



**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 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 was answer (c), since German law does not treat wage claims in a preferential way.

#### 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) 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

7 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)?

[International Insolvency law is regulated by §§ 335 et seq InsO. Those norms are binding as long as no bi-/multilateral agreements apply. The EU Regulation 2015/848 (hereinafter EIR) applies between EU Member States.

For Insolvency Proceedings that were opened in Germany, German law follows the principle of universality which prescribes that the effects of an insolvency proceeding are also binding in all other countries. The inverse constellation- whether a foreign proceeding is recognized in Germany-was historically treated differently. The jurisprudence instead applied a principle of territoriality and did not recognize the effects of foreign insolvency proceedings. The Bundesgerichtshof overruled this in 1985 and has since followed the principle of universality. Currently this jurisprudence is also legally represented by § 343(1) InsO, under which a foreign proceeding will only not be recognized if:

- (1) The courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law;
- (2) Where recognition would lead to a result which is manifestly incompatible with major principles of German law, particularly in cases of incompatibility with fundamental rights (ordre public) ]

This is copied from the guidance text and is not acceptable as a proper answer.

0 marks

Commented [DB1]: Half the marks awarded, 1.5/3

### 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?

[There is no central collateral registry, but publicity is addressed in different ways. The establishing of security rights generally follows the rules provided by the law governing the transfer of ownership of the specific kind of asset. Apparently, this applies as well for the security ownership/assignment since these are normal transfers of ownership of the asset, albeit in a fiduciary capacity. Since, the legal rules on the contractual transfer of ownership of assets vary depending on the nature of the asset, the rules on the creation of security rights do so as well. The rules may vary in relation to the requirements set by the "publicity principle" as well as the required form of the contractual agreement.

As far as security ownership/assignment is concerned, an act of publicity is not required. In the case of security ownership, the necessary transfer of possession is construed by constructive possession (*Besitzkonstitut*). The assignment of claims does not require any act of publicity. One exclusion is made for registered inland waterway vessels. Here the valid establishment of security ownership would require the creditor to be registered in the Ship Register as the new owner. Inland waterway vessels of a certain size have to be registered. The registration of smaller ones is voluntary.

As far as pledges are concerned the necessary act of publicity required for the validity of the security right in the case of tangibles is the transfer of possession. In the case of claims it is the notification of the debtor. As far as claims are concerned the "publicity principle" is stricter with pledges than with the assignment, which does not require any notification. The pledge of rights other than claims, on the other hand, does not require any specific acts of publicity, since the assignment of rights also does not require any such act. For some types of intellectual property rights, specific registers are provided in which, aside from ownership, pledge rights may also be registered (for example, patents, utility patents, commercial designs). However, such registration would merely have a declaratory value and is not required for the valid creation of the pledge.

As far as immovables are concerned, publicity is guaranteed by the validity requirement of the mortgage being registered in the Land Register. The same applies for ships and planes. ]

Again: copied from the guidance text.

0 marks

Commented [DB2]: Half the marks awarded, 2/4.

### Question 2.3 [maximum 3 marks]

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

[Creditors who do not have secured claims are able to enforce these in opened insolvency proceedings by filing their claims in the insolvency schedule (*Insolvenztabelle*). All registered claims are subsequently verified at the so-called verification meeting (*Prüfungstermin*) and are deemed to be determined only if no objection is raised by the insolvency administrator or by a creditor in the verification meeting. If a claim is disputed, then court proceedings are initiated to determine whether to include it in the schedule or not. The insolvency administrator satisfies the claims that have been registered to the schedule on a pro rata basis. Subsequent to the termination of insolvency proceedings, the creditors of these proceedings can enforce their claims against the debtor without restriction. In this process, entry into the insolvency schedule acts as a title to enforce such claims, as far as they have not been disputed by the debtor in the verification meeting.]

Again: copied from the guidance text.

0 marks

Commented [DB3]: Half the marks awarded, 1.5/3

in total: 0 marks

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

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

[During the period, from filing of bankruptcy to the time when the bankruptcy relief is ordered, the debtor continues in operation but with several limitations to dispose of its assets, and no automatic stay is imposed on creditors to collect from the debtor. Likewise, contracts continue to be binding to the debtor and the non-debtor party, thus both of them are obliged to continue performing their obligations under the contract. Because the effect of the bankruptcy procedure is triggered until relief is ordered, it is at this moment that executory contracts come into existence. According to the Insolvency Code, the bankruptcy trustee, who administers the bankruptcy estate, can reject executory contracts.

Correct; but the following is copied from the guidance text.

Commented [DB4]: I have awarded 4 more marks here.

Contracts are, in principle, also wound up in insolvency proceedings. That means that the partner to the contract also has to fulfill their obligations under the contract, even after the opening of insolvency proceedings. A claim against the debtor, however, is only satisfied by the insolvency administrator on a pro rata basis. Reciprocal contracts which are not yet fulfilled by either party are regulated differently. Under §103 InsO, the following applies: after the opening of proceedings, no winding up occurs. Both parties only fulfill if the insolvency administrator chooses fulfilment. If this is the case, then the full claim must be satisfied from the insolvency estate. If the insolvency administrator rejects fulfilment of the claim, then the contracting partner can register a claim for equalization to the schedule which will then be satisfied on a pro rata basis. Meaning thereby the damage claim for the rejection has to share pro rata with other general unsecured claims ( unless the non-debtor party has a secured interest on any of the debtor's assets). This bankruptcy system fosters the bankruptcy trustee's efforts to maximize the bankruptcy estate value by reducing the costs of rejection to the

bankruptcy estate. The purpose is to facilitate rejection of those contracts that are unfavorable or burdensome to the bankruptcy estate.

§ 104 et seq InsO contain specialized provisions intended to apply to specific types of contract. These especially encompass alternative provisions for tenancies and leases over immovable objects, contract of employment and for the expiration of madness.

No specific provisions based in insolvency law apply. Nevertheless, consideration must be taken for the fact that these contracts are continuing obligations which remain unfulfilled by the either party, hence the existence of the right to choose fulfilment on the part of the insolvency administrator. Even when the insolvency administrator chooses to fulfil the obligations under the contract, the back dated debts of the debtor need only to be fulfilled on a pro rata basis. The obligations need only be fulfilled in full as far as the assets were added to the estate after the opening of the insolvency proceedings. The German Insolvency Code does not impose a time limit for the assumption and termination of executory contracts; thus, it is implicit that the bankruptcy trustee can decide at any time before the confirmation of the reorganization plan.

In nutshell, the Insolvency Code gives complete discretion to the bankruptcy trustee to assume or reject executory contracts as no approval is required from the bankruptcy court. The rationale is that the bankruptcy trustee is supposed to know best how to achieve the maximization of the bankruptcy estate value. ]

**2 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.

[In all circumstances, the loan granted by B to D is a secured loan against the legal title over a lorry and also by virtue of assignment of all current and future receivables against customers. The transaction was entered in January 2018 i.e. 20 months before the opening of the insolvency proceedings by the court.

Further, in May 2019 D became unable to pay the debt and on July 3, 2019 the loan contract was terminated, and the lorry was sold by B for EUR 20,000. On July 5, 2019 B revealed the assignment to the customers and received an amount of EUR 15,000 from X. On August 1, 2019 B applied for insolvency and on September 10, 2019 B received another payment of EUR 10,000 from Y around 5 days before the date when the Court opened the insolvency



proceedings. Even after the appointment of administrator, proceeds of certain goods, which were sold by administration, was received by B amounting to EUR 5,000.

The legal positions in respect of various transactions may be understood as hereunder:

- (i) Nearly, all the security rights provide for a so called right to separate satisfaction in insolvency proceedings. Firstly, this means that the security right does not prevent the asset to which it is related from being legally part of the insolvency estate. Secondly, the secured creditor is granted the right to demand the preferential satisfaction the amount of the secured claim out of the proceeds of specific asset's realization.
- (ii) Under German Law, security rights can be challenged by the insolvency practitioner under §§ 130,131 InsO if they have been created within the relevant suspect period of three months prior to the application for insolvency proceedings. As opposed to this mere realization of a security right is not voidable under transaction avoidance law, since it does not disadvantage the general body of creditors;

**(iii) Transaction made after the Opening of Insolvency:**

As soon as insolvency proceedings are opened an automatic stay comes into force, preventing creditors from enforcing their claims. Thus, the payment by Z to B amounting to EUR 5,000 is during moratorium and accordingly, the administrator has all the legal rights to receive that amount;

**No, decisive is not the payment of Z but the transfer of the claim against Z to B which is hindered by § 91 InsO.**

**(iv) Transaction made before the Opening of Insolvency:**

Transaction made before the opening of insolvency proceedings can be contested if they were made to the disadvantage of the creditors and a reason to contest has been shown. § 129(1)

A transaction disadvantages the general body of creditors if it reduces the amount of proceeds that can be paid to the ordinary creditors. Typical examples are payments, creation of security rights, waivers of claims but also those of creditors, for example satisfaction by individual enforcement or set off.

The reason to contest is listed in §§ 130 et seq InsO. In summary, assets can be returned to the insolvency estate if they left it in close timing to the opening of the insolvency proceedings or under circumstances which justify their return, even if the third party has already relied on their disposition.

The lorry was sold by B on July 1,2019 and the other payment was received by B on July 5,2019 i.e. within a period of three months from the date of filing of insolvency and when the debtor was already illiquid, and the creditor was aware of it. Thus, these transactions are contestable.

**No, the establishment of the security right is not voidable and the realization of this security right isn't either because it does not cause any new disadvantage to the general body of creditors.**

- (v) Similarly, payment made on September 10,2019 i.e. after the filing of insolvency but before opening of Insolvency by the Court is also contestable being immediately disadvantageous to insolvency creditors.]

**Again, decisive is not the payment but the creation of the claims against X and Y.**

**0 marks**

**\* End of Assessment \***

**in total: 9 marks**

**9 additional marks awarded by the Course Leader. 18/50 total.**

**Note from Course Leader:** The marker is well within his rights to award 0 for questions where you have copied and pasted from the text. Please consult pages 15 to 17 of the Course Handbook and instruction 5 of the assessment.