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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 law provides the ineffectiveness of any contractual clauses that provides the automatic termination of the contract for the sole reason of the commencement of insolvency proceedings or the opening of the liquidation stage, in favour of any of either of the contracting parties.

**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 of the functions of the insolvency proceedings. Firstly, upon the “solving function”, the purpose of insolvency proceedings is to solve the crisis by satisfying creditors in the most efficient way, and, under the second function so-called “preservation function”, permits the continuation of the debtor’s professional or business activity if such continuity does not entail a lesser satisfaction of creditors. Also, according to the repression of the debtor or of its directors function, while punishing the conduct of the debtor or its directors (if legal entity) who generated or aggravated the insolvency through fraud or gross negligence, the qualification makes it possible to increase he degree of satisfaction of the creditors, because they can de condemned to pay the unpaid claims.

**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.)

To obtain the recognition of a foreign insolvency-related judgment from an EU country, there are two requirements to be met to be automatically recognised: 1) that the insolvency proceedings are included in annex A of the Recast EIR, and 2) the foreign court has jurisdiction according to the location of the COMI.

To obtain the recognition of a foreign insolvency-related judgment from a non-EU country, there are 5 conditions: 1) The proceeding must be collective, based on the insolvency of the debtor, by whose virtue his assets and activities are subject to control or supervision by a foreign authority or court, and for the purposes of the reorganization or winding-up; 2) the opening judgment must be final; 3) the competence of the foreign court that issued the judgment must be based either on the debtor’s COMI, the existence of an establishment, or a reasonable related connection of an equivalent nature; 4) the judgment must not have been handed down in contempt of court by the debtor; and 5) the judgment must not be contrary to Spanish public order.

Once the opening judgment is recognised in Spain, any other judgment issued on that proceeding is automatically recognised.

**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.)

Under Spanish law, it is possible to restructure the debt of a group of companies though a single procedure. Although the general rule is the co-ordination and accumulation of proceedings that will not be dealt with unitarily, the law exceptionally envisages the substantive consolidation of the different debtor’s assets and liabilities. This can exclusively be ordered provided that the different states are so intermingled that it is not possible to delimitate the correct owners of the assets and liabilities without incurring on unjustified delays or costs.

As said, the general rule is that several companies of the same group can be subject to a voluntary special regime, which consists of co-ordinated proceedings, which can be accumulated from their commencement with the filling of a joint petition or at a later stage, and each proceeding will follow its own path and can end differently.

**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 advantages of envisaging a special insolvency proceeding for microenterprises is that this proceeding allows the parties to request a number of effects (or “modules”) only if they so wish (for example, the appointment of an insolvency practitioner), eliminating all unnecessary formalities and reducing the participation of professionals and institutions. This helps to reduce the costs and the duration of the proceeding, as well as to increase its effectiveness due no pointless measures or effects are automatically undertaken.

In addition, the procedural structure is simpler and modern, as it allows the filling of standardized forms by electronic means and the holding of hearings by telematics means.

In addition, the special procedure has a unitary nature as microenterprises do not have access to insolvency proceedings or restructuring plans. Consequently, individual entrepreneurs can also have access to the second chance procedure.

All these advantages and characteristics of the special insolvency procedure seek to avoid the problems of the ordinary insolvency procedure related to its high costs, long duration, and participation of the court and professionals and institutions.

**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?

To avoid the commencement of insolvency proceedings upon creditors’ petitions and from enforcement actions during the negotiations of the restructuring plan, ADURU may initiate a communication of the opening of negotiation with creditors, so that the stay associated with said communication does not allow the exercise of creditors’ petition nor enforcement actions. For this, the Company can be in a state of probable insolvency, imminent insolvency or current insolvency.

With this pre-insolvency proceeding, ADURU will remain in possession because in the communication of the opening of negotiation with creditors there is no intervention or suspension of any kind in respect of the debtor’s powers to administer and dispose of its assets and rights.

Also, there is no risk that the counterparties terminate the executory contracts because Spanish law provides the ineffectiveness of any contractual clauses that provides the automatic termination of the contract for the sole reason of the commencement of insolvency proceedings or the opening of the liquidation stage. If ADARU had breached its contracts, it must be distinguished whether the breach occurred before or after the insolvency proceedings were initiated, because if it was before the declaration of insolvency, the termination can be exercised in any event, but if it was after it can only be exercised if the contract was of successive tract.

Regarding the enforcement actions and collaterals, it is necessary to distinguish if the collateral consists of non-necessary assets, because in that case the enforcement not stop under any circumstances. On the other hand, if consist in necessary assets, the enforcement may be commenced but suspended immediately. The communication of the opening of negotiation with creditors causes a stay of enforcement actions over the assets of the debtor that are necessary for the continuation of his activities.

Creditors should be organised into classes according the rank of their claims. Once the classes have been formed, the plan should be subject to approval by each class. If one of the classes does not approve the plan, the judicial homologation and extension of the effects is also possible. Non-consensual restructuring plans can be judicially homologated against the will of one or more of the classes as long as the plan has been approved by a simple majority of the classes, at least one of which being a class of privileged claims.

The general meeting of ADARU can approve the restructuring plan in accordance with corporate rules. However, it is important to take into consideration that, the agreement can be adopted even without the consent of ADARU and be imposed on the shareholders or partners of the company. For this to happen, the insolvency must be actual or imminent.

To protect the fresh money granted and the operations permed thereunder, the restructuring plan must (i) have been judicially homologated and (ii) a certain proportion of affected claims. Met those requirements, the interim and/or new financing are protected from avoidance actions and enjoy a collection preference in event of subsequent insolvency proceedings.

**\* End of Assessment \***