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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?

Statement 1 refers to accelerated safeguard, which is the only procedure that requires an opened conciliation proceeding before opening the new proceeding.

Statement 2 refers the *ad hoc* mandate and conciliation (if proceedings are opened before the debtor company becomes insolvent).

**Question 2.2 [maximum 3 marks]**

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

Degree of Financial Difficulty. To open a safeguard procedure, the debtor company must not be in a payment failure situation. To open a rehabilitation procedure, however, the debtor company must be in a more severe financial situation, actual payment failure.

Duration of Proceeding. The maximum duration for a safeguard proceeding is 12 months, while a rehabilitation proceeding may last up to 18 months.

Who May Submit a Plan. In a safeguard proceeding, only the debtor company may submit a plan to creditors for vote. In a rehabilitation plan, however, a plan may be submitted to creditors by any affected party.

Who May Request a Cross-Class Cram-Down. In a safeguard proceeding, the debtor’s consent is required before the court may approve a cross-class cram-down. The request is made by the debtor or the administrator with the debtor’s consent. In a rehabilitation proceeding, the request for a cross-class cram-down may be made by any affected party without debtor’s consent.

**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.

The Order of 15 September 2021 enhanced the accelerated safeguard procedure to work in conjunction with the negotiation and plan drafting done in a conciliation proceeding to ensure that a vote on a restructuring plan can be achieved in a very short time period.

In addition, all companies, regardless of their size, may take advantage of the accelerated safeguard procedure.

The third new element of insolvency law since the Order of 15 September 2021 is the “post-money” privilege, that is, protection for any new financing or cash contributions that the debtor obtains during the conciliation proceeding. This protection is only available if the court sanctions the conciliation agreement. Claims subject to the post-money privilege cannot be written off or postponed without the consent of the claimholder.

**Question 2.4 [maximum 2 marks]**

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

In the context of a conciliation agreement, *homologation* refers to the court’s sanctioning of the agreement. Sanction requires publication of the judgment sanctioning the agreement, which destroys any confidentiality that the debtor company and/or affected creditors may seek to protect. In the event that the conciliation proceeding is later converted to an accelerated safeguard proceeding, sanction provides the “post-money” privilege discussed above to protect claims for any new financing or cash contributions obtained by the debtor during the conciliation proceeding.

In the context of a conciliation agreement, *constatation* refers to approval, as opposed to sanctioning, of the conciliation agreement by the court. Court approval does not require publication and therefore preserves confidentiality of the conciliation agreement.

**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*?

Insolvency law in France has a history of regular and continuous reform activity. Significant changes to France’s Commercial Code were made in 2005, 2010, 2014, 2016, and 2019. In the reform of 15 September 2021 the French government transposed the provisions of the EU Directive on Preventive Restructuring by effecting an Ordinance adopting EU law into France’s domestic insolvency law. Depending on the differences between EU law and France’s domestic insolvency law (which is beyond the scope of Module 6A’s Guidance Text), the ordinance of 15 September 2021 may or may not be an overhaul of the *status quo* in France.

One of the changes as a result of the reform of 15 September 2021 was how creditors are grouped within committees in insolvency proceedings. For example, before the reform, creditors were assigned to committees on the basis of their position as credit institutions, main suppliers, and bondholders. The 2021 reform replaced the previous committees within classes of creditors based on common economic interests. In accelerated safeguard proceedings, all debtors must form classes of creditors for voting purposes. In safeguard proceedings, on the other hand, mandatory classification of creditors is required only for companies having over 250 employees and a turnover greater than EUR 20 million (or a turnover of more than EUR 40 million without regarding to the number of employees).

Additional changes brought by the 2021 reform include the introduction of cross-class cram-down of dissenting creditors and the “post-money” privilege that protects new financing or cash contributions obtained by the debtor during conciliation and safeguard proceedings. These reforms appear to be more than minor changes to the *status quo.*

Moreover, the 2021 reform was comprehensive and reconciled the insolvency laws and security laws in France.

**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. Safeguard and accelerated safeguard proceedings share the following similarities: both procedures are court-based, collective procedures that allow the debtor to remain in possession of the debtor company’s affairs; the opening of both procedures leads to the appointment of an insolvency judge, administrator, and creditors’ representatives; both procedures allow the court to approve a cross-class cram-down of dissenting creditors who do not approve the plan or conciliation agreement; and both procedures allow for court approval of the “post-money” privilege to protect new financing or cash contributions obtained by the debtor during the proceeding.

Differences. Safeguard proceedings are available to a debtor company that is not yet in a payment failure situation, while a company that has reached insolvency may enter conciliation and accelerated safeguard provided that the company has not been in payment failure for more than 45 days. Accelerated safeguard requires the company to first commence conciliation procedure to negotiate, draft, and obtain approval from creditors of the conciliation agreement to be sanctioned by the court in the accelerated safeguard proceeding. Only safeguard has an observation period; accelerated safeguard has no observation period and must adopt the plan within two months of the opening judgment. Safeguard does not require compulsory classes of creditors, while accelerated safeguard does require compulsory classes of creditors.

Objectives. The objective of both safeguard and accelerated safeguard proceedings is to reach a sanctioned or approved plan or conciliation agreement that can be implemented to restructure the debtor company’s liabilities and thereby preserve the company and its business as a going concern. This is particularly important for preserving employment. Safeguard is designed to prevent insolvency. Accelerated safeguard is available to an insolvent debtor within 45 days of the onset of insolvency and designed to quickly resolve the insolvency by pre-negotiated agreement with creditors.

**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.

With the 2021 reform, all accelerated safeguard proceedings are mandated to form classes of creditors for voting purposes. This mandatory classification of creditors does not apply to safeguard proceedings unless the debtor company employs over 250 employees and has a turnover greater than EUR 20 million (or a turnover of more than EUR 40 million without regarding to the number of its employees). The purpose of the formation of creditor classes is to enable creditors with similar economic interests to vote together as a class for purposes of approving or rejecting a restructuring plan. The debtor company is accorded flexibility in forming the creditor classes provided that such classifications meet certain minimum criteria: (1) secured creditors and unsecured creditors must be in separate classes; (2) the class formation must comply with any pre-existing subordination agreements among creditors; (3) equity holders must have their own class or classes; (4) any creditor secured by a trust must be classified only with respect to the amount of the creditor’s claim that is not secured (i.e., the deficiency claim only). In addition, certain creditors, such as tax and social creditors and employees, are not included in the classification of creditors.

The composition of each class can have a significant impact on the result of the voting for or against the proposed plan. As such, disputes may arise with respect to which creditors are grouped together or separated by the class structure, the distribution methodology and application of the absolute priority rule, as well as disputes about how votes are calculated. If such disputes are not resolved, the supervising judge may decide the matter upon a petition made by any affected party, the debtor, the public prosecutor, administrator, or creditors’ representative.

**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.

Yes, Mireille should consider applying for conciliation under these circumstances. Mireille qualifies for conciliation because she is not yet insolvent (although she would still qualify for conciliation up to 45 days after becoming insolvent). Conciliation is an out-of-court procedure that preserves confidentiality so Mireille need not worry about bad publicity from the conciliation procedure. If the conciliator is successful in negotiating agreement between Mireille and her landlord (her main creditor) and any other creditors, then the Conciliation Agreement will be brought to the court for approval, which will maintain the confidentiality of the proceeding.

**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.

The main advantages of a conciliation procedure is that it (a) allows the debtor to remain in possession of the business operations and (b) is designed to engage the debtor and its creditors in a negotiated resolution of their debtor-creditor relationship at an early stage and to prevent insolvency if possible. Mireille will nominate a conciliator to negotiate primarily with her landlord and secondarily with any other creditors to reach an agreement that pays her debts in full over a longer period of time or pays a reduced amount of debt over time, or both. The agreement will be documented in a conciliation agreement that will be approved or sanctioned by the court and enforced under contract law. In the meantime, Mireille will continue to operate her fitness business.

If the conciliation fails, Mirelle could try a safeguard procedure, but that is likely to be more involved and expensive than her business can afford.

Another alternative to conciliation is an *ad hoc* mandate, which is also a voluntary and confidential procedure that Mireille controls. The *ad hoc* mandate is very similar to conciliation but it may not result in a contract restructuring Mireille’s business debt.

**Question 4.3 [maximum 5 marks]**

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

Mireille can only open an accelerated safeguard proceeding after she has been engaged in the conciliation process. Mireille must be advised that an accelerated safeguard proceeding is not confidential, and she will be unable to avoid publicity if she chooses to enter an accelerated safeguard proceeding. Once she is assured that her creditors will approve her restructuring plan or conciliation agreement, and if Mireille requires a cross-class cramdown of dissenting creditors or court sanctioning of the restructuring plan, Mireille may find the advantages of an accelerated safeguard to be more attractive than simply a court approved conciliation agreement.

Once Mireille obtains an opening judgment for the accelerated safeguard proceeding, she must receive creditor adoption of the plan within two months. If she does not achieve that, the accelerated safeguard proceeding is closed with no possible conversion.

**\* End of Assessment \***