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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?

Statement 1 refers to accelerated safeguard procedure.

Statement 2 refers to 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 main variations between a safeguard procedure and rehabilitation procedure are that the company must not be insolent in safeguard procedure whereas in Rehabilitation procedure the company is insolvent. The other main variation between the two is that the Rehabilitation procedure can be opened by the debtor, creditor or public prosecutor unlike the safeguard procedure.

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.

1. Introduced classes of creditors
2. Introduced post money (post commencement funding) privilege
3. Introduction of the possibility to cross-class cram down dissenting creditors during Safeguard proceedings

Question 2.4 [maximum 2 marks]

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

1. The first difference is that for ad hoc, the company must not be insolvent whereas for conciliation proceedings the company must be insolvent for not more than 45 days.
2. In a conciliation, it is required that a conciliation agreement approved by the Court must be executed whereas there is no such requirement for Ad hoc proceedings.

**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.

Though French insolvency law has evolved to increase the protection afforded to creditors in recent times, it is more accurate to say that at present French Insolvency law is debtor-friendly. This is because in comparison with other jurisdictions, French law offers low level of protection for creditors compared to other stakeholders.

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**.

A company may commence a safeguard procedure when it is not insolvent. The objective of the safeguard procedure is to meet negotiate a plan in meeting the creditor’s claims.

The accelerated safeguard procedure on the other hand is different from the safeguard procedure in that it is only commenced after conciliation procedure has failed and the company must be insolvent to come this procedure. Unlike the safeguard procedure, the accelerated safeguard procedure is not a standalone procedure.

The two procedures above are similar in that the aim for both is to negotiate the claims and come up with restructuring solutions that can be implemented during the subsequent insolvency proceedings.

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 suggestion that the safeguard and rehabilitation procedures should be merged is not a reasonable idea. This is because though both procedures have a lot of similarities, they serve different purposes. The Safeguard procedures comes in to assist companies that are not in a payment failure situation but are facing difficulties that they are not able to overcome. The purpose of the safeguard proceedings is to help the company avoid insolvency by working on creditor’s claims and safeguarding the employees and company’s interests.

The rehabilitation proceedings on the other hand deals with companies that are already facing payment failure situations and are struggling with more problems that just monetary cash flow experienced in safeguard situations. The merging of these two proceedings would not serve their useful purpose.

**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.

Donald can benefit from a conciliation procedure. This is because the conciliation procedure is meant to help the debtor to preserve the business, its activities and employment. A conciliation procedure is an out of court procedure and will not expose Donald to bad publicity.

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.

A conciliation procedure is an out of court procedure commenced at the request of the debtor. At the time of commencement, the company must not have been insolent for more than 45 days. A conciliator is appointed by the Court and his role is to come up with solutions to reserve the business, its activities and its employees. When the conciliation proceedings fail, Donld could avail another procedure called accelerated safeguard procedure.

Question 4.3 [maximum 5 marks]

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

If conciliation fails, Donald can open accelerated proceedings. Accelerated Safeguard proceedings are proceedings that are only resorted to following conciliation procedure. The advantages of the accelerated safeguard procedure are that they bridge the gap between the out of court proceedings and Court proceedings and can develop restructuring solutions that will be implemented in the context of the subsequent insolvency proceedings.

**\* End of Assessment \***