INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) RESIT ASSESSMENT: MODULE 6B

GERMANY

This is the **summative (formal) resit assessment** for **Module 6B** of this course and must be submitted by all candidates who **have qualified for a resit assessment for Module 6B**.

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: 202122-336.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 "studentID" 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 **27 September 2021**. This assessment must be submitted to David.Burdette@insol.org via e-mail no later than 23:00 (11 pm) on **Monday 27 September 2021**.

7. Prior to being populated with your answers, this assessment consists of **6 pages**.

ANSWER ALL THE QUESTIONS

Commented [DB1]: 30 out of 50 = 60%

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

Commented [DB2]: 7 out of 10

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

Who decides which person should be appointed as Insolvency Practitioner in ordinary liquidation proceedings?

(a) The debtor.

(b) The creditors' committee.

(c) The court.

(d) The court, but subject to a diverging decision of the first creditors' meeting.

Question 1.2

Which of the following securities **does not** have an accessory nature?

(a) Suretyship.

(b) Mortgage (*Grundschuld*)

(c) Mortgage (*Hypothek*).

(d) Pledge.

Question 1.3

Which of the following **cannot** be decided by the first creditor' meeting (*Berichtstermin*)?

(a) Verification of creditors' claims filed with the insolvency administrator.

(b) Shut down of the business.

(c) Commissioning the insolvency administrator to develop an insolvency plan.

(d) Election of the final creditors' committee.

Question 1.4

After the occurrence of balance-sheet insolvency (overindebtedness), how long is the time period before the directors or obliged to file for insolvency proceedings?

(a) Three weeks.

(b) One month.

(c) Six weeks.

(d) Two months.

Question 1.5

Tax claims 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.

Question 1.6

What is the majority required for the adoption of a pre-insolvency restructuring plan under the StaRUG?

(a) 75% in sum regarding the claims of creditors present and voting.

(b) 75% in sum regarding the claims of all affected creditors.

(c) Simple majority in sum regarding the claims of creditors present and voting and simple majority of creditors (head count).

(d) 75% of all affected creditors (head count).

Question 1.7

Which court has jurisdiction to open insolvency proceedings?

(a) *Amtsgericht*.

(b) *Landgericht*.

(c) *Oberlandesgericht*.

(d) *Bundesgerichtshof*.

Question 1.8

Which of the following has a right to separation?

(a) Banks.

(b) Pledges.

(c) Tax authorities with statutory liens on the debtor's assets.

(d) Landlords after termination of the tenancy agreement.

Question 1.9

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

(a) Seven years.

(b) Six years.

(c) Three years.

(d) One year.

Question 1.10

Which of the following is a general prerequisite for transactions avoidance?

(a) Substantive insolvency of the debtor.

(b) Disadvantage for the general body of creditors.

(c) Opponent's knowledge of the disadvantage of the general body of creditors.

(d) Opponent is a creditor.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

How is "insolvency" defined in the *Insolvenzordnung*?

Historically, the main purpose of the insolvency proceedings provided by the insolvency code (and by the former one) had been to embrace a collective proceeding and, in a non-discriminatory way, to grant creditors payments on a pro-rata basis.

In this sense, to file for a bankruptcy proceeding under German Law, which should be done through a written requirement, the company must be considered insolvent. Insolvency itself has a lot of different meanings and can be verified in different opportunities.

The main grounds that lead an individual or a company to be considered insolvent and to commence an insolvency proceeding are (i) the inability to pay debts as they fall due, also known as cash flow insolvency or illiquidity (Zahlungsunfähigkeit); (ii) the overindebtedness

(Überschuldung), also known as balance sheet insolvency, or even (iii) the imminent inability to pay the debts.

As per the grounds to be considered insolvent aforementioned, **liquidity** is known as the inability to pay the debts as they fall due. Regarding case law that embraces this matter, illiquidity does not exist in the event of a certain timeframe. As for that, the debtor should have stopped performing payments as they fall due.

Given this requirement, some methods are prescribed to determine the debtor's **illiquidity**. Under §17 (2) InsO encompasses the ceasing of payments to be illiquid. This issue should be determined in case such inability is known by third parties. If the illiquidity is not public and this presumption is unhelpful, further verification should be conducted, and, in this sense, the accounts and documents of the insolvent debtor should be investigated. It is important to highlight that illiquidity cannot be presumed only by the debtor's inability to pay a certain obligation, such delay should be, estimated on more than three weeks.

As per the **overindebtedness** matter, the question that should be formulated is whether the debtor has assets to continue its operation and if there is a forecast for the business to have a positive continuation (positive Fortführungsprognose). Bearing this in mind, if the obligations that the debtor has to bear (as to liabilities) exceed the amount compared to the assets available, the company is deemed insolvent. Also, the debtor is considered overindebted if the likelihood of avoiding illiquidity over a medium-term is 50% or less.

As for the **imminent illiquidity** §18, InsO, it allows only the debtor to file for an insolvency proceeding if it is likely to become unable to meet the future obligations of payments.

In short, insolvency can be defined through the legislation in several ways as described above. Therefore, to be eligible to commence an insolvency proceeding, the debtor/creditor should be able to demonstrate the occurrence of at least one of the aforementioned hypothesis.

3 marks

Question 2.2 [maximum 4 marks]

Explain the relationship between pre-insolvency restructuring under the StaRUG and insolvency proceedings under the InsO.

If the debtor does not have to file for insolvency according to Sections 15a, 15b InsO, but is facing imminent illiquidity (drohende Zahlungsunfähigkeit, Section 18 InsO), the debtor may, to prevent insolvency proceedings, initiate a (pre-insolvency) restructuring as an alternative proceeding under the StaRUG.

The StaRUG offer instruments, and particular court proceeding for (i) voting on a restructuring plan,(ii) the preliminary examination by a court of the questions for the confirmation on a plan; (iii) a court-ordered moratorium; (iv) the court approval of a restructuring plan and (v) the appointment of a mediator.

The StaRUG is available for a natural person or entrepreneur (not a consumer) that is in a financial state of imminent inability to pay the debts (but not substantively insolvent yet).
It is important to bear in mind that the StaRUG is not an insolvency statute since deals with pre-insolvency negotiation and restructuring. Given that to be able to join the proceedings on insO the debtor must satisfy the requisites of the insolvency proceedings and if the debtor is not in that place yet, it can file for a StaRUG proceeding.

Under the StaRUG the debtor may commence an out-of-court negotiation with the creditors. The debtor will only receive court assistance if applied and related to specific matters. Given the preliminary nature, if the debtor becomes substantially insolvent, such proceeding can be stopped and converted into insolvency proceedings, but not automatically.

Section 29 § 2 StaRUG contains a conclusive list of the restructuring instruments provided to a company in difficulties as part of the pre-insolvency restructuring proceedings framework regulated by the StaRUG.

Also, the debtor can negotiate with the creditor to reach an agreement and get a partial waiver of the right to satisfaction. Even more, is possible to reach an agreement that the creditors declare themselves prepared to forego enforcement of their claims for a certain period so that the debtor's inability to pay can be delayed.

In sum, such proceeding is mostly used in order to avoid a formal insolvency proceeding, therefore, an agreement can be reached before getting into a more alarming situation that equals insolvency.

Yes, but you should have discussed termination of the StaRUG if insolvency occurs. **2 marks**

Question 2.3 [maximum 3 marks]

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

The insolvency proceeding states some specific ground rules to executory contracts after commencement.

Agreements, in general, are also wound up when the insolvency proceeding starts, and as for that, the counterpart has to fulfill its obligation. On the other hand, any claim or request against the debtors will only be paid by the estate on the pro-rata basis stated in insolvency law.

Bering in mind this disposition, insO brings a different disposition regarding executory contracts. Under § 103 InsO, it is stated that reciprocal agreements, in which both parties have obligations to fulfil, no winding up occurs automatically. In these cases, both parties perform their obligations if the estate chooses to, in benefit of the proceeding. In such cases, the creditor's claim has to be satisfied in full by the estate.

Concerning agreements involving tenancy rules, insO has some special provisions that may differ from the original ones stated for executory agreements. Given that, the provision regarding tenancy or lease contacts has a general rule based on the prohibition of its termination. That is because they are considered continuing obligations.

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: (i) because of default in the payment of tenancy or lease fees arising before the opening of the insolvency proceedings was requested; (ii) because of degradation of the debtor's financial situation.

Therefore, if the debtor has an amount due that is originated from a moment prior to the opening of the insolvency proceeding, the agreement cannot be terminated based upon the non-payment of such costs. Also, the agreement cannot be terminated on the basis that the financial situation of the debtor is in danger. InsO prevents such agreements to be terminated in such terms.

It is also important to highlight that if a contractual clause provides for a right of termination upon the occurrence of insolvency such provision will be void as has recently been decided by the Federal Court of Justice, as for that, the so-called ipso facto clauses are not considered valid under German legislation.

3 marks

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

Explain the rules in German insolvency law relating to transactions avoidance.

It is important to highlight that the avoidance of transactions is a disposition that aims to protect collective proceedings such as insolvency. As for that, when debtors take actions that could, in any way, affect the pro-rata distribution in which the insolvency proceeding is based, such actions have to be avoided. This is the main purpose of avoidance transactions, when, by any means, were made in a period before the insolvency opening and upon disadvantages of the creditors.

A transaction made to the disadvantage of the creditors' body is known when it reduces the whole amount of assets that would be split to the ordinary creditors. Some actions are considered standards when related to such transactions, like payments, granting of security rights, waiver of claims, and others. The grounds to request the avoidance of the transaction are listed in §§ 130 et seq insO and, and, when this kind of claim is successful the assets must be returned to the estate. The rule is that the estate must remain in a state in which it should have been without such transaction.

As a defense to the avoidance transaction and to argue against the restitution claim, the creditor must claim that the requirements legally disposed of were not met, especially regarding the fact that he or she did not know such transaction being avoidable or the insolvent state of the debtor. And then it is the estate burden to prove that the creditor knew about the requisites. On the other hand, the burden may rely on the creditor if he or she is a real close related party, in such cases, they have to prove that the transaction was not done with a bad faith intent.

Transactions carried out within a period of three months prior to the filing for insolvency as well as the period between the filing and the opening of proceedings are particularly sensitive. Also, longer challenge periods of up to ten years exist, depending on the nature of the transaction. For instance, for gratuitous benefits granted by the debtor to a creditor the preference period is four years.

Not detailed enough. Should have dealt with congruent / incongruent coverages amongst other things. **6 marks**

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

In January 2020, Bank (B) has granted debtor (D) a loan of EUR 50,000. Since B asked for security, D has assigned all her current and future receivables against her customers by way of security. Sixteen (16) months later, in May 2021, D is unable to pay her debts when they fall due. On 3 July 2021, insolvency proceedings are opened against D and IA is appointed as insolvency administrator. IA collects two receivables, both amounting to EUR 11,900 (including 19% VAT). The first claim is rooted in a service contract between D and X concluded in June 2020. D has rendered the services on 7 July 2020. The second claim stems from a contract which IA, who decided to maintain D's business, concluded with Z on 20 July 2021 and which IA performed on 16 August 2021. X and Z pay the consideration for the services

rendered to them by IA. B demands surrender of these payments (together EUR 23,800) from IA.

Does B have a claim against IA? Test this based on the norms.

When granted the security of future receivables, D was not insolvent (January 2020). The security right was granted upon the granting of a loan.

Security provided based on intangible and movable assets can be a pledge or an assignment. In this case, since the debtor transferred the property of such future receivables, it is understood that he gave the assignment, and the creditor can function as the fiduciary owner of the amounts when they fall due.

In this sense, it is important to highlight that since the receivables are future, the collateral is not created until the amounts become existing.

Given that, the first receivable was considered actually existing on a date prior to the insolvency, since it was rendered in 2020, on the other hand, the other one was had the conclusion after the commencing of the bankruptcy proceeding (July 3rd, 2021) and was performed only on august 2021.

Given the aforementioned, the second transaction right will not be covered by the security right and the creditor has no claim against the estate given §91 of InsO.

On the other hand, the first transaction that was hired and concluded prior to the opening of the proceeding and the suspect period is encompassed by the right to separation, therefore the secured creditor is granted the opportunity to claim the preferential satisfaction up to the amount of the secured claim. In this sense, only the surplus of the realization amount will actually be directed to the estate.

Also, regarding a secured creditor, it is possible to enforce the right through an enforcement proceeding, since the §89 of Inso applies only to insolvency creditors, which can be understood as unsecured creditors. The disposition of secured goods is regulated by §§165 insO and also embraces the responsibility of creditors and debtors.

Good attempt but falls short of what was required. What amounts can be deducted from the received value by IA? **9 out of 15**

*** End of Assessment ***