



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 (*Grundschuld*).
- (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

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

9 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)?

- a) SS 335 et seq InsO are binding where no bi-/multilateral agreements.
- b) Eu Regulation 2015/848 for EU Members States (except Denmark).

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?

We find the principle of publicity in the transfer of title as a way of security. The transfer of title by way of security requires the power of disposal and a contractual agreement between the previous owner and the new owner on the transfer of ownership as well as the factual transfer of possession of the object concerned from the previous owner to the new one.

This is not correct. Transfer of title by way of security does not require any transfer of possession and is therefore not an example for the principle of publicity. However, I take it from the answer after the next answer that you do not mean "transfer of title by way of security". But what do you mean? Transfer of title is not a security right and retention of title is not an example for the principle of publicity either.

Also, we find the principle of publication on the pledges on intangibles, which require the notification of the third party (obligor) to become effective.

correct

For security ownership / assignment no act of publicity is required, excluding registered inland water way vessels in the Ship Register (only compulsory for certain size vessels, the registration of smaller ones is voluntary).

correct

Regarding pledges it is necessary the act of publicity for the validity of security rights in case of the transfer of possession of tangibles. In the case of claims it is the notification of the debtor (obligor). As far as claims are concerned the principle is stricter with pledges than the assignment, which does not require notification. The pledge of rights other than claims, do not require any specific act of publicity, since the assignment of rights also does not require any such act.

correct

Regarding some types of intellectual property rights specific registers are provided in which pledges (as well as ownership) can be registered (example patents, utility patents and commercial designs). However, such registration has a declaratory value and is not an essential requirement for the validity of creation of the pledge.

correct

For immovables publicity principle is found in the fact that the publicity of the security is guaranteed by the validity requirement of the mortgage being registered in the Land Register, which also applies for ships and planes.

correct

4 marks

Question 2.3 [maximum 3 marks]

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

A verification meeting is a meeting where all registered claims are verified, regarding their amount and rank.

Creditors that wish to participate in the insolvency proceeding file their claim in writing to the insolvency administrator. Creditors without secured claims can enforce their claims in opened insolvency proceedings by filing their claims in the insolvency schedule. They must include the reason of the claim and the amount, as well as present copies of documents evidencing the claim.

The insolvency administrator prepares a schedule of the claims. On the verification meeting claims are verified, if no participant objects the claim, it will be formally included in the schedule, as well as the claims that do not have a title. Claims are deemed to be determined only if there is no objection by the insolvency administrator or by a creditor in the verification meeting (the debtor can also object).

If a claim is disputed, a proceeding in the court will be initiated to decide whether to include it in the schedule or not. The insolvency administrator satisfies these claims that have been registered to the schedule in a *pro rata* basis. Afterwards, to the termination of the insolvency proceeding, the creditors of these proceedings can enforce their claims against the debtor. In this process, entry into the insolvency schedule acts as title to enforce such claims, as far as they have not been disputed by the debtor in the verification meeting. Consequently, if the debtor opposes a claim, the insolvency proceedings will not be impacted, and the determination of the claim will remain the same. However, the insolvency schedule does not entitle creditors to open enforcement proceedings against the debtor in this case.

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.

The general rule is that contracts are wound up in insolvency proceedings, meaning the partner to the contract also has to fulfil their obligations after the opening of the insolvency proceeding. Claims against the debtor will be satisfied by the insolvency administrator on a pro rata basis.

Reciprocal contracts are regulated different if they have not yet been fulfilled by the parties. After opening of the proceeding no winding up occurs. The insolvency administrator must decide if both parties must fulfill the contract. If the contract has to be fulfilled, then the full claim must be satisfied from the insolvency state. On the other hand, if the insolvency administrator rejects the fulfilment of the claim, the contracting party can register a claim for equalization to the schedule, which will be satisfied on a pro rata basis.

There are specific provisions for specific types of contracts in SS 104 et seq InsO, such as tenancies and leases over immovable objects, contracts of employment or expiration of mandates.

No specific provisions based in insolvency law apply, but consideration must be taken for the fact that these contracts are continuing obligations which remain unfulfilled by the parties, thus

the insolvency administrator can choose the fulfillment of the contract. If the insolvency administrator chooses to fulfill the obligations, black dated debts of the debtor need only to be fulfilled on a pro rata basis. The obligations must be fulfilled in full as far as the assets were added to the estate after the opening of the insolvency proceeding.

15 marks

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.

The transactions made by B can be contested as vulnerable transactions since they imply a disadvantage to other creditors, as it reduces the amount of proceeds that can be paid to the ordinary creditors.

Not correct for the lorry, since the realization of an unchallengeable security right does not disadvantage the general body of creditors.

The insolvency administrator can claim there is a reason to contest the transactions made by B, consistent in the fact that these transactions made by B disadvantage the universe of D's creditors and B knew that when it sold the lorry and received the payments for the goods sold by D, that D was already insolvent and B was aware of its insolvency.

Furthermore, all the transactions made by B were done in the suspicious period (3 months before the application of insolvency).

This should be reasoned for payment of X and is not correct for the payments of Y (after the application for insolvency proceedings) and Z (after the opening of insolvency proceedings)

Also, the transactions facilitated an insolvency creditor the satisfaction of its securities in the last three months before the application to open the insolvency proceeding and when the debtor was already insolvent, and B was aware of D's insolvency.

Consequently, the assets should be returned to the insolvency estate since they were in close time to the opening of the insolvency proceedings and there are grounds to justify their return. This means that B must pay the EUR 50,000 claimed by I.

5 marks

*** End of Assessment ***

in total: 39 marks