



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.

D was the correct answer.

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: 8 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

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

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

Which insolvency procedures do these statements refer to?

Statement 1 – safeguard proceedings

Statement 2- accelerated safeguard

Question 2.2 [maximum 3 marks] 3

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

Under the safeguard procedure, the relevant company cannot be insolvent – however insolvency is required for the rehabilitation procedure.

The rehabilitation procedure may last for 18 months but the safeguard procedure must come to an end after 12 months.

Only a debtor is permitted to put forward a plan or to invoke the cross-class cram down procedure in the context of the safeguard procedure. By contrast, in the rehabilitation procedure, this can be done by impaired parties and creditors.

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.

Creditors who have the benefit of security interests *in rem* must not be in the same class as other creditors.

Any pre-proceedings subordination agreements must be reflected in the formation of classes.

Where the security in favour of a creditor is a trust, the amount of claims secured by such trust must be disregarded.

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 introduced classes of creditors going beyond the previous classification of credit institutions, main suppliers and bondholders – the result is that the interests of a wider range of creditors are now better protected, which is especially relevant in complex restructurings involving senior, mezzanine, junior, privileged and unsecured creditors.

In addition, the cross-class cram down procedure introduced in 2021 protects creditors through the “absolute priority” rule, which ensures that if a class of creditors voted against a plan which is nevertheless sanctioned and which provides that another, lower-ranking class of creditors will be repaid or will retain an interest, the dissenting class must be fully repaid.

Total marks: 10 out of 10.

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

In addition to the correctness, completeness (including references to case law, if applicable) and originality of your answers to the questions below, marks may be awarded or deducted on the basis of your presentation, expression and writing skills.

Question 3.1 [maximum 5 marks] 5

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

Unlike the majority of jurisdictions, creditors’ involvement in French insolvency proceedings tends to be very limited. Instead, the interests of other stakeholders (and, indeed, the debtors) are far more protected in such proceedings.

The overarching principle in French insolvency proceedings, which underpins the choice of measures available to debtors, is that of business rescue – as opposed to protection of creditors. This is illustrated by the wide range of corporate rescue procedures which are made available to businesses in order to work towards a rescue rather than an insolvent liquidation: ad hoc mandate, conciliation, safeguard, accelerated safeguard and rehabilitation procedure.

Perhaps this can be explained by the fact that, historically, the French legal system evolved from coercive insolvency procedures (pursuant to which the debtor was punished) to a rescue framework aimed at saving businesses by implementing a range of pre-insolvency measures which could aid a company. Considering how each successive reform, from the introduction

of *redressement judiciaire* to Ordinance No 2020-1193 of 15 September 2021, strengthened the rescue framework and expressly aimed to promote preventive measures, business growth and job creation, it is not surprising that French insolvency law is often characterised as debtor-friendly.

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?

It is fair to say that French insolvency law has been evolving towards a more creditor-friendly position, as can be seen, for example, from the introduction of the Ordinance No 2014-326 of 12 March 2014. One of the aims of that Ordinance (albeit the lowest ranking one in terms of priority) is to increase the rights of creditors in insolvency proceedings.

In addition, it is relevant to note that under the safeguard and liquidation proceedings *mandataires judiciaires* ensure that the creditors' interests are represented. Furthermore, the safeguard and accelerated safeguard procedures must involve all creditors and, since the Order of September 2021, such creditors are divided up into several classes which represent the different interests which senior, junior, privileged and unsecured creditors have. This is particularly important in the context of accelerated safeguard proceedings, in which the creation of such classes is compulsory. Creditors within each class get a chance to vote on any proposed restructuring plan and although the Order of September 2021 introduced the cross-class cramdown procedure it also contained provisions aimed at ensuring the fair treatment of all creditors.

For example, the "absolute priority rule" states that (subject to certain exceptions) if creditors within a certain class were crammed down by a lower-ranking class which stands to retain an interest under the restructuring plan, then these crammed down creditors must be repaid in full. Any cram down is also subject to the court being satisfied that i) none of the crammed down creditors will be in a worse position than they would otherwise be in the event of the relevant debtor's liquidation, and either ii) the majority of impaired classes voted in favour of the plan or iii) at least one affect class voted in favour of the plan.

In the ways set out above, it is clear that steps have been taken for French insolvency law to slowly move towards being more creditor-friendly.

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.

It is easy to understand why the idea of a merger of the safeguard and rehabilitation procedures is an appealing one. Both procedures share a number of similarities, being court-governed, collective debtor-in-possession procedures. Even their objectives are aligned, as both are corporate rescue procedures aimed at allowing the debtor to continue trading, keep members of staff employed and discharge the debtor's liabilities. In terms of the steps involved, both procedures involve i) an observation period (albeit a longer one under the rehabilitation procedure) during which an automatic stay on enforcement actions and legal proceedings applies to the debtor, ii) the appointment of an administrator and a creditors' representative in charge of supervising the proposed plan and representing the creditors'

interests respectively, and iii) the preparation of a rescue plan which creditors divided into different classes need to vote on and which must ultimately be sanctioned by the court. Both procedures allow dissenting classes of creditors to be crammed down, which is to say that (subject to certain safeguard measures ensuring the fair treatment of all involved parties) a plan can be sanctioned by the court and implemented even if certain class voted against it. Although a number of differences between the safeguard and rehabilitation procedures were introduced by the Ordinance of 15 September 2021, it remains that the tools both procedures make available to debtors are very similar therefore it is arguable that they could be merged into a single corporate rescue procedure.

Despite the above, these procedures remain separate and were not amalgamated as part of the implementation of the EU Directive on Preventive Restructuring Frameworks 2019, in what is probably a reasonable approach. The key issue, which justifies the safeguard and rehabilitation procedures being two different options available to debtors, is the fact that they apply at different times in the life cycle of a corporate debtor. For a company to be in a position to avail itself of the safeguard procedure, that company must not yet be insolvent while, on the contrary, the rehabilitation procedure only becomes available once a company has reached the point of insolvency. The dynamics involved in both situations, and the outcome of the rescue procedure itself, are likely to be very different indeed despite the similarity of the actual tools included in each procedure depending on whether or not a company is insolvent as the time it commences the relevant procedure. As a result, it makes sense to have kept the safeguard and rehabilitation procedures separate, as they ultimately serve a similar purpose in different contexts.

Total marks: 15 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] 3

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

As set out in question 3.3 above, this will depend on whether the company is insolvent at the time the procedure is started. Under the Law No 2005-845 of 26 July 2005 (as amended by Ordinances on 2008, 2014, 2016 and 2021), if Vantou is encountering cash flow problems which the company is not in a position to overcome, the safeguard procedure will be available as long as Vantou is not yet in a payment failure situation.

If, however, the financial difficulties experienced by Vantou are so severe that the company does find itself in a payment failure situation (and is therefore insolvent), then the rehabilitation procedure under the Law No 85-88 of 28 January 1985 (as amended by the Decree No 85-1389 of 27 December 1985, the Macron Law of 2015 and the ordinance of 15 September 2021) will be appropriate.

Yes but it would have been useful to provide the articles of the Commercial Code dealing with both procedures.

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?

If the company is placed under safeguard proceedings, the competent court will be either the commercial court or (if Vantou either i) employs more than 250 employees and has a turnover of over €20,000,000, ii) has a turnover of over €40,000,000, iii) holds or controls other companies and the combined turnover/number of employees falls with i) or ii) above) the specialised commercial court.

The answer would remain the same if Vantou was placed under rehabilitation proceedings instead.

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?

As an automatic stay on enforcement actions applies upon entry into the safeguard proceedings, the court is likely to rule that cutting off the water supply and taking legal action is not permitted and that Vantou cannot be required to repay the relevant debt to its supplier. This, however, only applies to the extent that the supplier took the relevant action within the observation period (this being 6 months from the date of the start of the safeguard proceedings, although this can be extended to up to 12 months).

Yes. However, 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: 11 out of 15.

*** End of Assessment ***

Total marks: 44 out of 50.