



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

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

10 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)?

- European Insolvency Regulation of 2015 [Guidance Text: par 4.1. page 3] although it is only binding on EU member states [Guidance Text: par 7.1. page 35].

- The Insolvenzordnung (specifically Part 11) [Ibid; see http://www.gesetze-im-internet.de/englisch_inso/ (accessed 14/07/2021)].
- Regulation 593/2008 (Rome I) (see s 337, specifically 'Regulation (EC) No 539/2008 of the European Parliament and of the Council of 17 June 2008 ... (Rome I) (OJ EC L 177 of 4.7.2008 ...) [Ibid; see http://www.gesetze-im-internet.de/englisch_inso/ (accessed 14/07/2021)] **No, this is not regulating insolvency law.**
- Bi- or multilateral agreements between jurisdictions if there are any [Guidance Text: par 7.1. page 35]

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?

Compliance with the principle of publication can have two outcomes: one, it may be necessary to establish the security as an enforceable claim in law; and two, it allows external parties to know that the asset is subject to a *real* right held by someone other than the debtor – in particular a *real security right* [Guidance Text: paras 5.2.1.1 and 5.2.4.2 pages 6 and 10]. A pledge, as a form of security over tangible movable property, must comply with “specific formal publicity” rules [Guidance Text: par 5.2.1.1 page 5]. This means that the creditor must be in possession (or “constructive possession”) of the asset that is the subject of the security [Guidance Text: par 5.2.1.1]. This is particularly evident in the case of the pledge over tangible property, where the creditor must take possession of the object that serves as security for the debt and, in doing so, the real right of the creditor is not only established in law but also “made public” [Guidance Text: par 5.2.1.1. page 5]. If the object is not possessed by the creditor, the requirements for a valid pledge has not been complied with [Ibid]. This is more complex where the pledged object is intangible and qualifies as a “claim”: the legislation (the BGB) prescribes that “notification of the ... obligor” is necessary for the pledge to be recognised in law and this “notification” serves as compliance with the publication requirements – meaning that the debtor must be informed of the security [Guidance Text: paras 5.2.1.2 and 5.2.4.2. pages 7 and 10]. Pledges that relate to intangible movable property that do not qualify as “claims” require no “acts of publicity” for its validity in law to be recognised, similar to security rights established by way of assignment [Guidance Text: par 5.2.4.2. page 10]. Technically, no publication requirements are required for security ownership to be valid [Guidance Text: par 5.2.4.2. page 10] but there are indicators that signal that a creditor may have rights over the property: In respect of the transfer of title by way of security, the rights of the creditor are dependent on the “factual transfer of possession” because the real ownership rights are given to the creditor as a form of security for payment of the debt incurred – in this manner, the possession signals the rights of the creditor in respect of tangible, movable property to uninformed third parties [Guidance Text: par 5.2.1.1. page 6]. Actual, physical possession is no longer required (or not always required although it is still possible and may be desired by the creditor) due to legislative amendments because delivery can be effected by way of “constructive possession” where the legal relationship between the debtor and object is characterized by an “intention” to hold the object on behalf of the creditor as opposed to possession of an object owned by the debtor himself [Ibid]. As an agreement to this effect would need to be present as that expression would hypothetically be the signal to third parties of the creditor’s rights [Ibid]. Security ownership or assignment does not have to comply with publication provisions as options exist to establish pledges without the creditor actually having to possess the asset and no provisions are made in respect of notification when it comes to assignment (with the exception of ships that use inland waterways, which must be registered in the name of the creditor as owner in the Ship Register [Guidance Text: par 5.2.4.2. page 10]. In addition, the registration of intellectual property rights in registers designed to set out

ownership and note pledges against the property, only serve the second, as opposed to the first outcome, indicated in the introductory sentence to this paragraph [Guidance Text: par 5.2.4.2. page 10].

In respect of *real security rights* over immovable property, the publication requirement is satisfied by way of registration of the rights in the Land Register [Guidance Text: par 5.2.2. page 7]. The *Grundschild* is the preferred manner to mortgage immovable property although provision is made for a *Hypothec* [Ibid]. Registration of a *Grundschild* signals to parties that there may be various debts secured over the property over which the mortgage rights are registered and that the creditor in whose favour the security is registered will have a preferential claim to funds generated by the involuntary sale of the property [Guidance Text: paras 5.2.2 and 5.2.3. pages 6 and 7]. As transfer of title by way of security is also possible in respect of immovable property, the publication principle will also be satisfied by way of registration in the Land Register [see by implication Guidance Text: par 5.2.4.3 page 11] and registration in the applicable registers also applies to water- and aircarriers [Guidance Text: par 5.2.4.2. page 10].

correct

4 marks

Question 2.3 [maximum 3 marks]

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

Creditors inform the administrator of the insolvent estate of their claims against the estate by following the steps set out in insolvency legislation – legally speaking, this category of creditors ‘fil[e] their claims’, where after it is the duty of the administrator to ‘enter every registered claim into a schedule’ [Guidance Text: par 4.2. page 4 and 6.2.8 page 20; ss 174 and 175 of the InsO at http://www.gesetze-im-internet.de/englisch_inso/ (accessed 14/07/2021)]. In this manner, the claims are ‘registered’ but must then also be confirmed – this ‘verifi[ca]tion’ takes place at the ‘verification meeting’ for purposes of ‘formal inclu[sion] in the schedule’ [Ibid; see also s 176 of the InsO, which determines the following: ‘During the verification meeting, the filed claims shall be verified in accordance with their amount and rank. Claims contested by the insolvency administrator, by the debtor or by an insolvency creditor shall be discussed individually’ at http://www.gesetze-im-internet.de/englisch_inso/ (accessed 14/07/2021)].

During this meeting, other creditors, the debtor or the administrator him/herself, may dispute the claim (‘object’ to it) and in the absence of such a dispute, the claim against the estate become enforceable by the creditors [Guidance Text: par 4.2. page 4 and 6.2.8 page 20]. In a nutshell, the outcome of the verification meeting determines the rights of the creditors to payment during the administration of the insolvent estate (as they have to prove the grounds for the claim, the amount of the claim, their ‘rank’ or category that they fall in together with evidence to support this – see Guidance Text: par 6.2.8 page 20; s 176 of the InsO at http://www.gesetze-im-internet.de/englisch_inso/ (accessed 14/07/2021)), alternatively enforcement, of their claims: the listing of the claim in the schedule mentioned above, remains on record unless it is disputed at the verification meeting [Ibid]. If the record of the claim is retained on the schedule after the meeting (survives the meeting), the result is that the registered claim is paid from the available funds in the insolvent estate or, if the insolvency proceedings is ended, the unsecured creditor may base the enforcement of the claim in a court of law on the inclusion of the claim in the insolvency schedule [Ibid].

The purpose of the verification meeting is thus to finalise the registered claims and deal with disputes – either raised by the administrator or creditors (which affects the retention of the claim on the schedule) or by the debtor (which affects the ability of the creditors to rely on the schedule as confirmation that the debt is indeed owed by the debtor but a debtor’s objection at the verification meeting does not affect the positive verification of a claim – see s 178(1) of the InsO at http://www.gesetze-im-internet.de/englisch_inso/ (accessed 14/07/2021)) [Ibid]. A creditor may refer a matter to court if the dispute is not solved during the discussions that take place at the verification matter in order to determine whether the claim should be ‘formally

included in the schedule' [Guidance Text: 6.2.8 page 20, see also s 176 referred to above]. Based on the aforementioned, it is therefore logical to assume that the meeting is a coming together of the administrator, creditors and debtor to deal with the authentication of claims lodged against the insolvent estate [Ibid]. However, the manner in which this authentication or 'determination' takes place is in the negative – 'a claim shall be deemed to have been determined if no objection is raised by the insolvency administrator or by an insolvency creditor during the verification meeting' – even though the legislation makes provision for the 'discussion' of filed but disputed claims: see ss 176 and 178(1) of the InsO at http://www.gesetze-im-internet.de/englisch_inso/ (accessed 14/07/2021).

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.

Contracts to which to the debtor is a party must be brought to conclusion during insolvency proceedings and the rules pertaining to uncompleted contracts apply to those contracts that are uncompleted at the date of commencement of insolvency proceedings [Guidance Text: par 6.2.9; see s 103 of the InsO quoted below]. First, a distinction needs to be made between contracts where only one of the parties to the contract still needs to perform, and a contract where both parties still need to perform as per the provisions of the contract [Ibid]. Second, a distinction needs to be made between contracts where special rules apply, and contracts where the general rules apply [Ibid].

In the instance where only the non-insolvent party to the contract still needs to perform in terms of the contract, the performance will be due to the insolvent estate [Ibid; see also Guidance Text: par 6.2.7 on the insolvency administrator's duties]. In the event that the debtor needs to perform, the non-insolvent party to the contract will become a creditor of the insolvent estate and will have to prove a claim based in contract against the estate – receiving a proportional part of the claim in accordance with the rules of the InsO [Guidance Text: par 6.2.9].

In the event that performance is lacking by the debtor and other party to the contract, s 103 of the InsO provides as follows: '(1) If a mutual contract was not or not completely performed by the debtor and its other party at the date when the insolvency proceedings were opened, the insolvency administrator may perform such contract replacing the debtor and claim the other party's consideration. ... (2) If the administrator refuses to perform such contract, the other party shall be entitled to its claims for non-performance only as an insolvency creditor. If the other party requires the administrator to opt for performance or non-performance, the administrator shall state his intention to claim performance without negligent delay. If the administrator does not give his statement, he may no longer insist on performance.' [http://www.gesetze-im-internet.de/englisch_inso/ (accessed 14/07/2021); see also Guidance Text: par 6.2.9]. This means that the administrator can either choose to honour the contractual obligations of the insolvent debtor or repudiate the obligations [Ibid]. If the administrator performs, then the non-insolvent party to the contract also has to honour his part of the contract (and if not, the administrator can claim this as a debt owed to the insolvent estate) [Ibid]. If the administrator decides to repudiate the debtor's obligations and not honour same from the estate, the non-insolvent party is viewed as a creditor of the estate (an insolvency creditor as per s 38 of the InsO) and will receive a proportional payment based on the claim for breach of contract [Ibid; see also s 103 above].

The rules applicable to natural persons involved in uncompleted contracts is the same for corporate entities in liquidation (corporate insolvency) and entities involved in corporate rescue attempts [Guidance Text: paras 6.3.8 and 6.5.13]. The exception is that the corporate

rescue plan (which is also a possibility for a natural person) can set out a different manner of dealing with uncompleted contracts [Guidance Text: paras 6.5.12 and 6.5.13]

The special rules applicable to certain types of contracts are dealt with in the InsO – these are rental agreements pertaining to immovable property, employment contracts and contracts of mandate [Guidance Text: par 6.2.9] to name but a few [see ss 104 – 116 of the InsO at http://www.gesetze-im-internet.de/englisch_inso/ (accessed 14/07/2021)].

In respect of rental agreements, ss 109 and 110 of the InsO apply depending on the position of the debtor. If the insolvent debtor had already taken possession of the leased premises, the administrator by provide notice that the contract in terms of which the debtor who rented immovable property will cease within three months or in terms of the rental agreement if the latter provides for a shorter notice period [s 109(1) of the InsO]. If the debtor is yet to take possession, the administrator does not terminate the contract but may withdraw from it [s 109(2) of the InsO]. The non-insolvent party may also withdraw from the contract [Ibid]. In both instances, the non-insolvent lessor and landlord may ‘claim damages as an insolvency creditor for premature termination of the contract’ [s 109 of the InsO]. There is further a restriction, based on pre-set *causa* for termination, on the right of the non-insolvent party to terminate a rental agreement in respect of which the insolvent debtor is the lessee as s 112 of the InsO determines the following: ‘Tenancy or lease contracts concluded by the debtor as tenant or lessee may not be terminated by the other party after the opening of the insolvency proceedings was 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 degradation of the debtor’s financial situation.’

Similar to the position where the debtor had taken possession of rented property as lessee, the administrator may give three months’ notice of the termination of an employment contract – irrespective of a longer termination period determined in the contract but if a period of less than three months was agreed upon, the shorter notice period will apply [s 113 of the InsO]. The resultant right of the non-insolvent party to the contract will be to ‘claim damages as an insolvency creditor for premature termination of the employment’ [Ibid]. Termination is a choice – as the legislation refers to the word ‘may’ [ss 109(1) and 112 of the InsO].

However, where contracts generate income for the estate, these contracts will continue [s 108 of the InsO]. S 108 of the InsO determines that, where the insolvent debtor was the lessor of immovable property, the contract continues and the rental amounts generated will form part of the insolvent estate. The same section determines that, where the insolvent debtor was the lender and the property is availed to the borrower, the contract continues and the amounts generated are ‘for the credit of the insolvent estate’.

A contract of mandate regarding property of the debtor ends automatically upon commencement of insolvency proceedings with the exception that, where termination of the mandate may prejudice the estate, the contract is ‘deemed’ not terminated (‘expired’) until the administrator can effect the duties of the mandated party [ss 115(1) and 115(2) of the InsO]. The mandatory’s expenses accrued after the commencement of insolvency proceedings are dealt with as ‘preferential claims’ but the remaining compensation for acting in terms of the contract under the impression that insolvency proceedings in respect of the insolvent debtor has not been commenced, will be dealt with as a ‘normal’ claim of an insolvency creditor and paid proportionally [s 115(2) and 115(3) of the InsO]. The main considerations applicable to contracts of mandate also apply to contracts in terms of which the business affairs of the debtor is managed by another [see s 116 of the InsO].

In some of the instances referred to above, a clear indication of the decision of the administrator must be made, for example, if a party requires a decision to be made, the administrator must communicate his or her decision as soon as possible against penalty of being barred to claim performance from the non-insolvent party [see s 103(2) of the InsO].

In addition, the rights and status as insolvency creditor of the non-insolvent party described above apply in respect of contracts terminated or non-performance elected by the insolvency administrator – where due and payable (unpaid/unperformed) debts arose in terms of the (‘continuous obligations’) contract prior to the commencement of insolvency proceedings, these debts are dealt with as ‘ordinary’ debts of insolvency creditors [s 108(3) of the InsO].

correct

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.

Transaction 1 (sale of the lorry on 3 July 2019): This transaction occurred within three months prior to the debtor applying for insolvency proceedings (opened on 1 August 2019 and the secured asset was sold on 3 July 2019). The facts indicate that the creditor was aware of the debtor's insolvent state when the transaction occurred and this knowledge was preceded by an inability to pay debts – hence at the time of the transaction, the debtor was already commercially insolvent. [See Guidance Text par 6.2.11. page 22 for the requirements].

However, there are a number of challenges with this scenario: 1) The removal of the asset may limit the proceeds generated and available in the estate for distribution to creditors but without knowing what the value of the lorry is on the open market, it is not possible to determine whether the “already existing security rights exceed the value of the collateral” [Guidance Text par 6.2.11. page 22]. 2) The nature of the security is the following: “Transfer of title by way of security means the transfer of ownership for security purposes. Ownership for the purposes of security is not restricted, which means that full ownership as the most comprehensive right is transferred” and falls in the arena of property law [Guidance Text par 5.2.1.1. page 6]. Hence, it can be argued that the lorry is no longer an asset of the insolvent estate and there is thus no prejudice caused to creditors in this regard [Guidance Text par 6.2.11. page 22]. This is notwithstanding that “the secured creditor holds title to the ownership of the asset in a fiduciary capacity. Transfer of title by way of security means the transfer of ownership for security purposes.” [Guidance Text par 5.2.1.1. page 6].

I am of the opinion that transaction 1's disposition is not capable of being avoided. The security rights were not “created” in the “suspect” time between 1 May 2019 and 1 August 2019 (I am assuming that the referral to “created” refers to when the security was granted in 2018) but only the asset that was the subject of the security was liquidated and thus “the transaction was perfected” in July 2019 [Guidance Text paras 5.2.3. and 6.2.11 and pages 9 and 22]. Notwithstanding that “the security right does not prevent the asset to which it is related from being legally part of the insolvency estate” and “the secured creditor is not entitled to claim its separation from the insolvency estate”, this is not relevant at the time of disposal of the lorry as it occurred prior to the application of the debtor and the amount received is less than the claim of the creditor (thus no surplus amount is due to the estate) [see Guidance Text 5.2.3. page 8]. In the absence of showing that the creditors were prejudiced due to a sub-value sale [as indicated above in this paragraph although the facts indicate that the value of the lorry probably was low as it was not enough to provide full security for the 50 000 euros, hence the need for additional security over receivables], the sale of the lorry is not subject to transaction

avoidance. In addition, there is no indication in the facts that the “security rights” relating to the lorry “[...] are challengeable themselves [when] realized” [Guidance Text para 6.2.11 page 22]. **correct**

Transaction 2 (proceeds directly paid to creditor from receivables on 5 July 2019): This is security by way of assignment over movable intangible property and correlates with the transfer of title by way of security over tangible movable property when it comes to the position of the creditor in law [Guidance Text 5.2.1.2. page 7]. As the relevant date to consider is the date on which D sold the goods to X (and not January 2018), the payment to B by X falls within the scope of s 130 of the InsO’s application [Guidance Text 5.2.1.2. page 7]. B’s position in respect of the receivables are different to that of the lorry – in the latter case, B was already a secured creditor whereas, in the case of the receivables, B only became a secured creditor upon the creation/establishment of the collateral (thus the sale of the goods and existence of receivables due) [Ibid]. Hence, section 130(1) makes provision for transactions to be dealt with whether they occur within three month or, or after, an application for insolvency proceedings – note that 1. of s 130(1) applies to transaction 2 and 2. of s 130 (1) applies to transaction 3 as explained below [for the exact translated legislative provisions of section 130, see http://www.gesetze-im-internet.de/englisch_inso/ (accessed 14/07/2021)]. I already referred to the requirements in paragraph 1 of this answer and will only apply the facts for purposes of transaction 2: In respect of transaction 2: the date on which the transaction too place that is of importance is 5 July 2019 (within three months of application for insolvency proceedings), the debtor was already commercially insolvent (as she was already unable to pay her debts in May 2019), and B was aware of this as steps were taken to recover the debt by calling up the securities. The creditors are disadvantaged because, prior to the sale on 5 July and the receivables generated, B was an ordinary unsecured creditor for the remaining 30 000 euros. Hence, B received full payment and, in doing so, reduced the value of the estate – as opposed to receiving pro rata payment from an estate that still had the 15 000 euros available for distribution to ordinary insolvency creditors. I am thus of the opinion that transaction 2’s payment may be avoided, recovered by the trustee and returned to the estate [Guidance Text par 6.2.11 page 23]. **correct**

Transaction 3 (sale of goods by the insolvent (D) and proceeds directly paid to creditor from receivables 10 September 2019): there are two aspects applicable here. First, D only loses the “right to manage and dispose of the insolvent estate” once insolvency proceedings are opened [Guidance Text 6.2.4. page 16]. However, the important second consideration is that of s 130 (1)2. The date on which the transaction took place (as explained above under transaction 2) is 10 September 2019, this is after the application for insolvency proceedings (requirement 1 of s 130(1)2). In light of the actions of B in May 2019, it is plausible that B knew that D was insolvent, if not also of D’s application to commence insolvency proceedings (requirement 1 of s 130(1)2). The same considerations pertaining to when B became a secured creditor is relevant here, as well as the prejudicial effect on other ordinary creditors as explained above in transaction 2. The same legal effect and effect on the creditors apply to transactions 2 and 3, it is the timing and application of different provisions of s 130(1) of the InsO that differentiate the two transactions. As such, the 10 000 euros must be returned to the estate [see in general Guidance Text paras 5.2.1.2. and 6.2.11]. **correct**

Transaction 4 (sale of goods by I and payment effected to B by Z after opening of insolvency proceedings): B has no right to the payment as a secured creditor as the funds are 1) due to the insolvent estate, and 2) B is not a secured creditor for purposes of payment of receivables founded on transactions that occurred after insolvency proceedings were opened (B is an ordinary unsecured insolvency creditor for purposes of payment and may only receive pro rata payment together with the other insolvency creditors) – “claims created after the opening of the insolvency proceedings are not covered by the security right at all, since it comes into existence after the opening of the proceedings and ... the improvement of a creditor’s position after the opening of the proceedings [is hindered] ... all receivables created after this point in time are part of the estate and are not covered by the security right” [Guidance Text 5.2.1.2. page 7]. As B has no right to payment, the amount must be returned to the estate. **correct**

15 marks

Bibliography: INSOL International *Module 6B Guidance Text Germany 2020/2021* INSOL International: London ("Guidance Text") Translated version of the Insolvenzordnung, available at http://www.gesetze-im-internet.de/englisch_inso/ (accessed 14/07/2021) [as per Guidance Text footnote 2].

*** End of Assessment ***

in total: 50 marks

Congratulations!