



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 **27September 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]: 40 out of 50 = 80% Well done!

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 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) 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*?

[There are different types of insolvency defined in the *Insolvenzordnung* namely:

- (a) Cash Flow Insolvency/Illiquidity is the most basic form of insolvency and triggers when the debtor is not able to meet the obligation to pay to a considerable number of monetary claims. Illiquidity is defined as a situation when the debtor does not have sufficient liquid funds to pay at least 90% of its dues and payable liabilities over the next three weeks. Though, this may not be compared with a mere delay in making payments of the ordinary dues rather insolvency or the inability to pay should be apparent to a third party;
- (b) Overindebtedness may also be defined as a Balance Sheet Insolvency. It may be defined as an insolvency wherein the debtor does not have the sufficient assets to cover its liability. This may be proved on the basis of a comparative balance sheet

where the assets and liabilities on a particular date may be compared to decide whether the assets are available to cover the liabilities present in the balance sheet. Apart from the fact that the debtor's liabilities surpass its assets, it is to be seen that it is more likely than not that the debtor cannot continue its business within a look forward period of 12 months;

- (c) Imminent Insolvency is based on the likelihood of default on the part of the debtor on the date of maturity of debt i.e. it is more likely than not that the debtor will be unable to pay the debts as and when they fall due within a look forward period of 24 months. It is more sort of an event which can be foreseen.

The question refers to the InsO and yet you do not refer to the relevant sections? 1.5 marks

Question 2.2 [maximum 4 marks]

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

[StaRug is an Act on the Framework for Stabilisation and Restructuring of Enterprises (StaRUG). The law is rather new and came into effect on January 1, 2021. This is an alternative to formal bankruptcy proceedings and provides various instruments for restructuring.

One of the highlight of the StaRUG is the option of pre-insolvency restructuring by way of a restructuring plan. The debtor has the opportunity to submit a restructuring plan to its creditors to provide for the restructuring measures as well as restructuring contributions of the affected creditors.

In view of the time required for a debtor to draft and negotiate the restructuring plan, the StaRUG like InsO provides for imposing a moratorium restricting the enforcement of creditor's rights. It may initially be imposed for a period of three months which may go upto maximum of eight months.

For the purpose of monitoring and mediation between the parties, there is a provision for a restructuring officer as well. Like InsO, there is also an option available to appoint a creditor's committee.

In case if the rescue attempts fail, then regular insolvency proceedings would commence. However, there is no automatic conversion and it only triggers when the debtor and creditors apply for insolvency.

Though, as per the provisions of InsO, it is the decision of Insolvency Practitioner whether liquidation or restructuring is the best available option.

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When must StaRUG be terminated? 3 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?

[Normally, the contracts get wound up post initiation of insolvency proceedings. However, the treatment is different in the case of executory contracts i.e. the contracts wherein either or both of the parties are to fulfil their obligations. As per section 103 InsO, these contracts don't get wound up post initiation of insolvency and rather it is as per the option available to insolvency administrator. If he chooses to perform then the claim of creditor must be satisfied from the insolvency estate. But if the administrator rejects the fulfilment then the creditor will have to raise a claim which will be satisfied on a pro rata basis.

However, in case of tenancy agreements, the insolvency administrator has discretion to terminate the tenancy with 3 months notice at the end of a calendar month. But if the

termination right is not exercised then rent and other payment obligation enjoy priority over other claims. Even landlord can terminate the lease in case if there are rent arrears pertaining to period post insolvency and he can't terminate it for arrears prior to commencement of insolvency.]

2.5 marks

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

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

[The transaction avoidance rules are an important tool in any Insolvency Law to avoid the transactions which are preferential or advantageous to some of the creditors. There is always a time period prior to commencement of insolvency in which the preferential transactions are to be observed. As a remedy, the legislation also provides for striking down the transaction or making good the loss to the corporate debtor as a result of such transactions. The nature of the transaction may be preferential, undervalue or fraudulent.

As per the German Insolvency Code, the law relating to the preferential transactions are stipulated in Part Two sections three of the Insolvency Code. The Code provides that such transactions can be contested by the Insolvency Administrator.

Article 130 in this regard is applicable to the transactions of congruent performance. It can be elaborated as a transaction made by the debtor to secure an insolvency creditor who was entitled to receive the security, payment or other consideration. This can be challenged only if the transactions are made within three months prior to the filing for the insolvency proceedings, or after it, and further if the debtor was already insolvent or illiquid at the time of transaction and illiquidity was in the knowledge of the creditor. Such transactions can be challenged by the administrator on the premise that the debtor was insolvent at the time of the relevant transaction and was not able to satisfy all its debts and the creditor was aware of it.

Similarly, Article 131 provides for the transaction of incongruent performance. This may be defined as a transaction which was made by the debtor to secure or satisfy an insolvency creditor, who was not entitled to such payment or it was made not in that manner or at that time. Thus, if a debt is paid even prior to the date of maturity then it would fall within the purview of incongruent performance. There is a difference in the congruent and incongruent performance as far as administrator is concerned. In case of an incongruent performance, the administrator is supposed to prove only the incurrance of transaction within one month prior to the application for the insolvency proceedings and no need to prove the intent like congruent performance.

Incongruent performances may also be challenged if they are performed within two to three months prior to the filing for the insolvency if the creditor was aware that the performance would lead to the disadvantage of the remaining creditors.

Contrast to abovementioned two Articles, Article 133 of the Code further provides the power for the reversibility of the transaction performed by the debtor within 10 years from the date of filing of insolvency application. It should be proved that the debtor intended to harm or prefer the creditors and the other party was aware of the intent at the date of transaction. There is a legal presumption as far as intent is concerned in case if the counterparty was aware of the debtor's imminent illiquidity and the transaction per se was disadvantageous to the creditors.]

Satisfactory answer – 12 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.

[Before answering the question, one need to understand the nature of claim on the basis of facts of the case in view of the aforementioned facts, B is a secured creditor since it had granted the loan to D on the strength of security of current and future receivables against the customers of D.

In the query, there are two receivables collected by the Insolvency Administrator ('IA').

I. First receivable pertained to a period prior to the commencement of insolvency. It was in respect of a service contract between D & X concluded in June, 2020 by virtue of which the services were provided by D on 7 July, 2020. Total amount of contract is EUR 11,900 including 19% VAT. X paid the consideration in this regard to IA.

As far as the receivable on account of this contract is concerned, there are two part of it. One is the consideration and other is the VAT amount. Since, B is a secured creditor in respect of receivables; therefore it can claim a right to separate satisfaction. Thus, B has a claim against IA for receiving the amount realised by IA from X and IA is obliged to hand over the net proceeds to B (Section 165 InsO). **What is the net proceeds in this case?**

II. Claim created after the opening of insolvency proceedings are not covered by the security rights at all, since it comes into existence after the opening of the proceedings and section 91 of InsO hinders the improvement of the creditor's position after the opening of the proceedings. All receivables created after this point in time are part of the estate and are not covered by the security right. Thus, B would not be able to file a claim against IA as far as receivables from Z are concerned.]

This is a good answer that shows understanding of the issues at play. 13 out of 15

End of Assessment