be 'paid-for' in full.

Obligations of other parties to the debtor under executory contracts remain extant even after the opening of insolvency proceedings.

Specific types of contracts are dealt with under further provisions from s104 onwards:

- Fixed-date transactions (s104): Creditors may claim only for non-performance if the fixed date for delivery of goods with a market price or stock-exchange price occurs after the opening of insolvency proceedings;
- Severable contracts (s105): The other party to a contract under which the performances of the parties are severable may claim as an insolvency creditor for the amount of its claim to consideration that relates to its performance already undertaken, even where the administrator requires performance of the remainder of the contract.
- Continuous obligations (s108): Contracts under which the other party has a continuing obligation to the debtor, such as leases of immovable property or employment agreements continue to exist, but the other party's obligations accrue to the benefit of the insolvent estate. Loan contracts where the debtor is the lender remain in force so long as the object owed remains available to the borrower.
- Mandates (s115): Any mandate arranged by the debtor over property forming part of the insolvent estate expires with the opening of the insolvency proceedings. There are two exceptions to this rule: (1) if the suspension of the mandate would cause a risk, the mandatory is to continue the transaction until the administrator is able to deal with it, and claim reimbursement of their expenses as a preferential creditor and (2) if the mandatory does not know about the opening of the insolvency proceedings, then the mandatory may claim as an equal insolvency creditor for his reimbursement claims.

The principles stated above apply equally with respect to companies in liquidation. However, this is not necessarily the case with respect to companies in corporate rescue proceedings. Because the agreement does not occur prior to the opening of insolvency proceedings, the prohibition contained in section 119 InsO does not apply. In this way, the default rules can be evaded in favor of more preferable, bespoke rules as agreed by the debtor and its creditors.

correct

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

In January 2018, Bank (B) has granted debtor (D) a loan of EUR 50,000. Since B asked for security, D has transferred legal title over a lorry by way of security and has assigned all current and future receivables against her customers by way of security. Sixteen (16) months later, in May 2019, D is unable to pay her debts when they fall due. On 3 July 2019, B, being aware of D's substantive insolvency, terminates the loan contract and sells the lorry for EUR 20,000 to W. On 5 July 2019, B reveals the assignment to all customers of B and receives EUR 15,000 from X, who bought goods from D on 1 July 2019 and who pays B the money he owes to D. On 1 August 2019, D applies for insolvency proceedings. B receives another payment of EUR 10,000 from Y who bought goods from D on 10 September 2019. Five days later, the court opens insolvency proceedings and appoints I as insolvency administrator. I maintains B's business and sells goods to Z for EUR 5,000. Z is a regular customer of B, knows about the assignment and pays EUR 5,000 upon delivery to B. I claims EUR 50,000 from B, arguing that the sale of the lorry and the payments of X, Y and Z are subject to transaction avoidance (§§129 *et seq* InsO).

What are the various legal positions? Test this based on the norms.

This question concerns vulnerable transactions, to which sections 129-146 InsO apply. Broadly speaking, the insolvency administrator, I, is challenging a number of transactions that have taken place before and after the opening of insolvency proceedings in relation to D, and which have benefitted B, one of D's creditors.

The principle on which an insolvency administrator may claw-back the proceeds of various transactions is set out in section 129 InsO which provides that transactions (including omissions) occurring before the opening of insolvency proceedings and which disadvantage the insolvency creditors may be contested.

A transaction will be considered to disadvantage insolvent creditors if its result is to reduce the amount of proceeds available to be paid to the pool of ordinary insolvent creditors. A disadvantage will not result in certain limited circumstances, including for example if the debtor disposes of worthless assets, or assets that would not accrue to the insolvent estate.

Reasons to contest a transaction include:

- If the transaction grants security or satisfaction to an insolvency creditor to which the contesting party had a claim and:
  - o It occurred in the three months immediately prior to the application to open insolvency proceedings; and
  - o The debtor was already cash flow insolvent and the creditor was aware of the debtor's cash flow insolvency.
- If the transaction grants security or satisfaction to an insolvency creditor who has no entitlement to the security and;
  - o It occurred in the three months immediately prior to the application to open insolvency proceedings; and
  - o The debtor was cash flow insolvent (but this is not required if the transaction occurred in the last month before (or after) the application to open insolvency proceedings).
- If the transaction constitutes a direct disadvantage to insolvency creditors occurred when the debtor was illiquid and the creditor was aware of the illiquidity or of an application to open insolvency proceedings;
- If the transaction occurred within the last 10 years prior to the request to open insolvency proceedings and;
  - o The debtor intended to prejudice creditors; and



- The other party knew of the debtor's intention.
- If the transaction was a gratuitous benefit (i.e. a gift) made by the debtor within four years of the request to open insolvency proceedings;
- If the transaction was a payment to shareholders made in the last year, or security granted to shareholders during the past 10 years prior to the request to open insolvency proceedings.

A party seeking to defend a transaction must prove that any one of the relevant criteria did not exist. Given that most of the criteria are easily ascertainable (in terms of time, value and the debtor's financial position), this will usually mean demonstrating that one or both parties to the transaction lacked the relevant intention or knowledge as the case may be.

A party to a transaction that has been contested must make restitution to the insolvent estate. The purpose is to return the estate to the position it would have been in but for the contested transaction. No separate proceedings are required for this to happen. The creditor's claim is revived and they may claim as an ordinary insolvency creditor.

Returning to the case of B and D, I is contesting four transactions, namely:

- B's sale of the lorry for EUR 20,000
- X's payment to B of EUR 15,000
- Y's payment to B of EUR 20,000
- Z's payment to B of EUR 5,000

We know that B was granted security over the lorry in January 2018, 16 months before any suggestion of imminent insolvency (D being unable to pay her debts as they fall due). There is no evidence that D intended to prejudice creditors or that B had corresponding knowledge. Moreover, the security was properly effected, by way of transfer of legal title in accordance with the principle of publicity. On that basis, it would appear that there is no basis under ss129-146 for I to successfully contest the sale of the lorry.

On 1 May 2019, D faced imminent insolvency. Having become aware of this, and in accordance with the principle of publicity, on 5 July 2019 B revealed the existence of D's assignment of future receivables to all customers of D. One of those customers was X, who bought goods from D on 1 July 2019 and becomes aware of B's assignment of future receivables from D. Because the assignment of future receivables to B occurred sixteen months before D's imminent insolvency, the payment by X to B is not a contestable transaction.

**This is not correct. A security right cannot exist without a security object. Hence, not the date of the assignment but the date of the purchase contract is relevant.**

Y's payment to B has a better chance of being contested. Because the sale of goods from D to Y occurred after the opening of the insolvency proceedings, B's security does not cover the proceeds of that sale. B will likely be required to make restitution of Y's payment to B to the insolvent estate.

**This is not precise enough. Y bought the goods from D not after the opening of but after the application for insolvency proceedings which is challengeable under § 130(1)No.2 InsO.**

Z's payment to B should clearly have been made to the insolvent estate. Section 91 prohibits the betterment of a creditors position after the opening of proceedings. The sale of goods by I to Z resulted in a receivable of EUR 5,000, created after the opening of the insolvency proceedings and which is not covered by B's security right.

I should be advised that B is likely to be able to keep the lorry proceeds and X's payment, but Y and Z's payments are likely to be successfully contested.

**11 marks**

**\* End of Assessment \***

**in total: 44 marks**