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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?

Accelerated Safeguard

**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. Safeguard procedure is available to solvent debtors (i.e., before cessation of payments) while rehabilitation procedure is available to insolvent debtors (i.e., after cessation of payments has occurred)
2. Safeguard procedure can only be initiated by the debtor company (or its legal representative), while rehabilitation proceedings can be initiated voluntarily by way of an application to the court by the debtor company (or its legal representative) or by an application to the court by an unpaid creditor or the Public Prosecutor.
3. In Safeguard proceedings, only the debtor company, with the support of the administrator, can submit a draft restructuring plan for consideration by the affected parties, while in rehabilitation procedures, in addition to the debtor company, any affected party (does not include bondholders) may submit a draft restructuring plan for consideration by the affected parties.
4. In Safeguard proceeding, where a draft plan is not approved by all affected parties (i.e., does not secure requisite majority in voting by creditor classes), the Court may approve the plan (cross class cramdown) only with the consent of the debtor company, while in rehabilitation proceedings, the court may approve a draft restructuring plan that has not been approved by all affected parties upon request by either the debtor or any affected party (i.e., the debtor’s consent is not a condition for such approval)
5. Safeguard proceedings have an observation period that is limited to a maximum of 12 months while rehabilitation proceedings have an observation period that is limited to a maximum of 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.

1. The Ordinance introduced classes of creditors to French insolvency and restructuring law – before the Ordinance, French insolvency law provided for grouping of creditors in committees which had senior, junior, privileged and unsecured creditors in the same committee. Under the Ordinance, separate classes such as secured, unsecured and equity holders were introduced.
2. With the introduction of classes of creditors, the Ordinance also introduced the concept of cross-class cramdown (subject to the absolute priority rule) – this allows the court to impose restructuring plans on dissenting classes of creditors. In safeguard proceedings, cross-class cramdown requires the consent of the debtor company while in rehabilitation proceedings the debtor’s consent is not required.
3. The Ordinance also introduced a new “post-money” or “post commencement funding” lien/privilege which accords protection to court-approved cash contributions to a debtor after the commencement of restructuring proceedings. This new money is protected from non-consensual postponement or restructure in subsequent restructuring proceedings. Only few specific claims can override this class of funding, such as super priority granted to wages and legal fees, amongst others.

**Question 2.4 [maximum 2 marks]**

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

Conciliation proceedings involve amicable contractual and confidential restructuring discussions between a debtor and its creditors. Conciliation agreements are ratified by the court, at the request of the debtor. In ratifying the conciliation agreements, the court may either approve the agreement (constatation) or sanction the agreement (homologation).

Constatation preserves the confidentiality of the conciliation proceedings and agreements since they are not publicised. This is, sometimes, viewed as desirous/advantageous since it does not signal the market that the debtor is distressed.

On the other hand, homologation involves the conciliation judgement being publicised (this may have some adverse effects due to the distress tag attaching to the debtor). However, compared to mere approval of conciliation agreements by the Court, sanctioning of conciliation agreements by the Court confers greater legal protection in the event of subsequent insolvency proceedings being opened in relation to the debtors. For example, is conciliation proceedings are subsequently converted to accelerated safeguard proceedings, providers of new money in the course of the conciliation proceedings enjoy the new money privilege/lien.

**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 primary objective of the Ordinance No. 2021-1193 of 15 September 2021 was to transpose the EU Directive on Preventative Restructuring into the French insolvency and restructuring regime.

Even before the Ordinance came into effect, France already had a formal court-supervised preventative restructuring framework in place comprising both pre-insolvency amicable contractual (and even confidential) restructuring proceedings (i.e., *mandat ad hoc* and *conciliation*) as well as preventative restructuring proceedings (safeguard proceedings, accelerated safeguard proceedings and accelerated financial safeguard proceedings). These proceedings were available to companies facing significant financial challenges, but which were not yet insolvent (i.e., in a situation of cessation of payments). Relative to other EU jurisdictions, France was already an established restructuring-biased jurisdiction which accorded greater importance to protection of debtors and preservation of employment (socio-economic impact of businesses).

Therefore, the Ordinance did not necessitate the introduction of new preventative restructuring procedures in France (since these were already in existence), rather, it resulted in the modification of some of these procedures (e.g., consolidation of the accelerated safeguard proceedings and accelerated financial safeguard proceedings) and enhancement of the preventative restructuring procedures through the introduction of new elements of insolvency and restructuring proceedings such as classes of creditors, cross-class cramdown and new money lien.

By way of contrast, some of the other EU jurisdictions had to adopt more radical changes in their insolvency and restructuring regimes in order to implement the directive. For example, before Germany implemented the EU Directive on preventative restructuring, the German insolvency regime/legislation did not provide for any restructuring procedures before a company was declared insolvent (i.e., restructuring procedures provided for in the law were only available after a company had been declared/filed for insolvency). To implement the EU Directive on preventative restructuring, Germany enacted the German Corporate Stabilisation and Restructuring Act (StaRUG) in 2021 which introduced pre-insolvency restructuring proceedings, supervised by the restructuring court, for “imminently illiquid debtors”. These proceedings are implemented by way of a restructuring plan. (<https://www.roedl.com/insights/ma-dialog/2021-02/starug-closing-gap> ).

Furthermore, one of the key introductions of the Ordinance, that is, the formation of creditor classes in insolvency and restructuring proceedings, may end up not being as widely used (hence, reduced impact in the French restructuring and insolvency landscape) due to the high threshholds set for companies to qualify to form creditor classes in safeguard and rehabilitation proceedings – i.e., companies that automatically qualify to form creditor classes in their safeguard and rehabilitation proceedings are those companies which (either on their own or as part of controlled entities) either: (a) employ at least 250 employees and have a turnover of at least 20 million Euros, or (b) have a turnover of at least 40 million Euros. Restructuring and insolvency proceedings did not involve formation of creditor classes pre-Ordinance (due to operation of the law) and this trend may continue to an extent post-Ordinance due to these thresholds.

**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**.

Objectives

The primary objective of Safeguard proceedings is to protect a debtor that is facing financial difficulties to allow it time to formulate and negotiate a restructuring plan with its creditors. This protection is primarily in the form of suspension of payment of pre-commencement claims and stay on enforcement action and unilateral legal proceedings linked to pre-commencement claims.

On the other hand, the primary objective of accelerated safeguard proceedings is to accelerate/fast track the resolution of the financial difficulties facing a debtor by providing a framework under which a debtor and its creditor can agree on a restructuring plan quickly.

Similarities

1. Both Safeguard and Accelerated Safeguard proceedings are initiated at the request of the debtor (i.e., an external party cannot initiate)
2. Both Safeguard and Accelerated Safeguard proceedings have the possibility of imposition of the restructuring plan on dissenting creditors by the Court with the consent of the debtor and subject to the absolute priority rule
3. Both Safeguard and Accelerated Safeguard proceedings accord the new money protection for any court-sanctioned funding advanced during the proceedings.
4. Safeguard proceedings that involve formation of classes of creditors and Accelerated Safeguard proceedings (which by law must have creditor classes) have the same approval thresh holds (i.e., approval by two-thirds of voting creditors in a class).

Differences

1. A company is eligible for Safeguard proceedings only if it is not already in a situation of cessation of payments. Accelerate Safeguard proceedings are available to companies that are in a situation of cessation of payments provided such cessation did not last more than 45 days before conciliation proceedings were opened.
2. Commencement of Safeguard proceedings results in suspension of payment of pre-commencement claims and stay on enforcement action and unilateral legal proceedings linked to pre-commencement claims. Accelerate Safeguard proceedings do not result in such a suspension/stay.
3. Classes of Creditors must be formed in all Accelerated Safeguard proceeding. In the case of Safeguard Proceedings, creditor classes are only formed if the debtor company meets the minimum thresh holds set (i.e., (a) employ at least 250 employees and have a turnover of at least 20 million Euros, or (b) have a turnover of at least 40 million Euros) or by order of the court upon petition by the debtor company.
4. Accelerated Safeguard Proceedings are a two-step process and must be preceded by conciliation proceedings during which the restructuring plan is drawn and substantially agreed with the majority of the creditors of the debtor. Safeguard proceeding are not required to be preceded by any other restructuring proceedings (i.e., single process proceeding) and involve the formulation of the restructuring plan during the course of the proceedings.
5. Accelerated Safeguard proceedings have a short timeline of up to Four Months. Safeguard proceedings have a longer timeline of with the observation period capable of being extended up to a maximum of 12 months.

**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.

Main features

1. Formation of classes of creditors is only applicable in Accelerated Safeguard Proceedings, Safeguard Proceedings and Rehabilitation Proceedings.
2. Creditor classes must be formed in all Accelerated Safeguard Proceedings. In Safeguard Proceedings and Rehabilitation Proceedings, creditor classes are only formed if the debtor company meets the minimum thresh holds set (i.e., (a) employ at least 250 employees and have a turnover of at least 20 million Euros, or (b) have a turnover of at least 40 million Euros) or by order of the court upon petition by the debtor company (Safeguard) or debtor/administrator (rehabilitation)
3. Creditors are grouped into classes by the administrator, primarily, on the basis of common economic interest.
4. Creditor classes are limited to “affected parties’ – i.e., creditors whose debts or interests are affected by the restructuring plan.
5. The minimum number of classes to be formed is two (can be more) and will, at a minimum, usually include separation of secured creditors, unsecured creditors, and equity-holders.
6. The establishment of classes is expected to adhere to any subordination agreements entered before the insolvency proceedings.
7. Approval of plans is by way of majority vote (two-thirds majority) of the creditors voting. Such approval is binding on the dissenting minority in a class in which such majority is achieved.

Potential Issues

1. Debtors or other affected parties may disagree with the manner of constitution of classes or allocation of voting weights by the administrator. Such disputes are determined by the court.
2. Creditor classes who do not have an economic interest in a restructuring plan (i.e., who do not stand to gain materially) may not be adequately incentivized to approve the plan. Possibility of court-imposed cross-class cramdown (with the consent of the debtor in safeguard and accelerated safeguard proceedings) addresses this challenge.

**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.

Section 611-5 of the Commercial Code lists parties that are eligible for composition (conciliation) proceedings (<https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf>, Page 199). This includes natural persons running independent professional activities, regulated or otherwise. Mireille, being an independent professional, qualifies for conciliation proceedings.

To qualify for conciliation proceedings, a debtor must not have been in payment failure (cessation of payments) for more than 45 days (i.e., the procedure is available to debtors facing existing or foreseeable economic or financial difficulties but who has not been in payment failure for more than 45 days).

Since Mireille is simply anxious that she may become insolvent in the near future and is not actually yet insolvent, she meets the criteria to open conciliation proceedings. Mireille should go ahead and open conciliation proceedings in line with her friend’s advice. Conciliation proceedings can be conducted confidentially, resulting in approval of the agreement between the debtor and creditors by the court, i.e., *constatation*. Mireille’s concerns regarding adverse publicity can, therefore, be addressed by requesting the court to keep the proceedings confidential.

**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.

Conciliation proceedings are opened at the request of the debtor by way of an application to the President of the Court. Sections 611-5 and 611-6 give jurisdiction for conciliation proceedings to the Tribunal de grande instance (High Court).

The application to the court should state the debtor’s economic, employment and financial situation. The President of the Court also has powers to appoint an expert of their choice to prepare a report on the debtor’s economic, employment and financial situation.

On opening the conciliation proceedings, the President of the Court appoints a conciliator for a period of four months (May be extended by a further month at the request of the conciliator). The debtor may also propose the party to be appointed as conciliator to the court.

The role of the conciliator is to oversee the proceedings and to assist the debtor in engaging with their creditors in an attempt to amicably agree on the resolution of the debts owed in a manner that resolves the difficulties facing the business of the debtor.

Once the debtor and their creditors reach agreement, they file their agreement with the court. The court records the agreement and makes it enforceable. In recording the agreement, the court can either approve the agreement (*constatation*) or sanction the agreement (*homologation*).

*Constatation* preserves the confidentiality of the conciliation proceedings while *homologation* involves the publicising of the judgement adopting the agreement. While homologation may result in adverse publicity, it accords greater protection to creditors involved in the conciliation proceedings in the event of subsequent insolvency proceedings (e.g., new money privilege or lien for creditors who provide new money in the course of conciliation proceedings that are subsequently converted to accelerated safeguard proceedings).

Approval of the agreement terminates the conciliation proceedings. Similarly, in the event the conciliator reports to the court that the debtor and creditors cannot reach agreement, the court will terminate the appointment of the conciliator and bring the conciliation proceedings to an end. This is because conciliation proceedings are consensual in nature.

Conciliation proceedings have the advantage of the confidentiality they accord, especially if they result in a *constatation*. They also have the advantage of added legal protection if they result in *homologation*.

In addition to conciliation proceedings, Mireille also has the option of applying for ad hoc mamdate, safeguard and accelerated safeguard proceedings.

**Question 4.3 [maximum 5 marks]**

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

Yes. Mireille can open accelerate safeguard proceedings.

Accelerated safeguard proceedings are a two-stage procedure designed to fast track the resolution of a debtor’s difficulties. They are available to debtors that are going through conciliation proceedings (i.e., must be preceded by conciliation proceedings) and who has not been in payment failure for more than 45 days. Mireille, therefore, qualifies to open accelerated safeguard proceedings.

The proceedings involve negotiation and drafting of a restructuring plan during the course of conciliation proceedings. Once it is clear that the restructuring plan will have sufficient support for approval (i.e., enough classes of creditors involved in the proceedings support the plan), the debtor can request the opening of accelerated safeguard proceedings. The court will open accelerated safeguard proceedings if there is likelihood of the restructuring plan being approved/adopted within four months of the commencement of accelerated safeguard proceedings.

Accelerated safeguard proceedings always involved the constitution of classes of creditors. Approval of the restructuring plan by a class of creditors requires two-thirds of the voting creditors in the class to support/approve the plan.

The advantage of accelerated safeguard proceedings is that they combine the contractual flexibility and confidentiality of conciliation proceedings with the possibility of cross-class cramdown by the court to bind a dissenting class of creditors. This cramdown is only exercisable with the consent of the debtor. Accelerated proceedings also offer the advantage of new money privilege where the new money was provided with the sanction of the court during conciliation proceedings.

Accelerated safeguard proceedings end with the approval of the restructuring plan by the court. If the plan is not approved by the requisite classes of creditors and adopted by the court within the stipulated timelines (i.e., four months), the court will bring the proceedings to an end.

While, theoretically, Mireille qualifies for accelerated safeguard proceedings, there is merit in considering whether her fairly straightforward circumstances (i.e., only one major creditor) merit the added complexity of accelerated safeguard proceedings over, say, conciliation proceedings only. Cross-class cramdown may not be necessary where there is only one creditor/creditor class.

**\* End of Assessment \***