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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: Accelerated safeguard proceedings.

Statement 2: Ad hoc mandate 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. Nature and severity of the difficulties encountered. For rehabilitation procedures, the company need to be in a payment failure situation (insolvency situation). In safeguard procedure, the company is not in a payment failure situation (state of insolvency) but is experiencing difficulties which it is not able to overcome.
2. Observation period. For rehabilitation procedures, the court opens a six-month observation period, renewable for up to 18 months. In safeguard procedure, the observation period can last a maximum of 12 months.
3. Opening of the proceeding. For rehabilitation proceedings, the debtor company, any unpaid creditor or the Public Prosecutor can request the opening of the rehabilitation proceeding. For safeguard proceeding, only the debtor company can request to the court the opening of the safeguard proceeding.

**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 classes of creditors.
2. The possibility to cross-class cram-down dissenting creditors.
3. The post-money privilege (post-commencement funding privilege).

**Question 2.4 [maximum 2 marks]**

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

The difference between homologation and constatation is the publicity of the procedure.

Homologation means the sanction of the conciliation agreement by the court, which involves publicising the judgment and confers more legal advantages than a mere approval in the event of subsequent insolvency proceeding is opened.

By its side, constatation means the mere approval of the agreement by the court, where the confidentiality of the procedure and judgment is preserved.

**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*?

Can be said that the reform of 15 September 2021 has been a minor reform because it slightly modified the safeguard proceedings and rehabilitation proceedings, as the government opted to add the accelerated safeguard proceeding as the main vessel for the transposition of the EU Preventive Restructuring Directive of 2019. Although it introduced some modifications to the pre-existing insolvency procedures in France, it did not take charge of their issues and they were not fundamentally reformed.

**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**.

The objective of the safeguard procedure is preserve a company who is encountering difficulties which it is not in a position to overcome, while not yet in a payment failure situation, by the way of a restructuring plan adopted by the affected creditors and the debtor. By its side, the objective of the accelerated safeguard procedure is preserve the company’s value within the framework of a so-called pre-pack, where a restructuring plan can be adopted by affected creditors

The main similarities between the safeguard and accelerated safeguard procedures are that only the debtor can present a restructuring plan, in both procedures is possible the cross-class cram-down of dissenting creditors, and in both procedures classes of creditors may be constituted.

Regarding the differences, the maximum duration of safeguard proceedings is 12 months, while accelerated proceedings can last up to 4 months. Also, accelerated safeguard proceedings are not a stand-alone procedure, as it can only be used following the opening of conciliation proceedings. Additionally, in accelerated safeguard proceedings the debtor is in payment failure situation, while in the safeguard proceeding the debtor cannot be in a state of insolvency to request the opening of this procedure.

**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.

The main features of the new class formation are, firstly, that in accelerated safeguard procedure is mandatory the constitution of classes, while in the safeguard procedure is mandatory only if certain thresholds are met (the company employ over 250 employees and have a turnover greater than EUR 20 million, or have a turnover of over EUR 40 million). Secondly, the classes of creditors are constituted by the administrator. Thirdly, classes of creditors are required to vote on the restructuring plan by the “consultation”. Finally, dissenting classes of creditors may be crammed down.

In relation to classes of creditors, were discussed that classes should be divided into sub-categories based on a commonality of interest. Also some commentators mentioned the possibility for the government to introduce a specific class for new money providers or a one-person class comprised of one creditor only.

**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.

Given the personal circumstances of Mireille she cannot apply for conciliation because she is not in a situation of insolvency yet.

Mireille does not meet the criteria to open the conciliation procedure because, to request the opening of this procedure, she must be in a situation of insolvency for no longer than 45 days, but she is not insolvent yet (she may become insolvent in the near future and then apply for 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 proceedings are mostly an out-of-court procedure, which is opened at the request of the debtor, in order to negotiate workouts with their creditors at an early stage and on a confidential and contractual bases. The opening of this procedure provokes the appointment of a conciliator who oversees the procedure and makes any proposal relevant for the preservation of the business. At the end of the process, the conciliation agreement is sanctioned by the court. The court can either approve the agreement (constatation) or sanction the agreement (homologation), which implies that confidentiality is maintained in the first case and that the procedure becomes public in the second case.

One of the advantages of the conciliation proceeding is that the conciliator will make any proposal to the preservation of the business and that this procedure enables the debtor to apply for the accelerated safeguard proceeding.

As Mireille is not insolvent yet, she could avail for an ad hoc mandate or safeguard proceeding.

**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 cannot request the opening of an accelerated safeguard proceeding because this procedure can only be used following the opening of a conciliation proceeding. As Mireille is not in a situation of insolvency, she cannot request the opening of a conciliation procedure, and, as the accelerated safeguard proceeding must be engaged to a conciliation procedure, she cannot open an accelerated safeguard proceeding neither.

The accelerated safeguard proceeding aims to preserve a company’s value within the framework of a so-called pre-pack, where a restructuring plan can be adopted by affected creditors. For its opening, the debtor must demonstrate that (i) they are engaged in the conciliation procedure, (ii) a conciliation agreement has been drawn up, aimed at ensuring that sustainability and rescue of the business, and (iii) the agreement must be likely to receive support from the affected partied within two months of the opening judgment.

The advantage of this procedure is that it combines confidentiality and contractual flexibility during the conciliation phase with the possibility for the court to bind dissenting creditors on the safeguard phase through a cross-class cram-down process. Also, the maximum duration of the accelerated safeguard proceeding is 4 months and only the debtor can present a restructuring plan.

**\* End of Assessment \***