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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6A**

**FRANCE**

This is the **summative (formal) assessment for Module 6A** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 6A**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

**INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial or Avenir Next font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment6A]**. An example would be something along the following lines: 202223-336.assessment6A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6.The final submission date for this assessment is **31 July 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **8 pages**.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

Which option below comprises a procedure which is **not** a pre-insolvency mechanism?

1. *Mandat ad hoc*, conciliation and safeguard.
2. *Mandat ad hoc,* conciliation, safeguard and rehabilitation proceedings.
3. Conciliation, safeguard and accelerated safeguard.
4. *Mandat ad hoc* and safeguard.

**Question 1.2**

Which statement below is **incorrect** in relation to the accelerated safeguard procedure?

1. The accelerated safeguard procedure is not a standalone procedure; it can only be used following the opening of conciliation proceedings.
2. The accelerated safeguard is the flagship of preventive restructuring in France.
3. The accelerated safeguard is the same procedure as the safeguard, except that its timeline is shorter.
4. The accelerated safeguard was revamped following the passing of EU Directive 2019/1023.

**Question 1.3**

What is the **main difference** between the safeguard procedure and the rehabilitation procedure?

1. The main difference lies in the person who can request the opening of the procedure (creditors of the company in the case of the safeguard and the company’s director(s) in the case of rehabilitation proceedings).
2. The main difference lies with in court that will deal with the case (the commercial court for the safeguard and the specialised commercial court for rehabilitation proceedings).
3. The main difference lies in the duration of the procedures (10 months for the safeguard procedure and 18 months for rehabilitation proceedings).
4. The main difference lies in the condition required to open the proceedings (insolvency for rehabilitation proceedings and no state of insolvency for the safeguard).

**Question 1.4**

Who can request the **opening** of an *ad hoc* mandate procedure?

1. The debtor’s creditors.
2. The president of the court.
3. The director(s) of the company.
4. The director(s) of the company or the company’s auditor.

**Question 1.5**

What are the **conditions** for a company in financial difficulties to resort to conciliation proceedings?

1. A debtor must not be in a state of insolvency (in a payment failure situation) and must not encounter difficulties that it is not able to overcome.
2. A debtor must not have been in a state of insolvency for longer than 45 days.
3. A debtor must prove that it has availed of an *ad hoc* mandate first, which has failed.
4. The rescue of the company must be deemed impossible by its directors.

**Question 1.6**

Can the president of the court impose a **conciliation procedure** on a debtor company?

1. Yes, at the request of the creditors.
2. Yes, at the request of the Public Prosecutor.
3. Yes, at the request of a contractual third party.
4. No, never.

**Question 1.7**

What are the conditions for a company to avail of **safeguard proceedings**?

1. When the company is not in a state of insolvency (in a payment failure situation) but is experiencing difficulties which it is not able to overcome.
2. When the company has not been in a state of insolvency for longer than 45 days.
3. When the company is insolvent.
4. When the company is insolvent and the company has attempted conciliation or *ad hoc* mandate proceedings which have failed.

**Question 1.8**

Which statement regarding liquidation proceedings is **incorrect**?

1. Liquidation proceedings trigger an automatic stay of proceedings and enforcement actions against the company.
2. All pre-filing creditors are barred from enforcing their rights to obtain payment from the debtor, subject to some exceptions.
3. All pre-filing creditors are barred from enforcing their rights to obtain payment from the debtor, with no exceptions.
4. If a sale plan is conducted, third parties cannot terminate or rescind their contracts with the debtor.

**Question 1.9**

In relation to the recognition of judgments under French law, choose the **accurate** statement:

1. Foreign judgments can only be enforced if they have been subject to a procedure of *exequatur*. The granting of *exequatur* to a foreign judgment is left at the discretion of the court.
2. Foreign judgments can only be enforced if they have been subject to a procedure of *exequatur*. For a foreign judgment to be granted *exequatur*, three conditions must be met: (i) the original judgment must be devoid of any fraudulent intention, (ii) the judgment must comply with international public policy, and (iii) the foreign court or tribunal who issued the judgment must have been competent to do so.
3. Even if foreign judgments have not been granted *exequatur*, there are some ways in which they can be recognised and enforced by French authorities. It is, for example, possible for the French court to recognise a foreign judgment if there are also local insolvency proceedings pending against the same debtor.
4. Once *exequatur* has been conferred, the foreign judgment is considered a French judgment.

**Question 1.10**

Marlon SARL, a company registered in France, has been experiencing financial difficulties since 10 June 2023. On 1 July 2023, it is officially insolvent (*en cessation des paiements*). On 11 August, it wants to file for an insolvency procedure. Which **procedure(s)** is / are available to the company?

1. *Ad hoc* mandate.
2. Conciliation.
3. Safeguard or rehabilitation proceedings.
4. Rehabilitation or liquidation proceedings.

**QUESTION 2 (direct questions) [10 marks in total]**

**Question 2.1 [maximum 2 marks]**

Consider the following two statements:

Statement 1: A procedure which can only be opened following conciliation proceedings.

Statement 2: The procedure is not limited in time; its objective is to avoid the insolvency of the company.

Which insolvency procedures do these statements refer to?

**Statement 1** refers to the Accelerated Safeguard procedure which can only be opened following conciliation proceedings, enabling to find a compromise between the amicable procedure of conciliation and the in-court proceeding of safeguard. It has a maximum duration of four months.

**Statement 2** refers to the ad-hoc mandate which is an out-of-court proceeding for companies finding themselves in financial difficulties but are not yet insolvent. There is no statutory limitation to the length of the mission of the *mandataire ad hoc,* which is typically defined and extended as needed by the presiding judge of the court.

**Question 2.2 [maximum 3 marks]**

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

Three of the main variations between the safeguard procedure and the rehabilitation procedure are:

1. The nature and severity of the issues triggering each event is different between the safeguard procedure and the rehabilitation procedure since for a safeguard procedure the debtor can not be in *cessation de paiement i.e.,* in a payment failure situation. Indeed, it can face financial difficulties or severe cash flow issues but cannot be technically cash-flow insolvent. However, for a rehabilitation procedure, the debtor must be insolvent already to avail of the procedure.
2. The observation periods for each procedure are different: for a rehabilitation procedure, the insolvency judge opens a 6-month observation period that is renewable for up to 18 months according to Article L631-7 of the Commercial Code. However, for the safeguard procedure the maximum observation period is 12 months.
3. The persons that are legally apt to open the procedure are different for each procedure: under the safeguard procedure, only the company’s directors or legal representatives can petition the court to open the procedure, while for a rehabilitation, the procedure can be opened not only by the debtor but any unpaid creditor or the Public Prosecutor, according to article L631-5 of the Commercial Code.

**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 entered into force on 1 October 2021 and was completed by Decree # 2021-1218 dated 23 September 2021) technically transposed the EU Directive on Preventive Restructuring Frameworks 2019 and made the accelerated safeguard procedure a key framework for preventive restructuring in the context of the EU Directive.

The first key element of insolvency law which had been introduced is the wider application of the accelerated safeguard to all companies irrespective of their size, providing greater flexibility for the application of the safeguard mechanism.

The second key element introduced is the mandatory passage through conciliation first as confirmed by article L628-1 of the Commercial Code. Accordingly, accelerated safeguard proceeding can only be opened by the debtor if: (i) they are engaged in the conciliation procedure; (ii) a conciliation agreement or restructuring plan is agreed; and (iii) the agreement is likely to receive support from the affected parties within two months of opening the judgment.

Last but not least, the third element of insolvency law which had been introduced is the replacement of the previous credit committees by the classes of affected parties, which is mandatory under the accelerated safeguard proceeding (and subject to conditions for safeguard proceedings and rehabilitation), coupled with more creditor flexibility to sanction a plan thanks to the cross-class cram down process and the privilege of new money for new financing brought in during the conciliation phase if the conciliation agreement is court-sanctioned (benefiting from homologation) (in reference to Articles L628-8, L626-31, and L611-11 of the Commercial Code).

**Question 2.4 [maximum 2 marks]**

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

The homologation entails a binding approval of the court which leads to publicising the judgment and renders the agreement binding on all parties. By homologating the conciliation agreement, there are more legal advantages granted to parties in the proceeding such as the new money privilege, more specifically priority of payment over pre and post-petition claims to investors injecting fresh new money during the conciliation period, if the sanctioned conciliation agreement is converted to an accelerated safeguard proceeding later on.

However, in the case of constatation, there is no court approval required but rather a simple acknowledgment by the court that the agreement is in place which preserves its confidentiality. As a result, the constatation is not binding in nature among the parties and so is less enforceable and relies on the contract law and underlying private agreement between parties.

Finally, homologation, as it entails court involvement, is more time consuming and costly compared to constatation, which is quicker and less expensive as it does not require court involvement.

**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 Ordinance n.2021-1192 of 15 September 2021 reforming security law has not completely overhauled the French insolvency law but rather introduced minor process-enhancing adjustments since its primary focus was to slightly modify the existing proceedings by transposing the requirements of the EU Directive (PRD 2019 or the EU Directive on Preventive Restructuring Frameworks 2019). Indeed, the key issues that are addressed relate to the discharge of debt and qualifications and approaches to increase the efficiency of the restructuring and insolvency procedures. As such, the Ordinance reinforced the preventative frameworks of conciliation and ad-hoc mandates, rather than overhauled the procedures, for instance, by ensuring that conciliation precedes accelerated safeguard proceeding. Also, the Ordinance did introduce aspects of enhancements into insolvency law as part of an enhancement of the French insolvency regime, including distinctions between the safeguard and rehabilitation procedures which sharpened their differences, such as (i) the maximum length of each proceeding (Art L631-7 and Art L621-3 for the safeguard); (ii) the threshold and conditions for creditors’ voting and classes under rehabilitation proceedings; and (iii) the availability and conditions of term-out under safeguard proceedings (Art L626-18). Overall, the Ordinance has preserved the debtor-oriented nature of the French insolvency regime, strengthened the preventive tools, and enhanced the efficiency of the rescue tools through the combination of conciliation and accelerated safeguard which aim for faster endorsement of pre-negotiated plans.

**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**.

In terms of main similarities between the safeguard and accelerated safeguard procedure, both procedures are debtor-in-possession, court-driven preventative measures that aim at rescuing companies that are in financial difficulties but not technically insolvent. The objective of both proceedings is to preserve the value of the company and negotiate a restructuring plan that will support the rescue of the company. However, the accelerated safeguard proceeding prioritizes speed and efficiency through the pre-pack process, given that it can only be initiated after a conciliation arrangement where the creditors and debtors agree on a restructuring plan in the amicable phase and implement and approve the plan in an expedited timeline during the accelerated safeguard insolvency proceeding.

In terms of main differences, the safeguard procedure stands on its own as an insolvency proceeding and can be petitioned by a debtor facing financial difficulties that it is not able to overcome. It does trigger a stay on creditor enforcement actions. However, the accelerated safeguard procedure can only be opened if the debtor was engaged in a conciliation procedure and a conciliatory pre-negotiated agreement with creditors has been reached and can be sealed within a strict deadline of 2 months of opening the judgment according to article L628-1 of the Commercial Code, which is a restriction not applicable under the traditional safeguard procedure. Moreover, which is a corollary of the previous point, the accelerated safeguard process can have a maximum duration of 4 months while for the safeguard proceeding the maximum duration is 12 months (six months renewable once), which is driven by the need to reach a quicker path to the recovery plan under the accelerated safeguard procedure. One additional key difference lies in the mandatory composition of classes of affected parties (class-based consultation) under the accelerated safeguard proceeding; however, based on the 2021 Ordinance, under the safeguard procedure the formation of affected parties is only compulsory if the debtor employs over 250 employees and has a turnover of more than 20mn Euros or generates a turnover of over 40mn Euros altogether, notwithstanding the fact that there is a certain flexibility for the supervising judge to constitute classes for companies that fall below the threshold.

**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 under French insolvency law following the reform of 2021 are the grouping of creditors on the basis of sufficient commonality of economic interests or *communauté d’intérêt économique suffisante* in relation to the company’s assets, liabilities and type of activities. For instance, secured, unsecured creditors, and equity holders belong to different classes; subordination agreements and security provided by a trust (*fiducie)* influence the formation of the various classes. A second key feature of the reform of 2021 pertains to the mandatory formation of classes of affected parties in the accelerated safeguard procedure to ensure the fairness and speed of the approval of pre-negotiated plans developed during the conciliation phase. Previously, up to the reform of 2021, the formation of classes was suffering from a lack of homogeneity and commonality of interests (the 3 previous classes of credit institutions, main suppliers, and bondholders lacked common sense in grouping) and the formation of classes was discretionary.

The key issues that may arise in insolvency cases in relation to classes of creditors are driven by the difficult of forming classes and the voting by the classes. Once the classes are set up, each class has the power to vote on the debtor’s proposal and can propose alternative plans in the case of accelerated safeguard proceeding. This process can add complexity to the process as negotiations would unfold. At the very beginning, though, the formation of the classes itself can trigger a disagreement among the affected parties. For instance, tax, social creditors, and employees are not part of any class and it is at the discretion of the administrators to notify the parties of their affected parties. The second key issue that arise is the fact that a plan can be imposed on dissenting classes through the mechanism of cross-class cramdown introduced by the 2021 reform. As such, with the debtor’s consent, and in safeguard proceedings, the court can impose the plan on rejecting classes provided that principles of fairness and protection are considered, including the fact, *inter alia*, that a majority of the classes of impaired creditors voted in favor of the plan and that no creditor shall be worse off than what they would receive in a liquidation scenario.

**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 should apply for conciliation, which is an out-of-court procedure aimed at rescuing companies that are facing financial difficulties but are not yet insolvent. As Mireille’s business is rapidly spiralling into a potential payment default, it is important to file as soon as possible and, in any case, no more than 45 days of insolvency. It appears at the time of the consultation that Mireille is not insolvent and if so less than 45 days. Since conciliation is a confidential and amicable procedure, it will help Mireille avoid bad publicity that could scare off her clients.

Mireille meets the criteria to open the procedure as she is the legal representative of the debtor, is not yet cash-flow insolvent (as per the French insolvency regime definition of insolvency), and is facing existing and foreseen financial difficulties that she cannot overcome (inability to pay her expenses).

Mireille, as the legal representative of the company, can start by formulating a written request (*requête)* addressed to the president of the competent Tribunal de Commerce depending on her activity (for reference used, the process can be found here <https://entreprendre.service-public.fr/vosdroits/F22295>).

**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 is an out-of-court procedure opened at the request of the debtor. Mireille, as the legal representative of the company, formulates a written request (*requête)* addressed to the president of the competent Tribunal de Commerce depending on her activity (as explained in the previous question above). Once a request is submitted, the president of the court interviews Mireille to better understand the situation and decides on ordering the opening of the proceeding. Such order confirms the appointment of a conciliator who will assist Mireille on defining a protocol to negotiate with her landlord primarily a rescheduling or waiver on the rent and any other liabilities and any needed reorganisation. Once the conciliation agreement is agreed with the landlord, it is either acknowledged by the court and remains confidential (constatation) or officially homologated which becomes public record.

The advantages of opening such procedure lie in the fact that it is an amicable framework to negotiate a voluntary agreement with key stakeholders and is informal and confidential. It also has a maximum duration of 4 months which ensures that the business is not destabilized and the process does not affect the business reputation as the aim is to restore the viability of the business and avoid an insolvency situation. Typically, during the conciliation phase, creditors cannot request a rehabilitation or liquidation of the business at their own request, which shields Mireille from involuntary or forced insolvency. Finally, the conciliation can allow the debtor to renegotiate a moratorium of up to 2 years on its liabilities for creditors requesting payment and can entice new money provider to invest thanks to the privilege of new money.

Mireille could avail of the ad hoc mandate procedure since it is not yet insolvent and she can benefit from the appointment of an ad hoc representative to oversee the procedure, ensuring the preservation of the business and pursuit of economic activity. This process is not limited in time and could allow Mireille more breathing room to negotiate an agreement; it is also convenient for all company sizes, which fits Mireille’s business size, and is more streamlined, while preserving the principle of confidentiality.

**Question 4.3 [maximum 5 marks]**

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

The accelerated safeguard is a compromise between the amicable procedure of conciliation and the in-court proceeding of safeguard. It has a maximum duration of four months.

Mireille cannot open the accelerated safeguard proceeding directly because it can only be opened following conciliation proceedings, enabling Mireille to quickly endorse the pre-negotiated plan with her landlord in the formal insolvency proceeding of the accelerated safeguard. However, if Mireille opens the conciliation proceeding and it is proceeding, it can apply for the commencement of accelerated safeguard proceedings.

Assuming the above conditions are met, to open the accelerated safeguard proceeding, most likely during the conciliation phase, Mireille needs to demonstrate that its accounts are certified by a statutory auditor or established by a certified public accountant and it must evidence, during the conciliation phase, that it has a prepared a plan ensuring the revival of its fitness business through the restructuring of key business expenses and seek the approval of the landlord thereof.

The advantages of the accelerated safeguard procedure are that it helps in reaching a decision with the landlord and other creditors in a speedy manner (within two months of opening the judgment), thereby protecting the confidentiality nature of the conciliation phase and reinforcing it with a binding procedure. It can also force a decision on dissenting creditors through the cross class-cram down process and provides comfort to new money providers in the conciliation phase if it has been sanctioned by the court, which helps in securing new financing that would be essential to the survival of Mireille’s business.

**\* End of Assessment \***