INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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**.

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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.

A was the correct answer.

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.

B was the correct answer.

Total marks : 7 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?

1 – safeguard proceedings
2 – accelerated safeguard proceedings

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 - For the safeguard procedure to start the debtor must face difficulties that it is unable to overcome on its own, but it is not already in cessation of payments, whereas for rehabilitation the company needs to be insolvent.

2 – Only in rehabilitation proceedings creditors can also present a competitive plan if they disagree with the plan presented by the management.

3 – Only in rehabilitation proceedings the judicial administrator may decide to organise a sale of the assets as a going concern if the company is not able to operate properly despite a reduction in its annual debt.

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 and unsecured creditors must belong to different classes.
2 – class formation is to be in line with subrogation agreements entered into prior to proceedings' commencement.

3 – equity holders have to form one or more separate classes.

Question 3.4 [maximum 2 marks] 0

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 – the enlarged scope and simplified enforcement for the pledge of tangible movables (for example, the pledge of tangible movables may now cover fixtures).

2 – all security agreements can now be executed by electronic signature, (before - was reserved for securities contracted for the needs of the debtor's profession).

This is the reform on security law, rather than the Order of 15 September 2021.

Total marks: 8 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] 1.5

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

Insolvency law of France is known for being more pro-debtor protective than pro-creditor. Creditors have a very limited role in insolvency proceedings (which puts France on a low position in international and comparative studies). French insolvency regime is inclined towards the rescue of the ailing businesses with a focus on preserving the employment at the company. Thus, the law is focused on saving and restructuring businesses with problems (thus, helping debtors and being "debtor-friendly") rather than liquidating them.

Correct but insufficiently developed answer.
The first French pre-insolvency process was introduced as early as 1984. Since then, the French legislator and Government have been exceptionally prolific in regularly modernising the French preventive restructuring landscape, with substantial reforms occurring every couple of years. This continuous reform activity is partly a reaction to regular economic crises, which have led to an increase in the number of insolvency cases, and partly to the consideration that previous reforms had fallen short of success. Over the years, most reform efforts have centred around the acknowledgement that the more the difficulties of the company are dealt with upstream, the better the chances are of preserving the value of the assets of

the company and to achieve a successful restructuring. As a result, the French preventive restructuring regime geared towards promoting the rescue of businesses at an early stage, with a view to preserving employment.
The French regime is thus known for its developed and sophisticated preventive restructuring framework, with no less than five preventive procedures available to debtors experiencing difficulties but not yet insolvent. Such a position has earned France the label of a "restructuring-biased" jurisdiction.
However, although the French preventive restructuring regime is composed of several efficient procedures, French insolvency law has also long been considered too favourable to the debtor and "unreasonably averse to creditors." Regular reforms have reinforced the prerogatives of creditors in insolvency procedures, but French insolvency law remains internationally known for the comparatively low level of protection afforded to the interests of creditors in comparison to those of other stakeholders. As a result, France ranks quite low regarding the "strength of its insolvency framework" in international and comparative studies, because of the limited role of creditors in restructuring proceedings.

Question 3.2 [maximum 5 marks] 0.5

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?

The regular reforms have reinforced the creditors' prerogatives in insolvency procedures.

For example, the 2014 Ordinance increased the rights of creditors in insolvency proceedings. It provided, *inter alia*, that the court-appointed agent can sell the business after consultation with the creditors.

The latest such reform took place in 2021. The Ordinances of 15 September 2021 substantially enhanced the position of secured creditors.

This is insufficiently developed. You were expected to cover at least these four elements:

- Creditors committees have been replaced by classes of creditors
- New safeguards in place in case of cross-class cram-down by the court
- The reduction of the observation period in safeguard proceedings.
- New-money and post-money privileges.

Question 3.3 [maximum 5 marks] 1.5

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.

Given that the French insolvency system is oriented to save the distressed companies, I believe it was a reasonable idea.

It is true that the objectives of rehabilitation proceedings are the same as for safeguard proceedings. Rules applicable to the observation period, the automatic stay and classes of creditors are also the same as in safeguard (with some exceptions, notably regarding shareholder consent). [This is incorrect, the observation period has been lowered in safeguard] However, it appears to me that the main difference between two procedures is that the safeguard procedure allows solvent debtors with difficulties to be

restructured as a preventive measure whereas rehabilitation is oriented at the insolvent debtor.

As a way to encourage debtors to tackle financial difficulties at an earlier stage, safeguard procedure shall exist as a debtor-driven pre-insolvency procedure in comparison to rehabilitation proceedings.

This is also insufficiently developed. A deeper discussion on the differences of both procedures was required.

Total marks: 3.5 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] 1

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 a subject to rehabilitation procedure. The fact pattern provides that the debts are "piling up". One of the main requirements for the debtor to start safeguard procedures is **not to be** in a payment failure situation, so the only available procedure out of two is the rehabilitation procedure.

This is incorrect.
Nothing suggests that the company is insolvent. If it is not insolvent, the company should be placed in safeguard proceedings. If it is admitted that the company is already insolvent, the debtor should file for rehabilitation proceedings.

Safeguard proceedings are opened at the request of the debtor. Wile the debtor will remain in possession, the judgement that opens the procedure will designate:
(i) an administrator
(ii) an insolvency judge
(iii) a creditors' representative

When the debtor is insolvent and rescue does not seem likely, the management of the distressed company can request the opening of rehabilitation proceedings no later than 45 days from the date on which it becomes insolvent, provided that conciliation proceedings are not pending. Any unpaid creditor or the Public Prosecutor may also request the court to open rehabilitation proceedings against the debtor.

Question 4.2 [maximum 5 marks] 2.5

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?

Either the commercial court or the specialised commercial court (in case the special circumstances exist, for example: if it has 250+ employees and turnover exceeds EUR 20 mln, or turnover exceeds 40 mln, etc.).

The answer is the same for rehabilitation.

Yes but reference to the legislation missing.

Question 4.3 [maximum 5 marks] 0

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 court will make an order for the proceedings to be replaced by either rehabilitation or liquidation proceedings. After that the water supplier will become a part of a particular class of creditors and its debt will be repaid according to the plan sanctioned by the court.

No. 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: 3.5 out of 15.

*** End of Assessment ***

Total marks: 22 out of 50.