



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

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

10 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)?

- i) Principle of universality applies in respect of insolvency proceedings in Germany which means that effects of insolvency proceedings opened in Germany are also binding in other countries;
- ii) Principle of universalism also applies in respect of recognition of foreign insolvency proceedings except in cases if
 - a) if the courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law;
 - b) where recognition leads to a result which is manifestly incompatible with major principles of German law, in particular where it is incompatible with basic rights.
 - c) By operation of the principle of *lex fori concursus*, the insolvency proceedings and their effects, unless otherwise provided, shall be subject to the law of the state in which the proceedings have been opened. However, the exception being in respect of a contract relating to a right in rem in an immovable object or a right to use an immovable object, the effects of the insolvency proceedings in which case shall be subject to the law of the state in which the object is situated.

You were asked to list the norms (§§ 335 et seq. InsO, EIR, bi-/multinational agreements).

0 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?

Germany has no register of security interests in movable assets at all and therefore publicity of various security rights is addressed in different ways. Legal rules for creation of security rights just like contractual transfer of ownership of assets vary and are governed by the nature of the assets in question. Such rules are also influenced by the 'requirement under the "publicity principle" as well as the required for of contractual arrangement.

Security Rights and Publicity Requirements:

- (i) Security ownership and assignment – aren't required to be subject to publicity. Security ownership is deemed to be created by way of constructive possession. The same applies with respect to assignment, except in case for registered inland waterway vessels, which for a valid creation of security ownership required registration of the creditor as the owner in the Ship Register under the Ship Register Regulations.
- (ii) Pledges – in respect of tangibles the necessary act of publicity required is transfer of possession. The publicity principle is stricter with respect to pledge to be created over claims which is achieved by way of notification of the debtor. Pledge rights other than claims do not require any specific act of publicity
- (iii) Immoveable: Publicity required and guaranteed by valid requirement of mortgage being registered in the Land Register (as described under the Ship Register Regulations). Also applies in case of ships and planes.

4 marks

Question 2.3 [maximum 3 marks]

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

- (i) A verification meeting as described in Section 29 (a) 2. of the Insolvency Act, 1994 (?) is a creditors' assembly verifying the filed and registered claims;
- (ii) During the verification meeting the filed claims are verified in accordance with their amount and rank. Claims contested by the insolvency administrator, by the debtor or by an insolvency creditor are required to be discussed individually.
- (iii) such verification meeting is required to take place not less than one week and not more than two months from the expiry of the period to file claims.
- (iv) During the verification meeting, claims filed after expiry of the filing period are also required to be verified.
- (v) Filed claims are deemed to be verified in the verification meetings only if no objection is raised by (a) the insolvency administrator; or (ii) by an insolvency creditor during the verification meeting; (iii) or in the written proceedings (under section 177); or (iv) if any objection raised by a party is removed. The debtor's objection shall not bar determination of a claim.

3 marks

in total: 7 marks

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

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

- (i) The provisions under the Germany Insolvency Act, 1994 only authorize the debtor in possession to assume and perform under the contract. The German law does not provide for a general right of the trustee or the debtor in possession to reject (executory) contracts, § 103 InsO (!) except in the cases of leases as provided under Section 109 and 279 of the Insolvency Act or employment contracts (as provided under Section 113 and 279 of the Insolvency Act). Some types of contracts terminate automatically in the case of insolvency.
- (ii) The standard rule that applies in the event of insolvency proceedings is that the contracts are also wound up meaning that the party to the contract also has the obligation to fulfil their obligations under the contract even after the opening of the insolvency proceedings. **What, if the counterparty has already performed?**
- (iii) However, consideration must be paid to the fact that an executory contract is one under which the obligation of both the insolvent and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other. This is why the administrator retains the right to choose fulfillment on the part of the insolvency administrator. In that event, full claim is required to be satisfied from the insolvency estate. § 103 InsO
- (iv) However, in the event the administrator chooses to reject fulfillment of the contractual claim, then the contracting party can register a claim for equalization to the schedule that shall then be discharged/satisfied on a pro rata basis.
- (v) Lease/Rental contracts:

- (a) In terms of Section 109 of the Insolvency Act, 1994, in case of a contract for the tenancy, 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;
- (b) 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;
- (c) 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.
The decisive rule is § 108 InsO; § 109 InsO concerns only agreements where the debtor is the tenant.

(vi) Employment contract:

- (a) In terms of Section 113 of the Insolvency Act, 1994, 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.
- (b) If the administrator terminates such contract, the other party may claim damages as an insolvency creditor for premature termination of the employment.

Again, the decisive norm is § 108 InsO.

(vii) A loan relationship entered into by the debtor as the lender shall continue with effect for the assets insofar as the object owed is made available to the borrower.

You should also mention §§ 115 et seq. InsO.

6 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

(i) The Insolvency Act, 1994 provides for instances where certain transactions may be avoided or contested by the insolvency practitioner, those which have been entered into three months prior to the insolvency and are subject to avoidance or or clawback in terms of the provisions of the Insolvency Act, 1994.

(ii) Some of such transactions that may be relevant for assessment of the case in hand include:

a) transaction granting or facilitating an insolvency creditor a security or satisfaction in terms of Section 130 of the Insolvency Act:

1. if it was made during the last three months prior to the request to open insolvency proceedings, if the debtor was illiquid on the date of the transaction, and if the creditor was aware of his insolvency on this date, or
2. if it was made after the request to open insolvency proceedings, and if the creditor was aware of the debtor's insolvency on the date of the transaction, or of the request to open insolvency proceedings.

- In the instant case, the security interest over the lorry and assignment of all future receivables and cashflows was created by D in favour of B in January 2018, i.e. 16 months prior to the insolvency (i.e. August 06, 2019) or even potential insolvency of D, thereby rendering the transaction outsider the purview of 1. above. Also, the creation of security interest clearly was not done after the request was made by D to open insolvency proceedings, i.e. on August 01, 2019, and B was not aware of D's insolvency or its request to open insolvency proceedings in the beginning of 2018. Thus, the transaction may (not?) be clawed back at the instance of the administrator.

The creation of the security right was not voidable and the realization of the security right did not cause new disadvantage to the general body of creditors.

b) A transaction granting or facilitating an insolvency creditor a security or satisfaction without his entitlement to such security or satisfaction, or to the kind or date of such security or satisfaction, may be contested if such transaction was made:

1. during the last month prior to the request to open insolvency proceedings or after such request;
2. within the second or third month prior to the request to open insolvency proceedings, and the debtor was illiquid on the date of the transaction;
3. within the second or third month prior to the request to open insolvency proceedings, and the creditor was aware of the disadvantage to the insolvency creditors arising from such transaction on its date.

For application of subsection (1) no. 3, awareness of circumstances pointing directly to the disadvantage shall be considered equivalent to awareness of the disadvantage to the insolvency creditors.

- The same analysis as above applies with respect to this class of avoidance transactions as well. Further, it may be noted that the enforcement of security interest otherwise legally create in favor of B is to be considered adjunct of the

legitimate creation of security interest, and as such, the entitlement to such security or satisfaction cannot be contested, albeit such security enforcement may have taken place within the proscribed periods prior to the opening of the insolvency proceedings by D.

Therefore, the above transactions do not cover one in which the creditor B being the lender bank has, upon failure of the debtor D to pay its dues owed to the creditor, legitimately exercised its right to recovery through enforcement of security interest created in its favour, as the same cannot be said to have disadvantaged the general body of creditors (as they would have been said to be disadvantaged at the time of creation of the security itself, and so cannot be disadvantaged again at the time of its retaliation or enforcement again); or said to have not been not entitle to exercise its right to enforcement of the said security interest because of reasons cited above.

This is not correct. Decisive is neither the collateral agreement nor the payment of the obligor but the creation of the assigned claim. Hence, the realization of the claim against X is voidable under § 130(1)No. 1 InsO, of the claim against Y under § 130(1)No. 2 InsO, and the assignment of the claim against Z is invalid under § 91 InsO.

3 marks

*** End of Assessment ***

in total: 26 marks