



**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 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.assessment4B]**. An example would be something along the following lines: 202122-336.assessment4B. **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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 **9 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**

Select the **correct answer**:

Which court(s) has / have jurisdiction over insolvency proceedings in France?

- (a) The commercial court.
- (b) The judicial court.
- (c) The commercial and / or judicial court.
- (d) Specialised insolvency courts.

**C was the correct answer.**

#### **Question 1.2**

Select the **correct answer**:

What are the current pre-insolvency mechanisms available to companies under French insolvency law?

- (a) *Ad hoc* mandate; conciliation; safeguard; accelerated safeguard.
- (b) *Ad hoc* mandate; conciliation; safeguard; accelerated safeguard; rehabilitation.
- (c) *Ad hoc* mandate; safeguard; rehabilitation.
- (d) *Ad hoc* mandate; conciliation.

#### **Question 1.3**

Select the **correct answer**:

Under the French Commercial Code, a debtor is considered insolvent when they are in a payment failure situation (*cessation des paiements*). What does this mean and lead to?

- (a) A debtor is in a payment failure situation when due and payable debts exceed available assets. The debtor must therefore file for insolvency within 45 days of the occurrence of such a situation.

- (b) A debtor is in a payment failure situation when due and payable debts exceed the available assets. The debtor must therefore file for insolvency within 40 days of the occurrence of such a situation.
- (c) A debtor is insolvent when they are unable to pay their debts as they fall due. The fact that a debtor's assets exceed its liabilities is immaterial under French law. The debtor must file for insolvency within 45 days of the occurrence of such a situation.
- (d) A debtor is insolvent when they are unable to pay their debts as they fall due. The fact that a debtor's assets exceed its liabilities is immaterial under French law. The debtor must file for insolvency within 40 days of the occurrence of such a situation.

#### Question 1.4

Select the **correct answer**:

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

- (a) The main difference between the safeguard and the rehabilitation procedures lies in the nature of the difficulties encountered. If it is a mere cash-flow issue, the debtor can start safeguard proceedings whereas if the debtor experiences balance-sheet insolvency, it must start rehabilitation proceedings.
- (b) The main difference between the safeguard and the rehabilitation procedures lies in the petitioner. Safeguard proceedings can only be opened by the debtor whereas creditors can petition the court to open rehabilitation proceedings.
- (c) The main difference between the safeguard and the rehabilitation procedures lies in the involvement of the court in the process. Safeguard proceedings are an out-of-court process with limited court involvement, whereas rehabilitation proceedings are led by the court.
- (d) The main difference between the safeguard and the rehabilitation procedures lies in the nature and severity of the difficulties encountered. For rehabilitation proceedings to be opened, the company needs to be in a payment failure situation, which amounts to difficulties which are more severe than the possible momentary cash flow problem under safeguard.

#### Question 1.5

Select the **correct answer**:

Since September 2021, what is the core preventive restructuring framework in France?

- (a) *Ad hoc* mandate + safeguard proceedings.
- (b) *Ad hoc* mandate + accelerated safeguard proceedings.
- (c) Conciliation + safeguard proceedings.
- (d) Conciliation + accelerated safeguard proceedings.

### Question 1.6

Select the **correct answer**:

What is the threshold to enter safeguard proceedings?

- (a) The company needs to be in a payment failure situation, which amounts to difficulties that are more severe than the possible momentary cash flow problem under safeguard.
- (b) The company needs to show that it is encountering difficulties which it is not in a position to overcome, while not yet in a payment failure situation.
- (c) The company needs to show that it is facing difficulties that it is not able to overcome and which will lead to a payment failure situation.
- (d) The company needs to be in a payment failure situation and have engaged in successful conciliation proceedings which have led to the drafting of a rescue plan.

### Question 1.7

Select the **correct answer**:

Under French insolvency law, how are creditors grouped into classes to vote on a restructuring plan?

- (a) For safeguard proceedings, the constitution of classes of creditors is not compulsory except for companies that employ over 250 employees and have a turnover greater than EUR 20 million or have a turnover of over EUR 40 million. If classes are formed, it is up to the insolvency practitioner to group creditors within classes representative of a sufficient commonality of economic interests. For accelerated safeguard proceedings, class formation is compulsory.
- (b) For safeguard proceedings and accelerated safeguard proceedings the constitution of classes is compulsory, except for companies that employ over 250 employees and have a turnover greater than EUR 20 million or have a turnover of over EUR 40 million. The court has jurisdiction to create classes and to group creditors within classes representative of a sufficient commonality of economic interests. For accelerated safeguard proceedings, class formation is compulsory.
- (c) For safeguard proceedings and accelerated safeguard proceedings the constitution of classes is compulsory for all companies. The Commercial Code requires the insolvency practitioner to create the following three classes: (i) credit institutions; (ii) main suppliers; and (iii) bondholders.
- (d) For safeguard proceedings the creation of classes is compulsory, which is not the case for accelerated safeguard proceedings. For the latter, classes will only be formed if the creditors have consented to be grouped within classes during the conciliation phase. If they consent to be grouped within classes, secured creditors will be grouped within the same class, unsecured creditors will be grouped within the same class and employees will be grouped within the same class.

### Question 1.8

Select the **correct answer**:

During liquidation proceedings, which creditors are barred from enforcing their rights to obtain payment from the debtor?

- (a) All pre-filing creditors.
- (b) Pre- and post-filing creditors.
- (c) Pre-filing creditors, except (i) claims secured by a security interest conferring a retention title right; (ii) claims assigned by way of a *Dailly* assignment of receivables; (iii) claims secured by a *fiducie* agreement; (iv) set-off and close-out netting of financial obligations.
- (d) Post-filing creditors, except (i) claims secured by a security interest conferring a retention title right; (ii) claims assigned by way of a *Dailly* assignment of receivables; (iii) claims secured by a *fiducie* agreement; (iv) set-off and close-out netting of financial obligations.

### Question 1.9

Select the **correct answer**:

Under safeguard and accelerated safeguard proceedings, a plan will be approved if two-thirds of the amount of claims held by the voters of the class concerned have voted positively.

- (a) False.
- (b) True.
- (c) True, but the court has full discretion to approve or reject the plan nonetheless, at the request of the debtor or the creditors.
- (d) True, but the court can approve the plan nonetheless, at the request of the debtor or the administrator.

### Question 1.10

In relation to the recognition of judgments under French law, which of the following statements **is accurate**?

- (a) 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.
- (b) 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.

- (c) 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.
- (d) Once *exequatur* has been conferred, the foreign judgment is considered a French judgment.

**Total marks : 9 out of 10.**

## **QUESTION 2 (direct questions) [10 marks]**

### **Question 2.1 [maximum 2 marks] 2**

Consider the following **two (2) statements**:

Statement 1: “The debtor is encountering difficulties which it is not in a position to overcome, while not in a position to overcome, while not yet in a payment failure situation.”

Statement 2: “The debtor can demonstrate they are engaged in conciliation proceedings, an agreement has been drawn up aimed at ensuring the sustainability and rescue of the company and the agreement is likely to receive support from the affected parties within two months of the opening judgment.

Which insolvency procedures do these statements refer to?

Statement 1: Safeguard

Statement 2: Accelerated safeguard

### **Question 2.2 [maximum 3 marks] 3**

List **three (3)** of the main variations between the safeguard procedure and the rehabilitation procedure under the Commercial Code.

1. Severity of difficulties: Safeguard procedure requires possible momentary cash flow problem, Rehabilitation procedure requires payment failure situation;
2. Maximum duration of observation period for Safeguard procedure last for up to 12 months, and the same for Rehabilitation procedure last for up to 18 months;
3. If the rehabilitation is not approved by classes or via cross-class cram-down, the court has power to reschedule the debtor's liabilities for up to ten years, but the same power is not available in Safeguard procedure.

### **Question 3.3 [maximum 3 marks] 3**

While it is now up to the insolvency practitioners to group creditors within classes representative of a sufficient commonality of economic interests, this will vary depending on the typology of the company's liabilities and its activity. The law has, however, ensured some minimum criteria that the insolvency practitioner will need to consider when constituting classes of creditors. List **three (3)** of these criteria.

1. Secured creditors and other creditors (unsecured) shall be classified in different groups;

2. Equity holders shall constitute one or more classes;
3. Class grouping shall be in accordance with the subordination agreement that has been signed prior to the safeguard proceeding.

**Question 3.4 [maximum 2 marks] 2**

Pick and briefly explain **two (2)** ways in which the protection of creditors has been increased by the reforms introduced by the Order of 15 September 2021.

1. Before the reform, creditors were grouped as creditor committees (bondholders, credit institutions, suppliers) which were lack of similarity of common interest within the same group. The reform using classes of creditors to substitute creditor committees. Creditors are grouped into different classes according to their similar economic interest. Under new rule, at least secured creditors and unsecured creditors must be classified in different groups; shareholders are composed of at least one group separate from other claimholders. Class grouping of creditors is compulsory for Accelerated safeguard procedure, and the same is applicable to Safeguard procedure if the debtors in question achieve the threshold.

2. In order to give effect to cross-class cram-down dissenting creditors, the court have to confirm that during voting either the secured creditor class voted in favour of the plan; or at least one of the class other than shareholders voted in favour of the plan. The Court also has to make sure the affected dissenting creditor would not be worse than they would be if the company is in liquidation or being sold out. Besides, absolute priority rule is used, class of creditors voted not in favour of the plan shall be paid in full before any class of creditors junior to said class being repaid.

**Total marks: 10 out of 10.**

**QUESTION 3 (essay-type questions) [15 marks in total]**

*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] 5**

Explain why French insolvency law has been characterised as “restructuring-biased” and excessively debtor-friendly.

In France, there are 6 type of insolvency proceedings in total: Ad hoc mandate; Conciliation; Safeguard proceedings; Accelerated Safeguard proceedings; Rehabilitation proceedings; and Liquidation proceedings.

Among these six proceedings, five of them (i.e.: Ad hoc mandate, Conciliation, Safeguard proceedings, Accelerated Safeguard proceedings, Rehabilitation proceedings) aim to provide restructuring for debtor and to assist the debtor to continue business.

Among the said five proceedings, four of them (i.e.: Ad hoc mandate, Conciliation, Safeguard proceedings, and Accelerated Safeguard proceedings) can only be raised by the debtor, and only the Rehabilitation proceedings can be raised by debtor, unpaid creditor or Public Prosecutor.

Under the said four proceedings, debtors remain in possession to control the business. Only in Rehabilitation proceedings the debtor can control the daily management of the business, but the administrator appointed by the court can supervise the management of the debtor’s



business.

All of the said five proceedings provide mechanism to enable debtor to negotiate restructuring plan or work out with debtors. Especially in Accelerated Safeguard proceedings there are 2 months short deadline which encourages speedy negotiation that in turn tend to put the debtor in advantageous position.

Under Safeguard, Accelerated Safeguard, and Conciliation proceeding, post money or new money privilege can lead to the financial support to the companies even they are in certain kind of difficulties, which is advantage to the debtor.

Silence of creditors is also deemed as acceptance of modification of the safeguard or reorganisation plan.

Moreover, there are also cross-class cram-down dissenting creditors mechanism for voting on plan in Safeguard, Accelerated Safeguard, and Rehabilitation proceedings respectively. Under cross-class cram-down dissenting creditors mechanism, even the plan has not won by voting, nevertheless, the court can still sanction the plan upon the request of debtor or administrator.

Last but not the least, in Rehabilitation proceeding even the plan is not passed under cross-class cram-down dissenting creditors mechanism, the court can reschedule the debts by up to ten years, which in turn put the debtor in advantageous position during negotiation with creditors.

Thus, due to above factors, French insolvency law has been characterised as “restructuring-biased” and excessively debtor friendly.

### **Question 3.2 [maximum 5 marks] 2.5**

Building on your previous answer, has there been, in recent years, any evolution in the law in relation to the protection of the creditors as opposed to the debtor?

With the reforms introduced by the Order of 15 September 2021, there are evolution in the law in relation to the protection of the creditors. In the first place, classes of creditors have been adopted to substitute creditors’ committees. Before the reform, creditors were grouped as creditor committees (bondholders, credit institutions, suppliers) which were lack of similarity of common interest within the same group. The reform using classes of creditors to substitute creditor committees. Creditors are grouped into different classes according to their similar economic interest. Under new rule, at least secured creditors and unsecured creditors must be classified in different groups; shareholders are composed of at least one group separate from other claimholders. Class grouping of creditors is compulsory for Accelerated safeguard procedure, and the same is applicable to Safeguard procedure if the debtors in question achieve the threshold.

Moreover, in order to give effect to cross-class cram-down dissenting creditors, the court have to confirm that during voting either the secured creditor class voted in favour of the plan; or at least one of the class other than shareholders voted in favour of the plan. The Court also has to make sure the affected dissenting creditor would not be worse than they would be if the company is in liquidation or being sold out. Besides, absolute priority rule is used, class of creditors voted not in favour of the plan shall be paid in full before any class of creditors junior to said class being repaid.

Here you were also expected to refer to the reduction of the observation period in safeguard proceedings and new-money and post-money privileges.

**Question 3.3 [maximum 5 marks] 3**

During the debates surrounding the implementation of the EU Directive on Preventive Restructuring Frameworks 2019, some commentators have suggested that the safeguard and rehabilitation procedures should be merged. Consider whether this was a reasonable idea.

I think this was not a reasonable idea. Safeguard and Rehabilitation are two different kinds of restructuring mechanisms. Safeguard is preventive restructuring mechanism for difficult but still solvent debtors (may be a likelihood of insolvency), and Rehabilitation is afterward remedial restructuring mechanism for insolvent debtors.

Besides, as safeguard procedure aim to give the debtors flexibility during their negotiation with creditors in order to save the business, so under safeguard proceedings, debtors remain in possession to control the business. However, in rehabilitation proceedings the debtor can control the daily management of the business, but the administrator appointed by the court can supervise the management of the debtor's business. I think under rehabilitation procedure the power of administrator is too wide, and exercise of such power may intervene the operation of debtor's business which may be unfavourable to the saving of debtor's business. If the safeguard and rehabilitation procedures were merged, the flexibility under safeguard procedure may be lost, and the original purpose of safeguard procedure to preserve the business of debtor may not be achieved.

Yes, however, despite its efficient regime, the safeguard procedure represented a mere 6% of the restructuring procedures opened in France between 2008 and 2018 due to firms preferring to enter into confidential procedures or not filing for insolvency proceedings on time and ending up in rehabilitation or liquidation proceedings.

That is why French commentators argued that more information and a clearer distinction between the safeguard and rehabilitation procedures could help increase the use of the safeguard.

**Total marks: 10.5 out of 15.**

**QUESTION 4 (fact-based application-type question0 [15 marks]**

"Vantou" is a limited liability company (*SARL*) specialising in optical material. Its head office is located in Metz, France.

A competitor has set up shop in a nearby shopping mall, which has caused serious financial difficulties for Vantou. Debts are now piling up.

However, Mr Schmidt, Vantou's sole director, wants to diversify his business because he thinks that this will help turn the company's economic situation around.

**Question 4.1 [maximum 5 marks] 4**

With reference to the law, explain whether the company is likely to be subject to a safeguard or rehabilitation procedure.

Vantou is likely to be subject to a safeguard procedure, since as per Commercial Code, safeguard procedure is available to debtor who is unable to overcome difficulties but not yet in payment failure situation. In our case, Vantou has merely come across financial difficulties

and debts are piling up, but not yet fall within payment failure situation. Moreover, Mr. Schmidt, sole director of Vantou, wants to diversify the business, and under safeguard procedure, the debtor is allowed to remain in possession and continue to do business, so safeguard procedure is more suitable for Vantou.

It would have been useful here to provide a definition of the French threshold for insolvency ('cessation des paiements').

#### **Question 4.2 [maximum 5 marks] 3**

Which court will be competent if the company is placed under safeguard proceedings? What would your answer be if it is placed under rehabilitation proceedings?

The Commercial Court is placed under safeguard proceedings. The Commercial Court is placed under rehabilitation proceedings.

It is not the court itself that is placed under the proceedings but the company. It would have been good here to provide a bit more information.

The courts that have jurisdiction over insolvency proceedings will differ depending on the nature of the debtor and the type of activity carried out. The commercial court will be competent if the debtor carries out a commercial or agricultural activity, while the judicial court will be competent if the debtor carries out an independent profession. This is the case for both safeguard and rehabilitation proceedings.

In some specific cases, the specialised commercial court can also be competent. This would be the case where the debtor carries out a commercial or agricultural activity and if the debtor is a company:

- Whose employees exceed 250 and turnover exceeds EUR 20 million; or
- Whose turnover exceeds EUR 40 million; or
- That holds or controls other entities, where the total combined number of employees is 250 or above and where the combined total turnover is of at least EUR 20 million; or
- That holds or controls other entities and where the combined turnover is of at least EUR 40 million, irrespective of the number of employees.

In the case at hand, Vantou carries out a commercial activity and therefore, the competent court will be the commercial court of Metz. We do not have enough information to determine whether the specialised commercial court will be competent.

#### **Question 4.3 [maximum 5 marks] 1**

Finally, assume that Vantou is placed under safeguard proceedings. The company's water supplier, unhappy with the non-payment of the last two invoices, decides to cut off the water supply and take legal action. What will the decision of the court be in relation to this debt?

During the observation period of safeguard proceedings, legal action against Vantou shall be stayed, thus the court will stay the legal action of the water supplier in respect of this debt.

Your answer is incomplete.

The water supplier is a creditor of the company.

If a safeguard procedure is opened, the judgement automatically triggers the opening of an observation period of six months, during which a stay on enforcement actions operates. While the debtor remains in possession, all secured and unsecured creditors

are subject to a stay on enforcement actions and legal individual proceedings against the company for proceedings or claims that arose before the opening judgment.

However, while the company is therefore temporarily relieved from repaying its debts and free from legal proceedings, the observation period can in no case lead to a worsening of the situation, and the company needs to ensure the payment of post-judgment debts.

Moreover, in the safeguard procedure, it is possible to force a creditor to execute current contracts.

In this case, therefore, while Vantou will not have to repay the debt during the observation period, the court can also force the supplier to continue its obligation to supply water.

**Total marks: 8 out of 15.**

**\* End of Assessment \***  
**Total marks: 37.5 out of 50.**