



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)?

Insolvenzordnung

2 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?

As the rules on contractual transfer of ownership vary dependent on the nature of the asset, thus rules on creation on security rights have their requirements for publicity respectfully. It is dependent on the requirements for the form of contract primarily.

For security ownership/assignment there is no requirement for publicity since the possession at hand is “constructed possession” in which actual person in possession is “holding” it for another person, the actual owner. Only exception for this rule is for inland water vessels which would require creditor to be registered in Ship register as new owner. Registration of these vessels is mandatory above certain size of the vessel.

For pledges, in case of tangibles, transfer of possession by itself validates the security. In case of claims the notification to the debtor serves that purpose. That is different for pledges than for assignments.

In case of security of rights since assignment of them does not require any act of publicity. For special types of intellectual rights pledge rights aside from ownership have to be registered in special registers, but it serves only publication purpose and does not constitute as requirement for validity of creation.

For immovables, registration of mortgage in Land Registry is mandatory which is also the case for ships and planes and that guarantees publicity.

For personal security, there is no requirements for publicity.

4 marks

Question 2.3 [maximum 3 marks]

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

Verification meeting is a court meeting where claims of creditors are examined. This is after unsecured creditors have filed their claims with insolvency administrator, and are listed in insolvency schedule.

If no complaint is raised by insolvency administrator or other creditor, claim is determined to be verified and it is listed in the schedule as confirmed claim and is to be satisfied by insolvency administrator on pro rata basis.

If a claim is disputed, then court procedure is initiated in order to confirm the claim or to reject it.

3 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.

Opening of insolvency proceeding in itself doesn't cancel contracts, and if insolvency administrator chooses to continue the contracts, both sides have to continue to perform according to it. This is with exception that creditor's (as other party) claim that matured before opening of the proceedings is satisfied only on the pro rata basis.

You should mention §§ 103, 105 InsO.

If the contract isn't fulfilled by either party insolvency administrator has right to choose whether or not he will fulfill the contract. If he chooses to continue with the contract, the satisfaction of the other party will be from insolvency estate. If insolvency administrator chooses to terminate the contract, other party can file it's claim for damages or previously performed actions as insolvency creditor. **Again: § 103 InsO**

In case the contract is severable, and if the other party had already performed part of the services up to the date when the insolvency proceedings were opened, claim for that part is to be filed as his claim as insolvency creditor and if verified will be paid on pro rata basis. As for his performance after the opening of the proceedings, his claim will be satisfied as the obligation of the insolvency estate (only as far as assets have been added to the insolvency estate after opening of the proceedings). (InsO § 105)

There are special provisions for lease and tenant contracts on immovable assets, contracts of employment and expiration of mandates.

As for basic rules on this subject table of contents

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 (a) because of default in the payment of tenancy or lease fees arising before the opening of the insolvency proceedings was requested or (b) because of degradation of the debtor's financial situation. **§ 112 InsO**

InsO § 108 **It is not necessary to quote the wording of the relevant rules.**

(1) Contracts concluded by the debtor for the lease and tenancy of immovables or premises and employment relationships of the debtor shall continue to exist, but to the credit of the insolvency estate. This shall also apply in respect of rental and lease contracts concluded by the debtor as landlord or lessor relating to other effects assigned as a security to a third party who had financed their acquisition or production.

InsO § 109

(1) A contract for the tenancy or lease of immovables or premises concluded by the debtor as tenant or lessee may be terminated by the insolvency administrator without regard to the agreed term of the contract or an agreed exclusion of a right to the legal period of notice; the period of notice shall be three months to the end of the month unless another shorter period is applicable. If the dwelling of the debtor is the subject-matter of the lease agreement, termination shall be replaced by the right of the insolvency administrator to declare that claims becoming due on expiry of the period specified in the first sentence may not be asserted in the insolvency proceedings. If the administrator terminates under the first sentence or if he submits the declaration in accordance with the second sentence, the other party may claim damages as an insolvency creditor for premature termination of such contract.

Employments contracts are not terminated automatically upon opening of the insolvency proceedings.

InsO § 113

An employment relationship may be terminated by the insolvency administrator and by the other party irrespective of any agreed duration of such contract or agreed exclusion of the right to routine termination. If no shorter period has been agreed, the period of notice shall be three months to month's end. If the administrator terminates such contract, the other party may claim damages as an insolvency creditor for premature termination of the employment.

InsO § 115

- (1) Any mandate ordered by the debtor referring to the property forming part of the insolvency estate shall expire upon the opening of the insolvency proceedings.
- (2) If suspension of such mandate would cause a risk, the mandatory shall continue to perform the mandated transaction until the insolvency administrator is able to otherwise take care of such transaction himself. For this purpose the mandate shall be deemed to continue. The mandatory may claim reimbursement of his expenses incurred for such continuation as a preferential creditor.
- (3) As long as the mandatory is not at fault in being unaware of the opening of insolvency proceedings he shall benefit from the presumption that the mandate continues. The mandatory shall rank among the insolvency creditors with his reimbursement claims arising from such continuation.

This article (InsO § 115) is also applicable on the contracts with other party (manager) to manage a business transaction and to reimbursement claims arising from continuation of such contract.

12 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 task is to determine whether or not the B allowed to satisfy its claim based on the loan granted to D in relation to insolvency proceeding that is opened on D. Part of it was satisfied before and part after the proceedings were opened. I is challenging all transactions.

The loan was granted on January 2018 – that is almost two years before the insolvency proceedings were opened and that transaction with security which followed it (transfer of title and assignation of current and future receivables) is legal.

Petition for opening the proceedings was filed on August 1 2019 and insolvency proceedings were opened

There were 4 transactions that led to satisfaction of B's claim which happened on respective dates:

1. July 3 2019 – 20,000 EUR – sale of the lorry
2. July 5 2019 – 15,000 EUR – from X (who bought goods from D on July 1 2019)
3. September 15 2019 – 10,000 EUR – from Y (who bought goods from D on September 10 2019)
4. Unknown date after the proceedings were opened – 5,000 EUR - from Z (good bought after the proceedings were opened)

Going “back in time” in regards to transactions, last transaction (4.) is “avoidable” in itself since after the proceedings are opened all performance must be made to the insolvency estate, and Z couldn't have not been aware that for D insolvency proceedings have been opened (invoices should state that fact, requirements for publicity in publicly available registers also...)

Problematic is not the payment of Z but the transfer of the claim to B (§ 91 InsO).

In regards to transactions no. 2. and no. 3. B's security over the claims of D towards X and Y are perfected on July 1 and September 10 2019 respectively (it is presumed that the invoices for goods paid were due immediately since both debtor's debtors paid them to B).

Transaction 3. is avoidable under InsO § 130(1)No. 2 since it was done within 3 months prior to the application for insolvency (which was submitted on August 1) **No, Y paid after the application for insolvency proceedings** and B was aware of D not being able to pay its debts as they fall due which at that moment lasted for almost 4 months (since may 2019)

Avoidance of transaction number 2. is questionable since beside the condition for it to be avoidable as per InsO § 131 **the correct norm is § 130(1)No. 1 InsO** in the limited time frame (within second and third month prior to request for opening the insolvency proceedings), which it is, since it occurred 2 and a half months before proceedings were opened and 2 months before petition for insolvency was filed, insolvency administrator has to prove that B was aware of the disadvantage this transaction brings to the other creditors of the D. That situation is always difficult to prove. D obviously continued to trade during this time (at least one another transaction (no. 3.) occurred later and it will largely depend on the other facts of the case whether or not other creditors were disadvantaged).

Transaction no. 1., the sale of lorry from facts of the case seems legal since the transfer of title was done for the purposes of giving B additional security and there are no indications that provisions of the contract forbid B from terminating it and selling the lorry.

The realization of the unchallengeable security right is not voidable because it does not cause new disadvantage for the general body of creditors.

1 mark

*** End of Assessment ***

in total: 31 marks