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**.

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] 1

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 number 1 is related to the proceeding known as safeguard proceeding, once even though the Company is facing economical adversities, it is not yet in default with its payments. The second statement concerns the out-of-court proceeding known as Conciliation that, although occurs extrajudicially, by the end of the proceeding the conciliation proceeding is sanctioned b the court.]

The second 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.

[The first main difference is that, in the Rehabilitation proceeding the debtor must already be insolvent for the proceeding to be commenced, while in the Safeguard procedure the debtor is going through economic difficulties, but the Debtor must not yet be in default with its obligations.

The second main difference is that the Rehabilitation proceeding could be filled both by the insolvent Debtor, as well as by an unpaid creditor or the Public Prosecutor. Meanwhile, the Safeguard proceeding can only be filled by the Company undergoing financial difficulties.

The third, and last difference is that in the Rehabilitation proceeding the observation period lasts six-months, renewable for up to eighteen months, while the maximum of observation period that can be granted in the Safeguard proceeding I up to twelve months.]

Question 2.3 [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.

[The three criteria that could be used to group the debtor's creditors are the nature of the claim and if they are secured by security interests *in rem* or not (the so called unsecure claims); if the creditors belong to equity holders, and if so, they must be part of the same class; and take into account if there are any subordination agreements entered into before the commencement of the insolvency proceeding.]

Question 2.4 [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 first thing that could be considered as an increase in the protection granted to creditors, introduced by the Order of 15 September 2021 is the post money privilege, that grants privilege and a protection for those that decide to grant new money for the Debtor, after its insolvency proceeding has commenced. Such claims cannot be subject to write-off postponements and can only be overridden by specific claims (that are not many).

The second privilege that could be mentioned is the provision for the separation of secured creditors benefiting from rights *in rem* and unsecured creditors, into two distinct classes, enabling such creditors to actually be able to vote in the rehabilitation plans in a more meaningful way, and also more accordingly to its interests.]

Total marks: 9 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] 3

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

[The French insolvency law has been characterised as "restructuring-biased" and excessively debtor-friendly because their insolvency law proposes and foresees a plethora of possibilities for restructuring proceedings, that have as main goal to rescue business undergoing financial troubles and to preserve the employers that hold their job before the Debtor.

Such tendency and "reputation" of the French insolvency system is even more evident when it is noted that they have no less than five rescue procedures that could be used by the Companies in financial troubles (taking into account the singularities of each proceeding).]

Yes but you could have developed your answer further.

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] 1.5

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?

[Even though the French insolvency system is still very debtor biased, and ranks quite low, internationally speaking, on how the creditor is involved in the insolvency proceeding foreseen in the system, the French jurisdiction has been undergoing some changes, in order to give the creditors more voice and representativeness in such proceedings.

One very relevant example of that occurs in the rehabilitation proceeding and in the Safeguard Proceeding, cases in which the creditor has the power to vote on the restructuring scheme elaborated by the debtor and, in case they reject the scheme, the Company would have to apply for a liquidation proceeding (always taking into account the respective exceptions).]

Yes but this could have been developed further by discussing at least the following four aspects:
(1) Creditors committees have been replaced by classes of creditors.
(2) New safeguards in place in case of cross-class cram-down by the court.
(3) The reduction of the observation period in safeguard proceedings.
(4) 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.

[In my opinion it would be a reasonable idea, considering that these both proceedings, the safeguard and the rehabilitation proceeding, are very similar in the way they are processed,

and in their main goal, which is recover the Company/Debtor, and find ways for them to be back in business again.

The only thing that would be important to highlight - which is also the reason why I consider that, even though both proceeding could be merged they shouldn't -, is that the proceedings are applied in favour of Companies undergoing different scenarios: in one of them the Company is already in default with its obligation, while in the other the Company, even though undergoing financial struggles, is not yet defaulting its obligations.]

Yes but this could have been developed further.
Transposing Directive 2019/1023 into the French Commercial Code raised several issues. While the first, main issue that the French Government had to consider was whether the minimum standards of the Directive should have been implemented in an/several existing procedure(s) or whether a new, standalone procedure should be created, another debate which had emerged was whether the safeguard and rehabilitation proceedings should be merged. Studies reported that firms that filed for safeguard proceedings were better off than those that went into rehabilitation proceedings. 62% of safeguard proceedings result in a successful restructuring plan, while only 27% of rehabilitation proceedings succeed.
Although the difference can be explained by different factors, the reputation of the safeguard also contributes to its success. Since firms under safeguard have a greater change of survival, the opening of this procedure does not drive away stakeholders – customers, creditors, employees, suppliers – which in turn increases the firm's chances of survival.
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: 6 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] 3

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

[In Vantou's case, the proceeding that suits them better is the Safeguard Proceeding, introduced in the French insolvency system by the Law of 2005, subsequently reformed in 2008, 2014 and 2016.

Such proceeding would be the most adequate, once, according to the above stated, the company is not yet falling short on its obligation, but still only in financial difficulties, and wishing to recover from such scenario.

If Vantou was already failing with its paying and not fulfilling its obligations, then the appropriate proceeding would be the Rehabilitation (that is the proceeding fitting for Companies that are already in default).]

Yes but it would have been useful to provide the legal references governing these proceedings.

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?

[The competent court to deal with the Safeguard proceeding, as well as with the Rehabilitation proceeding is the Commercial Court, or *tribunal de commerce*, once it is the Court that has jurisdiction over insolvency proceeding such as the Safeguard and Rehabilitation proceedings.]

You should also have mentioned the specialised court.

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?

[If these amounts refer to credits originated after the commencement of the safeguard proceeding, these amounts need to be paid, as they would not be subject to the safeguard proceeding. Taking that into account, the possible decision to be granted in this scenario would be ordering Vantou to pay the outstanding invoices.

A second path that the Court could take is to inform the water supply company that the outstanding invoices are related to credit subject to safeguard proceeding and, therefore, can only be paid on the basis of the rehabilitation plan that needs to be presented and approved by the Vanrou's creditors, and homologated judicially by the Court.]

This is not correct.
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: 6.5 out of 15.

*** End of Assessment ***

Total marks: 30.5 out of 50.