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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: This procedure is an accelerated safeguard procedure.

Statement 2: This procedure is either a conciliation procedure or an ad hoc mandate procedure.

**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 (3) main variations from the safeguard procedure and the rehabilitation procedure are:

 1. The safeguard procedure is only available for Debtors that are not insolvent while the rehabilitation procedure is available for insolvent Debtors.

 2. The rehabilitation procedure has an observation period of six months that can be extended to 18 months by the Court, while the observation period in the safeguard procedure lasts from six to 12 months, if extended by the Court.

3. Court’s powers to approve up to 10 years rescheduling of debts in the absence of an approved plan (“term out”) is no longer available in safeguard procedures but remains in rehabilitation procedures subject to a minimum instalment of 10% after the fifth year.

4. New powers are given to the Court in rehabilitation procedures, after the same have been opened for 3 months. These include ability to force increase of capital or allowance of forced sales of opposing shareholders shares under certain conditions.

**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 accelerated safeguard procedure was made the core framework of preventive restructuring to all companies regardless of their size.

2. The concept of post money privilege was introduced benefiting claims arising from cash contributions to the Debtor under certain conditions.

3. A change in the classification of claims in accelerated safeguard and safeguard procedures that requires compulsory classification in accelerated safeguard proceedings and that is more complex and flexible than the three (3) original classes that previously existed (i.e. credit institutions, suppliers and bondholders) and which is not mandatory in safeguard proceedings if companies employ over 250 employees and have a turnover greater than 20 Million EUR or they have a turnover greater than 40 Million EUR.

**Question 2.4 [maximum 2 marks]**

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

The main difference between the homologation and constatation of the conciliation agreement is that the Court can either approve the agreement (constatation) maintaining its confidential nature or can sanction the agreement (homologation) which requires that the judgment be made public. In the case of the constatation, the plan has been accepted by all affected classes, while in the homologation, there are dissenting classes and the Court proceeds with a cross-claim cramdown of the plan.

**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 reform provided by the Ordinance 2021-1193 (“the Ordinance”) did not overhaul the status quo because it does not supersede or entirely amend the French insolvency system and laws. The Ordinance modified the restructuring and corporate rescue portions of French Insolvency law in order to transpose and incorporate the EU Directive on Preventive Restructuring Framework 2019, as well as to harmonize the same with the recently amended French security law. Nevertheless, the Ordinance did not substantially affect other portions of French insolvency law included in Title VI of the Commercial Code, for example liquidation proceedings.

The Ordinance strengthened the existing insolvency law. It updated the same by including mechanisms to detect and prevent problems in French companies related to rehabilitating from financial difficulties and insolvency. These include, among others, amendments to the conciliation procedures, accelerated mechanisms for detecting difficulties in the companies and their warning signs, merging the accelerated financial safeguard and the accelerated safeguard provisions, allowing the creation of new creditor classes that would facilitate cross-claim cramdown procedures, allowing the different secured claims classes, the integration of subordination agreements when performing distribution and allowing third affected parties to propose a draft of a restructuring plan, among other things.

**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 safeguard and accelerated safeguard proceedings are two procedures in French insolvency law that have been created to assist debtors that are in financial distress but that wish to protect and preserve their business and operations through the restructuring of their debts and negotiations with creditors. Even though both processes can be considered similar in their restructuring nature, there are particular traits of the procedures that differentiate them.

Similarities of the safeguard and accelerated safeguard proceedings include:

1. Both procedures have the objective of achieving the restructuring of companies that face financial distress.

2. Both procedures have a court intervention for the approval of the restructuring proposal or plan. They are court administered, even though the accelerated safeguard procedure has an out of court phase for negotiations prior to the court administered phase.

3. They are both debtor in possession procedures.

4. Both procedures are available to Debtors that are not yet insolvent.

5. Both procedures are voluntary procedures commenced at the request of the Debtor.

6. Both procedures utilize the voting conditions and adoption of the plan of the safeguard procedure

7. Both procedures have provisions that protect new money providers.

Differences between the safeguard and accelerated safeguard proceedings include:

1. The safeguard procedure is a standalone procedure while the accelerated safeguard procedure requires that a conciliation procedure be commenced prior to the commencement of the accelerated safeguard procedure.

2. The accelerated safeguard procedure has a maximum duration of four months, while the safeguard procedure is longer. For example the initial observation period can last six months, which can be extended by the Court.

3. The accelerated safeguard procedure allows for a pre-pack restructuring plan, while the safeguard procedure does not.

4. The accelerated safeguard procedure has a compulsory constitution of affected classes, while in the safeguard procedure such classification is not compulsory

Objectives of the safeguard and accelerated safeguard include:

1. The objective of the accelerated safeguard procedure is to preserve the company’s value through the framework of a pre-pack restructuring plan adopted by affected creditors in a speedy fashion.

2. The objective of the safeguard procedure is to serve as a preventive restructuring tool for debtors that are facing financial difficulties and need to restructure their debts in order to allow the continuity of the business.

**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 2021 reform brought forth a new system for the constitution of classes in restructuring plans which is more flexible and facilitates approval of the same over dissenting classes or creditors. Prior to the 2021 reform, the French Commercial Code allowed only three (3) classes of creditors: credit institutions, suppliers and bondholders. With the 2021 reform discretion or leeway is given in the constitution of classes, since they can be formulated depending on the complexity and nature of the Debtor’s liability.

There has to be a commonality of the claims when formulating the classification and the following criteria have to at least be considered according to Art. 626-30:

1. secured claims and unsecured claims have to be in different classes.

2. class formation must comply with the subordination agreements executed pre-petition.

3. equity holders must be classified separately from other creditors.

4. creditor’s that are secured by a trust granted by the debtor will only be considered for those amounts that are unsecured.

5. Tax, social creditors and employees are not part of the classes.

Also, it should be noted that this reformed manner of classification in compulsory in accelerated safeguard procedures, but discretional in safeguard procedures, unless the Debtor complies with certain threshold provisions of turnover and number of employees. See Art R 626-29 and R626-52.

This classification allows that the plan be either approved because it is accepted by the different classes in the parameters established by the law (Art. L-626-30-2) or a cross-class cramdown can be performed if certain conditions are met and the same is sanctioned by the Court. The cross-claim cramdown requires that the Debtor consents and the absolute priority rule is followed (unless excepted by the Court). Also, the Court must ascertain that either the majority of the classes of impaired parties, including at least one secured class, accepted the plan or that at least one class of affected parties (except equity holders) accepted the plan or any other class which is “in the money” (or has a monetary stake and would be expected not to receive payment under a liquidation scenario or sale plan). See Art. L626-32-I-a and Art. L626-32-I-b. Finally the Court has to ensure the plan follows the best interest test which requires that creditors will be better off under the plan than in a liquidation scenario or sale of the company. See Art. L626-31. If these conditions are not met, the Court can reject the plan and the case can be followed by a liquidation proceeding.

**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.

Mireille can apply for a conciliation procedure. According to the facts provided Mireille is not yet insolvent and a conciliation procedure is one of the alternatives under the Commercial Code that she can turn to in order to restructure her finances and reach a payment plan with her creditors, mainly her lessor. This procedure is amicable, confidential and on a contractual basis. She maintains the control of her business. Art. L611-7. Therefore, her fear of damaging her business with bad publicity can be mitigated.

If the Court approves or constates the agreement then the same maintains its confidential nature. In the event the agreement is sanction (homologation) by the Court, then the same is publicized, but the benefits of the homologation of the agreement may outweigh the loss of its confidential nature at the end. See Art. L611-8, Art L611-9.

**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 conciliation procedure is a voluntary, out of court procedure which is commenced by the Debtor in order to negotiate and workout its debts with the creditors. The same is confidential and has a contractual nature if an agreement is reached, making the same binding to Mireille and her creditors. Once Mireille commences the conciliation procedure, an insolvency practitioner or conciliator is chosen by her or appointed by the Court. This professional will oversee the negotiations with the creditors and will alter on make a proposal that will be submitted to the Court for its approval once an agreement is reached. This proposal must consider the continuity of the business, the pursuit of its economic activity and the preservation of employment. The Court will then either approve the agreement (constatation) or can sanction the agreement (homologation). Before the Court approves the agreement, it hears the Debtor, the creditors bound by the agreement, a representative of the company and the conciliator. Art. 611-9. If the Court approves the agreement, the same remains confidential. If the Court sanctions the agreement, it is publicized.

Mireille also has available the ad hoc mandate, which is another voluntary out of court procedure that is confidential and available to Debtors that are facing financial distress but are not yet insolvent. Under this procedure and ad hoc representative is appointed to oversee the process and make a proposal that also considers the continuity of the business, the pursuit of its economic activity and the preservation of employment. The main difference is that this agreement is not submitted to the Court for its approval or sanction, in the way it is done in the conciliation procedure.

Should Mireille wish to forego the confidentiality of these two out of court procedures, she also has available the safeguard and accelerated safeguard procedures, which are public and court assisted procedures for restructuring. Nevertheless, since she is preoccupied with the image of the business, should her financial problems be made public, we would recommend first to go into the conciliation or ad hoc mandate procedures to try and achieve a workout with her creditors.

**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 accelerated safeguard procedures in connection with the conciliation procedures explained above. This process is a pre-insolvency restructuring tool available to Debtors that wish to negotiate with their creditors and achieve a fast track resolution of their financial distress. It is not a standalone process. In turn, Mireille needs to go through the conciliation out of court process to negotiate a pre-pack agreement with her creditors and then propose a plan which may be approved by the Court through a procedure which is faster than a safeguard procedure. The advantage is that this procedure allows the continuity of the business and the restructuring solution that is prompt and if certain legal conditions are met, it is binding, even if some creditors dissent to the same.

The accelerated safeguard procedure is a voluntary process, commenced by the Debtor. It last up to four months and allows the debtor to be able to present a restructuring plan using the classification of claims that are available under the law for these types of cases. The classification in the accelerated safeguard process allows the Debtor to group creditors based on their nature, rank and relationship with the Debtor. This is a powerful tool in order to obtain the required votes for its approval. The plan is then voted for by the creditors and can be either consensual (approved by all classes) or have dissenting classes.

If the plan is consensual, then the Court approves the same. If there are dissenting classes and the plan is not consensual, then the Court can proceed to cramdown the plan to those dissenting classes of creditors in order to sanction the plan. This is an advantage, since Mireille can have creditors that may not agree with the plan proposal and she can still have the same be bound by the provisions of the Plan, if the conditions established by the law for a cross-claim cramdown are complied.

The cramdown of the plan needs to be consented by Mireille. The Court must confirm that either the majority of the classes of impaired parties, including at least one secured class, accepted the plan or that at least one class of affected parties (except equity holders) accepted the plan or any other class which is “in the money” (or has a monetary stake and would be expected not to receive payment under a liquidation scenario or sale plan). See Art. L626-32-I-a and Art. L626-32-I-b. Finally, in order to sanction the plan through a cramdown the Court has to ensure that creditors will be better off under the plan than in a liquidation scenario or sale of the company. See Art. L626-31.

**\* End of Assessment \***