



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 was answer (b), cf. § 3(1)(sentence 1) InsO.

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

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)?

- InsO §§ 335 *et seq.*: the law of applicable to an insolvency case should be the law of the state in which the case was opened;

- EU Regulation 2015/848 (for cross-border insolvency between EU members): one main proceeding opened in a Member State, with additional proceedings allowed, governing only the assets and creditors in that state, subject to cooperation and communication between courts;
- Bi-lateral agreements may also apply, if exist and applicable

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 principle of publication or publicity is concerned with the ability of third parties to discover rights enforceable against them. Under the German law, with respect to security rights, the act of publicity is required for pledges, but not for security ownership / assignment contracts. In case of pledges, the publicity requirement can be fulfilled in various ways, depending on the type of the pledge. In case of tangibles, it is fulfilled by the transfer of possession. In case of claims, it can be done by notification of the debtor. In case of certain intellectual property assets, publicity requirement can be fulfilled by registration of the pledge in the specialized register. On the contrary, pledges of rights other than claims do not require explicit acts of publicity.

Finally, with respect to immovables as well as ships and planes, publicity is required, but is satisfied through registration in the Land Register.

4 marks

Question 2.3 [maximum 3 marks]

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

Verification meeting is the meeting between the insolvency administrator and creditors, where these parties consider unsecured claims filed in the insolvency schedule. Claims that receive no objections from the insolvency administrator or any creditors are verified and are included in the formal insolvency schedule, meaning they can be entitled to a recovery in the proceeding on a *pro rata* basis. On the contrary, claims that are disputed will require court proceedings to determine if the claim is valid and should be included in the insolvency schedule.

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.

Under German insolvency law, treatment of executory contracts is governed by certain §§103 *et seq* InsO.

In case of insolvency proceedings as well as corporate liquidation, under §103 InsO, upon initiation of proceedings, the insolvency administrator decides if the contract is to be fulfilled. If he or she chooses fulfilment, both parties are obliged to fulfil the contract and the estate is liable to satisfy the claim in full. If the contract is rejected, the counterparty can file the claim for the non-fulfilled portion of the contract to be included in the insolvency schedule and satisfied on *pro rata* basis with other unsecured creditors. If the other party requires

performance, the administrator shall state their intention of performance or non-performance without a delay.

However, certain contracts are subject to special rules under §§104 *et seq* InsO. Such contracts include fixed-date financial futures (§104), severable contracts (§105) tenancy leases (§108), as well as employment contracts (§114) and expiration of mandates (§115). For these contracts, even if the administrator chooses fulfilment, the creditor can only claim damages for non-fulfillment and the estate only need to be satisfied on *pro rata* basis. In case of tenancy, certain other immovable property contracts and contracts for services performed for the debtor, pursuant to §108, such contracts and services shall be fulfilled by the other party to the credit of assets of the estate. Back-dated claims arising from before the proceedings were opened can be filed and satisfied on *pro rata* basis.

The above provisions also apply in case of corporate rescue. In addition, pursuant to §119 InsO, agreements limiting the application of §103 InsO, such agreements are also invalidated.

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.

Based on the information provided in the question, B extended a secured loan of EUR 50,000 and received a total of EUR 50,000 payment back, of which EUR 20,000 were received pursuant to the sale of the truck, secured by a transfer of a title, and EUR 30,000 – pursuant to the assignment of customer receivables. All payments were made within the three-months "suspect period" for avoidance transactions, of which EUR 5,000 on account of the receivables was made after the opening of insolvency proceedings by the court. Therefore, we would separately consider the payments made for the truck vs on account of receivables, as well as the timing of these payments with respect to debtor insolvency.

First, the claim on the truck arises from a transfer of a title by way of security, which means a transfer of ownership for the purpose of security, including disposal rights. However, pursuant to the "separation principle" under the German law, applicable to transfers of title by way of security, the truck is not legally separable from the insolvency estate. Instead, the creditor is entitled to a preferential satisfaction up to the amount of the claim on the specific asset (after which only the surplus would belong to the estate). Generally, while the creditor is entitled to a recovery up to the amount of their secured claim, disposition of the asset may be performed by both the Bank and the Insolvency administrator. We know that at the time of opening insolvency proceedings the truck was no longer in possession of the debtor. Therefore, the

Bank will likely argue that they had a right to dispose the asset and receive the full amount as recovery, since it was less than the amount of the secured loan outstanding at that time. In addition, the Bank would likely take the position that the sale of the truck in July 2019 could be value-maximizing, as the estate was not formally in insolvency and the asset was not sold in an insolvency “fire sale”.

On the other hand, the Insolvency administrator may take a position that the truck should be returned to the estate, its value should be realized by the Insolvency administrator, the proceeds should be paid to the Bank up to the amount of their claim outstanding at that time (after taking into consideration the discussion below), with any surplus retained by the estate. In addition, since the

The Insolvency administrator would like to challenge the Bank’s security rights as avoidance transactions. Pursuant to §§129 *et seq* InsO, creditor security can be challenged if it was granted during the suspect period of three months prior to the debtor’s application for insolvency proceedings. Since the loan and associated security for the truck was granted in January 2018, this cannot be considered avoidance transaction, since other creditors were “disadvantaged” more than three months before insolvency application. Assuming the Bank’s security rights were properly documented and perfected, realization of security rights cannot be challenged by the Insolvency administrator.

Yes, but the reason is that the realization causes no new disadvantage for the general body of creditors.

Second, the claim on the receivables was created pursuant to assignment of customer receivables by way of security. Such security rights, despite being granted, do not exist until collateral is created and can therefore be challenged as avoidance transactions within the three-month suspect period, pursuant to §130 InsO. Since we know the debtor was insolvent in May 2019, the administrator will likely be successful in challenging the security associated with the receivables, pursuant to §140 InsO. In addition, the payment made after the court opened insolvency proceedings is not covered by the security right at all, pursuant to §91 InsO. Therefore, the Insolvency administrator can challenge both the security granted and realization through the payments and claim back EUR 30,000 from the Bank.

Correct in principle. However, you should distinguish between the claim against X (challengeable under § 130(1)No.1 InsO) and the claim against Y (challengeable under § 130(1)No.2 InsO).

All in all, the Insolvency administrator has a right claim back EUR 30,000 from the Bank on account of avoidance transactions for the payments made from realization of security on receivables. The remaining EUR 20,000 recovered from the truck cannot be claimed back on account of avoidance transaction, but the administrator may still claim that back if it is an essential part of the estate and can be realized for a higher value. Even then, since the question does not specify the split of security between the truck and the receivables, the Bank would be entitled to preferential satisfaction on account of the sale of the truck up to EUR 50,000 (if the truck can be re-sold for more than EUR 20,000). Otherwise, the Bank would return EUR 30,000 and receive an unsecured claim treated on *pro rata* basis with other insolvency creditors.

10 marks

*** End of Assessment ***

in total: 43 marks