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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6G**

**SPAIN**

This is the **summative (formal) assessment** for **Module 6G** of 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 6G**. 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 or Avenir Next 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.assessment6G]**. An example would be something along the following lines: 202223-336.assessment6G. **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 **31 July 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**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**

In general terms, the Spanish insolvency system is regarded as inefficient. What is the main efficiency problem relating to **insolvency administrators**?

1. The Spanish market lacks a sufficiently large pool of specialised professionals.
2. The technical level is low.
3. The remuneration system is flawed.
4. There are no professional associations with codes of conduct and disciplinary procedures in case of malpractice.

**Question 1.2**

In general terms, the Spanish insolvency system is regarded as inefficient. What is the main efficiency problem relating to **courts**?

1. The lack of specialised judges.
2. The number of insolvency courts.
3. The scarce resources that the system allocates to insolvency courts.
4. The reputation of the judges.

**Question 1.3**

The insolvency reform of 2003 created one **unified** procedure (*concurso de acreedores*). This procedure –

1. Applies to both natural persons and legal entities, so long as they have legal personality, disregarding whether they are professional debtors (sole entrepreneurs, companies) or private individuals.
2. Is currently regulated, as far as substantive matters are concerned, in the Recast Insolvency Act. Procedural aspects, however, are regulated elsewhere, in the Civil Procedure Act.
3. Exclusively allows for the liquidation of the debtor’s estate. Reorganisations ought to be carried out through out-of-court procedures.
4. Does not entail any special treatment for less complicated / smaller cases.

**Question 1.4**

In Spain, insolvency proceedings can be **opened**:

1. *Ex officio* by the court.
2. Upon the request of at least 20% of the creditors.
3. Exclusively upon the request of the debtor.
4. None of the above is correct.

**Question 1.5**

In Spain, the **commencement** of insolvency proceedings:

1. Entails the automatic stay of all enforcement actions, with no exceptions.
2. Has no automatic effect on enforcement actions. The insolvency court will order a stay on a case-by-case basis.
3. Entails the automatic stay of enforcement actions, with the exceptions of certain labour enforcement actions, certain public enforcement actions and the enforcement of securities, irrespective of the seized assets / the collateral.
4. Entails the automatic stay of the enforcement of security, but the enforcement may be resumed once the insolvency court declares that the collateral is not necessary for the continuation of the debtor’s business activity.

**Question 1.6**

Insolvency practitioners in Spain:

1. Are civil servants.
2. Can be either natural persons or legal entities.
3. Are not allowed to appoint assistants.
4. Collect their remuneration only after all creditor claims have been satisfied.

**Question 1.7**

Regarding the **effects of the commencement** of insolvency proceedings on the debtor:

1. The fundamental rights and freedoms of the debtor shall not be affected by the commencement of insolvency proceedings.
2. If the debtor files for its own insolvency, the general rule provides that its patrimonial faculties will be merely subject to the intervention of the insolvency administration, but not suspended.
3. The operations carried out by the debtor in contravention of the patrimonial limitations are, by definition, null and void.
4. The commencement of insolvency proceedings automatically interrupts the debtor’s business activity.

**Question 1.8**

Regarding the **ranking of claims** under Spanish insolvency law:

1. All claims against the estate are those arising after the opening of insolvency proceedings.
2. The subordination of claims is automatic (that is, it does not require any judicial decision) upon the concurrence of certain circumstances.

1. As far as the payment of secured claims is concerned, if the realisation of the collateral brings a surplus over the value of the claim, the secured creditor will be entitled to collect said surplus.
2. None of the above is correct.

**Question 1.9**

The insolvency plan:

1. Must necessarily include reschedulings and write-offs, with no limits whatsoever.
2. Can provide for write-offs that do not exceed 50% of the value of the claims.
3. Can provide for reschedulings that do not exceed 10 years.
4. Can be subject to a condition precedent.

**Question 1.10**

The Spanish Insolvency Recast provides for the **discharge of the unsatisfied claims**. This regime:

1. Entails the automatic exoneration of all unsatisfied claims for natural persons who have undergone insolvency proceedings.
2. Has a limited scope, since it does not affect all claims.
3. Can be applied irrespective of whether the insolvency has been classified as guilty or not.
4. Is exclusively foreseen for natural persons who are entrepreneurs.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 2 marks]**

Will a provision in a contract providing for automatic termination of the contract upon the commencement of insolvency proceedings over one of the Spanish contracting parties be enforceable in Spain? (Students should please limit their answers to this question to 50 words.)

No, the Recast Insolvency Act renders ineffective ipso facto clauses. Therefore, automatic termination clauses in upon commencement of insolvency are not enforceable.

**Question 2.2 [maximum 4 marks]**

Why is Spain considered a creditor-friendly jurisdiction when compared to other jurisdictions? (Students should please limit their answers to this question to 150 words.)

Spain is considered a creditor-friendly jurisdiction because the Spanish insolvency system has a primary function to solve the “crisis” caused by the Debtor’s insolvency by satisfying creditors in the most efficient way. This can be achieved by selling the assets of the debtor to pay creditors with such proceeds or by proposing a payment plan or insolvency plan. Other jurisdictions, like the United States are more Debtor friendly because they favour the Debtor’s fresh start rights and discharge. Spanish insolvency law gives preference to the interests of the creditors over the interests of the Debtor because of its “solving function”. The insolvency proceedings also have a repressive function against the Debtor, qualifying the insolvency as “guilty” or “fortuitous”. This function is not present in other jurisdictions that are Debtor-friendly.

**Question 2.3 [maximum 4 marks]**

Name and briefly summarise the requirements to obtain the recognition of a foreign insolvency-related judgment in Spain (both from a EU country and from a non-EU country of origin). (Students should please limit their answers to this question to 100 words.)

1. For an EU country: Recognition is automatic if the judgment is entered in a proceeding included in Annex A of the EIR Recast and the foreign court has jurisdiction based on the location of the COMI.
2. For a Non EU country: The opening judgment needs to be recognized via an exequatur. The other judgments are recognized automatically. The exequatur has various conditions:
   1. Proceedings is collective based on Debtor’s insolvency
   2. Judgment is final
   3. Competence of the foreign Court based on the Debtor’s COMI, establishment or a connection of equivalent nature
   4. Judgment not due to contempt of court by the Debtor
   5. Judgment not contrary to Spanish public order

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

**Question 3.1 [maximum 7 marks]**

Is it possible, under Spanish law, to restructure the debt of a group of companies through a single procedure? (Students should please limit their answers to this question to 200 words.)

Spanish law does not have a specialized procedure for corporate rescue. The same is treated as an insolvency proceeding. The law allows the restructuring of the debt of a group of companies through the special regime of coordinated proceedings, where various proceedings are accumulated. One court has competence, there is one insolvency administrator and the insolvency plans are coordinated. Nevertheless, the insolvencies are not dealt unitarily. This means that the assets and liabilities of each member of the group is dealt separately and the cases may have different out comes. This regime may allow for the substantive consolidation of all cases of the members of the group of companies are so intertwined that they can be dealt as one unit. This is an exception. Also, this is available at the pre-insolvency level where joint communications and joint restructuring plans can be presented by groups of companies.

**Question 3.2 [maximum 8 marks]**

Describe the main advantages of envisaging a special insolvency procedure for microenterprises and the problems associated with ordinary insolvency proceedings that said special procedure intends to avoid. (Students should please limit their answers to this question to 250 words.)

The main advantage of a special insolvency procedure for microenterprises is that the procedure provides a more agile and reduced cost alternative for dealing with insolvency or restructuring of small businesses or microenterprises. It is designed to allow the business to continue or to liquidate in an expedite and cost effective fashion, taking into consideration the fast pace and volatility of these specific debtors. This special procedure uses the technological tools available in order to allow these special debtors to navigate without the burdens of a typical insolvency or restructuring procedure. Its modular nature also reduces costs to creditors which are associated with the ordinary insolvency proceedings.

Among the problems or inconveniences associated with the ordinary insolvency proceedings that are not present in the special procedure for microenterprises are the formalities, the costs of multiple professionals that need to be engaged in the case, the paperwork and filings that have to be done in person, the constant need for judicial intervention, the consecutive stages of ordinary proceedings instead of the parallel stages available in the special procedure for microenterprises, the lack of virtual proceedings and lengthy wait period for opinions or judicial decisions and lack of finality due to long appellate process, among others.

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

ADARU, SL is a product manufacturing company incorporated under the laws of Spain that is undergoing certain financial distress. It is therefore exploring options to restructure its debt. The relevant creditors are mostly banks and financial institutions (holders of both secured and non-secured claims). However, commercial, public and labour claims are also significant. ADARU is the licensee in a patent license agreement related to its manufacturing process with a German licensor. It also has a distribution agreement with a Spanish company.

The general counsel in Madrid has asked you to advise on the following issues:

* Is there any mechanism to protect your client from the commencement of insolvency proceedings upon creditors’ petitions and from enforcement actions during the negotiations of the restructuring plan? In what financial situation should ADARU be for these mechanisms to be available? Is it necessary that its business is viable in order to resort to these mechanisms?
* Is there a risk that the counterparties to the different key contracts of ADARU terminate them once they know that your client has started negotiations aimed at its restructuring? Would the answer be different if ADARU had breached its payment obligations under the license and the distribution agreements?
* In the event that the banks have exercised enforcement actions for the collateral, would these actions be affected? In the event that the counterparty to the distribution agreement had exercised enforcement actions to recover the claim, would this action be affected?
* Does ADARU remain in possession?
* How should creditors be organised so as to adopt the agreement that will avoid the commencement of insolvency proceedings?
* Can this agreement be extended to dissenting creditors?
* Can the agreement be adopted without the consent of ADARU? Is the approval of its general meeting necessary for said approval?
* In the event that the restructuring plan envisages a debt-to-equity swap, can this measure be imposed on ADARU’s shareholders if they do not approve thereof?
* What requirements do the restructuring plan need to meet so as to protect the fresh money granted and the operations performed thereunder?

Let’s address the multiple questions of the Madrid counsel as the same are posed:

1. Is there any mechanism to protect your client from the commencement of insolvency proceedings upon creditors’ petitions and from enforcement actions during the negotiations of the restructuring plan?- Yes, the company has a pre-insolvency tool available. It can issue and file with the Court a communication of negotiations with creditors which would stay enforcement actions during negotiations and the commencement of an insolvency proceeding from its creditors. This communication protects ADARU because it provides a stay or moratorium in order to allow ADARU to negotiate with creditors and achieve a restructuring plan.
2. In what financial situation should ADARU be for these mechanisms to be available?- Since this is a pre-insolvency tool, ADARU cannot be insolvent. It has to be in a state of probable insolvency, which has been defined as a state in which if the Debtor does not have a restructuring plan in place, it will become insolvent in a period of two (2) years. See RIA Art. 584.1 and 584.2.
3. Is it necessary that its business is viable in order to resort to these mechanisms?- Yes, the business has to be viable, since the purpose of these pre-insolvency tools is the preservation of the business operation and the financial rehabilitation of the Debtor who is carrying out a business activity.
4. Is there a risk that the counterparties to the different key contracts of ADARU terminate them once they know that your client has started negotiations aimed at its restructuring? – No, there is no risk, since ipso facto clauses are not enforceable once a Debtor commences its pre-insolvency process. See RIA Art. 595, 597 and 598.
5. Would the answer be different if ADARU had breached its payment obligations under the license and the distribution agreements? – No, ipso facto clauses are still unenforceable if the other party has not declared a default under the contract or terminated the contract and the same remains executory.
6. In the event that the banks have exercised enforcement actions for the collateral, would these actions be affected? – The enforcement of actions against the collateral depend if such collateral is necessary for the operation of the business or not. It is necessary for the operation of the business the enforcement actions are stayed or suspended automatically. If the collateral is not necessary for the operations, then the enforcement proceedings can continue and is not suspended.
7. In the event that the counterparty to the distribution agreement had exercised enforcement actions to recover the claim, would this action be affected?- Yes, this action would be suspended since the distribution agreement is necessary for ADARU’s operations.
8. Does ADARU remain in possession? – Yes, ADARU remains in possession of its assets and is able to continue with the operations of its business. Pre-insolvency proceedings allow the debtor the ability to continue in control of its assets and dispose of the same due to its minimal intervention with the administration of the business.
9. How should creditors be organised so as to adopt the agreement that will avoid the commencement of insolvency proceedings?- Creditors should be organized depending on the rank, nature and priority they have. Secured creditors, executory contracts (like the distribution and licensing agreement) and labour claims should be organized separately from other unsecured creditors or those other creditors that do not have a priority under the law or have a common interest. Secured creditors can also be classified separately if they hold different collateral and different treatment will be provided to their claims.
10. Can this agreement be extended to dissenting creditors? – Yes, the agreement can be extended to dissenting creditors if certain conditions are met. If the plan is consensual it is considered a horizontal cramdown and the Debtor needs to prove:
    1. That the plan offers a reasonable of avoiding insolvency of the Debtor and shorten the viability of the Debtor in a short or medium period of time.
    2. The plan complies with the legal requirements of contents and form.
    3. All claims within the same class receives an equal treatment.
    4. The plan has been notified to all affected creditors.
    5. The plan respects the minimum rights of the dissenting creditors including equal treatment within the class, the best interest test and the “sacrifice” of their claim is not disproportionate to what is needed for the viability of the company.

If the plan is not consensual it is considered a cross-claim or vertical cramdown. The Debtor needs to prove:

a. All requirements for the horizontal cramdown plus

b. If majority of classes is not achieved, at least one affected class has voted in favor of the plan.

c. The absolute priority must be respected.

1. Can the agreement be adopted without the consent of ADARU? – No, the plan needs to be consented by ADARU’s majority shareholders. If the plan is consensual then it has to be approved by the majority of the shareholders then the minority shareholders who dissent the approval of the plan are to bound as per corporate by-laws. If the plan is non-consensual then it is necessary to see if the Debtor is a small company or not. If the company is a small company, then the plan needs to be consented by the Debtor and its shareholders. If the Debtor is not a small company then in order to impose the non-consensual plan on the Debtor’s shareholders the insolvency must be actual or imminent, not just a mere likelihood of insolvency. Nevertheless, the plan cannot be imposed if the Debtor is a natural person or the shareholders are liable for the claims.
2. Is the approval of its general meeting necessary for said approval? – The Spanish law does not require that the approval of a pre-insolvency plan follow a formal or regulated procedure for voting in favor of the plan. The same is organized and conducted by the debtor. With respect to the shareholders, a shareholders meeting must be held in accordance to corporate rules and notice, agenda and the required majority as per the by-laws of the corporation is necessary.
3. In the event that the restructuring plan envisages a debt-to-equity swap, can this measure be imposed on ADARU’s shareholders if they do not approve thereof? If the shareholders do not approve this measure, the same can be imposed to them if the absolute priority rule is followed and all other requirements for the vertical cramdown are complied with.
4. What requirements do the restructuring plan need to meet so as to protect the fresh money granted and the operations performed thereunder? In order to protect fresh money and operations the plan needs to comply with the following: protection must be granted against avoidance actions and protection is granted to allow negotiations and implementation of the plan. This is achieved by the judicial homologation of the plan and a certain proportion of affected claims. This allows the preservation of this new financing from avoidance actions in the event of a subsequent insolvency and for it to maintain a preferential rank for payment in the event of insolvency.

**\* End of Assessment \***