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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, under Spanish insolvency law, provisions in contracts that automatically terminate the contract upon the commencement of insolvency proceedings over one of the contracting parties are generally unenforceable. Insolvency proceedings trigger a stay on contractual termination clauses to protect the interests of the insolvent party and its creditors.]

**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 due to several factors. Its insolvency laws prioritize creditor protection by providing mechanisms such as the automatic stay of enforcement actions upon the commencement of insolvency proceedings, facilitating creditor participation in insolvency proceedings, and allowing for the discharge of unsatisfied claims. Additionally, Spain's legal framework emphasizes the orderly distribution of assets to creditors, ensuring fair treatment and maximizing creditor recovery. These creditor-friendly provisions aim to enhance the efficiency and effectiveness of insolvency proceedings while balancing the interests of debtors and creditors in resolving financial distress situations.]

**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.)

[In Spain, to obtain recognition of a foreign insolvency-related judgment from an EU country, the requirements include a declaration of enforceability from the court of origin and the submission of a certified copy of the judgment. For non-EU countries, the judgment must meet certain criteria, including reciprocity with Spain, conformity with Spanish public policy, and a court decision recognizing its enforceability.]

**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.)

[Yes, under Spanish law, it's possible to restructure the debt of a group of companies through a single procedure known as a "concurso de acreedores" (creditors' voluntary arrangement). This procedure allows a group of companies to file for insolvency collectively, consolidating their debts and assets. However, each company within the group must meet certain legal criteria to be eligible for inclusion in the same proceeding. The restructuring plan must be approved by the creditors and confirmed by the court. This consolidated approach streamlines the process, avoids duplicative proceedings, and promotes efficient resolution of financial difficulties within the group.]

**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.)

[Envisaging a special insolvency procedure for microenterprises offers several advantages. Firstly, it provides a simplified and cost-effective framework tailored to the specific needs and resources of microenterprises, which typically lack the financial capacity and administrative resources to navigate complex insolvency processes. This specialized procedure facilitates quicker and more efficient resolution of financial distress, allowing microenterprises to focus on restructuring and preserving their business operations rather than being burdened by lengthy and cumbersome legal proceedings.

Moreover, a dedicated insolvency procedure for microenterprises aims to address the problems associated with ordinary insolvency proceedings, such as excessive administrative requirements, high costs, and lengthy timeframes. Ordinary insolvency proceedings often involve complex legal procedures and substantial professional fees, which can be prohibitive for microenterprises with limited financial resources. Additionally, the lengthy duration of ordinary proceedings can exacerbate the financial strain on microenterprises, leading to further deterioration of their financial position and increased risk of liquidation.

By contrast, a special insolvency procedure for microenterprises seeks to streamline the process, reduce administrative burdens, and lower costs, thereby enabling timely intervention and rehabilitation of financially distressed microenterprises. This approach not only benefits the microenterprises themselves but also contributes to the overall economic stability by preserving jobs, fostering entrepreneurship, and maintaining a competitive business environment.]

**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?

[1. Mechanisms to Protect from Insolvency Proceedings and Enforcement Actions: ADARU can explore the possibility of a pre-insolvency mechanism, such as a "pre-concurso" proceeding, available when facing financial distress but before insolvency. The company should be in a situation where it's struggling to meet its financial obligations but still has prospects for viability. Viable businesses can use these mechanisms to negotiate restructuring plans without the threat of immediate insolvency proceedings or enforcement actions.

2. Risk of Contract Termination: There is a risk that counterparties to key contracts may terminate them upon learning of ADARU's restructuring negotiations, especially if payment obligations are breached. The risk may be mitigated through communication and negotiation. However, if ADARU is in breach, counterparties may have stronger grounds for termination.

3. Effect of Enforcement Actions by Banks and Counterparties: Enforcement actions by banks and counterparties may complicate restructuring efforts. Depending on the situation, these actions could be affected by ongoing negotiations or restructuring proceedings.

4. Possession of Assets: ADARU typically remains in possession of its assets during restructuring negotiations unless a court orders otherwise.

5. Organizing Creditors and Adopting Agreement: Creditors should be organized to adopt a restructuring agreement aimed at avoiding insolvency proceedings. This may involve negotiation and consensus-building among various creditor groups.

6. Inclusion of Dissenting Creditors: The restructuring agreement ideally should include provisions to bring dissenting creditors on board, possibly through voting mechanisms or incentivizing participation.

7. Approval Without ADARU's Consent: Depending on the circumstances, a restructuring agreement may be adopted without ADARU's consent, but its approval might be necessary depending on the specifics of the agreement and corporate governance rules.

8. Debt-to-Equity Swap and Shareholder Approval: A debt-to-equity swap may require shareholder approval if it significantly impacts their rights. If shareholders do not approve, the imposition of such measures could depend on legal provisions and the specifics of the restructuring plan.

9. Requirements for Protecting Fresh Money: The restructuring plan should include provisions to protect fresh investments and operations, ensuring that they are shielded from potential insolvency or creditor claims. This might involve creating priority rights or security interests for new investors.]

**\* End of Assessment \***