INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6A

FRANCE

This is the summative (formal) assessment for Module 6A ***of this course and must be submitted by all candidates who*** selected this module as one of their elective modules**.**

The mark awarded for this assessment will determine your final mark for Module 6A**.** ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***

2. ***All assessments must be submitted electronically in*** Microsoft Word format***, using a standard A4 size page and an 11-point Arial or Avenir Next 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.assessment6A]**.** ***An example would be something along the following lines: 202223-336.assessment6A.*** 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 2023**.** ***The assessment submission portal will close at*** 23:00 (11 pm) BST (GMT +1) on 31 July 2023**.** ***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

What is the main difference ***between the safeguard procedure and the rehabilitation procedure?***

(a) The main difference lies in the person who can request the opening of the procedure (creditors of the company in the case of the safeguard and the company's director(s) in the case of rehabilitation proceedings).

(b) The main difference lies with in court that will deal with the case (the commercial court for the safeguard and the specialised commercial court for rehabilitation proceedings).

(c) The main difference lies in the duration of the procedures (10 months for the safeguard procedure and 18 months for rehabilitation proceedings).

(d) The main difference lies in the condition required to open the proceedings (insolvency for rehabilitation proceedings and no state of insolvency for the safeguard).

Question 1.2

What are the pre-insolvency mechanisms ***available to companies under French insolvency law?***

(a) Ad hoc mandate, conciliation, safeguard and accelerated safeguard.

(b) Ad hoc mandate, conciliation, safeguard, accelerated safeguard and rehabilitation.

(c) Ad hoc mandate, safeguard and rehabilitation.

(d) Ad hoc mandate and conciliation.

Question 1.3

What are the conditions for a company in financial difficulties to resort to an ad hoc mandate?

(a) A debtor must not be in a state of insolvency (in a payment failure situation).

(b) A debtor must prove that it has not been insolvent for over 45 days and that it is not encountering difficulties that it is not able to overcome.

(c) A debtor must be insolvent.

(d) A debtor must prove that it has engaged in conciliation proceedings first, which have failed.

Question 1.4

Who can request the opening of an ad hoc mandate procedure?

(a) The debtor's creditors.

(b) The president of the court.

(c) The director(s) of the company.

(d) The director(s) of the company or the company's auditor.

Question 1.5

What are the conditions for a company in financial difficulties to resort to conciliation proceedings?

(a) A debtor must not be in a state of insolvency (in a payment failure situation) and must not encounter difficulties that it is not able to overcome.

(b) A debtor must not have been in a state of insolvency for longer than 45 days.

(c) A debtor must prove that it has availed of an ad hoc mandate first, which has failed.

(d) The rescue of the company must be deemed impossible by its directors.

Question 1.6

Can the president of the court impose a conciliation procedure on a debtor company?

(a) Yes, at the request of the creditors.

(b) Yes, at the request of the Public Prosecutor.

(c) Yes, at the request of a contractual third party.

(d) No, never.

Question 1.7

What are the conditions for a company to avail of safeguard proceedings?

(a) When the company is not in a state of insolvency (in a payment failure situation) but is experiencing difficulties which it is not able to overcome.

(b) When the company has not been in a state of insolvency for longer than 45 days.

(c) When the company is insolvent.

(d) When the company is insolvent and the company has attempted conciliation or ad hoc mandate proceedings which have failed.

Question 1.8

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, and (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, and (iv) set-off and close-out netting of financial obligations.

Question 1.9

Minago, a company, is facing financial difficulties but is not yet in a state of insolvency. Some of its suppliers are demanding the payment of their invoices but Minago's directors believe that this would lead to the company's insolvency. Which procedure(s) is / are available to the company?

(a) Ad hoc mandate.

(b) Conciliation and ad hoc mandate.

(c) Rehabilitation proceedings.

(d) Ad hoc mandate, conciliation and safeguard proceedings.

Question 1.10

In relation to the recognition of judgments under French law, choose the accurate statement:

(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: 10/10

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 2 marks] 2

Consider the following two statements:

Statement 1: A procedure which does not stand alone and can only be opened following conciliation proceedings.

Statement 2: The objective of this procedure is to appoint a professional who will seize and realise the assets of the debtor and distribute the proceedings to creditors or proceed to a sale of the business.

Which insolvency procedures do these statements refer to?

Statement 1: accelerated safeguard.
Statement 2: liquidation proceedings.

Question 2.2 [maximum 3 marks] 2

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

As indicated in the Guide Text, the main difference between this procedure lies in the nature and severity of the difficulties encountered by the respective debtor. In order to initiate a rehabilitation proceeding, the debtor must demonstrate its payment failure situation. ***Good.***
Only the debtor might initiate the safeguard procedure. On the other hand, in the rehabilitation procedure, any unpaid creditor or the public prosecutor may request the court to open this proceeding.
The safeguard procedure has a limited duration (18 months, which can be extended), while the rehabilitation can last for several years. ***Be a bit more specific here.***

Question 2.3 [maximum 3 marks] 1.5

List three ***new elements of insolvency law which had been introduced in the French Commercial Code following the Order of 15 September 2021.***

The new elements introduced according to the Guide text are: (i) the mechanisms for the detection of difficulties were accelerated, alongside waring procedures; ***I am not sure I understand this point well. What are "waring procedure"?*** *(ii) the conciliation procedure was strengthened* ***How so?****; a and (iii) creditors' classes have replaced the previous committees of creditors.*

While this is correct, you could have expanded upon your answer which remains relative vague. How has the conciliation procedure been strengthened? You could have mentioned the fact that it can be combined with accelerated safeguard, which has now become the flagship preventive restructuring option.

Question 2.4 [maximum 2 marks] 2

Name and briefly explain two ***of the main differences between the conciliation and ad hoc proceedings.***

The main difference is the fact that a conciliation agreement is ratified by the court at the request of the debtor, and the court can either approve the agreement or sanction it.
Another difference is that in the ad hoc mandate the debtor cannot be insolvent. On the other hand, the conciliation procedure provides that the debtor must not have been insolvent for more than 45 (forty five) days (i.e., there is a time limitation for this procedure).

Total marks: 7.5 out of 10.

QUESTION 3 (essay-type question) [15 marks]

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] 1.5

France has often been characterised as a "restructuring-biased" jurisdiction. However, in recent times, French insolvency law has evolved to increase the protection afforded to creditors. Is it more accurate to say that at present, French insolvency law is "debtor-friendly" or "creditor-friendly"? Justify your answer with reference to the law and legal provisions.

In general, French insolvency law is considered "debtor-friendly", especially because it provides 5 (five) different insolvency regimes that pursues the protection of the debtors dealing with economic and financial difficulties. These insolvency regimes, in general, do not provide high levels (this should be nuanced) of involvement of the creditors and tools / mechanisms to protect their claims and interests. The reform of the Law in 2021 changed a little this scenario, creating new mechanisms seeking to protect creditor (such as?), however it is reasonable to state that the French insolvency law continues to be "debtor-friendly".

While your answer is correct, it should have been nuanced and expanded upon further to make it more convincing. For example, for increased protection of creditors, you could have mentioned:

- ***Creditors committees***
- ***New safeguards in place in case of cross-class cram-down by the court***
- ***The reduction of the observation period in safeguard proceedings***
- ***New-money and post-money privileges***

Question 3.2 [maximum 5 marks] 3

While they exhibit some similarities, the safeguard and accelerated safeguard procedures are nonetheless very different proceedings. List the main similarities, differences and objectives of these two proceedings**.**

According to the Guide Text:

> ***Objective of the safeguard: to facilitate the reorganization of the business in order to allow continuation of the economic activity, preservation of employment and settlement of liabilities[1].***
>
> ***Objective of the accelerated safeguard: preserve the company's value within the framework of a so-called pre-pack, in which affected creditors can adopt a restructuring plan.***
>
> ***Main difference between these procedures: the accelerated safeguard can only be opened following conciliation proceedings;***
>
> ***Mains similarities: both are subjected to the same rules (with some variations) provided in the Commercial Code.***

You should also have mentioned that the specificities of the accelerated safeguard lie in the compulsory constitution of classes of affected parties (which is not the case under safeguard proceedings) and the imposition of a short deadline, since the plan must be adopted within two months of the opening judgment, otherwise the procedure is closed, without possible conversion.

Question 3.3 [maximum 5 marks] 3

[1] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://blog.avocats.deloitte.fr/content/uploads/2017/01/Deloitte-Legal-Pre-Insolvency-Insolvency-Proceedings-Guide.pdf

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 suggestion had some strong arguments, it reasonable to note that it would bring some challenges. Indeed, both procedures have shown to be useful for distressed companies according to the characteristics of their distress. Therefore, maybe unifying this procedure would reduce the variety of tools that might be chosen by these debtors and that maybe would better fit their issues and concerns. Stakeholders might also suffer with this unification unless this new unified proceeding provides clear and consistent rules on their rights and remedies. Finally, the duration of the procedures might be impacted, because this new unified procedure might not allow a quick responses and results as the one observed in the safeguard proceedings.

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.
To strengthen your answer, you could have relied on figures. 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.

Total marks: 7.5 out of 15.

QUESTION 4 (fact-based application-type question) [15 marks]

Donald has been working as an independent architect for over 15 years. In January 2022 he started experiencing cash flow difficulties, which have continued ever since. He is now struggling to pay his expenses, and in particular his office rent. This month, he is also concerned that he will not be in a position to meet his obligation (GBP 2,000) under his professional loan. Donald does not know what to do anymore.

A friend told him that he should apply for conciliation proceedings but Donald fears that it will give him bad publicity and scare off his clients.

Question 4.1 [maximum 5 marks] 0

Can Donald benefit from a conciliation procedure? Justify your answer.

As a rule, insolvency proceedings are not applicable to natural person. However, since the debts of Donald are qualified as "professional debts" and Donald is not yet insolvent, he might befit from a conciliation procedure. The conciliation agreement might be ratified by the court at the request of the debtor.

You have not provided sufficient information to answer the question.

- ***To avail of conciliation proceedings, the debtor must exercise a commercial, artisanal or independent profession (Article L611-5 Commercial Code).***
  - ***In this case, Donald is an independent architect. Therefore, he meets the criterion under Article L611-5.***
- ***To open conciliation proceedings, the debtor must be experiencing difficulties of a legal, economic or financial nature, proven or foreseeable, and is not in a state of insolvency for longer than 45 days (Article L611-4).***
  - ***At this point in time, Donald is not insolvent. However, he is experiencing financial difficulties.***
- ***The president of the Court is seized by the debtor who must present sufficient proof demonstrating the need for opening the procedure (e.g. their economic and financial situation, their financing needs, their difficulties and the solutions to tackle them) (Article L611-6).***
  - ***Donald, as the debtor, can seize the court himself.***
- ***Conciliation proceedings cannot be opened against a debtor who has been engaged in conciliation proceedings within three months.***
  - ***Since it was Donald's friend who advised him to open conciliation proceedings, it is safe to assume that Donald was not aware that such procedure existed and therefore, that he has never been engaged in one before.***

Question 4.2 [maximum 5 marks] 1

Explain to Donald the way conciliation proceedings run and the advantages of opening such procedure. Further advise him whether he could also avail of any other insolvency procedure.

Conciliation proceeding is a voluntary, amicable and confidential procedure, in which the debtor remains in control of its affairs while nominating an insolvency practitioner who will oversee the negotiations with the respective creditors. The conciliation agreement might be ratified by the court, that might approve the agreement (maintaining, therefore, the confidentiality) or sanction it (publicising the judgment). He might also benefit from the other pre-insolvency mechanisms, which are Ad hoc mandate, conciliation and safeguard. ***You have already spoken about the conciliation…***

Your answer is insufficient.

- ***Easy to open: The procedure is quite flexible. It is open at the sole request of the debtor who seizes the competent court. The debtor does not need to be insolvent but they also can be, albeit for no more than 45 days.***
- ***Objective: The objective of the proceedings is to promote the negotiation between the debtor and its creditors of a debt reduction, rescheduling or repayment plan, under the aegis of an insolvency professional called a conciliator.***
- ***Duration: The procedure will last for up to four months, which can be renewed once for one month.***
- ***Confidentiality: Conciliation proceedings are confidential in nature and their opening is not publicised.***
- ***Homologation: that a conciliation agreement is ratified by the court at the request of the debtor. The court can either approve the agreement (*constatation*), which means that the confidentiality of the procedure is preserved, or it can sanction the agreement (*homologation*), which involves publicising the judgment. In the latter case, the adverse effect of publicity is mitigated by the fact that the sanctioning confers more legal advantages than a mere approval in the event of subsequent insolvency proceedings being opened. In particular, if the conciliation proceedings are converted into accelerated safeguard proceedings, new money providers will benefit from a new money privilege (*privilège de conciliation*). This is granted to investors injecting new money, goods or services into a business during conciliation proceedings which have been sanctioned through *homologation* by the court. These investors will enjoy a priority of payment over all pre- and post-commencement claims in the event of subsequent court-administered proceedings. Such claims benefitting from this new money privilege may also not be rescheduled or written-off by a safeguard or rehabilitation plan without their holders' consent (not even through a cram-down or cross-class cram-down).***
- ***However, Donald will need to bear in mind that the procedure is amicable, which means that the court cannot force any debt rescheduling, reduction or repayment plan on the creditors.***

Ad hoc proceedings: ***Donald could also open ad hoc proceedings.***

- ***The conciliation procedure is opened for a maximum of four months (renewable by one month maximum), while the ad hoc mandate has no limit of duration. Despite the various advantages of the conciliation procedure, some companies prefer the ad hoc mandate for this flexibility.***
- ***In 2019, before the COVID-19 pandemic, conciliation proceedings were chosen by debtor companies in 56% of cases. In 2020, the COVID orders made it possible to extend conciliation proceedings to up to 10 months. During this period, therefore, the ad hoc mandate lost the advantage of duration which it typically has over the conciliation procedure.***
- ***Generally, conciliation proceedings are more advantageous to debtors than the ad hoc mandate.***

- ***The conciliation procedure allows the president of the court to order the suspension of the enforceability of a creditor's claim with regard to debts already due if they refuse the conciliator's proposals. The president of the court can also decide to spread the repayment of the debt over 24 months.***
- ***When a conciliation agreement has been reached, the court can approve the agreement (*homologation*). In this case, contributors of new money under the agreement benefit from a special privilege (privilege de conciliation) compared to other creditors in case insolvency proceedings are subsequently opened.***

- ***There are thus advantages to opening conciliation proceedings rather than ad hoc proceedings. Often, companies start with an ad hoc mandate, which they renew for as long as necessary. When they are ready to conclude an agreement, they convert the proceedings to conciliation proceedings to be able to benefit from its advantages.***

Safeguard proceedings: ***Donald could also open safeguard proceedings.***
The safeguard is available to a debtor who is encountering difficulties which it is not in a position to overcome, while not yet in a payment failure situation. It can therefore serve as a preventive restructuring procedure.
Compared to the *ad hoc* and conciliation procedures, safeguard exhibits characteristics more similar to formal insolvency proceedings. For example, it is not confidential and must involve all creditors. It triggers a stay on enforcement actions during which a rehabilitation plan is proposed (*plan de sauvegarde*). While the debtor remains in possession, the judgment opening the procedure triggers the appointment of an administrator (*administrateur judiciaire*).
The court can only be petitioned by the debtor company who requests the opening of the procedure.
The judgment pronouncing the safeguard triggers the opening of a so-called observation period (*période d'observation*) which lasts for six months (renewable once by judgment of the court and, if necessary, a second time, at the request of the Public Prosecutor).

Donald would remain in possession in all three proceedings (ad hoc mandate; conciliation; safeguard).

Question 4.3 [maximum 5 marks] 0.5

Can Donald open accelerated safeguard proceedings? If so, explain what this procedure is and what its advantages are.

He can't, because the accelerated safeguard is not a standalone procedure. It can only be initiated following a conciliation proceeding, and its main objective is to preserve

the company's value within the framework of a so-called pre-pack, in which affected creditors can adopt a restructuring plan.

That is correct; but since he can open conciliation proceedings, you were meant to explain that he could open accelerated safeguard proceedings after conciliation.

The attractiveness of the two-stage approach of the conciliation and accelerated safeguard preventive restructuring framework is that it combines confidentiality and contractual flexibility during the conciliation phase with the possibility for the court to bind dissenting creditors in the safeguard phase of the procedure through a cross-class cram-down process. It also protects new financing brought forward during the conciliation process (*privilege de conciliation*) if the conciliation agreement has been sanctioned (*homologation*) by the court. Investors will enjoy a priority of payment over pre- and post-commencement claims in the event of subsequent court-administered proceedings. Such claims benefitting from this new money privilege cannot be rescheduled or written-off by a safeguard or rehabilitation plan (*plan de sauvegarde / plan de redressement judiciaire*), without their holders' consent, not even through cram-down or cross-class cram-down.

Total marks: 1.5 out of 15.

*** End of Assessment ***

Total marks: 26.5 / 50