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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6A**

**FRANCE**

This is the **summative (formal) assessment for Module 6A** 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 6A**. 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.assessment6A]**. An example would be something along the following lines: 202223-336.assessment6A. **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 **9 pages**.

**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**

What is the **main difference** between the safeguard procedure and the rehabilitation procedure?

1. The main difference lies in the person who can request the opening of the procedure (creditors of the company in the case of the safeguard and the company’s director(s) in the case of rehabilitation proceedings).
2. The main difference lies with in court that will deal with the case (the commercial court for the safeguard and the specialised commercial court for rehabilitation proceedings).
3. The main difference lies in the duration of the procedures (10 months for the safeguard procedure and 18 months for rehabilitation proceedings).
4. The main difference lies in the condition required to open the proceedings (insolvency for rehabilitation proceedings and no state of insolvency for the safeguard).

**Question 1.2**

What are the **pre-insolvency mechanisms** available to companies under French insolvency law?

1. *Ad hoc* mandate, conciliation, safeguard and accelerated safeguard.
2. *Ad hoc* mandate, conciliation, safeguard, accelerated safeguard and rehabilitation.
3. *Ad hoc* mandate, safeguard and rehabilitation.
4. *Ad hoc* mandate and conciliation.

**Question 1.3**

What are the **conditions** for a company in financial difficulties to resort to an *ad hoc* mandate?

1. A debtor must not be in a state of insolvency (in a payment failure situation).
2. A debtor must prove that it has not been insolvent for over 45 days and that it is not encountering difficulties that it is not able to overcome.
3. A debtor must be insolvent.
4. A debtor must prove that it has engaged in conciliation proceedings first, which have failed.

**Question 1.4**

Who can request the **opening** of an *ad hoc* mandate procedure?

1. The debtor’s creditors.
2. The president of the court.
3. The director(s) of the company.
4. The director(s) of the company or the company’s auditor.

**Question 1.5**

What are the **conditions** for a company in financial difficulties to resort to conciliation proceedings?

1. A debtor must not be in a state of insolvency (in a payment failure situation) and must not encounter difficulties that it is not able to overcome.
2. A debtor must not have been in a state of insolvency for longer than 45 days.
3. A debtor must prove that it has availed of an *ad hoc* mandate first, which has failed.
4. The rescue of the company must be deemed impossible by its directors.

**Question 1.6**

Can the president of the court impose a **conciliation procedure** on a debtor company?

1. Yes, at the request of the creditors.
2. Yes, at the request of the Public Prosecutor.
3. Yes, at the request of a contractual third party.
4. No, never.

**Question 1.7**

What are the conditions for a company to avail of **safeguard proceedings**?

1. When the company is not in a state of insolvency (in a payment failure situation) but is experiencing difficulties which it is not able to overcome.
2. When the company has not been in a state of insolvency for longer than 45 days.
3. When the company is insolvent.
4. When the company is insolvent and the company has attempted conciliation or *ad hoc* mandate proceedings which have failed.

**Question 1.8**

During liquidation proceedings, which creditors are **barred from enforcing** their rights to obtain payment from the debtor?

1. All pre-filing creditors.
2. Pre- and post-filing creditors.
3. Pre-filing creditors, except (i) claims secured by a security interest conferring a retention title right, (ii) claims assigned by way of a Dailly assignment of receivables, (iii) claims secured by a *fiducie* agreement, and (iv) set-off and close-out netting of financial obligations.
4. Post-filing creditors, except (i) claims secured by a security interest conferring a retention title right, (ii) claims assigned by way of a Dailly assignment of receivables, (iii) claims secured by a *fiducie* agreement, and (iv) set-off and close-out netting of financial obligations.

**Question 1.9**

Minago, a company, is facing financial difficulties but is not yet in a state of insolvency. Some of its suppliers are demanding the payment of their invoices but Minago’s directors believe that this would lead to the company’s insolvency. Which **procedure(s)** is / are available to the company?

1. *Ad hoc* mandate.
2. Conciliation and *ad hoc* mandate.
3. Rehabilitation proceedings.
4. *Ad hoc* mandate, conciliation and safeguard proceedings.

**Question 1.10**

In relation to the recognition of judgments under French law, choose the **accurate** statement:

1. Foreign judgments can only be enforced if they have been subject to a procedure of *exequatur*. The granting of *exequatur* to a foreign judgment is left at the discretion of the court.
2. Foreign judgments can only be enforced if they have been subject to a procedure of *exequatur*. For a foreign judgment to be granted *exequatur*, three conditions must be met: (i) the original judgment must be devoid of any fraudulent intention, (ii) the judgment must comply with international public policy, and (iii) the foreign court or tribunal who issued the judgment must have been competent to do so.
3. Even if foreign judgments have not been granted *exequatur*, there are some ways in which they can be recognised and enforced by French authorities. It is, for example, possible for the French court to recognise a foreign judgment if there are also local insolvency proceedings pending against the same debtor.
4. Once *exequatur* has been conferred, the foreign judgment is considered a French judgment.

**QUESTION 2 (direct questions) [10 marks in total]**

**Question 2.1 [maximum 2 marks]**

Consider the following two statements:

Statement 1: A procedure which does not stand alone and can only be opened following conciliation proceedings.

Statement 2: The objective of this procedure is to appoint a professional who will seize and realise the assets of the debtor and distribute the proceedings to creditors or proceed to a sale of the business.

Which insolvency procedures do these statements refer to?

[The first statement refers to “Accelerated safeguard”. The second statement clearly refers to a Liquidation procedure.]

Question 2.2 [maximum 3 marks]

**List three** of the main variations between the safeguard procedure and the rehabilitation procedure under the Commercial Code.

[The first difference between these procedures is that in safeguard procedure, the debtor cannot be in an insolvency situation, unlike the rehabilitation procedure.

The second difference might be its objective. The safeguard procedure has the objective to prevent the insolvency of a company by restructuring its debt while ensuring its viability. It focuses on negotiating and implementing a recovery plan to preserve the business and repay the creditors. Unlike the rehabilitation procedure, that is designed to rescue a company that is already insolvent and facing financial difficulties. Its goal is to reorganize the company's activities, restructure its debts, and achieve a viable long-term solution.

Lastly, in a Safeguard procedure, it can only be opened with a request coming from the company itself. On the other hand, the rehabilitation procedure it can be opened by the debtor, any unpaid creditor or the Public Prosecutor.]

Question 2.3 [maximum 3 marks]

**List three** new elements of insolvency law which had been introduced in the French Commercial Code following the Order of 15 September 2021.

[First, the debtor’s consent is compulsory for the court to cross- class cram-down creditors (Article L626-32). Second, the adoption of the absolute priority rule, which mandates that when a lower class is entitled to be paid, the higher class creditor that voted against the plan must be fully repaid before. Lastly, the introduction of “post-money” privilege, which in the event of subsequent restructuring proceedings, write-off or postponements that are not agreed upon by their holders cannot be imposed..]

Question 2.4 [maximum 2 marks]

**Name and briefly explain two** of the main differences between the conciliation and *ad hoc* proceedings.

[1. Initiation and purpose: In conciliation, the debtor must not be insolvent for longer than 45 days and is initiated by the debtor itself, without any court assistance. The ad hoc proceeding does have an ad hoc representative appointed and the debtor cannot be insolvent at any time.

2. The main difference between both proceedings is that a conciliation agreement is ratified by the court at the request of the debtor, this ratification might be through *constatation* or *homologation.* In the case of homologation, this might bring some important benefits to those creditors that gave new money to the debtor. These investors will have a special priority in case that the conciliation turns into a court-administrated proceeding.]

**QUESTION 3 (essay-type question) [15 marks]**

**In addition to the correctness, completeness (including references to case law, if applicable) and originality of your answers to the questions below, marks may be awarded or deducted on the basis of your presentation, expression and writing skills.**

Question 3.1 [maximum 5 marks]

France has often been characterised as a “restructuring-biased” jurisdiction. However, in recent times, French insolvency law has evolved to increase the protection afforded to creditors. Is it more accurate to say that at present, French insolvency law is “debtor-friendly” or “creditor-friendly”? Justify your answer with reference to the law and legal provisions.

[It’s unclear whether to categorized the French insolvency system as a creditor friendly or debtor friendly system. There has been good developing among some aspects leading to protect creditors such as having to require that a professional oversees some of the insolvency procedures, which gives transparency to the process. It also helps the fact that the debtor is required to provide information to their creditors, which allows these creditors to make better decisions.

Although these efforts have been made, French insolvency system has other features that makes it a “debtor friendly system” such as that the debtor remains in control of the business, in some of the procedures.

It’s also important to highlight that there are a lot of different type of procedures in the French system in comparison to other countries. This, and the fact that there are some of the proceedings that doesn’t even require to be insolvent at the time of the opening, leads to the conclusion that, although there has been some improvements, the French insolvency system remains debtor friendly.

Additionally, French insolvency system has a low level of involvement of creditors within the procedure, reaffirming its debtor friendly status.]

Question 3.2 [maximum 5 marks]

While they exhibit some similarities, the safeguard and accelerated safeguard procedures are nonetheless very different proceedings. **List the main similarities, differences and objectives of these two proceedings**.

[Similarities:

* Both procedures provide an automatic stay on creditors actions. (Art L622-7)
* The voting conditions and adoption of the plan by the classes of affected parties
* Both procedures involve court oversight and the appointment of a judicial administrator to oversee the process and ensure compliance with legal requirements.

Differences:

* Accelerated safeguard requires a previous conciliation procedure, unlike safeguard.
* Accelerated safeguard has a time limit of 4 months, unlike safeguard.
* Accelerated safeguard does not have an observation period, unlike safeguard.

Objectives:

* Safeguard procedure: help the debtor overcome its financial difficulties and continue its activities by restructuring its debts. The procedure aims to ensure the viability of the business and maximize creditor repayment.
* Accelerated safeguard: Similar objective to safeguard procedure but at a higher speed and less time involved].

Question 3.3 [maximum 5 marks]

During the debates surrounding the implementation of the EU Directive on Preventive Restructuring Frameworks 2019, some commentators have suggested that the safeguard and rehabilitation procedures should be merged. **Consider whether this was a reasonable idea**.

[The main reason for merging these two procedures shall be its main objective: rescuing business. It would be easier to have a unified framework, specially when there is a common goal and similar effects upon the two procedures. They also both have an observation period, the requirements are the same, voting rules are the same for classes, it allows the company to continue to operate and in both cases the company is insolvent.

Taking into account that, in practice, the procedures are very much alike and the difference relies on whether the company is insolvent or not, it’s reasonable to merge both and allow that, in these new combined procedure, there is no requirement to be insolvent or not.

Therefore, an unified “recovery” procedure that brings aspects from both procedure would be a good decision, it would allow easier understanding of the insolvency law and a chance to improve the framework to help both creditors and debtors.]

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

Donald has been working as an independent architect for over 15 years. In January 2022 he started experiencing cash flow difficulties, which have continued ever since. He is now struggling to pay his expenses, and in particular his office rent. This month, he is also concerned that he will not be in a position to meet his obligation (GBP 2,000) under his professional loan. Donald does not know what to do anymore.

A friend told him that he should apply for conciliation proceedings but Donald fears that it will give him bad publicity and scare off his clients.

Question 4.1 [maximum 5 marks]

Can Donald benefit from a conciliation procedure? Justify your answer.

[It’s important to clarify that Donald doesn’t apply for any of the insolvency procedure. According to French insolvency system, Donald is a natural person and, for that fact, can’t be subject of any of the procedures, including the conciliation.

In favour of the discussion, if we agree that Donald is enable to this procedure, then yes. Of course he will benefit because an agreement may be met or it could led to an accelerated safeguard procedure, which grants different type of advantages such as the stay.]

Question 4.2 [maximum 5 marks]

Explain to Donald the way conciliation proceedings run and the advantages of opening such procedure. Further advise him whether he could also avail of any other insolvency procedure.

[Conciliation requires that the debtor must not been insolvent for more than 45 days. A conciliator is appointed and in the end it would be ratified by a court (constatation or homologation). Conciliation may lead to an accelerated safeguard procedure. It’s important to highlight that the debtor remains in possession of the company.

As stated before, Donald is a natural person and can’t be subject of insolvency procedure. Although, he could try to enter an over-indebtedness of individuals, but, given the facts that were provided, there is no personal debt or non-professional.]

Question 4.3 [maximum 5 marks]

Can Donald open accelerated safeguard proceedings? If so, explain what this procedure is and what its advantages are.

[He can’t open a safeguard proceeding, as stated before, he is a natural person and is not subject of this procedure.

The accelerated safeguard procedure is a court-based and debtor in possession procedure. This procedure gives a similar advantages to the debtor as in the standard safeguard, such as an automatic stay or voting system. This procedure takes place in maximum of 4 months and it could derive from a conciliation.

The court makes the decision to initiate accelerated safeguard proceedings based on the report provided by the conciliator, who expresses their opinion on the likelihood of the restructuring plan being accepted by the relevant creditors.

During the conciliation proceedings, the restructuring plan is prepared and must obtain sufficient approval from the affected parties to ensure its acceptance. The two-stage approach of the conciliation and accelerated safeguard preventive restructuring framework offers advantages in terms of maintaining confidentiality and contractual flexibility during the conciliation phase. Additionally, it allows the court to enforce the restructuring plan on dissenting creditors in the safeguard phase through a cross-class cram-down process, ensuring a binding outcome.

So, in conclusion, the main objective is to preserve the company’s value, by getting into a fast pace agreement with their creditors, which would be sanction by the court (or rejected). At any time, the court may order a rehabilitation or liquidation procedure if no solution was found.

The advantages are the automatic stay, the fast paced procedure, the support of an administrator and specially the fact that it should lead to a plan that helps to rescue the company from its financial difficulties.]

**\* End of Assessment \***