



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 MARKS: 41.5/50, very good!**

QUESTION 1 (multiple-choice questions) [10 marks in total] **9 marks, well done!**

**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.*

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] **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, as in many other Insolvency Systems, a contractual clause that states such effect for entering an insolvency procedure would not have effectiveness at all.]*

Question 2.2 [maximum 4 marks] **4 marks, excellent!**

**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.)**

*[Because it has, primarily a “solving function” that seeks to satisfy the creditors as much as possible. Although the insolvency system has a preservation function, this goal has to be fulfilled without endangering the creditors’ right, either by a insolvency plan or by liquidating the debtor’s assets. Unlike other systems, the judge may order the close of offices if it represents losses and harms creditors. In other systems, the court may not even be able to interfere in the functioning of the company until its liquidation.]*

Question 2.3 [maximum 4 marks] **4 marks, good summary!**

**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.)**

*[If the insolvency procedure has been held in a EU-member country, it would be automatically be recognized by Spain, without further requirement. The automatic recognition derives directly from the principle of mutual trust between member states.*

*On the other hand, if such insolvency proceeding has been held in a non-member state, it would proceed through the supplementary regime of the Recast Insolvency Act. Basically, it would need to meet some conditions and go through an exequatur. When the conditions are met and the opening judgment of the foreign insolvency proceedings is recognized, any other judgement would be automatically recognized.]*

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

Question 3.1 [maximum 7 marks] **3.5 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.)**

*[Spain allows the coordination of the different proceedings in regard of a group of companies that are related to each other. This coordination does not mean that a single procedure would be held, but, on the contrary, it means that a single court would be competent and that the same administrator may attend each procedure. In this sense, although their paths may cross, the truth is that it may end with one of them in a liquidation process and the other one with a insolvency plan. So, in conclusion, is not possible to go through a single procedure for a single group of companies.]*

**While your answer is correct with regard to insolvency proceedings, the question referred specifically to restructuring. On this regard, kindly note that both the communication of the opening of negotiations with creditors and the restructuring plan can be joint on a group basis.**

Question 3.2 [maximum 8 marks] **7 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.)**

*[It's a procedure specially designed to avoid some of the conditions that only a bigger company can fulfil without significant harm. The main advantages may be described as:*

- *The elimination of most of the formalities and the involvement of professionals, which means in lower cost.*
- *A simplification of the procedure. For example, it would be mainly online or by electronic platforms, special proceedings taking in parallel, the involvement of the judge only in important decisions, among others.*
- *Its modular nature.*
- *It can be entered in pre-bankruptcy, in imminent insolvency or current insolvency.*
- ***I would add the reliance on the proactivity of the parties involved.***

*Forcing a microenterprise to go through a regular insolvency procedure, given the effects, costs and duration of the process, may be the end of the company or the inefficient management of the assets for creditors.]*

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?*

*I. Yes, given the fact that the creditors can't prove the insolvency itself, the debtor has the possibility to prove it wrong and avoid the commencement of the procedure. It also can be decided to enter a "preconcurso", which would avoid the commencement of formal proceeding by the creditors. With this type of mechanism, the debtor would be able to negotiate a restructuring plan in a period up to 4 months and avoid the enforcing actions that creditors may have. **Correct!***

*II. As a general rule, parties are unable to terminate contracts just by the fact of entering any type of insolvency matter. The breach of the contract creates an exception from the general rule stated before. When there is non-compliance, the contract may be terminated, although its subject to substantive and procedural specialties. **Kindly note that, in case of breach, the termination will only be possible if the breach is subsequent to the communication of negotiations.***

*III. All enforcement proceedings would be suspended upon the commencement of an insolvency proceeding. However, if the obligation is defaulted upon maturity, the creditors may proceed with the realisation of the collateral to obtain the payment.*

*Suspension would also affect the counterparty and would be subject of the normal regulation. 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.*

*IV. If the commencement of the insolvency was from a creditor's request, ADARU would lose possession. If it was from the debtor's request, then would be a debtor-in-possession procedure, subject to exceptions. As we are in pre-insolvency proceedings, the debtor would remain in possession in any case.*

*V. By any of the pre-insolvency mechanism, either communication or restructuring plan. Creditors needs to be organized in classes according to bankruptcy ranks.*

*VI. If it is a consensual plan, then the majority of each class will impose the plan against those dissenting creditors. If it is a non-consensual plan, it can be judicially homologated even against the will of some classes, just by the approval of the majority of the classes. This is correct.*

*VII. In consensual plan, when it comes to extending the debt restructuring plan to minority shareholders, if the decision made by the shareholders' meeting is in favor of the plan, the imposition of the plan on dissenting minority shareholders is typically done in accordance with the rules outlined in corporate law. On the other hand, in non-consensual plan, for this scenario to occur, the insolvency situation must be real or imminent. It is not enough for there to be a mere possibility of insolvency in order to impose the plan against the will of the shareholders. Additionally, there are certain circumstances in which the plan cannot be imposed. These include: (i) when the debtor is an individual rather than a legal entity, (ii) when it is against the will of shareholders who bear legal liability for the company's debts, or (iii) when it concerns small companies.*

*VIII. Yes, it can be imposed if the requirements stated before are met.*

*IX. It needs to be judicial homologated, and therefore, it needs to comply with the legal requirements depending if it is a consensual or non-consensual plan. The judicial control is very limited which means that they are usually accepted. This homologation would protect this fresh money in case of subsequent insolvency procedures. This protection also needs to have a certain proportion of affected claims, besides being judicially homologated. These would grant a protection from avoidance actions and also enjoy a collection preference in the subsequent insolvency proceeding.] Good!*

**Commented [MFS3]:** 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 \*