INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

1

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.

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?

(i) Statement 1: Refers to safeguard procedures, a preventive measure that enables the debtor to resolve his financial difficulties before facing any payment suspension.

(ii) Statement 2: Refers to the accelerated safeguard procedure, an amicable procedure, that can be opened following the conciliation proceedings.

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.

(i) Variation 1: Financial difficulties vs insolvency and duration of the proceedings

- The safeguard procedure is a court-based procedure that concerns exclusively companies that are experiencing financial difficulties but are not in cessation of payments and can therefore continue making payments to their creditors. Upon initiation of such a procedure, an administrator will be appointed. The legal representatives of the company, together with the appointed administrator, will have to assess the economic and social situation of the company and make an inventory of the estate of the company and also analyse the necessary reorganisations steps that need to be taken in order to ensure the recovery of the company. The maximum duration of these proceedings is 12 months.

- The rehabilitation proceedings concern companies that are already insolvent. If a company is insolvent or become insolvent after the opening of a safeguard

procedure, the safeguard procedure will be converted into rehabilitation or liquidation proceedings. These proceedings can last for up to 18 months.

(ii) Variation 2: Differences to the safeguard rules

Rules related to creditors' voting and classes in the safeguard proceedings generally also apply to rehabilitation proceedings. However, the rehabilitation proceedings foresee the following differences:

- The administrator may request the formation of classes even though the debtor does not fulfil the requirement and does not consent to it;
- a draft of a restructuring plan can be submitted by any affected party;
- if the plan is not approved, the court, at the request of the debtor or any affected party, can decide to impose the plan (cross-class cram-down mechanism). In safeguard proceedings, this mechanism can be implemented by the court upon consent of the debtor; and
- In case the plan is neither approved through the class approval, nor by cross-class cram-down, the approval may occur through individual consultation of the creditors.

(iii) Variation 3: Term-out

- In case the plan is neither approved through the class approval, nor by cross-class cram-down, the court can no longer reschedule the debtor's liabilities by up to ten years in safeguard proceedings. This is however still possible in rehabilitation proceedings.

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.

While constituting the groups, the administrator has to consider the at least the following:

(i) creditors having secured claims by security *in rem* and unsecured creditors do not belong to the same classes;

(ii) the constitution of the classes must take into consideration subordination agreements entered into prior to the commencement of the proceedings; and

(iii) creditors secured by a trust agreement entered into with the debtor are secured up to the amount of their claims not secured by the trust agreement.

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.

(i) Absolute priority rule:

The absolute priority rule foresees that a dissident class must first be completely compensated in the same or equivalent means before a lower-ranking class can be entitled to a payment or retain an incentive under the plan. The court may under certain circumstances make exceptions to this rule.

(ii) Consideration of creditors' interests by the court

The court must ensure that dissenting parties to the plan are not affected / less favoured by the plan than they would be if insolvency proceedings over the assets of the debtor would have been opened.

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] 3

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

(i) The French insolvency law mainly focuses on rescuing of the companies in distress and preserving employment. Thus, the French insolvency law foresees five different types of proceedings aiming at rescuing these companies: ad hoc mandate; conciliation; safeguard; accelerated safeguard; and rehabilitation procedure. Due to this focus, the French insolvency law has been characterized as "restructuring-biased" and particularly debtor-friendly.

(ii) In its decision rendered in the case Coeur Défense, the Cour de Cassation stated the that safeguard proceedings are "open to any debtor confronted with difficulties it cannot overcome, regardless of their nature and regardless of whether the debtor is an operational or a holding company or a special purpose vehicle (SPV)". According to that decision, the debtor does not even have to demonstrate that the claims are well-founded. The mere fact that the creditor is seeking payment is sufficient to constitute the difficulty provided for by the law.[1)]

[1)] https://www.legifrance.gouv.fr/juri/id/JURITEXT000023694421/
https://www.gibsondunn.com/wp-content/uploads/documents/publications/RobeMcArdle-CoeurDefenseJudgmentBroadensScopeofFrench.pdf

Yes but you could have mentioned other elements here. 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?

In proceedings such as safeguard and rehabilitation proceedings, the court is more involved in the proceedings and has to ensure that the interests of the creditors are taken into consideration in the safeguard and restructuring plan. Even though the plan can be adopted through a cross-class cram-down, the court has to make sure that either (a) a majority of the classes of impaired parties voted in favour of the plan and one of those classes is a secured creditors' class or is senior to the ordinary unsecured creditors' class; or (b) at least one of the classes of affected parties has voted favourably, which is not the equity holders' class or any other class which is "in the money".

Yes but there are three other elements which you should have discussed here:

- Creditors committees have been replaced by classes of creditors.
- The reduction of the observation period in safeguard proceedings.
- 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.

These two procedures are very similar, but they also somewhat differ, when it comes to the respective requirement of commencement and the powers granted to the debtor over the management of the company. Due to their similarity, it is reasonable to consider their merging. However, this raises a lot of questions with regard to the (a) position and the power of the debtor, (b) commencement of the merged proceedings, and (c) right of creditors.

The merging of these two proceedings will require the legislator to rethink the main purpose and the aim of the safeguard proceedings, which is a preventive court-based procedure.[2)]

[2)](http://www.senat.fr/rap/r20-615/r20-61512.html)

Yes but your answer 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 10.

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.

Vantou is likely to be subject to safeguard proceedings since the company is just facing financial difficulties. Based on the information provide, the company is not in a payment failure and therefore it could file for the opening of safeguard proceedings.

Rehabilitation proceedings are excluded in the case at hand since the company is not insolvent.

Yes but you were required to provide reference to the law. Which articles of the Commercial Code deal with these proceedings?

Question 4.2 [maximum 5 marks] 5

Which court will be competent if the company is placed under safeguard proceedings? What would your answer be if it is placed under rehabilitation proceedings?

(i) Competent court under safeguard proceedings

In cases where the debtor carries out a commercial activity, the commercial court would be competent for the safeguard proceedings. If the debtor carries out an "independent profession", the judicial court would be competent. In some specific cases, such as cases where the debtor is a large company which employs over 250 employees and has a turnover exceeding EUR 20 million, the specialised commercial court can also be competent.

In the case at hand and based on the information provided to us, it can be assumed that Vantou is carrying a commercial activity and thus the commercial court should be competent for the opening of the safeguard proceedings. However, we have excluded the competence of the special commercial court based on the assumptions that that Vantou:

(a) is not a company having over 250 employees and a turnover of over EUR 20 million;
(b) does not have a turnover exceeding EUR 40 million
(c) does not hold or control other entities, where the total combined number of employees exceeds 250 and where the combined total turnover is of at least EUR 20 million; and

(d) does not hold or control other entities and where the combined turnover is of at least EUR 40 million.

(ii) Competent court under rehabilitation proceedings

Under the assumptions mentioned in item (i), the commercial court would be competent for the opening of rehabilitation proceedings over the assets of Vantou.

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?

(i) Prohibition for Vantou to pay any claim

The opening of the safeguard proceedings triggers the stay on all repayment deadlines. The order opening the procedure entails the prohibition for the company in difficulty to pay any claim arising prior to the opening judgement. In practice, this means that the company no longer pays its debts from the opening of the safeguard proceedings. Creditors must therefore file a declaration of their claims with the administrator. The water supplier, as creditor of Vantou, must file its claim related to the non-payment of the last two invoices with the administrator.

(ii) The legal action against Vantou

The opening judgment also leads to a stay on the filing of individual lawsuits against the debtor. Creditors who had not yet initiated lawsuits on the day of the opening judgment can no longer do so afterwards. Thus, based on the information provided, it can be assumed that the court would dismiss the claim.

Yes but you should have provided reference to the articles of the Commercial Code which deal with this.

Total marks:11.5 out of 15.

*** End of Assessment ***

Total marks:35.5 out of 50.