



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 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)?

Cross-border insolvency in Germany is regulated by Part 11 (section 335 to 358) of the Insolvenzordnung ("InsO"), which norms are binding provided that no bi- or

multilateral agreements apply. Cross-border case involving EU member states are governed by the EU Regulation (2015/848) (“EIR”).

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 rules and requirements relating to the publicity principle in German law varies depending on the specific type of security. The required registration of mortgage in the Land Register serves to guarantee the publicity of security over immovable assets. Security ownership or assignment does not require an act of publication. The exemption from the publicity requirements does however not apply to registered inland waterway vessels, which requires the new owner to be registered as such in the Ship Register for valid security of ownership. In respect of a pledge over tangible assets, transfer of possession is required for a valid security right to be established and where claims are pledged, the relevant debtors must be notified. Pledges of rights other than claims do not require any specified acts of publication. Whilst pledge rights over certain intellectual property rights may be registered in relevant registers, such registration merely has a declaratory value and does not affect the validity of the pledge.

4 marks

Question 2.3 [maximum 3 marks]

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

During the verification meeting, claims filed by unsecured creditors are verified in respect of the amount and ranking of the claim. Objections against claims may be raised by the insolvency administrator or creditors and the debtor may also dispute or contest any claims during this meeting. If a claim is disputed, it will be further adjudicated upon during court proceedings.

Dispute by the IP or another creditor is relevant only. And what happens if nobody objects?

2 marks

in total: 9 marks

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

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

Executory contracts can be divided into contracts in terms of which a partner is required to fulfill an obligation and reciprocal contracts. **No, only reciprocal contracts not fulfilled by either party are “executory” contracts.**

The former is generally “wound up” during insolvency proceedings and the partner is obliged to fulfill its obligations under the contract and submit a claim with the insolvency administrator. The claim will be satisfied on a *pro rata* basis through the course of the proceedings.

The latter, being reciprocal contracts, are ongoing obligations which must still be fulfilled. The treatment of such contracts is regulated by sections 103 to 119 of InsO. These contracts are not “wound up” during the proceedings unless the insolvency

administrator has a discretion as to whether to elect fulfillment thereof. If the right to elect fulfillment is exercised, both parties must fulfill their obligations under the agreement and the partner's claim in respect thereof must be satisfied in full from the insolvent estate. Obligations need only be fulfilled insofar as assets were added to the insolvent estate after the opening of proceedings. Back dated debts, which would be debts arising prior to the opening of proceedings, will only be fulfilled on a *pro rata* basis. If the insolvency administrator elects not to fulfill a reciprocal executory contract, the partner (a creditor in the proceedings) may lodge a claim for equalization in the insolvency proceedings. This claim will be satisfied on a *pro rata* basis.

Alternative provisions for specific types of reciprocal executory contracts are set out in InsO from section 104 onwards. These include tenancies and leases of immovable property, employment contracts and expiration of mandates.

Executory contracts are dealt with as set out above during personal/consumer bankruptcy, corporate liquidation and corporate rescue. However, in corporate rescue the provisions or prescripts of the applicable sections of InsO may be circumvented by the insolvency plan. Whilst section 119 of InsO determines that agreements excluding or restricting the application of sections 103 to 118 are invalid, the section will not serve to invalidate an insolvency plan which circumvents the sections as the plan is not an agreement concluded prior to the opening of insolvency proceedings.

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 transaction concluded prior to the opening of insolvency proceedings which disadvantages the general body of creditors may be capable of being contested and set aside under the relevant provisions of InsO. Such a transaction reduces the funds available to pay ordinary creditors. To successfully set aside the transaction, a reason to contest must be shown. Reasons to contest, as set out in from section 130 onwards in InsO, include transactions:

- (i) in terms of which the debtor granted security or satisfaction to a creditor occurring within 3 (three) months immediately preceding an application to open insolvency proceedings at a time when the debtor was cashflow insolvent or illiquid. The creditor must have been aware of the debtor's insolvency or

illiquidity alternatively had knowledge of a pending application to open insolvency proceedings;

- (ii) in terms of which the debtor granted security or satisfaction to a creditor in circumstances where the creditor was not entitled thereto occurring within 3 (three) months immediately preceding an application to open insolvency proceedings. At the time, the debtor must have been unable to pay its debts (cashflow insolvent) unless the payment was made one month prior to or following the application for insolvency proceedings in which case cashflow insolvency is irrelevant;
- (iii) which occurred whilst a creditor was aware either of a pending application to open insolvency proceedings or that the debtor was illiquid, and which immediately disadvantage insolvency creditors;
- (iv) intentionally made to disadvantage creditors within 10 (ten) years immediately preceding the application to open insolvency proceedings, provided that the third party involved therein was cognizant of these intentions;
- (v) consisting of a gratuitous benefit granted by the debtor within 4 (four) years immediately preceding an application to open insolvency proceedings; and
- (vi) in terms of which payment and securities were granted to shareholders. Payments made within 1 (one) year and charges granted within 10 (ten) years or after the application to open insolvency proceedings may be voidable.

Upon the opening of insolvency proceedings, a claim for restitution arises by force of law in respect of contested transactions. If successfully contested, the insolvent estate must thus be placed in the same position in which it would have been had the transaction not occurred and any party that had received property from the debtor under such a transaction must return same. Avoidance of the transactions discussed above may be successfully opposed by illustrating that the requirements set out above are absent.

Security rights usually provide for a right to separate satisfaction. The secured creditor is, by virtue thereof, unable to claim separation of the asset from the insolvent estate but is granted the right to demand preferential satisfaction, limited to the value of its of its secured claim, from the proceeds of realization of the particular asset. The responsibility to realize the asset lies with either the creditor or the insolvency administrator, depending on the type of asset, the type of security right and the identity of the possessor of the asset. A secured creditor's ability to enforce its security becomes impossible if the insolvency administrator is responsible for the realization of the asset. Under section 89 of InsO without a right to separate are prohibited from enforcing their secured claims. Secured creditors who hold a right to separate satisfaction, being a right in rem, is not affected by section 89.

When applying the legal principles set out above to the factual scenario provided, it becomes apparent that not all the contested transaction will necessarily be voidable. For the sake of clarity, it is stated that the granting of the security by D to B, which occurred more than 3 (three) months prior to insolvency, is not capable of being set aside as a voidable transaction. The sale of the lorry will be capable of being contested if it can be shown that the transaction was to an immediate disadvantage to creditors, which would be the case if, for example, the was sold at a value lower than could reasonably be expected to be achieved. If this true, the sale will be voidable under (iii) above. If not, the transaction cannot be contested despite the fact that B was aware of D's solvency issues. **This is not entirely correct. The realization of the security cannot be**

challenged because it does not cause a new disadvantage to the general body of creditors. If the lorry was sold under value, this would be to the detriment of B, unless the estate could expect the handover of a surplus. The payments of EUR10,000 by X and Y will also not be voidable as valid notification was given of the assignment, B would have been entitled to receive the whole of the proceeds in any event and it could not have been a transaction at undervalue. This is not correct. The claim against X was established on 1 July 2019; hence, the security can be challenged under § 130(1)No.1 InsO. The claim against Y was established after the application for insolvency proceedings; hence, the security can be challenged under § 130(1)No.2 InsO. The claim against Z was established after the opening of insolvency proceedings. This security right is invalid under § 91 InsO. Accordingly, it was not to the disadvantage of creditors. Whether the payment of EUR5,000 is voidable will depend on whether a right of separate satisfaction is included in the assignment agreement. If it is, the transaction will be valid.

1 mark

*** End of Assessment ***

in total: 32 marks