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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 - The procedure which can be opened following a conciliation procedure is accelerated safeguard.

Statement 2 – The procedure which is not limited in time and aim to avoid insolvency is ad hoc mandate]

**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 three main variations are as follow:

1. As compare rehabilitation, the process of safeguard procedure was introduced with the aim to be a pre-insolvency mechanism where the debtor should not be insolvent whereas for rehabilitation, the debtor is insolvent.
2. Another difference would be in the participation of the creditors in both procedures where in rehabilitation, an affected party/ the debtor can propose another plan to the one submitted by the debtor for voting and in rehabilitation procedure, a creditor may petition the court for applying its power to order a cross-class cram-down. In contrary, the safeguard procedure allows a debtor to come forward with a plan and/or a cross-class cram-down.
3. Now, the maximum period for a safeguard procedure is 12 months (it is renewable for six months only once) and the rehabilitation procedure may take 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.

[The Order of 15 September 2021 which transposed the EU Directive on Preventive Restructuring Frameworks 2019, which make the accelerate safeguard procedure as the main framework in respect of preventive restructuring and provide an accelerate safeguard proceeding:

New elements are as follows:

1. The accelerate safeguard procedure shall be for a maximum duration of four months and all entities can use this procedure which was not available before October 2021 and the aim is to preserve the value of the entity in a framework of so-called pre-pack and a restructuring plan may be used by the creditors.
2. The accelerate safeguard shall follow a conciliation procedure which aimed at the sustainability and salvage the entity. The procedure shall be supported by the creditors within two months for the opening judgement. The Court within three months as from the opening judgement must approve the agreement as per Article L626-31.
3. There is also a new protection for new financing which has been raised during the conciliation procedure and the new financing is secured and rank as priority payment on distribution during the accelerated safeguard and it also introduce the compulsory constitution of classes of affected parties.]

**Question 2.4 [maximum 2 marks]**

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

[The difference is that under constatation, the agreement shall remain confidential and under homologation, upon approval of the agreement, the judgement has to be advertised and same provide a more legal advantage than a mere approval especially if there is a subsequent insolvency proceeding, new money privilege will help the new financing party,]

**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*?

[France is well known even at international level to be a restructuring biased country with aim to rescue businesses which are facing financial difficulty to promote the preservation of employment. This reform is of consequence of Order No. 2021-1193 which has amended Book VI of the French Commercial Code, on Wednesday, September 15, 2021 (the Order). It transposed into the French law, the European directive (EU) No 2019/1023 of June 20, 2021 (the Restructuring Directive) and was oriented toward the harmonisation of the laws of the different Member States on preventive restructuring and insolvency, to diminish the length of proceedings, to encourage debtor to make use of preventive proceedings and benefit the creditors especially the security holders; and making it more simple while adding more clarity and modernising the rules in respect to security interests and security-holding creditors in Book VI of the French Code de Commerce.

Yet, no major changes in the insolvency law were brought, as the law has not found it necessary “***to call into question its general architecture, but rather to ensure the legibility of the law****”.*

Although the debtors in France could avail to safeguard procedure if they are solvent and rehabilitation procedure if insolvent, the ordinance of 15 September 2021 has moderately changed these proceedings and introducing the accelerated safeguard as the main process for the transposition of the PRD 2019.

**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**.

[Safeguard procedure as per Ordinance of 2008 is a procedure avail for debtor which are facing financial difficulties where the debtor is not in a position to overcome but not yet in a payment failure position. Th accelerated safeguard was established in 2014 as a pre-pack variant of safeguard and on 15 September 2021, the accelerated safeguard became the core preventing restructuring after the transposing of the EU Directive on Preventive Restructuring Frameworks 2019.

**Similarities**

The accelerated safeguard is also influenced by the rules which are applicable to the traditional safeguard.

Both procedures are not amicable and confidential as compared to conciliation and ad hoc mandates and both procedures although the safeguard procedure was intended by the law as a pre-insolvency mechanism.

For both procedures, the debtor is facing financial difficulties but is not in payment failure situation but may lead to a failure situation.

The procedure can be open by court order petitioned by the debtors and cross-class cram down process of dissenting creditors is available under both procedures.

**Differences**

To be able to avail the accelerated safeguard, the debtor should first proceed with a conciliation and the accelerated proceeding shall be opened by the debtors which the conciliation procedure is still ongoing but same is not applicable for the opening of a safeguard procedure as no conciliation proceeding is required to open a safeguard proceeding. For accelerated safeguard procedure, an agreement drafted under the conciliation procedure is probably be adopted in three months from the opening judgement by the creditors which are affected by the plan.

Another distinction would be that under an accelerated safeguard procedure, the formation of classes of affected parties is obligatory whereas for safeguard procedure, the new class system is not an obligation except for entities which employees more than 250 employees and generate a turnover which is more than EUR 20 million or companies generating a turnover of more than EUR 40 million.

For safeguard procedure, the maximum duration is twelve months (can be renewed once after six months whereas for accelerated safeguard, the maximum duration allowed is four months.

**Objectives**

The aim of accelerated safeguard procedures is to protect the value of an entity within the framework of the alleged pre-pack enabling the restructuring plan to be approved by the affected creditors on an early basis as the maximum duration is four months as it followed a conciliation process and the plan built during the conciliation process will likely be adopted within a period of three months from the opening judgement by the affected parties .

The safeguard procedure aimed under law was to be a pre-insolvency mechanism whereby the entity shall not be insolvent. The safeguard process is more debtor-driven pre-insolvency process to help the entities to get out of the financial prevailing situation This procedure encourages companies facing financial difficulties at an early stage which lead to a stay on enforcement actions from the creditors and enable the debtor to proceed with a rehabilitation plan which the debtor still remain in office.. The safeguard procedure is opened by the court leading to a so-called observation period with the objective to :

1. Undertake a detailed assessment of the situation of the business (financial, operation, social, commercial and legal aspects);
2. Plan and proceed within possible a restructuring plan to salvage the business; and
3. Account for the total of debts that will require payments during the rescue process once the observation period ends.

**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.

[Before the reform of 2021, the insolvency law in France enabled three committees of creditors namely creditor institutions, main suppliers, and bondholders. After the reform of 2021, the Commercial Code provide a difference between the safeguard and accelerated safeguard whereby for the former, new class is not mandatory for safeguard process except if the entity has more than 250 employees and generate a turnover of EUR 20 million or generate a turnover of EUR 40 million. For accelerated safeguard, the formation of classes is a requisite condition. Although, these thresholds are higher as compared to the previous one, it was predicted that the changes in formation was to some extend marginal in number. It reflects delicate political options among the equal access of restructuring tools and leading to more or less complexity in the process because of the size of the debtor.

A debtor may petition the supervising judge to constitute the classes of creditors which are below the threshold, or the insolvency practitioner may constitute the classes of creditors base on sufficient commonality of economic interest. Same will depend on classification of the entity’s liabilities and activity. Tax and social creditors as well as employees do not form part of any classes.

The 2021 reform also enable the possibility of cross-class cram-down dissenting creditors during safeguard procedure to ensure that all parties are treated fairly. The process has to be approved by the debtor before been ordered by the court and so-called post commencement funding privilege.

Issue which may arise in relations to classes of creditors.

France has been heavily blamed by commentators for showing insufficient uniformity of interest in respect to the different classes of creditors which were been grouped in same committees which were not as per international requirement for complex financing schemes dealing with different layers of debts. With the transposition of the Directive, debtors are now able to request the supervising judge to nonetheless constitute different classes of creditors for them which fall below the threshold and same is not subject to appeal. And the insolvency practitioner may now constitute groups of creditors base on a sufficient customary of economic interest. Hence the creditors may disagree with the way the classes are constituted and there is also a clause where the supervising judge order cannot be appeal.

**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.

[For Mirelle to be able to open a conciliation proceeding, the business of Mirielle must not be a personal debt. As the debts of Mirielle business relates to professional activity especially the rent of the fitness studio is seriously struggling the business and hence the personal debts theory shall not apply which enable Mirielle to proceed with a conciliation process.

To be able to proceed with a conciliation procedure, the business must not in a position of insolvent for more than 45 days. As Mirielle is having some cashflow issues and is struggling to settle the outstanding claims especially the rent but Mirielle is not yet in an insolvent position (not in payment failure position) and hence she can proceed with a conciliation.]

**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 is a process whereby while facing financial difficulties but not in payment rupture, the process shall be opened by the debtor which will enable the debtor to remain in office but nominate an insolvency practitioner (a conciliator) to make proposal to the creditors with the aim of protecting the preservation of the business and the economic activity. The conciliation agreement needs to be ratified by the court through constatation whereby the confidentiality is preserved and homologation whereby the judgement has to be published which will enable the debtor to have a more legal advantage upon opening of subsequent insolvency proceeding like new money providers will be protected if there is an opening of an accelerated safeguard. The homologation will also protect the new finance providers as their claims cannot be rescheduled or written-off in a safeguard or rehabilitation process without their approval and same apply for a cross-class cram down.

The advantages of a conciliation are:

As Mirielle is facing financial difficulties and she may be in the future face insolvency issue. Falling to draft a declaration of payment failure may leads Mirielle to sanction like been personally liable for debts due or professional sanctions.

Upon opening of a conciliation process, the creditors will not be able to any proceeding (a stay of enforcement) against Mirielle business as there shall have an observation period for Mirielle and the insolvency practitioner to make a proposal of restructuring the business without any pressure from the creditors. Conciliation will enable Mireille to come to an agreement with the creditors on an early basis and on a confidential and contractual foundation.

Mirielle may also open an accelerate procedure later which bring the out of court amicable proceeding of conciliation and insolvency proceedings together.

Under a constatation of the conciliation procedure, the confidentiality of the process will be secured and as the business is based on word-of-mouth clientele, the issue of bad publicity and scare off of the customers will not occurred.

The conciliation process will enable Mirielle to remain in control and as she is more familiar to the business, the client and the creditors, it would be easier to salvage the business.

The other insolvency procedure which Mirielle can avail is ad hoc mandate whereby an insolvency practitioner appointed as an ah doc representative by the debtor or the court to oversee the negotiation with the creditors. The ah doc representative may come with new ideas which will help on the salvage of the business and continuity of the economic activity.

Safeguard and rehabilitation shall not apply as it not confidential and involve all creditors. Mirielle does not want a public bad publicity and liquidation process will like the business of Mirielle.

Accelerated procedures shall not be available also as the business need to open a conciliation process before.]

**Question 4.3 [maximum 5 marks]**

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

[Accelerated safeguard came in existence in 2014 as a pre-pack version of safeguard transposing the EU Directive on Preventive Restructuring Framework 2019 which make the accelerated safeguard as the main process of preventive restructuring as per the Directive which cannot exceed a duration of four months.

To be able to open an accelerated safeguard procedure, the below processes are required:

1. The business has been under a conciliation procedure before the opening of the procedure.
2. The conciliation agreement has been drafted with the aim of providing a sustainability and directed toward the salvage of the business.
3. The agreement will receive the support of the affected parties in less than two months as from the opening of the judgement of the accelerated process.
4. The debtor should not be in a payment failure situation and open at the request of the debtor.
5. The opening of the said safeguard will lead to the creation of creditors’ classes as per Article L626-29 of the Commercial Code.

If the business of Mirielle meets the above criteria, the business will be able to proceed with the accelerated procedure in the future.

1. The advantages are that Mirielle business will benefit from the confidentiality and contractual flexibility from the conciliation process and afterward with the court assistance, able to bind the dissenting creditors from a cross-class cram-down approach.
2. The accelerated safeguard aims at providing an fast track way of restructuring the business as it has to been completed within four months.
3. New money privilege will not be rescheduled in events of safeguard or rehabilitation without their consent and same shall not even be applicable for cram-down or cross-class cram-down process. This may encourage creditors to supply fund for the restructuring.
4. The agreement from conciliation process approved by the majority is binding on the minority.]

**\* End of Assessment \***