



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.

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 procedure.

Statement 2 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.

Three differences between the two procedures are as follows:

Safeguard Procedure	Rehabilitation procedure
Maximum duration is now 12 months (having previously been 18 months)	Maximum duration is 18 months
In terms of voting and classes: <ol style="list-style-type: none"> Classes are not mandatory unless the debtor passes certain thresholds or <i>the debtor</i> requests the supervising judge to constitute classes if thresholds are not met. The administrator drafts the restructuring plan which is proposed to the creditors for voting Cross cram down is only available on the debtors request Class based consultation on the plan is used 	In terms of voting and classes: <ol style="list-style-type: none"> Where the thresholds are not met the administrator may request the court to form classes and the debtors approval is not required The administrator drafts the plan but any affected party is entitled to propose alternative plans to the creditors meeting Cross cram down can be requested by the debtor or any affected party Consultation can be class or individual creditor based

The court has no ability (any more) to term out debtor liabilities

The court retains the ability to term out debtor liabilities for up to ten years provided instalments of not less than 10% happen after year 5.

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.

The insolvency practitioners needs to group creditors into classes with sufficient economic alignment called communauté d'intérêt économique suffisante. In doing so he must have consideration to the following factors:

- Secured creditors with in rem claims and creditors without secured claims must be in separate classes
- Classes must acknowledge the effect of binding subordination agreements that predate the proceedings
- Shareholders and other forms of equity must be in at least one class
- Where creditors have the benefit of a fiducie and therefore the assets are outside of the estate then that creditor is only relevant to the amount of its claim not covered by the fiducie.

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.

Prior to the order of September 2021 the Commercial Code did not, when considering class formation, distinguish between rights of creditors with secured in rem interests and those that were unsecured. This failed to recognise the very different economic position between these two and a fundamental flaw in the successful alignment of interests into classes. This was remedied by the September 2021 order by the introduction of the distinction between these two in class formation.

Secondly, prior to the September 2021 order, the only person who could propose a rehabilitation plan was the administrator. The Order introduced an ability for any affected party to propose an alternative plan to the administrators plan which is helpful in expanding the potential range of positive outcomes to the rescue.

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.

France could be described as a dirigiste culture in which government is both large and overarching, in the commercial context this means, amongst other things, there is a heavy presence of the state in all aspects of commercial life. Alongside this French insolvency law is a part of a civil code legal system. It operates via a prescriptive statute led system with heavy involvement by a supervisory court system. Its legal philosophy is tilted towards the benefit of the state through collective success and protection of the citizen. In the context of this philosophy, the French state has therefore historically sought to prioritise actions that protect business as an employer (such as restructuring) and to circumspect actions that could be destructive of survival of business (such as unfettered asset seizure by creditors as that would stymie the ability for the employer to continue to operate and employ).

This contrasts with free market cultures prevailing in the English cultural world, Napoleon having famously described the English as a 'nation of shopkeepers' by which I think he meant a nation primarily driven by affairs of commerce as opposed to affairs of the state. The common law systems epitomised by the English law system create a statutory frame work which is implemented and interpreted (which in practice can often mean adjusted) by the court system and with a philosophy of enabling commercial conduct and freedom of the individual. Therefore they have historically favoured allowing freedom of action through contract and recognising the supremacy of those contracts. For that reason you will see the English law systems having a predisposition to respect rights of creditors agreed with properly advised and competent borrowers.

When comparing these two systems its is therefore clear that, in comparison, the French system is much less culturally disposed to the creditor over the employing debtor. For example, It has only be comparatively recently that French law recognised the complex difference in creditors and the need to give them a ranked voice. Article L262-30-2 of the Commercial Code was the main article dealing with this and was in force until the September 2021 Order, that article divided creditors into three classes only. The 2021 Order moved France much closer to the 'norms' of creditor class recognition prevailing in the rest of the world and for the first time recognised that secured creditors are a different class to unsecured given the nature of the priority of their ranking. This is an example of why international commentators do see France as an outlier in the protection of creditors over debtors. It is also well worth noting that the changes brought into effect by the September 2021 Order are not domestic in origin but are an implementation of the EU Directive on Preventative Restructuring of 2019.

Looking at the French bias towards restructuring. The French state has been very keen on restructuring as a tool of insolvency remedy for some time. France has continually reformed and improved on its restructuring tools as it has learnt from the economic crisis of the last 50 years. This is entirely inline with the French philosophy of preserving business as a source of employment where possible. As a result of this focus it is arguable that France has a preponderance of restructuring tools with no less than 5:

- The ad hoc mandate
- The conciliation
- The safeguard
- The accelerated safeguard
- The rehabilitation

Given that there are so many tools with a view to restructuring it is understandable that commentators describe France as having a 'restructuring bias'. It is also worth noting that it is arguable that France was ahead of the curve in that regard as the trend in global insolvency

over the last thirty years has been very heavily away from traditional insolvency towards restructuring.

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?

As mentioned above there has been a significant change in the French law by the September 2021 Order which is an implementation of the EU Directive on Preventative Restructuring of 2019. The 2019 Order introduced into French law a number of concepts that affect creditor rights:

1. the concept of dividing creditors up into multiple classes reflecting their actual economic priority in the estate was introduced. This certainly facilitates the supply of credit into the credit market as it allows a clear distinction between the rights of creditors according to their interest. Previously the law did not distinguish secured from unsecured and in that situation there can be less credit available to mitigate against the risk of an inability to make that distinction. So this has the effect of improving the rights of creditors generally.
2. The possibility of cross-cramdown of creditors has been introduced. The French cross cram down rules are broadly similar to those used in the USA in its Bankruptcy rules. Essentially the creditors must be treated in order of priority, must not receive less than they would in a liquidation distribution and that a majority of impaired classes are in favour of the proposed plan. The ability to cross cram down certainly improves the position of those creditors who are in the priority position but more generally the test that all creditors must receive at least their liquidation dividend means that some creditors must defacto come out better than liquidation.
3. The concept of post money privilege was introduced for the first time. This is similar to the 'DIP financing' concept seen in the USA. The facilitation of this sort of rescue financing arrangements should be for the benefit of the creditors as it permits a rescue where new monies are needed to allow it to succeed.
4. The 2019 Order brought the accelerated safeguard to the forefront of the restructuring process by allowing a conciliation (being a negotiated outcome between debtor and creditors for a restructuring) to be given the protection of insolvency law and thereby provide both sides certainty of outcome. This is in essence a pre-pack structure as seen across developed insolvency landscapes and one favoured by creditors for its certainty and speed of execution. As a result of the 2019 Order this process is now available to all companies.
5. Changes were introduced to the rehabilitation procedure, these are reflected in my answer to question 2.2 in that it was the 2019 Order that drew the differences between safeguard procedure and the rehabilitation procedure. IN particular the ability for any affected party to propose a rehabilitation plan is a major advance for creditors as it allows them, individually or as a group, to explore alternative rescues plans to that put forward by the administrator. In addition to this, the 2019 Order also permits bilateral consultation with creditors, this is important in situations where you have significant blocking creditor positions and allows that or those creditors to have a dialogue potentially addressing heir particular concerns.

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.

There is a significant philosophical distinction between the footing for these two procedures. The safeguarding procedure requires that the debtor not be in a situation of 'payment failure' (which is the French test for actual insolvency) whereas the rehabilitation procedure requires the debtor to be in a payment failure situation i.e. be insolvent.

Notwithstanding this difference the safeguard does have some of the features commonly seen in a formal insolvency proceeding. It has court supervision, a stay on actions, is encompassing of all creditors, as it is a court proceeding it is not confidential, it involves a insolvency professional and supervising judge. However the purpose of either safeguard procedure is to obtain creditor approval or not to a restructuring plan and the court's options are either to approve that plan or not (having taken into account the vote and any cram down). It is not of itself an insolvency process that can end up with a court sanctioned set out outcomes or a liquidation. The court can refer the company to a liquidation procedure if it believes the company is not viable but that is a separate legal process.

Rehabilitation has more of the features of a formal insolvency style proceeding. It also has an insolvency professional and court supervision. Unlike in the safeguard, the court and administrator have more powers (though it remains a DIP style proceeding). The administrator has the power to terminate contracts which it does not in the safeguard. The court has a number of powers that are not aligned with a pure restructuring philosophy; the end of the observation period gives the court the option of adopting the resolution plan, selling assets of the debtors as a part of a sale plan or, if no plan is viable converting into a liquidation. There is also a difference in control afforded to the debtor, the administrator has the capacity to request classes to be formed in a rehabilitation whereas in a safeguard the debtor must request this; any affected party may submit a resolution plan not just the debtor; the court can apply cross-cramdown at the request of any affected party not just the debtor and the court has the power to allow individual creditor negotiations with respect to a plan which has the powerful effect of allowing a more bespoke but not controlled by the debtor process. In addition, in 2015, the Macron Law was passed giving the court powers to alter existing shareholdings by ordering a capital increase or the sale of existing shareholders shares. The Macron law goes far beyond powers generally seen in a restructuring laws worldwide and is reflective of the French culture towards state led outcomes.

So whilst the two options have many similarities in how they function they have some major distinctions. Safeguarding is a process to designed to encourage and implement an agreed restructuring outcome (albeit one that contemplates a cram down). Rehabilitation is at best a hybrid of a restructuring and an insolvency procedure with many more elements of court sanction and control and much less control for the debtor. So to my opinion the two have different purposes. Merging them therefore is not really a viable idea given their different footings. The question would be more whether both processes are required and that's very ,much a question of French legal policy as set by government.

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.

Firstly do the French courts have jurisdiction? As this is a French SARL based in Metz I think it is safe to assume that they do. The relevant court is the commercial court on the basis that this is a commercial legal entity carrying out commercial activity. It may be the specialised commercial courts however there is insufficient information in the fact pattern to tell whether relevant thresholds for the commercial court have been met.

Secondly, an analysis must be undertaken as to the condition that Vantou is in. Safeguard procedures are only open to companies that are not in a payment failure situation of 45 days or more. If it is in a payment failure situation of 45 days or more then the only process available to it is the rehabilitation procedure. A payment failure situation means the debtor is unable to meet its debts as falling due using immediately available assets and available credit as defined in Article L631-1 of the Commercial Code. This is a pure 'cash flow' based test. The so called 'balance sheet' test used in other jurisdictions is not relevant in France.

In the event that Vantou is not in a payment failure situation but just financial difficulties then either process is available to Vantou. However the rehabilitation procedure has a much higher level of court involvement and allows for various steps to take place without the consent of the debtor. Whereas the safeguard and accelerated safeguard procedures are both debtor led procedures and it is not possible for the court to order a number of steps without the debtors application for them. So it is generally better for a debtor company to use the safeguarding procedures where possible.

There are two different safeguarding processes; the safeguard and the accelerated safeguard. Accelerated safeguard has been adopted by the French government as the primary restructuring tool in France and is designed to promote a quick, negotiated restructuring backed with the certainty of a court sanction. This is France's version of a 'pre-pack'. It commences with a negotiation under the conciliation procedure, and, if the three requirements in article L-628-1 are met, then the debtor can request accelerated safeguard proceedings to be commenced.

Clearly the safeguarding procedure requires a creditor agreed restructuring plan to be implemented. Vantou will need to consider its creditor base and the feasibility of a plan being successfully voted through. There is the option of asking for classes to be formed and for the possibility of use of a cram down mechanic if a successful two thirds of the creditors vote is unlikely. However Article L 626-32 sets out a number of protections for creditors if they are to be crammed down, if these thresholds cannot be met then a cram down will not be possible. If pursuing an accelerated safeguarding procedure then the court will need to be satisfied that the plan negotiated in a conciliation process is deliverable in order to open the proceedings.

There is reference in the scenario to needing to diversify the business. If additional finance is required to do this and is contemplated in the plan it is permitted under safeguarding, accelerated safeguarding or rehabilitation procedures as 'post money privilege' (Article L622-17) or as a result of homologation.

In conclusion, the accelerated safeguard process is the fastest tool for restructuring and would be best suited to Vantou as it gives management to most control. However if it is in a payment failure situation rehabilitation will be the only route available.

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?

The relevant court is the commercial court on the basis that this is a corporate legal entity carrying out commercial activity. It may be the specialised commercial courts however there is insufficient information in the fact pattern to tell whether relevant thresholds for the commercial court have been met (Article L721-8). It should be the court in Metz as that appears to be the place where Vantou is registered.

If Vantou were carrying out an independent profession (i.e. a person carrying on as a sole trader) then the competent courts would be the judicial courts.

The court would be the same for safeguard proceedings and rehabilitation proceedings.

Question 4.3 [maximum 5 marks] 4.5

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?

Under safeguarding proceedings the opening of the first six month observation period gives rise to a stay on all enforcement actions whilst the company trades. However, whilst Vantou has a suspension of enforcement of existing debts which cannot be sued upon, it must not have a further deterioration of its financial situation. In practice this means it needs to meet its ongoing liabilities during the observation period. This must logically be the case because the precursor to safeguarding is financial difficulty but not payment failure situation. If it goes into a payment failure situation then the court would no longer be able to consider it to have a reasonable prospect of a rescue. If the court cannot satisfy itself of the rescue due to ongoing defaults then it will put Vantou into liquidation proceedings.

The decision of the court on the issue of the water bills will depend on when the invoices were issued. If they were issued prior to the opening of the safeguarding proceedings they are not able to be sued upon and are claims in the safeguarding procedure to be dealt with in the plan by the creditors representative. If they relate to the observation period then Vantou would be in a payment failure situation and the court should look to wind Vantou up via a liquidation. **Or rehabilitation proceedings.**

Total marks: 14.5 out of 15.

*** End of Assessment ***

Total marks: 48.5 out of 50.