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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 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.

7. Prior to being populated with your answers, this assessment consists of **8 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**

Which option below comprises a procedure which is **not** a pre-insolvency mechanism?

1. *Mandat ad hoc*, conciliation and safeguard.
2. *Mandat ad hoc,* conciliation, safeguard and rehabilitation proceedings.
3. Conciliation, safeguard and accelerated safeguard.
4. *Mandat ad hoc* and safeguard.

**Question 1.2**

Which statement below is **incorrect** in relation to the accelerated safeguard procedure?

1. The accelerated safeguard procedure is not a standalone procedure; it can only be used following the opening of conciliation proceedings.
2. The accelerated safeguard is the flagship of preventive restructuring in France.
3. The accelerated safeguard is the same procedure as the safeguard, except that its timeline is shorter.
4. The accelerated safeguard was revamped following the passing of EU Directive 2019/1023.

**Question 1.3**

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 1.4**

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**

Which statement regarding liquidation proceedings is **incorrect**?

1. Liquidation proceedings trigger an automatic stay of proceedings and enforcement actions against the company.
2. All pre-filing creditors are barred from enforcing their rights to obtain payment from the debtor, subject to some exceptions.
3. All pre-filing creditors are barred from enforcing their rights to obtain payment from the debtor, with no exceptions.
4. If a sale plan is conducted, third parties cannot terminate or rescind their contracts with the debtor.

**Question 1.9**

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 1.10**

Marlon SARL, a company registered in France, has been experiencing financial difficulties since 10 June 2023. On 1 July 2023, it is officially insolvent (*en cessation des paiements*). On 11 August, it wants to file for an insolvency procedure. Which **procedure(s)** is / are available to the company?

1. *Ad hoc* mandate.
2. Conciliation.
3. Safeguard or rehabilitation proceedings.
4. Rehabilitation or liquidation proceedings

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

**Question 2.1 [maximum 2 marks]**

Consider the following two statements:

Statement 1: A procedure which can only be opened following conciliation proceedings.

Statement 2: The procedure is not limited in time; its objective is to avoid the insolvency of the company.

Which insolvency procedures do these statements refer to?

The procedure affected by the two statements is the "accelerated safeguard proceeding". This proceeding is a variant of the classic " safeguard proceeding" and only occurs in combination with a " conciliation proceeding". The latter procedure must have preceded the former. According to Article L628-8 of the French Commercial Code, in order to enter the accelerated safeguard proceedings, a plan must have been drawn up in the conciliation proceeding, which is expected to be accepted by the creditors concerned within three months of the decision to open proceedings.

**Question 2.2 [maximum 3 marks]**

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

1. Insolvency

As the safeguard procedure was envisaged by the French legislator as a pre-insolvency mechanism, a prerequisite for utilising this procedure is that the company is not insolvent. In rehabilitation proceedings, however, insolvency is a prerequisite for its utilisation, so that this factual feature is a significant difference.

1. Participation

While the safeguard procedure only allows the debtor to propose a plan or a cross-class cram-down, classes can be formed in the rehabilitation procedure and an impaired party can also propose an alternative plan.

1. Duration

The maximum duration of the safeguard procedure is 12 months and the rehabilitation procedure up to 18 months.

**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.

With the order of 15 September 2021, the EU Directive on the Preventive Restructuring Framework 2019 was implemented into French law. With the implementation of this order, changes have been made to French insolvency law.

1. Combination of two types of preventive insolvency proceedings

Initially, the order established a combination in French insolvency law between conciliation proceedings and accelerated safeguard proceedings. The effect of the conciliation procedure will be strengthened by the implementation of the principle of suspension of individual proceedings and the adoption of restructuring plans will be facilitated despite the opposition of dissenting parties.

1. Implementation of Creditor Classes

The order provides for the introduction of classes of affected parties to give creditors and shareholders the opportunity to comment on the proposed plan and, in the event of rejection, to apply a cross-class cram-down mechanism. This will facilitate the adoption of reorganisation plans.

1. Expansion of the judicial Intervention Options

In the safeguard proceedings, the order has removed the court's ability to impose a time limit on dissenting creditors once classes of creditors have been formed. In addition, the Regulation has limited the possibility of imposing a time limit on dissenting creditors in reorganisation proceedings to situations where the plan has been rejected when classes of creditors have been formed.

**Question 2.4 [maximum 2 marks]**

Explain the difference between *homologation* and *constatation* of the conciliation agreement.

In the event that a conciliation procedure is to be utilised as a voluntary proceeding, the procedure must be applied for before a court and ratified by it.

The court can initially approve the application by way of "constatation", which is a favourable approval overall, as the proceedings can be conducted unpublished and confidentiality is maintained.

Alternatively, the court can grant the authorisation, but sanction it altogether by publishing the court's decision. However, the unfavourable effect is mitigated by the fact that advantages are granted if insolvency proceedings are opened. For example, there is the option of the so-called new money privilege, which is granted to investors if the conciliation proceedings are transferred to accelerated safeguard proceedings. Investors who provide money in the phase prior to the opening of insolvency proceedings are categorised as creditors with priority over the claims of other investors in any subsequent insolvency 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]**

Why can it be said that the reform of 15 September 2021 has been somewhat minor and not an overhaul of the *status quo*?

The order of 15 September 2021 implemented the European Restructuring Directive (EU) 2019/1023 in France. The law aims to strengthen creditors and simplify rules on security rights in insolvency proceedings.

The purpose of this directive has always been to strengthen creditors' rights in the context of insolvency proceedings. This objective has not been fully realised in France, even though significant changes have been achieved through the creation of creditor classes and their more active participation in insolvency proceedings.

Unlike other member states of the European Union, France has long had preventative procedures in place, such as the ad hoc procedure and conciliation, which have proven to be effective so far. A large proportion of these procedures end with settlements with the main creditors. Creditors have always had little say in these proceedings. For example, creditors have no influence whatsoever in the selection of an insolvency administrator to supervise the aforementioned proceedings.

The "sauvegarde accelérée" procedure now follows the reform in that it is fast, public and results in a creditor deferral. Above all, the insolvency administrator is obliged to form creditor classes that are affected by the reorganisation plan. These creditor classes are then authorised to have a say in the decisions on the restructuring plan.

Even though creditors can now be more effectively involved in the drafting of reorganisation plans, their authority is still subject to the court, which has the final say. In particular, the reform has not extended the creditors' vote to company sales, which remain the sole responsibility of the insolvency courts.

Alongside new options, such as the legal possibility of a debt-to-equity swap by excluding shareholders who are "out of the money", the French system still favours saving the debtor and the workplaces associated with it rather than creditors' investments, so that the result is not so much a "revolution" of the status quo but rather an evolution in French insolvency law. The status quo has largely been maintained.

**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**.

1. Similarities between the two Procedures

The accelerated safeguard procedure is still a safeguard procedure by its very name. This variant of the safeguard procedure is therefore still subject to the regulations of the basic safeguard procedure. The deviations that specifically form the basis of the accelerated safeguard procedure are originally derived from Chapter VIII of Book VI of the French Commercial Code. Common to the variant of the basic procedure, for example, are the conditions for voting and the acceptance of reorganisation plans. This protection was and is also the hallmark of Book VI of the French Commercial Code in the accelerated safeguard procedure.

1. Differences between the two Procedures

While the basic safeguard procedure stands on its own, the first and essential difference to the accelerated safeguard procedure is the requirement of a prior conciliation procedure.

Another difference is that the debtor must not be insolvent in the safeguard procedure. However, insolvency is not an obstacle to accelerated safeguard procedure, which is conducted on the basis of conciliation proceedings in which insolvency may exist. However, as in the conciliation proceedings, the insolvency must not have existed for longer than 45 days.

In contrast to the safeguard procedure, accelerated safeguard proceedings are then initiated by the court on the basis of a report by the conciliator. The conciliator must state his opinion as to how likely he considers the adoption of a reorganisation plan to be.

The timeframe also clearly distinguishes the simple procedure from the accelerated procedure. The basic safeguard procedure can take up to 12 months and the accelerated safeguard procedure a maximum of 4 months.

A distinction also results from the introduction of creditor classes with the 2021 reform, which is mandatory in the accelerated safeguard procedure.

1. Objectives of the Safeguard and Accelerated Safeguard Procedure

The original aim of the safeguard procedure is to enable the debtor to free himself from economic difficulties by his own efforts. This procedure is intended to enable the debtor to continue his activities and repay his debts by means of an instalment plan. The debtor should be put in a position to reorganise itself in order to continue its activities, preserve jobs and satisfy all creditors.

The aim of the accelerated safeguard procedure is to preserve the value of a debtor company by means of a so-called pre-pack, in which a restructuring plan is accepted by affected creditors. The fact that this procedure is based on a conciliation procedure in which the plan is already being drawn up is intended to characterise the fast-track nature of the procedure. As a result, the debtor should reach an agreement with the creditors quickly.

**Question 3.3 [maximum 5 marks]**

Explain what the main features of the new class formation are under French insolvency law following the reform of 2021. Explain, also, what issues may arise in insolvency cases in relation to classes of creditors.

In the accelerated safeguard procedure, the creditors affected are selected by a court-appointed trustee on the basis of claims that were established prior to the insolvency proceedings and other objectively verifiable criteria. The creditors affected are those whose rights are affected by a proposed restructuring plan as well as shareholders if their rights or the debtor's articles of association are to be changed by the aforementioned plan.

Each of the classes formed must be characterised by the fact that it is made up of a group that has a common economic interest. The distinction between secured and unsecured creditors, for example, is essential for differentiating between the groups. The shareholders must also be defined as a class in a separate group. The law does not specify a certain number of groups. However, there will be at least one group of secured creditors, another group of unsecured creditors and a group of any shareholders.

The trustee will inform each group of the voting rights it will receive. The voting rights are based on the claims registered in each case).The classes then vote on the submitted restructuring plan on a fixed date. Depending on the vote, the competent court will then approve or reject the plan.

The fundamental problem that can arise in connection with class formation is obviously the sometimes differing interests of the groups represented in the classes. Shareholders will often not necessarily be able to represent the same interests as certain creditor groups. This can lead to situations in which the classes vote differently, e.g. one class votes against the plan while the other classes vote in favour of the plan.

In the event of rejection, there is still the possibility that the plan will nevertheless be approved at the request of the debtor or the administrator. This is the case of the cross-class cram-down. Typically, in this case at least the majority of the classes must have approved the plan.

In addition to thresholds relating to the number of employees and net turnover, the prerequisite for the cross-class cram-down is the so-called "best interest of creditors" test, according to which the court must check that none of the affected parties who voted against the plan are in a worse position as a result of the plan than they would have been if the plan had not been approved. The creditors of a dissenting class must be satisfied in full for a lower-ranking class to be entitled to any payment or share under the plan.

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

Mireille has been working as an independent fitness coach for 10 years. During the Covid-19 pandemic, her business took a serious hit due to confinement restrictions. In January 2022, she started experiencing serious cash flow difficulties, which have continued ever since. She is now starting to struggle to pay her expenses, especially the rent of her fitness studio, which is her main liability each month. Mireille is starting to feel very anxious that she may become insolvent in the near future.

One of her friends told her that she should apply for conciliation proceedings, but Mireille fears that it will give her business bad publicity and scare off her clients. This is of particular importance to her as most of her business is premised on word-of-mouth clientele.

**Question 4.1 [maximum 5 marks]**

Should Mireille apply for conciliation given her personal circumstances? Does she meet the different criteria to open the procedure? Justify your answer.

Based on the facts described, it is clear that Mireille's declared aim is to continue her fitness studio. She therefore needs an orderly procedure that will simply help her out of the liquidity crisis and, in particular, avoid insolvency. A procedure that consistently prepares for a possible insolvency scenario is out of the question. It is particularly important that confidentiality is maintained, i.e. that third parties do not learn of the "crisis situation" and that the studio can continue to operate without hindrance.

As an amicable and, in particular, out-of-court procedure, the conciliation procedure can be considered. The conciliation procedure is intended to encourage companies that are not yet insolvent to negotiate a solution to their financial difficulties with creditors on a confidential basis at an early stage. This fits in with Mireille's initial situation. This procedure also helps her to continue running her fitness studio independently and thus keep control in her own hands.

Mireille can choose a so-called conciliator, who is appointed by the court and makes suggestions for the preservation of the company. This procedure helps Mireille to negotiate a way out of the crisis with her chosen creditors under the supervision of a conciliator. All creditors who do not participate or refuse to participate are simply not affected by the results of the negotiations. These creditors are also not informed of the results of the negotiations. Confidentiality can help to protect the reputation of the fitness centre run by Mireille, which should increase the chances of economic survival.

A significant and favourable feature of the conciliation procedure is the fact that the court can suspend enforcement measures in individual cases during the conciliation procedure. This provides a breather and creates space for the debtor to reorganise.

To be eligible for conciliation proceedings, a company must either be a French company with its registered office in France or have its centre of main interests in France. This can be assumed in the present case. In addition, the gym operated by Mireille must not have been insolvent for more than 45 days if insolvency has already occurred. In the present case, "only" considerable liquidity difficulties and Mireille's fear that she could become insolvent can be assumed. This requirement should therefore also be met.

According to Article L611-5 of the French Commercial Code, the conciliation procedure is applicable under the same conditions to legal persons governed by private law and natural persons exercising an independent professional activity, including the liberal professions. As Mireille runs her fitness studio as a self-employed fitness instructor, she also fulfils this substantive requirement.

Ultimately, there is nothing to stop Mireille from considering conciliation proceedings if she believes that an agreement with the main creditors can help her out of the crisis.

However, it should be noted that the conciliation procedure is limited to a period of 4 months. If no solution has been reached by then, the proceedings can typically be transferred to the opening of accelerated proceedings with protective measures or accelerated proceedings with financial protection measures. If the court does not simply approve the agreement reached but officially sanctions it, which is at the discretion of the court, the agreement will be published in the judgement.

Against this backdrop, it is generally recommended that Mireille should issue an ad hoc mandate in the first step before the arbitration proceedings. This procedure has no time limit and is regularly brought forward.

**Question 4.2 [maximum 5 marks]**

Explain to Mireille the way conciliation proceedings run and the advantages of opening such procedure. Further advise her whether she could also avail of any other insolvency procedure.

In order for Mireille to have access to conciliation, she must file a request for conciliation with the President of the competent commercial court in accordance with Article L611-6 and the following of the French Commercial Code. She must state that she is experiencing actual or foreseeable legal, economic or financial difficulties in running her fitness studio, but has been insolvent for less than 45 days.

As the debtor, Mireille can propose an conciliator. This conciliator is then appointed by the presiding judge for a period of 4 months. This period can be extended by one month to a maximum of 5 months upon request.

Once conciliation proceedings have been opened, the court can obtain all the necessary information to ascertain Mireille's financial situation and examine the prospects for conciliation. The appointed conciliator will then do everything in his power to promote an agreement between Mireille and her main creditors and make suggestions as to how the gym can continue to operate economically.

If no agreement can be reached, the conciliator shall immediately submit a report to the presiding judge. This concludes his assignment and the conciliation proceedings.

However, if an agreement is reached between Mireille and the main creditors, the President of the Commercial Court will, at the request of both parties, finalise the agreement and make it enforceable. This determination is not made publicly and cannot be contested. The consequence of this determination is the termination of the arbitration proceedings.

If Mireille does not simply apply for a declaratory judgement together with the creditors, but for approval, the court decides on the approval, but hears the parties beforehand. The confirmation judgement is then made public.

In addition to the conciliation procedure, Mireille has access to another out-of-court procedure aimed at finding an amicable solution from the pool of French insolvency proceedings. This is the so-called "ad hoc mandate".

This procedure pursues the same objectives as the conciliation procedure and is intended to encourage companies that are not yet insolvent to negotiate a solution with their creditors at an early stage and on a confidential and contractual basis. Even with this procedure, Mireille retains control over its business operations, which will continue. In the ad hoc mandate, an ad hoc representative is chosen instead of a conciliator, who also makes proposals that are relevant to the preservation of the company.

In the case of an ad hoc mandate, however, the agreement reached with the creditors is not confirmed by the court. An essential prerequisite for this procedure is that Mireille must not be insolvent, which can be assumed on the basis of the known facts. The ad hoc mandate is therefore preferred to conciliation proceedings, also because it is not time-bound.

Conciliation proceedings can be useful for companies that have already started negotiations and want to reach a binding agreement within a short period of time. The court decision then gives this agreement special legal force, as the agreement is already enforceable. As the ad hoc mandate is less restricted in terms of the timeframe and serves as a platform for a constructive, accompanied and in particular confidential dialogue with the creditors, this procedure typically precedes the conciliation procedure.

**Question 4.3 [maximum 5 marks]**

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

The particularity of the accelerated safeguard proceedings is the fact that these proceedings cannot be initiated in isolation. One key requirement is that conciliation procedures are already underway and a reorganisation plan has already been drawn up. This plan must then be accepted by the parties concerned within 2 months of the proceedings being opened.

The aim of this procedure is to reach an agreement quickly. Unlike in simple safeguard proceedings, the debtor may already be insolvent, but for no longer than 45 days. The decision to initiate accelerated safeguard proceedings is taken by the court on the basis of the conciliator's report, in which he expresses his own opinion on the likelihood of the reorganisation plan being accepted by the creditors concerned.

For Mireille, this means that such an accelerated safeguard procedure is not an option at the stage it is at. Not only must the conciliation procedure have been initiated as a first step, but a reorganisation plan must also have been reached.

**\* End of Assessment \***