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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, it will not be enforceable according to the principles of article 111 because Spanish insolvency law establishes the concept of continuity of the business activity of the debtor in order to restructure its estate and repays its creditors. The law protects the continuity and validity of the contracts and article 156 clearly stipulates the ineffectiveness of such clause.

**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 (i) the limitations to automatic stay since, while the commencement of insolvency proceedings triggers an automatic stay, secured creditors benefit from the right to a separate enforcement if the debtor’s obligation defaulted at maturity; and (ii) the limitations to the discharge regime since Spain does not offer automatic discharge of liabilities for debtors but factors like good faith are important to determine eligibility, which can be perceived as creditor-friendly measures. Overall, the basic function of the Spanish insolvency law is “solving function” which entails solving the crisis by maximizing recoveries to creditors in the most efficient way either by means of an insolvency plan (*convenio concursal*) or by means of liquidation (*liquidacion concursal*).

**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.)

Stemming from a EU country, the requirements are: (i) the insolvency proceedings are within Annexure A of the Recast EIR; (ii) the foreign court jurisdiction is consistent with the location of the COMI; and (iii) the foreign proceeding does not impede on Spanish public order. For a non-EU country, the supplementary regime of the Recast Insolvency Act requires an *exquatur* for the submission of the opening judgment. The requirements thereafter comprise: (i) the collective nature of the proceeding; (ii) the final nature of the foreign order; (iii) the competence of the foreign court based on the COMI, establishment, or equivalent nature; (iv) the rights of the debtor are not affected by a contempt of court; (v) consistency with Spanish public order; and (vi) reciprocity between Spain and the non-EU country.

**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 the Recast Insolvency Act article 38 et sub., it is possible to restructure the debt of a group of companies through a single procedure which is voluntary and based on a set of co-ordinated proceedings. There are specific regulations allowing a group of companies to (i) apply jointly for insolvency proceedings at the onset or at a later stage; or (ii) inform the court of the recourse to negotiations with creditors for the agreement on a restructuring plan. Substantive consolidation is only exceptionally granted as generally the limited liability principle prevails among Spanish companies to prevent assets and liabilities of companies within a group from being combined. As a result, the assets and liabilities of the different entities in the group will remain separated with different insolvency proceedings, yet coordinated among each other and with possibly different outcomes. Typically, this single procedure would allow the appointment of the same insolvency administrator to manage all of the proceedings. The procedure can also permit a debtor to request the suspension of the enforcement of guarantees or security interests granted by another company in the group, provided that evidence is provided to prove that this could lead to the insolvency of the debtor and guarantor.

**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 special procedure for microenterprises is called *procedimiento especial para microempresas*. The main advantages of the procedure are (i) its cost-effective and efficient approach driven by the modular approach whereby the parties are allowed to request the effects required only if they need to, such as stay on execution of enforcement actions etc., which avoids unnecessary cost and formalities and allows faster resolution with less unnecessary formalities; and (ii) the broad application of the procedure stemming from its unitary nature, allowing the microenterprise to use the procedure either for pre-insolvency restructuring plans or actual insolvency and bankruptcy.

The problems associated with ordinary insolvency proceedings that this special procedure intends to avoid are (i) the high costs of ordinary insolvency proceedings that trigger automatic effects for creditors that are costly and time-consuming for microenterprises, such as the fees paid to lawyer, restructuring experts, insolvency practitioner etc.; and (ii) the complex and bureaucratic processes which are addressed by simpler and more streamlined processes on the special procedure, such as the use of standard electronic forms for submission, compared to traditional paper pleadings for ordinary processes, and the possibility for parallel proceedings as opposed to proceedings taking stage in a linear fashion in ordinary proceedings.

**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?

Under Spanish law, creditors can initiative insolvency proceedings. However, ADARU can take advantage of pre-insolvency mechanisms or *preconcurso* through (i) the communication/notification to the court of its intention to start negotiations immediately with its creditors to agree on a restructuring plan, which must be agreed within 3 months; or (ii) the proposal of a restructuring plan as introduced and defined by Law 16/2022 of 5 September. Since ADARU is already undergoing financial distress and probably foresees its inability to regularly and punctually meet its debt payment obligations over the next 3 months, it is advisable to make this communication as soon as possible and effect a stay of enforcement actions over the assets of ADARU that are necessary for the business continuity. This mechanism can be used if the company is in a situation of present or imminent insolvency or even probable insolvency, with the concept of insolvency defined by a cash-flow test according to Royal legislative Decree No 1/2020 of 5 May. The pre-insolvency mechanisms are only available to rescue viable businesses to ensure their continuity.

* 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?

According to article 156 of the Recast Insolvency Act, the commencement or intention of commencement of a reorganisation proceeding precludes counterparties to the different key contracts of ADARU to seek termination, on grounds that these contracts are necessary to maintain the activity of ADARU and serve the purpose of rescuing the viability of the business. However, if ADARU has breached its payment obligations under the license and distribution agreements prior to the say commencement of proceedings, the counterparties could benefit from the provisions for termination for non-compliance per article 160 of the Recast Insolvency Act and as confirmed by the judgment of the Spanish Supreme Court of 11 October 2011. Indeed, it can be considered that the license and distribution agreements are of successive tract or continual performance. However, since these two contracts are essential to the viability of the business i.e. a patent for the product and a distribution for sales in Spain, the court could prevent the termination of these contracts in the interest of the estate and consider the breach as a preferential claim in the course of the proceedings.

* 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?

If banks exercise enforcement actions for the collateral, it is important to know that enforcement actions over assets or rights necessary for the continuity of the business will be suspended, excluding any financial collateral that is available and not affecting the rescue of ADARU. It is likely that in the case of enforcement actions by the counterparty to the distribution agreement, such actions will be suspended and the court orders consequently that the contract is fully complied with and not terminated. Since this is a payment obligation it is pending performance only by the debtor and so this claim will be classified within the insolvency proceeding as a claim against the estate as an ordinary claim and as the contact is executory and vital in nature, the court will object to its termination.

* Does ADARU remain in possession?

If ADARU files for voluntary reorganisation within the two months of the date on which it knew or should have known of insolvency, then ADARU will remain in possession. This is consistent with the legislation objective to incentivize distressed companies to file early and facilitate a speedier path to recovery.

* How should creditors be organised so as to adopt the agreement that will avoid the commencement of insolvency proceedings?

Creditors should be organized into classes of homogenous interests in order to ensure a proper functioning of the voting on the reorganization plan. Since ADARU has a diverse set of claim-holders ranging from banks, financial institutions, commercial, public and labour claims, and patent and distribution licensors, according to Spanish law, creditors will be grouped according to common interests among claims with the same ranking in the insolvency proceeding: secured creditors will be grouped in a single class; claims that have a public nature will be within a separate class; and another class will encompass SME creditors if the restructuring plan leads to a haircut of more than 50% of their claims.

* Can this agreement be extended to dissenting creditors?

Pre-packaged insolvency plans can be crammed down according to the Recast Insolvency Act. Indeed, to bind dissenting creditors, including entire classes and equity holders, the requirements stipulate that the restructuring plan must be approved by (i) a simple majority of classes assuming that such majority includes at least one class of claims ranked as privileged claim; and (ii) at least one class that is in-the-money as confirmed by a restructuring expert on the valuation of ADARU as a going concern. The appointment of the restructuring expert is required for the court to sanction the agreement and homologate (judicial homologation) it so it becomes binding on dissenting creditors.

* Can the agreement be adopted without the consent of ADARU? Is the approval of its general meeting necessary for said approval?

Spanish law allows the shareholders of ADARU to vote on the agreement according to the company’s corporate rules (according to article 631.1 of the RIA). As such, the equity holders are considered as one class among the classes formed and their vote is considered for the approval of the restructuring plan in accordance with the rules outlined on the previous questions. One needs to note that according to article 631.2 quorums or special majorities drafted in the company’s bylaws are void with respect to the agreement on a restructuring plan.

To homologate the restructuring plan (without cramdown) the plan must be approved by all creditors and equity holders if they are legally liable for the debts of the corporation or by the shareholders’ meeting otherwise. However, if the shareholders are dissenting to the approval of the plan, they can be crammed down in according to the principles laid out in the previous question.

* 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?

There are special provisions in case the restructuring plan envisages a debt-to-equity swap. Accordingly, in reference to article 376.2, the approval of 50% of the ordinary claims is required, with a definition of ordinary claims, for the purpose of calculating the votes, that includes not only ordinary claims but also privileged claims, special or general, inclusive of tax claims, employment claims etc. As a result, if the 50% threshold is attained and ADARU’s shareholders are among the remaining 50% dissenting, the plan can be approved accordingly.

* What requirements do the restructuring plan need to meet so as to protect the fresh money granted and the operations performed thereunder?

The restructuring plan needs to obtain judicial homologation in order to receive special protection in subsequent insolvency proceedings for the new financing. It should be noted that according to articles 242 and 280 of RIA the claims of the new financing will be classified as a claim against the insolvency estate for 50% and as a general privilege claim for the remaining 50%. 50% of the principal amount of the new money provided necessary for the execution of the restructuring plan will be carved out legally to benefit from the same level of ranking as the insolvency receiver’s fees (administrative costs). This new money will also benefit from protection against clawback actions related to provisions against detrimental actions that could have occurred between ADARU’s beginning date of financial crisis and application date for the commencement of the insolvency plan.

**\* End of Assessment \***