



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.

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.

A was the correct answer.

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 refers to the safeguard procedure.

Statement 2 refers to the accelerated safeguard procedure.

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. The maximum duration of the safeguard proceedings is 12 months while the maximum duration of the rehabilitation procedure is 18 months.
2. In the safeguard proceedings only the debtor may submit a draft restructuring plan to the vote of the creditors. Where classes are constituted in a rehabilitation procedure, any impaired party by the plan may submit an alternative restructuring plan to the vote of the creditors. Additionally, a creditor may also propose a cross-class cram-down in a rehabilitation procedure while in a safeguard procedure, only the debtor may propose a cross-class cram-down.
3. If the plan is not approved the court has the power to reschedule the debtor’s liabilities by up to ten years in the rehabilitation procedure under the condition of a minimum instalment of 10% after the fifth year. In the safeguard procedure, the court does not have the power to reschedule the debtor’s liabilities.

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. Creditors with secured claims (by security interests in rem) and creditors with unsecured claims must belong to different classes.
2. The formation of the classes must be in line with subordination agreements entered into before the commencement of proceedings.
3. Equity holders must make up one or more classes.

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. In rehabilitation proceedings, in the case creditor's classes are constituted, an impaired party may propose an alternative draft restructuring plan. In safeguard proceedings, the debtor only may propose a draft restructuring plan. The possibility for creditors to propose an alternative draft restructuring plan gives the creditors more control of the proceeding and strengthens their negotiation power in rehabilitation proceedings (if the debtor is not willing to make concessions towards the creditors in the draft restructuring plan the creditors may propose their own draft restructuring plan).
2. The maximum duration of regular safeguard proceedings has been reduced from 18 to 12 months. This reform also shifts negotiation power in favour of creditors. As long as the safeguard proceeding is ongoing, creditors can not enforce their claims against the debtor. This can put creditors which are close to financial difficulties under pressure to make concessions towards the debtor in the draft restructuring plan. The reduction of the duration of the safeguard proceeding decreases this pressure on the creditors and makes it easier for creditors to decline unfavourable terms in a restructuring plan.

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.

The protection of the interests of creditors is relatively low in French insolvency law in comparison to those of other stakeholders. Debtors in financial difficulties are given a wide range of procedures designed to enable them to restructure their debts prior to insolvency.

There are the out-of-court ad hoc mandate and the conciliation proceedings which support debtors to restructure their debts prior to insolvency. The safeguard proceedings are also available in a pre-insolvency situation and enable debtors to restructure their debts under the protection of a moratorium on enforcement actions and with support of the court. Only debtors may petition safeguard proceedings. Furthermore, only debtors may submit a restructuring plan to the vote of the creditors. In the accelerated

safeguard proceedings, it is also only the debtor that may request the initiation of the proceedings and may propose a restructuring plan.

Once the company is in a payment failure situation, the debtor, any unpaid creditor or the Public Prosecutor may request rehabilitation procedure. This procedure is also designed to rescue a debtor in financial difficulties if possible. The debtor is enabled to negotiate a restructuring plan with its creditors during an observation period which lasts between 6 and 18 months. During the observation period all creditors are subject to a stay on enforcement actions re default of cash payment. The administrator appointed to supervise the management of the company during the observation period has the power to continue or terminate the debtor's contracts. The possibility to submit a restructuring plan to the vote of the creditors is, however, not restricted to the debtor and any affected party may do so. If the plan has not been approved by all classes of affected parties, the court may apply the cross-class-cram-down mechanism at the request of any affected party.

Hence, French insolvency law focuses more on the restructuring of debtors in financial difficulties than other insolvency regimes and, in the process, restricts some rights creditors enjoy under other insolvency regimes.

Question 3.2 [maximum 5 marks] 4

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 2021 Ordinance, the following provisions have been introduced which strengthen the position of the creditors:

- the separation of secured creditors and unsecured creditors into two classes;
- the reduction of the duration of the regular safeguard proceedings from 18 to 12 months,
- the possibility for an impaired party to propose an alternative restructuring plan in rehabilitation proceedings,
- classes of affected parties are automatic under the accelerated safeguard procedure and subject to certain thresholds under the regular safeguard procedure,

You should also have mentioned the pre- and post-money privileges here.

Question 3.3 [maximum 5 marks] 4

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.

Safeguard and rehabilitation procedures have much in common. Both proceedings are court-based, collective and debtor-in-possession procedure. Both proceedings aiming at restructuring the debtor with a restructuring plan. Both proceedings trigger the appointment of an insolvency judge, an administrator and creditors' representatives. In view of all these similarities, it would not have needed many changes to merge both proceedings. A merger could have simplified France's insolvency framework. Therefore, it was a reasonable idea to merge these proceedings.

However, there are also some differences between the safeguard and rehabilitation proceedings. Safeguard proceedings can only be initiated if the debtor is not payment failure situation while rehabilitation proceedings are only available if the debtor is insolvent. Safeguard proceedings may only be requested by the debtor and only the debtor may submit a restructuring plan to the vote of the creditors while rehabilitation proceedings may be

requested by the debtor, any unpaid creditor or the Public Prosecutor and, besides the debtor, any affected party may submit a restructuring plan to the vote of the creditors. Hence, the debtor has more control of the procedure in safeguard proceedings than in rehabilitation proceedings. In order to maintain the differences between the two proceedings and give the debtor more control of the proceedings at a stage when is not insolvent (safeguard proceedings), it was also reasonable not to merge the two proceedings.

Yes – you could also have mentioned the fact that 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: 13 out of 15.

QUESTION 4 (fact-based application-type question) [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] 5

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

Pursuant to art. L620-1 of the Commercial Code, the safeguard procedure may be opened upon request of a debtor mentioned under art. L620-2 who is not in a payment failure situation but is encountering difficulties which it is not in a position to overcome.

According to art. L620-2 of the Commercial Code, the safeguard procedure is available, among other, for any person exercising a commercial activity.

Pursuant to art. L631-1 of the Commercial Code, the rehabilitation procedure may be opened upon against a debtor mentioned under art. L631-2 or L631-3 who is in a payment failure situation.

According to art. L631-2 of the Commercial Code, the rehabilitation procedure is available, among other, for any person exercising a commercial activity.

In the case at hand, Vantou is in “serious financial difficulties” and debts are piling up. It does not state in the facts that Vantou is in a payment failure situation. Therefore, it is more likely that Vantou is subject to a safeguard procedure at the moment. Giving that debts are piling up, it is, however, likely that Vantou will be in a payment failure situation in the near future and would then be subject to a rehabilitation procedure.

Question 4.2 [maximum 5 marks] 5

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?

Vantou is a limited liability company specialising in optical material. Hence it carries out a commercial activity.

In general, the commercial court is competent for insolvency proceedings if the debtor carries out a commercial activity. However, if the debtor is a company (i) whose employees exceed 250 and turnover exceeds EUR 20 million, or (ii) whose turnover exceeds EUR 40 million, or (iii) that holds or controls entities, where the total combined number of employees is 250 or above and where the combined total turnover is at least EUR 20 million, or (iv) that holds or controls other entities and where the combined turnover is of at least EUR 40 million, the specialised commercial court is competent.

There is no information on the numbers of employees or the turnover of Vantou. It is, therefore, unclear if the commercial court or the specialised commercial court is competent for the safeguard proceedings concerning Vantou.

Question 4.3 [maximum 5 marks] 5

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?

The judgment pronouncing the safeguard proceedings triggers the opening of the observation period which brings with it a stay on enforcement actions. The observation period can, however, not lead to a worsening of the situation of a debtor, and the company needs to ensure the payment of post-judgment debts.

If the last two invoices of the water supplier concern the time before the opening of safeguard proceedings concerning Vantou the court will not allow the water supplier to enforce its claim against Vantou. However, if these invoices concern costs which accumulated during the observation period and Vantou cannot ensure that it will settle these invoices the court will end the safeguard proceedings and may order rehabilitation or liquidation proceedings to be opened.

Total marks: 15 out of 15.

*** End of Assessment ***

Total marks: 47 out of 50.