



**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.**

**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.

#### 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 insolvency procedure.

Statement 2 refers to the accelerated safeguard insolvency 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.

[First, the main difference between the two procedures lies in the nature and severity of the difficulties encountered by the debtor. The payment failure situation under rehabilitation should be more severe than just a cash flow problem.

Second, the observation period available under rehabilitation process is for six-months that is renewable for up to 18 months. The observation period available under safeguard process is for maximum of 12 months.

Third, the safeguard procedure can be opened only on a petition filed by the debtor whereas the rehabilitation procedure can be opened by a request from the debtor or by any unpaid creditor or the Public Prosecutor.]

### **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.

[While grouping creditors within classes, the insolvency practitioner has to consider at the very least:

1. Creditors whose claims are secured by security interest *in rem* and other creditors (such as unsecured creditors) must belong to different classes;
2. Class formations should follow the subordination agreements entered into before the commencement of insolvency 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.

[The Order of 15 September 2021, first introduced the formation of classes of creditors that provided the possibility to cross-class cram-down dissenting creditors and ensuring that all parties are treated fairly.

Second, the Order introduced a “post-money” (post commencement funding) privilege that benefits claims arising from a cash contribution to the debtor cannot be subject to write-off or postponement which are not agreed by their holders in the event of subsequent restructuring proceedings.]

**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 French jurisdiction is considered favourable to the debtors as it allows comparatively low level of protection to the interest of the creditors in comparison to other stakeholders thus resulting in France's ranking low in “strength of its insolvency framework”.<sup>1</sup>

Further, the restructuring proceedings envisage limited role for creditors.<sup>2</sup> Under the insolvency framework of France court takes leading role, of which several

<sup>1</sup> World Bank, *Doing Business Report*, which states that the recovery rate of creditors in a fictitious case under consideration was estimated at 74.8% in France, compared to well above 85% in other European countries such as Denmark, Finland, Ireland, the Netherlands, Norway, Slovenia and the United Kingdom.

<sup>2</sup> A Epaulard and C Zapha, “Distressed firms: how effective are the preventive procedures?” *France Strategie – La Note d'Analyse* No 84 (February 2020) at 2.



commentators have advocated for adjustment arguing that the debtor and creditor should be left to negotiate a fair settlement on their own.<sup>3</sup> The courts are primarily compelled by consideration of preservation of business, pursuit of economic activity and preservation of employment.

France is a restructuring-biased jurisdiction since it has five rescue procedures that include two amicable out-of-court proceedings and three court-administered proceedings. *Ad hoc* mandate and conciliation are out-of-court, voluntary and confidential procedures whereas safeguard, accelerated safeguard and rehabilitation are in-court preventive restructuring processes.

These rescue procedures are opened by the debtors on payment failure situation. In *ad hoc* mandate and conciliation debtors are encouraged to negotiate workouts with their creditors to maintain confidentiality. In rehabilitation procedure, unpaid creditor or Public Prosecutor are also allowed to request the court to open the proceedings.

Under the rescue tools, the debtor remains in control of its affairs<sup>4</sup>. The objective of restructuring plan is preservation of business, the pursuit of economic activity and preservation of employment rather than the creditor recovery at times of default<sup>5</sup>.

Order of September 2021 introduced in Commercial Code classes of creditors and the possibility of cross-class cram-down of dissenting creditors by the court. However, as a safeguard the cram-down compulsorily requires the debtor's consent.

Further the Order introduced difference between the safeguard and accelerated safeguard proceedings, where the accelerated safeguard procedure encourages conciliation with the aim of sustainability and rescue of the debtor.

In the rehabilitation proceedings where plan is not approved by the requisite classes including though a cross-class cram-down, the court has powers to reschedule the debtor's liabilities up to ten years known as "term out". This provides the debtor with stronger leverage in restructuring negotiations.

There is a stay on enforcement actions relating to default of cash payments. These would majorly affect the creditor recoveries. Otherwise legal proceedings or enforcement actions related to specific performance are not subject to the stay. Administrator has power to continue or terminate debtor contracts that are deemed necessary to safeguard the debtor. The creditor shall continue to honour its commitments despite the default of payment by the debtor prior to the proceedings.]

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

[Order of September 2021 ("Order") introduces the formation of class of creditors. In accelerated safeguard proceedings, formation of class of creditors is mandatory whereas in safeguard proceedings it is restricted to certain thresholds for companies employing over 250 employees and having turnover greater than EUR 20 million or

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<sup>3</sup> V Rotaru, "The Restructuring Directive: A Functioning Law and Economic Analysis from a French Law Perspective" (30 September 2019) at para 107.

<sup>4</sup> Commercial Code, Art L611-7

<sup>5</sup> *Idem*

those having turnover in excess of EUR 40 million. These were imposed as preventive restructuring tools allowing for equal access and greater or lesser complexity of procedures depending on the size of the debtor. In the rehabilitation process the authorisation to form classes of affected parties maybe requested by the administrator without the debtor's approval.

Grouping of creditors within classes allows fair treatment to the creditors considering the homogeneity of interest based on commonality of economic interest. The insolvency practitioner is to consider, depending on the typology of the company liabilities and its activity:

- a. Creditors whose claims are secured by security interest *in rem* and other creditors (such as unsecured creditors) must belong to different classes;
- b. Class formations should follow the subordination agreements entered into before the commencement of insolvency proceedings;
- c. Equity holders must make up one or more classes;
- d. For creditors secured by trust granted by the debtor, only amount of their claim not secured by such security, is considered.

Through the same Order, the cross-class cram-down procedure was introduced allowing the court to deal with dissenting creditors who before could defeat the adoption of plan.

The Order transposes the EU Directive on Preventive Restructuring Frameworks 2019 and made accelerated safeguard procedure the core framework of preventive restructuring tools. It ensures a vote on a restructuring plan in a short timeframe based on an initial conciliation proceeding. Thereby it serves the objective of preserving company's value.

Lastly, the Order provides for new money protection. While rescuing a business, protection is needed for new money to be introduced. Protection now has been provided as post-money privilege. Claims guaranteed by such privilege cannot be subject to write-off or postponements which are not agreed by their holders in the event of subsequent restructuring proceedings.

Under the court monitored rehabilitation process, the 2015 Macron Law provided powers to the court to order either:

- i. a forced increase of capital; or
- ii. a forced sale of opposing shareholder's shares at the administrator or Public Prosecutor request under certain conditions:
  - a. the company employs atleast 15 employees or is a dominant enterprise under French Labour Code; and
  - b. Cessation of business would lead to serious harm to the national or regional economy and to employment; and
  - c. Change in company's share capital appears to be the only serious option; and
  - d. Affected parties refused to adopt the changes in the company's share capital proposed in the rehabilitation plan.

Such court actions ensure adoption of rehabilitation plan and protection of creditor money.]

### **Question 3.3 [maximum 5 marks] 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.

[The objective of the two proceedings is to rescue debtors. The safeguard is available to a debtor who is encountering difficulties which is not in a position to overcome while not yet in a payment failure situation. The rehabilitation proceeding is available to a debtor who is in a payment failure situation and the difficulties are more severe for the business.

There are number of similarities between the two proceedings:

- i. The debtor remains in possession and keeps trading to preserve employment and pay off the liabilities;
- ii. The proceedings are not confidential and must involve all creditors;
- iii. It triggers a stay on enforcement actions during which a safeguard/rehabilitation plan is proposed;
- iv. The opening of the procedures triggers the appointment of administrator;
- v. Observation period for negotiating plan;
- vi. Formation of class of creditors is not compulsory and is restricted to certain thresholds for companies;
- vii. The creditor voting rules on plan approval, among other similarities.

There are some differences between the two proceedings:

- i. The period under rehabilitation proceedings may extend to 18 months as compared to 12 months for safeguard proceedings;
- ii. The rehabilitation proceeding is opened on request of debtor, any unpaid creditor or Public Prosecutor in contrast to safeguard proceedings that are opened on request of only the debtor;
- iii. Formation of class of creditors in the rehabilitation process maybe requested by the administrator without the debtor's approval but in safeguard maybe on request of debtor;
- iv. In the rehabilitation procedure any affected party may submit draft plan;
- v. Rehabilitation proceedings also allows the court to force increase capital or force sale opposing shareholders' shares under certain conditions that include dominant company, employment & economic interest, where share capital change is the only option and affected parties refused to adopt the change
- vi. Rehabilitation proceeding allows the cross-class cram-down mechanism to be applied by court at the request of any affected party else the approval may be accorded through individual consultation rules. Where plan is not approved by requisite classes, court may reschedule debtor liabilities in the rehabilitation procedure.

The safeguard proceedings are available to solvent debtors (that are facing possible insolvency) and rehabilitation proceedings are available to insolvent debtors. By passing Ordinance of September 2021, the French government has opted to use the accelerated safeguard as the main vessel for transposing the EU Directive on Preventive Restructuring Frameworks 2019. Therefore, the differences in the two processes, that essentially are procedural, may not be compelling enough to keep the two processes separate. Further, the crux of preventive restructuring for solvent debtors facing insolvency is conciliation, discussions and negotiations. These may be achieved by the accelerated safeguard procedure. The two processes that are essentially similar leads to greater administrative intervention and costs.]

**Total marks: 15 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] 5**

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

[The safeguard procedure is available to Vantou as it is encountering difficulties that are difficult for it to overcome as debt mounts. However, as understood, the debtor is not in a payment failure situation. Rehabilitation proceeding is applicable where the debtor is insolvent thereby being in a payment failure situation.

Vantou is in business and would be reluctant to make public its financial position that would impact sales and its credibility. Safeguard procedure is similar to formal insolvency proceedings but is not confidential and must involve all creditors. In the safeguard procedure the debtor remains in possession of its affairs.

Vantou may prefer to apply accelerated safeguard procedure, wherein it shall negotiate an agreement before entering into safeguard proceedings. This would ensure confidentiality and short timeframe during the conciliation process and thereby preserve the company's value. Moreover, even if the debtor was in a payment failure situation, which has not been mentioned, the application of accelerated safeguard proceedings to Vantou is not precluded.

The opening of the safeguard procedure is on request of the debtor and triggers the appointment of an administrator who supervises the proceeding and/or assists the management to prepare a plan. On opening of the proceedings the debtor enters an observation period wherein no enforcement action can be taken against the debtor. Cross-class cram-down is available in safeguard proceedings.]

**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 carries out commercial activities and thus the competent court would be the commercial court having jurisdiction in the Metz region. If Vantou's commercial activities are such that:

- Employees exceed 250 and turnover exceeds EUR 20 million; or
- Turnover exceeds EUR 40 million; or
- It holds or controls other entities where the combined number of employees exceed 250 and combined turnover exceeds EUR 20 million; or
- It holds or controls other entities where the combined turnover exceeds EUR 40 million

Then specialised commercial court (*tribunal commercial specialise*) can also be competent.

The competent court shall not change with the type of proceedings opened.]

**Question 4.3 [maximum 5 marks] 3**

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 triggers the opening of the observation period (*periode d'observation*) which lasts for six months and is renewable once by judgement of the court and, if necessary, second time, at the request of the Public Prosecutor.

The observation period brings with it a stay on enforcement actions while the company continues to trade. If these non-payments are pre-admission, then the water supplier shall have to present their claim to the creditor representative and is barred for enforcing any action relating to payments.

The vendor shall continue to perform under the contract and restore the water supply.

The administrator has to ensure that the dues arising during the safeguard period are paid in complete and no new debt is incurred by the debtor.

The claim for non-payment with respect to post-admission dues, the administrator has to ensure payment and cannot lead to worsening on situation.]

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: 13 out of 15.**

**\* End of Assessment \***

**Total marks: 47 out of 50.**