



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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 8 pages.**

**ANSWER ALL THE QUESTIONS**

**TOTAL: 44.25/50 MARKS - Well done!**

QUESTION 1 (multiple-choice questions) [10 marks in total] **8 marks, good!**

**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?**

- (a) The Spanish market lacks a sufficiently large pool of specialised professionals.**
- (b) The technical level is low.**
- (c) The remuneration system is flawed.**
- (d) 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?**

- (a) The lack of specialised judges.**
- (b) The number of insolvency courts.**
- (c) The scarce resources that the system allocates to insolvency courts.**
- (d) The reputation of the judges.**

Question 1.3

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

**(a) 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.**

**(b) 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.**

**(c) Exclusively allows for the liquidation of the debtor's estate. Reorganisations ought to be carried out through out-of-court procedures.**

**(d) Does not entail any special treatment for less complicated / smaller cases.**

Question 1.4

In Spain, insolvency proceedings can be opened:

**(a) Ex officio by the court.**

**(b) Upon the request of at least 20% of the creditors.**

**(c) Exclusively upon the request of the debtor.**

**(d) None of the above is correct.**

Question 1.5

In Spain, the commencement of insolvency proceedings:

**(a) Entails the automatic stay of all enforcement actions, with no exceptions.**

**(b) Has no automatic effect on enforcement actions. The insolvency court will order a stay on a case-by-case basis.**

**(c) 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.**

**(d) 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.**

Commented [MFS1]: This part of answer c is incorrect.

Commented [MFS2]: The correct answer is d.

Question 1.6

**Insolvency practitioners in Spain:**

- (a) Are civil servants.
- (b) Can be either natural persons or legal entities.**
- (c) Are not allowed to appoint assistants.
- (d) 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:**

- (a) The fundamental rights and freedoms of the debtor shall not be affected by the commencement of insolvency proceedings.
- (b) 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.**
- (c) The operations carried out by the debtor in contravention of the patrimonial limitations are, by definition, null and void.**
- (d) The commencement of insolvency proceedings automatically interrupts the debtor's business activity.

**Commented [MFS3]:** The correct answer is b.

**Commented [MFS4]:** This answer is incorrect because the effects of the operations carried out by the debtor in contravention of the limitations will depend on whether these operations are detrimental or beneficial for the estate.

Question 1.8

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

- (a) All claims against the estate are those arising after the opening of insolvency proceedings.
- (b) The subordination of claims is automatic (that is, it does not require any judicial decision) upon the concurrence of certain circumstances.**
- (c) 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.
- (d) None of the above is correct.

Question 1.9

**The insolvency plan:**

- (a) *Must necessarily include reschedulings and write-offs, with no limits whatsoever.*
- (b) *Can provide for write-offs that do not exceed 50% of the value of the claims.*
- (c) **Can provide for reschedulings that do not exceed 10 years.**
- (d) *Can be subject to a condition precedent.*

Question 1.10

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

- (a) *Entails the automatic exoneration of all unsatisfied claims for natural persons who have undergone insolvency proceedings.*
- (b) **Has a limited scope, since it does not affect all claims.**
- (c) *Can be applied irrespective of whether the insolvency has been classified as guilty or not.*
- (d) *Is exclusively foreseen for natural persons who are entrepreneurs.*

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] **1.75 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, because in Spanish law, the opening of an insolvency proceeding doesn't terminate executory contracts, as a general rule. The exceptions are termination due to a breach of contract and termination in the interest of the proceeding.*

***I would add that such a provision is directly ineffective under Spanish law.***

Question 2.2 [maximum 4 marks] **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 it has a unified approach for the insolvency procedure. It has the purpose to solve the debtor's crisis by satisfying creditors in the most efficient way possible. Although the insolvency system favours the reorganisation or rescue of enterprises, the continuity of the business is tailed to a sufficient satisfaction of creditors. The law gives priority to the interest of the proceedings (or, in other words, of the creditors), over the interest of the debtor. One example of this priority is the discharge provisions. The general rule on unpaid claims is that the debtor continues to be liable after the insolvency proceeding conclude (this is most notably on individuals), establishing only in the last reform the mechanism of the exoneration of unsatisfied liabilities, subject to certain requisites.*

***This is correct, but I call your attention to the fact that the exoneration of unsatisfied liabilities could be seen as an exception to the creditor-friendly approach.***

Question 2.3 [maximum 4 marks] **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.)**

*The recognition for a country within the EU is subject to EIR rules. According to the arts. 19, 20 and 32 of the EIR, any judgment concerning the opening, conduct, and closure of insolvency proceedings which fall within its scope, or handed down by a court of a member state in direct connection with such insolvency proceedings, will automatically be recognized in Spain.*

*The recognition for a country outside the EU is subject to requisites established in art. 742 of the Recast Insolvency Act (Judgement referred to collective proceeding, final character, competence of the court, compliance with rights of debtor and non-contrary to Spanish public order)*

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

Question 3.1 [maximum 7 marks] **5.5 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, the Spanish Recast Insolvency Law (RIL) allow the accumulation of proceedings, at the time of opening or later (arts. 38 and 41). According to article 38, companies belonging to the same group could apply for joint judicial opening of the insolvency proceedings. Article 41 regulates the accumulation when a proceeding is already opened, establishing some circumstances to declare the accumulation, *inter alia*, companies of the same group. Generally, the accumulation of proceedings doesn't involve the estate consolidation (*consolidación de masas*), but the court can order the consolidation if there's an estate confusion that causes delays and unjustified costs.

Also, the group of companies could apply for a joint communication of the opening of negotiations with creditors, a pre-insolvency proceeding (art. 587 RIL).

**Your answer is correct but you forgot to mention that restructuring plans can be joint on a group basis. This is important as almost half of the restructurings held in Spain so far are group ones!**

Question 3.2 [maximum 8 marks] **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 the special procedure for microenterprises are:*

- 1. Reduced costs: The special procedure eliminates formalities and participation of professionals, leaving only the essentials to the continuation of the proceeding.*
- 2. Flexibility: The special procedure has a modular nature, with a basis of procedural simplification and economy. Filings are electronics, most of the applications are voluntary and special proceedings are holding in parallel.*
- 3. Efficiency: The special procedure, with its reduced costs and proceedings, aims for help companies that doesn't have big resources, offering effective exit instruments to better allocate those resources.*

*The problems associated with ordinary proceedings that the special procedure intends to avoid are:*

- 1. Length: Ordinary insolvency proceedings could be lengthy, with many incidents and actuations that delays the conclusion.*
- 2. Costs: Ordinary insolvency proceedings are expensive, as they involve formalities and the participation of professionals and institutions.*



3. Complexity: Ordinary insolvency proceedings are complex and time-consuming.

**Good summary!**

QUESTION 4 (fact-based application-type question) [15 marks] **11 marks**

**ADARU, S.L. 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. Yes, there is the pre-insolvency mechanism of the communication of the opening of negotiations with creditors. This mechanism triggers a moratorium that prevent enforcement actions. As this is a pre-insolvency mechanism, ADARU doesn't need to be on actual insolvency, but probably or imminent insolvency, as the number 1 of article 585 of the RIL says. Number 2 of article 585 also allows the communication under actual insolvency if the opening of a formal insolvency proceeding hasn't been ordered by the court. The business needs to be viable as the purpose of pre-insolvency proceedings is the rescue of the business.
2. Yes, as executory contracts don't terminate with the opening of a pre-insolvency or insolvency proceeding, any action in this sense from the creditors is voidable. As this is a pre-insolvency proceeding, there is no difference if ADARU had breached its payments obligation (but if an insolvency proceeding *-concurso-* is opened, a breach before the opening would be a cause of termination with continuous contracts as the license and distribution agreements are). **Kindly note that, in case of breach, the termination will only be possible if the breach is subsequent to the communication of negotiations.**
3. The communication doesn't affect the right of secured creditors to enforce the collateral, as only protects the debtor and his assets. On the distribution agreement, the counterpart is inhibited to enforce his claim, because in this case the stay over the assets of the debtor apply. **A key issue under Spanish law is whether the assets are necessary or not for the debtor's activity. Enforcement actions over assets necessary for the continuation of the activity will be suspended for 3 months after the communication. If the assets are not necessary, the enforcement can also be suspended upon decision of the court. Enforcement of collateral is possible but if the secured assets are necessary for the continuation of the activity then the enforcement will be suspended.**
4. Yes, ADARU remains in possession as the communication doesn't restrict the debtor' powers of administration and disposal of its assets. **Correct!**
5. If after the communication of the opening of negotiations with creditors, ADARU negotiates a restructuration plan under the rules of the Title III of RIL, the goal is to form classes of creditors that allows for the arrival of a consensual plan, that is, a plan that has been voted upon favourably by the necessary majorities in all classes of claims, and filing for judicial homologation. **I would only add that classes should be formed according to bankruptcy ranks.**
6. Yes, the agreement can be imposed on dissenting creditors. **Kindly note that the cramdown can be both horizontal and vertical (cross-class cramdown).**

7. **Yes, a plan could be adopted without the consent of the shareholders, as a non-consensual plan, if ADARU is on actual or imminent insolvency (art. 640 RIL).**

8. **Yes, the former answer is applicable.**

9. **To avoid rescissory actions over the financing, the restructuring plan need to be judicially homologated and the affected claims needs to be over the 51 percent of the total. (Art. 667 RIL). **Good!****

**Commented [MFSS]:** Please note that question 7 refers to the consent of the debtor (the corporation, ADARU) while question 8 refers to the consent of shareholders. In any case, neither the consent from the debtor nor the consent from the shareholders are required.

\* End of Assessment \*