



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.

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: 10 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 proceeding.

Statement 2: Accelerated Safeguard proceeding.

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 difference between safeguard and rehabilitation procedure is the severity of the financial distress of the company. In the safeguard procedure, even though the company is passing through a cash flow problem, the company isn't yet suffering from a payment failure situation (the company is solvent). In rehabilitation, on the other hand, the company must be in a payment failure situation, which means that the company is insolvent.

The second main difference is in relation to the administrator's power. As it occurs during the safeguard proceeding, in the rehabilitation, the court also appoints an administrator, who will assist the debtor during the proceeding. However, in rehabilitation procedure, it is the administrator who has the exclusive power of continuing or terminating the contracts of the debtor.

The third main difference is that in rehabilitation procedure, any interested party may submit a draft of a plan to be voted on by classes, while in the safeguard procedure that power is just given to the debtor.

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.

To group the creditors into different classes, the insolvency practitioner must separate creditors who have different economic interests and put together creditors that have the same or similar interests. The most important criteria that must be satisfied are (i) put the secured and unsecured creditors in different classes, (ii) include one or more classes for the equity holders and (iii) follow subordination agreements made between creditors and debtors before the commencement of the proceeding.

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.

After the Order of 15 September 2021, the creditors have two important guarantees: the first one is the classification of creditors affected to deliberate in restructuring proceeding as an accelerated safeguard procedure. Different from the committee of creditors that existed before the Order of 15 September 2021, the creditors now need to be classified with a criterion of economic interest (the security of the credit, for example), which means that creditors who share the same interest will vote together on a restructuring plan. That measure ensures that the creditors will be treated with more equity.

The second one is the priority given to the post-commencement funding ("post-money"), which is the credit that arose from contracts celebrated during the observation period or that have the goal of supporting the implementation of the restructuring plan. This credit, besides not being subject to the restructuring plan, since it needs to be paid when it is due, has priority over other credits in case of non-payment (article L621-17 of Commercial Code).

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 insolvency law has as its primary goal the preservation of employment and the continuing of the business. To achieve this, it provides five different types of restructuring procedures (ad hoc mandate, conciliation, safeguard, accelerate safeguard and rehabilitation); one of them - rehabilitation - applies even when the company is already insolvent.

In addition, some reforms that French insolvency law passes through had as one of its goals the improvement of restructuring measures to, once more, allow the continuing of the business and preserve the employment. For example, in 2021 French law renewed the old accelerated financial safeguard into the accelerate safeguard proceeding that presupposes the attempt of conciliation between debtor and creditors affected (which strengthens the participation of the creditors) and provides a faster and more affective restructuring proceeding.

Another example is the institution of post-money guarantee, which on one side protects the interest of creditors that assist in the implementation of the restructuring plan but also incentivizes the financier of the economic crisis.

Additionally, the possibility of cross-class cram-down if one class of creditors rejects the restructuring plan proposed by the debtor is another way to give the debtor the chance to maintain its business.

Finally, until the recent reform in 2021, the creditors had little space to intervene in the insolvency or restructuring proceedings in general, which made the French insolvency law to be characterised as a restructuring-biased and debtor friendly system.

Question 3.2 [maximum 5 marks] 2.5

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 reform made in 2021 through the Order of 15 September 2021 brought some provisions to protect the creditor's interest, especially in restructuring proceedings under French Insolvency Law.

For example, it was assured the participation of creditors in accelerated safeguard proceeding, which presupposes the attempt of conciliation between debtor and creditors. Besides that, the classes of creditors were improved and now the insolvency practitioner must acknowledge the criteria of economic interest, security of the credit, previous subordination agreement, and equity holders to institute these classes.

Finally, even when the court applies the cross-class cram-down to force the approval of the restructuring plan when the criteria of the majority of all creditors affected by the plan aren't met, the interest of the dissenting class must be preserved.

Considering that, it is possible to conclude that in the last year, the protection of the creditors has improved in the French insolvency law.

You were also required to mention the lowering of the observation period in safeguard proceedings as well as the introduction of pre- and post-money privileges.

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.

Although the safeguard and rehabilitation procedures are species of restructuring proceedings in the French Insolvency System and have similar rules for the observation period and the proceeding to present and approval of the restructuring plan, these two procedures have important differences, especially after the reform in 2021.

At first, while the safeguard procedure is intended to be a pre-insolvency proceeding, the rehabilitation is a proceeding applied when the company already is insolvent.

Because of this primary difference between the procedures, there are other important differences in the proceedings themselves as, for example, the power of the administrator appointed by the court and the creditors.

In rehabilitation procedure, the administrator has more extensive powers, including the exclusive ones to terminate or continue contracts; while in the safeguard proceeding the administrator's powers are limited to assist the debtor in the restructuring plan and supervises the procedure.

The creditors, on the other hand, have the power to propose a restructuring plan in the rehabilitation procedure, while in safeguard proceeding, its powers are just to vote on the plan proposed by the debtor.

Considering that primary differences between both rehabilitation and safeguard procedures, doesn't look like a reasonable idea merge those proceedings in one.

Total marks: 12.5 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] 5

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

The type of proceeding will depend on some factors, especially the insolvency status of the company. If the financial problem of the company that makes the debts “pile up” is a transitory cash flow problem and the company is viable to continue operating, the recommended procedure is the safeguard and not the rehabilitation, according to article L620-1 of the Commercial Code.

On the other hand, the rehabilitation procedure applies when the company is insolvent (article L631-1 of the Commercial Code), but the continuing of the business is possible. The rehabilitation must be required by the debtor within 45 days after the beginning of the insolvency status (the day when the payment failure situation started).

In that specific case, the debtor wants to continue the operation diversifying its business, so the continuation of the business is satisfied. It's just important to find out if the company is already insolvent or not to know which procedure is recommended.

Question 4.2 [maximum 5 marks] 3

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 article L621-2 of the Commercial Code establishes that the competent court to open the safeguard proceeding is the Commercial Court if the debtor is a regularly registered trader. The High court will have the jurisdiction over the case if the company has more than 250 employees and the turnover exceeds EUR 20 million or if the turnover exceeds EUR 40 million.

As the article L631-7 establishes that articles L621-1, L621-2 and L621-3 also applies to rehabilitation proceeding, the same court that has jurisdiction to open a safeguard procedure also can do so in the rehabilitation proceeding.

In this case, it would not be the high court but the specialised commercial court which could 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] 3.5

Finally, assume that Vantou is placed under safeguard proceedings. The company's water supplier, unhappy with the non-payment of the last two invoices, decides to cut off the water supply and take legal action. What will the decision of the court be in relation to this debt?

The commencement of a safeguard proceeding leads to a stay of all actions taken by creditors, especially related to debts existed prior to the beginning of the procedure (article 622-21 of the Commercial Code).

So, if these invoices are related to water supplied prior to the commencement of the safeguard procedure, the court should dismiss the action and the creditor should continue the supplying and wait for the restricting plan to be proposed and voted on, which will establish the payment of all debts that arose prior to the commencement of the proceeding.

However, if the debt was incurred after the beginning of the procedure, the debtor should pay the invoices when they are due considering that it is a supplier of daily necessities of the company's life (articles 622-7 and 622-17 of the Commercial Code).

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: 11.5 out of 15.

*** End of Assessment ***

Total marks: 44 out of 50.