



45/50 = 90%

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6B

RESIT ASSESSMENT: SEPTEMBER 2023

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: [studentID.assessment6B]. An example would be something along the following lines: 202223-336.assessment6B. 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. The final submission date for this assessment is 21 September 2023. Please provide the completed assessment back to Sanrie Lawrenson via email at Sanrie.Lawrenson@insol.org by no later than 23:00 (11 pm) GMT on 21 September 2023. No submissions can be made after this time, no matter the circumstances.**
- 6. When submitting your assessment you will be required to confirm / certify via email 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.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total] **9 marks**

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.**

Question 1.2

Which of the following securities has an accessory nature?

- (a) Suretyship.**
- (b) Assignment by way of security.**
- (c) Mortgage (*Grundschild*).**
- (d) Retention of title.**

Question 1.3

Choose the correct statement in order to complete the statement below:

Creditors who wish to participate in the insolvency proceedings must file their claims with the -

- (a) creditors' committee.**

(b) creditors' meeting.

(c) insolvency practitioner.

(d) court.

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.

Question 1.5

Choose the correct statement in order to complete the statement below:

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 recognised in insolvency proceedings at all.

Question 1.6

Who of the following is entitled to submit an insolvency (restructuring) plan?

(a) Every creditor.

(b) The insolvency practitioner.

(c) The court.

(d) The creditors' committee.

Question 1.7

Which of the following circumstances is not relevant when establishing whether the local insolvency court (*Amtsgericht*) has jurisdiction?

- (a) **Registered office.**
- (b) Location of assets.**
- (c) **Place of residence.**
- (d) **Centre of economic activities.**

Question 1.8

Choose the correct answer in order to complete the sentence below:

The rights of _____ cannot be affected by an insolvency plan.

- (a) **employees.**
- (b) **shareholders.**
- (c) **banks.**
- (d) creditors with a right to separation.**

Question 1.9

How long is the compliance period (time frame) for the discharge of residual debt?

- (a) **Seven years.**
- (b) **Six years.**
- (c) Three years.**
- (d) **One year.**

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.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks] **3 marks**

How is "insolvency" defined in the *Insolvenzordnung* (InsO)?

*Insolvency is defined in §§ 17-19 InsO. First of all, § 17(1) InsO prescribes that insolvency is the general reason to open insolvency proceedings. Under § 17(2) InsO, debtors are deemed illiquid if they are unable to meet their mature obligations to pay. The debtor must lack the necessary means of payment and is, as a result, unable to meet a considerable number of monetary claims against it. Under § 17(2) (sentence 2) InsO, a debtor is presumed to be insolvent if it has ceased payments. The determining factor in such a case is whether the inability to pay debts has become apparent to third parties. If the presumption does not arise, then further consideration of the debtor's circumstances is warranted. In this case, a liquidity balance (*Liquiditätsbilanz*) is drawn up and the debtor's mature obligations are listed against the financial means available to the debtor in the short term. Insolvency under § 17 is also referred to as an inability to pay debts as they fall due / cash flow insolvency / illiquidity.*

Another reason for the opening of insolvency proceedings is overindebtedness / balance sheet insolvency under § 19 InsO. Accordingly, § 19 InsO can also be considered to provide a definition of "insolvency". Under § 19(2) (sentence 1) InsO, overindebtedness exists when the debtor's assets no longer cover its existing obligations to pay and the subsistence of the enterprise is no longer highly likely. The continuation of the enterprise will be considered over the next 12 months and depends mainly on the debtor's desire for continuation and the mid-term sustainability of the enterprise. A balance sheet will be drawn up in which the assets and liabilities are compared.

A debtor is also allowed to request for the opening of insolvency proceedings if it faces an imminent inability to pay debts (§ 18). Though an "imminent inability to pay debts" does not strictly speaking amount to "insolvency", I consider it for completeness given that it is also one of the grounds for the opening of insolvency proceedings under the InsO. For there to be an imminent liability to pay debts, it must be predominantly likely that the debtor will be unable to meet its existing obligations and pay them on the date of their maturity (§ 18(2) InsO). This includes payments or obligations whose maturity or emergence can be foreseen over the next 2 years. Income that is reasonably likely to be added to the debtor's estate is also included in the consideration of whether the debtor is imminently insolvent.

Question 2.2 [maximum 4 marks] **4 marks**

What is the line of demarcation between restructuring under the StaRUG and restructuring under the InsO?

*The line of demarcation between restructuring under the StaRUG and restructuring under the InsO lies in: (a) which type of companies can make use of restructuring under each instrument; and (b) the degree of intervention by the insolvency court. While restructuring under the InsO is more suited to companies undergoing insolvency proceedings under the InsO, restructuring under the StaRUG is appropriate for financially distressed companies who wish to *prevent* undergoing insolvency proceedings under the InsO. Restructuring under the InsO also involves a higher degree of court intervention than restructuring under the StaRUG. I elaborate on these points below.*

*Restructuring under the InsO concerns the use of restructuring tools for enterprises or persons meeting the definition of “insolvency”, as provided for in §§ 17-19 InsO and explained above. §§ 217-269 InsO contain provisions relevant to the implementation of the *Insolvenzplan*. A key difference is that restructuring under the InsO involves the insolvency court to a larger degree than restructuring under the StaRUG. The insolvency administrator and the debtor are entitled to submit an insolvency plan before the court (§ 218 InsO). The insolvency court is also entitled to refuse the insolvency plan *ex officio* if certain elements are present, for example, if the submitted plan has obviously no chance of being accepted by the parties to the proceedings or approved by the court (§ 231(1) InsO). The insolvency court will also docket a meeting to discuss the insolvency plan and the voting rights of the parties to the proceedings (§ 235 InsO).*

Restructuring under the InsO also requires comments and consent from creditors (§ 232 InsO). In particular, acceptance of the plan by the creditors requires that, in each group, the majority of creditors with voting rights backs the plan and the sum of claims held by creditors backing the plan exceeds half the sum of claims held by the creditors with voting rights (§ 244(1) InsO). While the InsO does provide for cross-class cram-down mechanisms, certain requirements must be met to use the mechanism, e.g., the disadvantage caused to creditors must be considered. The majority of the voting groups must also have backed the plan with the necessary majorities (§ 245(1) InsO).

Finally, after the parties to the proceedings have accepted the plan, the plan still requires approval by the insolvency court (§ 248(1) InsO). This shows the relatively high degree of court intervention present in restructuring under the InsO.

*Restructuring under the StaRUG involves pre-insolvency restructuring for companies in financial difficulty. Crucially, the StaRUG is appropriate for companies that do not have to file for insolvency pursuant to §§ 15a and 15b InsO, but are still facing imminent illiquidity (per § 18 InsO). In order to *prevent* insolvency proceedings under the InsO, therefore, the debtor may initiate pre-insolvency restructuring proceedings in accordance with the StaRUG. Under the StaRUG, the debtor may choose from a*

broad tool-kit of individual instruments required to successfully implement the restructuring concept. § 29(2) StaRUG contains a conclusive list of the restructuring instruments provided to a company in difficulty. Pursuant to § 29(2) StaRUG, the debtor may: (a) arrange for court approval of the restructuring plan in accordance with §§ 45 and 46 StaRUG; (b) arrange for a pre-audit of the restructuring plan by the court (§§ 47 and 48 StaRUG); (c) apply for stabilization orders in accordance with §§ 49 et seq StaRUG; and (d) arrange for the restructuring plan being confirmed by the court (§ 60 StaRUG).

*If the debtor wishes to make use of the restructuring instruments under the StaRUG, the restructuring proceedings must be *notified* to the restructuring court. The notification initiates the procedure and makes the “restructuring case” pending.*

In addition, restructuring under the StaRUG does not require the consent of all creditors; the plan can be limited to certain creditor groups. The StaRUG also provides for a restructuring plan with the possibility for a cross-class cram-down and a court-imposed ban on enforcement and realization measures.

Based on all of the above, it can be seen that the StaRUG closes the gap between restructuring options within the InsO on the one hand and consensual out-of-court restructuring solutions on the other.

Question 2.3 [maximum 3 marks] **3 marks**

Explain the special rules on tenancy agreements for real estate compared to the general rules on executory contracts.

*The general rule on executory contracts is that, under § 103 InsO, both parties only fulfill the executory contract if the insolvency administrator so chooses. The contracting party must state his intention to claim performance from the insolvency administrator without negligent delay. If the insolvency administrator opts to perform the contract, then the creditor’s claim must be satisfied in full from the insolvency estate (§ 55(1) (No 2) (alternative 1) InsO). If the administrator refuses to perform the executory contract, the contracting party is entitled to claim for non-performance as a creditor (§ 103(2) InsO). The contracting can register a claim for equalization to the insolvency schedule which will then be satisfied on a *pro rata* basis (§ 103(2) (sentence 1) InsO).*

The special rules on tenancy agreements for real estate are contained in §§ 108 et seq InsO. The key difference is that tenancy agreements for real estate continue to exist, but to the credit of the insolvency estate. This also applies in respect of tenancy agreements concluded by the debtor as landlord or lessor relating to other effects assigned as a security to a third party which had financed their acquisition or production (§ 108(1) InsO). Importantly, under § 112 InsO, the other party to the tenancy agreement cannot terminate the tenancy agreement after the opening of

insolvency proceedings on the basis that: (a) the debtor had defaulted in the payment of tenancy before the opening of insolvency proceedings was requested; or (b) the debtor's financial situation has deteriorated.

§ 109(1)(sentence 1) InsO provides that the insolvency administrator may terminate a tenancy agreement for real estate concluded by the debtor as tenant or lessee 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 is three months to the end of the month unless another shorter period is applicable. According to § 109(1)(sentence 2) InsO, where the subject matter of the tenancy agreement is the debtor's dwelling, termination is replaced by the right of the insolvency administrator to declare that claims becoming due on expiry of the notice period mentioned in § 109(1)(sentence 1) InsO may not be asserted in the insolvency proceedings. If the administrator terminates under § 109(1) (sentence 1) or submits a declaration in accordance with § 109(1) (sentence 2), the other party may claim damages as an insolvency creditor for premature termination of the contract. If the debtor had not yet entered into possession of the premises when the insolvency proceedings were opened, the administrator and the other party may withdraw from the contract. The other party may claim damages as an insolvency creditor for premature termination of the contract if the administrator withdraws. Each party may state within two weeks whether it intends to withdraw from the contract; if no statement is given, they lose the right to withdraw (§ 109(2) InsO).

There are also special rules where the debtor has assigned a tenancy agreement. Under § 110(1) InsO, if the debtor as landlord or lessor assigned a future claim to tenancy to a third party before the opening of insolvency proceedings, the validity of such assignment is limited to tenancy received for the current month following the opening of insolvency proceedings. If the insolvency proceedings were opened after the 15th day of the month, the validity of the assignment is also valid in respect of the following month.

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

Explain the rules in German insolvency law relating to a restructuring plan (Insolvenzplan).

*The debtor or the insolvency administrator can submit an *Insolvenzplan* (§ 218(1) InsO). In the alternative, the creditors may also ask the insolvency administrator to submit an *Insolvenzplan* at the creditors' meeting (§ 157 InsO). If this is done, the insolvency administrator must then submit to the insolvency court an *Insolvenzplan* within a reasonable period of time (§ 218(2) InsO). Once the *Insolvenzplan* is submitted, the insolvency court will determine whether the plan has been submitted by the correct party and whether the rules governing the contents of the *Insolvenzplan* have been complied with.*

According to § 219 InsO, there are two parts to an *Insolvenzplan*. The first part, which is the declaratory part, contains the information necessary for the parties entitled to vote to make an informed decision. The plan describes the measures taken or still to be taken after the opening of insolvency proceedings to create the basis for the envisaged establishment of rights held by the parties to the proceedings (§ 220(1) InsO). This includes all information concerning the bases for and effects of the plan which are relevant to the decision by the parties to the proceedings to approve the plan and for its approval by the court. In particular, it includes a comparative calculation setting out the plan's impact on the creditors' expected satisfaction. If the plan provides for the continuation of the enterprise, then it is generally assumed that the enterprise will continue when determining the expected satisfaction without a plan. This does not apply where the sale or continuation of the enterprise in another form lacks the prospect of success (§ 220(2) InsO).

The second part, the constructive part, contains the actual structure of how the legal position of the parties to the proceedings would be transformed (§ 221 InsO). The constructive part may also stipulate that the insolvency administrator be authorized to take necessary measures to implement the plan and correct any obvious errors the plan contains (§ 221 InsO). To determine the rights held by the parties in the *Insolvenzplan*, the parties must be separated into the following groups: (a) creditors entitled to separate satisfaction if their rights are interfered with by the plan; (b) ordinary creditors; (c) each class of subordinate insolvency creditors, unless their claims are deemed to be waived pursuant to § 225; (d) persons with a participating interest in the debtor where their share or membership rights are included in the plan; and (e) holders of rights resulting from intra-group third-party guarantees (§ 222 InsO). Within each group, all parties are to be offered equal rights under the *Insolvenzplan* (§ 226(1) InsO). If equal rights are not given to all parties within a group, their unanimous consent must be obtained, and the *Insolvenzplan* must be accompanied by each party's statement of consent (§ 226(2) InsO).

Unless otherwise stated in the *Insolvenzplan*, the *Insolvenzplan* does not affect the rights of creditors entitled to separate satisfaction to achieve satisfaction from their security (§ 223(1) InsO). Where the *Insolvenzplan* reduces their rights, the plan must specify the fraction by which their rights will be reduced, the period of respite for their claims and which other provisions are to be binding on them (§ 223(2) InsO). The *Insolvenzplan* must specify the same in respect of ordinary creditors (§ 224 InsO). Regarding subordinate creditors, their claims are deemed to be waived unless otherwise provided in the *Insolvenzplan* (§ 225(1) InsO). If the *Insolvenzplan* provides otherwise, the same must be specified for the subordinate creditors. The constructive part of the *Insolvenzplan* may also provide that creditors' claims be converted into share and membership rights in the debtor (§ 225a(2) InsO).

The insolvency court will consider whether the above requirements have been complied with, whether the plan has a prospect of success (in the case of a debtor-submitted plan), and whether the claims provided for under the constructive part of the plan manifestly can be satisfied. If any of these are not satisfied, the court refuses

*the plan ex officio (§ 231(1) InsO). The court will also refuse the *Insolvenzplan* if there is obviously no chance of it being accepted by the parties to the proceedings, such as if the refusal is requested by the insolvency administrator with the consent of the creditors' committee (§ 231(2) InsO)). If the *Insolvenzplan* is not refused on any of these grounds, the insolvency court will forward the plan to the creditors' committee, the debtor and the insolvency administrator for their comments (§ 232 InsO), and lay the plan out for their inspection in the registry of the court (§ 234 InsO).*

*Subsequently, the insolvency court docket a meeting to discuss the *Insolvenzplan* and the voting rights of the parties to the proceedings within one month (§ 235(1) InsO). The date of this "discussion and voting meeting" is to be published, and the publication must indicate that the plan and any comments received are available for inspection in the registry of the court (§ 235(2) InsO). Individual summonses are to be sent to certain parties, such as the insolvency administrator, insolvency creditors who have filed claims, and creditors entitled to separate satisfaction (§ 235(3) InsO). All creditors impacted by the *Insolvenzplan* are entitled to vote, while those not impacted by the plan have no voting rights (§ 237 InsO).*

*The *Insolvenzplan* is approved when a majority in number and value within each group of creditors with voting rights vote in favour of the plan (§ 244(1) InsO). The debtor must also consent to the plan, and the debtor is deemed to consent if the debtor does not oppose the plan in writing at the latest in the voting meeting (§ 247(1) InsO). The debtor's opposition is deemed irrelevant if the debtor is likely not to be placed at a disadvantage by the plan compared with his or her situation without a plan, and no creditor receives under the plan an economic value exceeding their claim (§ 247(2) InsO).*

*In addition, there are "cross-class cram-down" mechanisms that enable the approval of the *Insolvenzplan* even if the necessary majorities were not achieved. A voting group is deemed to have consented if the members of the group: (a) are not likely to be disadvantaged by the *Insolvenzplan* compared with their situation without such plan; and (b) participate to a reasonable extent in the economic value devolving to the other groups under the plan. The majority of the voting groups must also have backed the plan with the necessary majorities (§ 245(1) InsO). For the purpose of determining whether requirement (b) is satisfied, § 245(2) InsO provides that there is reasonable participation of a group of creditors if, under the plan, (a) no other creditor will receive economic value exceeding their claim; (b) neither a creditor with a lower-ranking claim than other creditors forming his group, nor the debtor, nor a person with a participating interest, receives an economic value not fully compensated for by way of performance in the debtor's assets; and (c) no creditor ranked equally to other creditors within the group receives an advantage over the other creditors. If these requirements are met, the *Insolvenzplan* is deemed approved.*

*After the creditors have approved the *Insolvenzplan*, the insolvency court must approve the plan (§ 248(1) InsO). Before doing so, the court must hear the insolvency administrator, the creditors' committee and the debtor (§ 248(2) InsO). The court will*

*consider whether the necessary procedure was followed and whether the voting process was proper or effected by improper means, particularly by an advantage favouring one of the parties (e.g. whether a creditor was given an advantage outside the plan in exchange for their vote of approval) (§ 250 InsO). It is possible for a party to seek minority protection if they will be disadvantaged by the *Insolvenzplan* (§ 251(2) InsO). However, the request is to be rejected if the constructive part of the *Insolvenzplan* provides for funds to be made available to compensate such parties (§ 251(3) InsO).*

*Once the court orders that the *Insolvenzplan* is approved, the effects under the constructive part become binding on all parties to the proceedings, including creditors who have not filed their claims and creditors who opposed the plan (§§ 254, 254b InsO).*

QUESTION 4 (fact-based application-type question) [15 marks in total] **11 marks**

In January 2020, Bank (B) granted debtor (D) a loan of EUR 50,000. Since B asked for securities, D transferred legal title on a lorry by way of security and had assigned all current and future receivables against its customers by way of security. Sixteen months later, in May 2021, D was unable to pay its debts when they fell due. On 3 July 2021, B, being aware of D's substantive insolvency, terminated the loan contract and sold the lorry for EUR 20,000 to W. On 5 July 2021, B revealed the assignment to all customers of B and received EUR 15,000 from X, who bought goods from D on 1 July 2021 and who paid B the money he owed to D. On 1 August 2021, D applied for insolvency proceedings. B received another payment of EUR 10,000 from Y who bought goods from D on 10 September 2021. Five days later, the court opened insolvency proceedings and appointed I as insolvency administrator. I claims EUR 50,000 from B, arguing that the sale of the lorry and the payments of X and Y are subject to transactions avoidance (§§129 et seq InsO).

What are the various legal positions? Test this based on the norms.

The underlying rule of German insolvency law is that all creditors shall be treated equally. If one creditor manages to secure full payment shortly before the debtor files for insolvency to the disadvantage of other creditors, there are legal remedies for the insolvency administrator to challenge those payments and claw them back to the insolvency estate (§ 129(1) InsO). The sale of the lorry and the payments of X and Y run afoul of this rule that all creditors shall be treated equally. Accordingly, B is liable to retribute the insolvency estate. I explain further below.

B's sale of the lorry

Crucially, B received a satisfaction of EUR 20,000 by selling the lorry. Given that there is a right to separate satisfaction in insolvency proceedings (§§ 49, 50 and 51(1) InsO), D's transfer of legal title to B in January 2020 does not prevent the lorry from being

legally part of the insolvency estate. Accordingly, the lorry would otherwise have been restored to D's estate and would have formed part of the pool of assets to be distributed to creditors. This is especially since B as an insolvency creditor was not allowed to pursue enforcement proceedings against the insolvency estate or the debtor's property during insolvency proceedings. B did so upon being aware of D's substantive insolvency, by terminating the loan contract and selling the lorry. While B is a secured creditor and is entitled to enforce security rights which provide for a right to separate satisfaction, the disposition of the lorry must have been done according to the specific provisions in §§ 165 et seq InsO.

The sale of the lorry cannot be contested under German transactions avoidance law, since the realisation of a security right does not disadvantage the general body of creditors as required in §129(1) InsO.

B's sale of the lorry can be contested under § 130 InsO, on the basis that it is a transaction granting a creditor a satisfaction to which the opponent had a claim (i.e., congruent coverage), the claim in this case being B's entitlement to repayment on the EUR 50,000 loan granted to D. Under § 130(1) InsO, such a transaction is contestable if it occurred within the last three months before the application to open insolvency proceedings, the debtor was already cash flow insolvent / illiquid at the time of the transaction, and the creditor was aware of this. These requirements are satisfied in the present case. First, the sale of the lorry was performed on 3 July 2021. It cannot be disputed that the sale of the lorry was performed on 3 July 2021 since its legal effects (i.e., the transfer of title to W) arose on 3 July 2021 (§ 140(1) InsO). Therefore, the sale of the lorry took place two months after D was unable to pay its debts when they fell due in May 2021. D's failure to pay its debts means that D was already illiquid at this point (§ 17(2) InsO). Second, B was aware of D's substantive insolvency when B terminated the loan contract and sold the lorry. Awareness of circumstances necessarily indicating insolvency or a request to open insolvency proceedings is considered equivalent to awareness of insolvency or of the request to open insolvency proceedings (§ 130(2) InsO).

Alternatively, B's sale of the lorry can also be contested on the basis that it is a transaction directly disadvantaging insolvency creditors (§ 132(1) InsO). The sale was on 3 July 2021, which is within three months prior to D's request to open insolvency proceedings on 1 August 2021. Moreover, D was illiquid on 3 July 2021, and B was aware of D's substantive insolvency at this time. It should be noted, however, that § 132 is inapplicable if §§ 130 or 131 InsO is found by the court to apply.

Given that B's sale of the lorry to obtain a satisfaction of EUR 20,000 is likely to be successfully contested, B would be required to make restitution of the EUR 20,000 B received to the insolvency estate. Under § 143 InsO, the insolvency estate must be returned to the state in which it would have been had the challengeable transaction never occurred.

Payments of X and Y

X paid EUR 15,000 to B for goods bought from D on 1 July 2021, while Y paid EUR 10,000 to B for goods bought from D on 10 September 2021. These payments to B were done because of D's assignment of all current and future receivables to B in January 2020. D's assignment of receivables to B effectively meant that payments due to D, for D's benefit and which would have been added to D's estate to be paid out to D's creditors were instead diverted to B. The payments therefore reduced the amount of proceeds that could be paid to the ordinary creditors, and meant that B was preferred over other creditors. Accordingly, under § 129(1) InsO, the payments can be contested since the payments were made to the advantage of B and the disadvantage of other creditors.

*Regarding such assignment by way of security of all current and future receivables stemming from the debtor's business (*Globalzession*), future claims are not affected by the assignment before they are created, given that a security right cannot exist without a security object. Therefore, claims created within the suspect period of three months prior to the application for insolvency proceedings - namely, X's payment of EUR 15,000 to B - is subject to transactions avoidance under § 130 InsO.*

On X's payment of EUR 15,000 to B for goods bought from D on 1 July 2021, this can be contested under § 130 InsO. X's payment to B essentially granted B a satisfaction to which B had a claim, the claim being B's entitlement to D's receivables. Moreover, the payment was done on 5 July 2021 (assuming it was after B revealed the assignment), and this was in the last three months prior to D's request to open insolvency proceedings on 1 August 2021. B was also aware of D's substantive insolvency on this date.

In the alternative and if § 130 is found not to apply, then the payment could be contested under § 132(1) InsO. A similar analysis applies - the payment was done on 5 July 2021 (assuming it was after B revealed the assignment), and this was in the last three months prior to D's request to open insolvency proceedings on 1 August 2021. It is clear that the payment constituted a direct disadvantage to the other insolvency creditors since, if not for the payment to B, there would have been EUR 15,000 more in D's estate for distribution to creditors.

As for the payment from Y which is a claim created after the opening of the insolvency proceedings on 1 August 2021, it can be voided. § 91 InsO provides that once the insolvency proceedings are opened, rights in objects forming part of the insolvency estate cannot be acquired with legal effect even if such acquisition of rights is not based on the debtor's transfer or effected by way of execution. In this way, § 91 InsO hinders the improvement of the creditor's position after the opening of the proceedings. Therefore, all receivables created after this point - including Y's payment to B - is not covered by the security right and can be contested.

Therefore, on Y's payment of EUR 10,000 to B for goods bought from D on 10 September 2021, this too can be contested under § 130 InsO, as Y's payment to B

granted B a satisfaction to which B had a claim (B's entitlement to D's receivables). The payment was also made on 10 September 2021 after D had filed its application to open insolvency proceedings on 1 August 2021. Thus, I need only show that B had knowledge of this application, which is likely the case considering that B was already aware of D's substantive insolvency prior to D's application to open insolvency proceedings. In the alternative and if § 130 is found not to apply, then the payment can be contested under § 132(1) InsO. The payment was made subsequent to D's request to open insolvency proceedings on 1 August 2021, and again, B would have been aware of D's request to open insolvency proceedings or at least, D's substantive insolvency (§ 132(1) InsO). Moreover, it is clear that the payment constituted a direct disadvantage to the other insolvency creditors since there would otherwise have been EUR 10,000 more in D's estate for distribution to creditors.

Quantum of payment

Under § 143 InsO, the insolvency estate must be returned to the state in which it would have been had the challengeable transaction never occurred. Given that B has received a total satisfaction amounting to EUR 45,000 (EUR 20,000 + EUR 15,000 + EUR 10,000) in priority to the other creditors, B must pay this amount to D's estate.

That said, it is uncertain if I can, on top of the EUR 45,000 which B has received, claim an additional EUR 5,000 to increase the total claimable amount to EUR 50,000. Given that the challengeable transactions above (namely, the sale of the lorry and payments by X and Y) only total EUR 45,000, I is only entitled to claim this sum from B.

*** End of Assessment ***