



**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](mailto: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]: 29 out of 50 = 58%

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

Commented [DB2]: 8 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 (*Grundschild*)
- (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 are 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) Pledgees.
- (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*?

[The *Insolvenzordnung* (Insolvency Regulation) regulates insolvency proceedings in Germany. This regulation applies to all types of debtors, liquidation and restructuring of insolvent entities. In *Insolvenzordnung*, insolvency is defined as a single, unitary insolvency process, irrespective of whether its objective is liquidation or restructuring.

In this procedure, the "Protective Umbrella Procedure" (Schutzschirmverfahren) - § 270d InsO - describes the restructuring preparation procedures. The debtor, therefore, requires the formal insolvency process in view of the probability of inability to pay his debts or insolvency of the balance sheet.

In the case of consumer insolvency, the debtor must prove that he has been legally advised before the application to open the insolvency proceedings.

It is also worth mentioning the Part One, Section 1, of the InsO: "The insolvency proceedings shall serve the purpose of collective satisfaction of a debtor's satisfaction by liquidation of the debtor's assets and by a distribution of the proceeds, or by reaching an arrangement in an insolvency plan, particularly in order to maintain the enterprise. Honest debtors shall be given the opportunity to achieve discharge of residual debt.".]

**You did not read the question properly – you were supposed to deal with § 17, 18 and 19 of InsO. 0 marks**

**Question 2.2 [maximum 4 marks]**

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

[As mentioned in the previous answer, Insolvenzordnung applies to all types of debtors, liquidation and restructuring of insolvent entities.

The StaRUG, in turn, deals with pre-insolvency restructuring and is not an insolvency statute. Thus, the StaRUG is an alternative to the formal bankruptcy process, which can be used by an individual who is not a consumer and is not substantially insolvent, despite being in a difficult financial situation.

See the instruments offered by StaRUG: (i) preliminary examination by a court of matters relevant to the confirmation of a restructuring plan; (ii) lawsuits for voting on a restructuring plan; (iii) moratorium; (iv) confirmation of a restructuring plan and (v) appointment of a restructuring mediator.]

**What happens if the person does become insolvent? 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?

[Initially, it is important to note that a claim against the debtor is only settled by the insolvency practitioner on a pro rata basis. Thus, § 103 InsO provides that after the opening of the process, there is no settlement. Both parties comply only if the insolvency practitioner admits it. If this is the case, the creditor's claim must be fully satisfied by the insolvent estate.

Thus, in enforceable contracts, execution requests lose their enforceability if a mutual contract has not been fully executed by the debtor on the date of opening of the insolvency proceedings. Therefore, the administrator has the option to choose enforcement, making both claims enforceable again.

The tenancy agreement (§ 104 InsO), in turn, differ from executory contracts, because they are continuing obligation contracts. Therefore, there is a right to choose compliance by the insolvency practitioner. Even when the insolvency practitioner chooses to fulfil contractual obligations, the debtor's retroactive debts must be paid on a pro rata basis.

It is also worth commenting on § 108 InsO, which establishes that "Contracts concluded by the debtor for the lease and tenancy of immovables or premises and employment of the debtor shall continue to exist, but to the credit of the Insolvency estate".]

**Not all parts of your answer are relevant – 2 marks**

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

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

[Before opening the insolvency proceedings, it is possible that some transactions may be challenged, in the following cases: (i) if carried out to the detriment of creditors and (ii) if a reason for challenge (avoidance ground) has been presented.

In the first case, a transaction harms the general body of creditors if it reduces the value of resources that can be paid to ordinary creditors.

The reasons for preventing this situation are listed in § 130 InsO. For example, see: "(1) A transaction granting or an insolvency creditor a security or satisfaction may be contested 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."

Thus, even if the third party has invoked their alienation, the assets must be returned to the insolvent estate if they have abandoned it in a period close to the opening of the insolvency proceedings or in circumstances that justify their return.

See, for example, some reasons for contesting: (i) if, in the last three months before the request to open the insolvency process, a transaction was carried out that facilitates one of the insolvency creditors; (ii) situations that place some creditors at a disadvantage if the debtor was already illiquid and the creditor was aware of the illiquidity or the request to open the insolvency proceedings; (iii) an undervalued transaction, among others.

Thus, the insolvent estate must be returned to the state it would have been in had the contestable transaction never taken place.

After opening the process, a refund request can be made. Against the claim for restitution, the party opposing the annulment must contest that the requirements were not present. The insolvency practitioner will be responsible for proving the prerequisites, if the party is not closely related to the debtor.]

**A good attempt but all the sections of InsO that are relevant should have been discussed. 9 out of 15**

### 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.

[It is important to highlight some peculiarities of the specific case: (i) bank B's credit has security; (ii) in the first claim, the contract was concluded before the insolvency request, but the service was performed after the request; (iii) in the second claim, both the contract and the provision of service were formalized after the insolvency request; (iv) the receivables are made up of 19% VAT.

That said, it's important to address the secured asset in insolvency. In this regard, German law provides for the Absonderungsrecht, related to the right to separate satisfaction in insolvency proceedings.

The right of guarantee does not prevent the asset to which it is related from being legally part of the insolvent estate. Thus, the secured creditor does not have the right to claim its separation from the insolvent estate. On the other hand, the secured creditor has the right to demand preferential satisfaction up to the amount of the secured credit with the proceeds from the realization of the specific asset. Therefore, only what exceeds the amount of the secured credit belongs to the insolvent estate.

Having made these considerations, it is worth to mention that there is a difference whether the insolvency administrator or the secured creditor is responsible for carrying out the realization. Therefore, if the insolvency administrator is responsible for realizing the asset - as in the second claim, the secured creditor will no longer be able to enforce the right to the guarantee.

??

§ 89 InsO stipulates that insolvency creditors, that is, unsecured creditors with obligatory claims, cannot initiate enforcement proceedings against the insolvent estate or other assets of the debtor during the insolvency proceedings. On the other hand, enforcement proceedings are generally possible in preliminary insolvency proceedings, unless the court orders otherwise.

Secured creditors will not be able to enforce their secured claims, but this does not affect the enforcement of lien rights that provide for the right to a separate satisfaction, as they are not mandatory rights, but real rights.

Even if the insolvency practitioner transfers the credit, he can contribute an amount that covers the costs of determination and disposal, as well as the turnover tax (VAT) in advance for the insolvent estate.

The right to separation from satisfaction and the right to separation are different, as the right to separation does not consist in satisfying a claim under the law of obligations.]

A good answer in parts, especially the part dealing with separation. Still, a number of issues were not covered. **8 out 15**

**\* End of Assessment \***