



## 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 was answer (d). 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 was answer (c), cf. § 343 (1) InsO.

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)?

[ 1. Sec 343 envisages automatic recognition of foreign insolvency proceeding , unless a plea is brought in a German Court and the plea succeeds in determining either that the

Court in the State where the insolvency proceeding was opened (the “Opening State”) lacked jurisdiction in the matter in terms of German law or that recognition results in manifest incompatibility with German Law.

2. If bilateral or multilateral treaties exist then those provisions would apply. In the case of cross-border insolvency within the European Union, European Insolvency Regulation (EIR) will apply.
3. Lex fori concursus applies u/s 335 of Insolvenzordnung . The law of the Opening state will govern that insolvency proceeding. The exception u/s 336 is that rights in rem on property are subject to Lex Situs , the law of the place where the object is situated such as the mortgaged property or pledged goods. U/s 337, also excepted is contracts of employment and here, the section envisages the application of Regulation 593/2008 of EU . Law that will apply to employment contracts is law of country from which employee habitually carries out his work. Further exception is that u/s 338, the right of a creditor to setoff is unaffected by the opening of proceedings if u/the law applicable to the debtor’s claim , he is entitled to such setoff.]

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?

[Publizitätsprinzip envisages publicity for certain security creation transactions to serve the purpose of allowing for third party knowledge of the security charge existing over the respective assets.:

S No.	Security Creation	Publicity Requirement
1	Mortgage of land	Registration in Land Register
2	Pledge of goods	Transfer of possession
3	Pledge of claims or receivables	Notifying respective debtors who owe The claims/receivables
4	Transfer of title as security	No publicity requirement
5	Ships/Planes	Respective registers ]

4 marks

### Question 2.3 [maximum 3 marks]

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

[(a)U/s 174, claims are filed with Insolvency Administrator (IA). IA files in Registry of Court a schedule of claims which are also available for inspection by parties.

(b) A Verification Meeting (VM) is held with IA/creditors/debtor participating where all claims are discussed . All claims are verified in accordance with amount and rank .Claims to which there is no objection are deemed to be determined .

(c ) Contested claims have to be pursued by aggrieved creditors through initiating court action for suitable orders.

(d ) For subsequent filings ( either after deadline and which were not considered in VM or subsequent to VM), Court can order for a Special VM .]

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.

[ Rules in German insolvency law in respect of executory contracts are as follows:

S No	Situation/Particulars	Rule that applies
1	Counterparty of debtor remains to perform his side of contract , but no subsisting performance due from debtor as on insolvency commencement date	This contract is not executory and counterparty still has to fulfil the contract which will now be to credit of insolvency estate. Claim on this count will be payable in full.
2.	Insolvency Administrator (IA) chooses fulfilment of an executory contract where both debtor and counterparty have unfulfilled obligations under the contract	(IA is exercising the option available to IA ) The contract is now fulfilled to the credit of insolvency estate . The claim in full is, u/s 55(1) of Insolvenzordnung, a deemed debt of the insolvency estate. It is payable in full
3	IA chooses to reject the contract	Counterparty can register claim for "equalization to the schedule" . Payable as pre-insolvency debt , payable prorata with other unsecured pre-insolvency debt
4	Lease transactions, where debtor is lessee	U/s 108(1) , the leases continue , and the continuing performance of lease contract by lessor is for the credit of insolvency estate. Post-insolvency-commencement lease dues become a charge on insolvency estate while pre-insolvency lease dues remain an insolvency creditor payable pro rata.
5	IA exercises choice u/s 109 of terminating lease on 3 months' notice (or till expiry of lease whichever is earlier) <b>OR</b> in case the lease relates to dwelling of debtor, then the alternative for IA is to declare that claims due on expiry of 3 months or the applicable lesser period cannot be asserted during insolvency process period.	The Lessor can claim damages for premature termination which would be an insolvency creditor
6	Contract of employment	IA can terminate u/s 113
7	U/s 115 ,Mandates ordered by debtor referring to property in insolvency estate, shall expire. Exception is that if such	The reimbursement of expenses for the mandatory performance during insolvency process would be a preferential creditor.

	suspension poses a risk, then the mandatory transaction shall continue to be performed	
8	Severable contracts	U/s 105, the part performed pre-insolvency , results in a claim prorata to the portion of the contract and is an insolvency creditor

here]

A schedule is hardly an essay. However, your explanations are correct.

**14 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.

[(a)  $TXN_L$ ,  $TXN_X$ ,  $TXN_Y$ ,  $TXN_Z$  refer respectively to sale of lorry/payment by X of EUR 15K/Payment by Y of EUR 10K/Payment by Z of EUR 5K .

This is hardly understandable

(b)  $TXN_L$  is realization of a security (validly created , 16 months prior to even indications of insolvency and 20 months preceding request filed for insolvency , a period of time well before the thresholds of 1 to 3 months for avoidance transactions in respect of security creation contained in Sec 131 ) . The realization of security does not disadvantage the insolvency creditors and is , therefore not contestable.

correct

(c )  $TXN_X$  also relates to a security interest created well before insolvency occurrence and realization of this security does not harm the insolvency creditors in any way, since the value of the security equals the principal amount of secured claim (Refer para 2.4(b) ,page 15 of Hengeler Mueller "Claw-back of security in insolvency"). As such  $TXN_X$  is also not contestable

This is not correct. No security right can exist without a security object. The claim of X was created on 1 July 2019 and the assignment is therefore challengeable under § 130(1)No. 1 InsO.

(e)  $TXN_Y$ , and  $TXN_Z$  are also covered by the same legal argument presented in subpara (c ) above and, therefore, are also not contestable.]

This is also not corrected. Y's claim was created between the application for and the opening of the insolvency proceedings and is therefore challengeable under § 130(1)No. 2 InsO. The assignment of Z's claim failed because of § 91 InsO.



**4 marks**

**\* End of Assessment \***

**in total: 36 marks**