



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?

The first statement refers to an accelerated safeguard procedure. The second statement refers to liquidation proceedings.

Question 2.2 [maximum 3 marks] **3**

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

- 1. The debtor cannot be insolvent to avail of safeguard procedure. To enter to a rehabilitation procedure the debtor must be insolvent.*
- 2. In the safeguard procedure, the creditor participation is more limited. In rehabilitation procedure, an impaired party can propose an alternative plan to be voted. Also, the safeguard could only be opened by the debtor, but the rehabilitation could be opened by the debtor, a creditor or by the court.*
- 3. The duration of the safeguard procedure is maximum 12 months. The rehabilitation procedure can last for up to 18 months.*

Question 2.3 [maximum 3 marks] **2**

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

- 1. The strengthen of the conciliation procedure allowing the debtor to obtain a stay on enforcement action and claims.*
- 2. Broad scope of the accelerated safeguard procedure, making it available to all companies, regardless of their size. **The main difference with the accelerated safeguard is that it can now be combined with the conciliation, making them the flagship preventive restructuring combination of the insolvency regime.***
- 3. Creditors' classes replaced the committees of creditors.*

Question 2.4 [maximum 2 marks] **2**

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

One of the main differences between conciliation and ad hoc mandate is the mission of each procedure. The mission and objective of the ad hoc mandatary is defined by the debtor at the time of appointment. The mission of the conciliator is defined in the article L611-7 of the Code de commerce (Cdc) as “The conciliator's mission is to promote the conclusion between the debtor and his main creditors as well as, where applicable, his usual co-contractors, of an amicable agreement intended to put an end to the company's difficulties. It can also present any proposal relating to the safeguarding of the company, the pursuit of economic activity and the maintenance of employment. He may be entrusted, at the request of the debtor and after the opinion of the participating creditors, with a mission aimed at organizing a partial or total sale of the company which could be implemented, if necessary, within the framework of a subsequent safeguard, receivership or judicial liquidation procedure.”

*Another main difference is the approval (*constatation*, non-public) or sanction (*homologation*, public) of the conciliation agreement by the court, that isn't necessary on ad hoc mandate. Because of this, the ad hoc mandate is viewed as more confidential, but doesn't have the advantage to confer legal protection in case of subsequent insolvency proceedings, as the creditors could continue with enforcement proceedings.¹ **Good.***

Total marks : 9 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] **2**

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-

¹ See <https://www.captaincontrat.com/fermeture/entreprise-en-difficulte/mandat-ad-hoc-et-conciliation-tout-savoir-sur-ces-procedures>

friendly” or “creditor-friendly”? Justify your answer with reference to the law and legal provisions.

I think that, despite the reforms to increase the protection afforded to creditors, the French insolvency system continues to be “debtor-friendly”. One example is the restructuring bias of the insolvency system, with five procedures to seek for the rescue of a troubled company: ad hoc mandate, conciliation, safeguard, accelerated safeguard and rehabilitation. Also, that the last reform eliminated the creditors committees, diminishing even more the role on a restructuration procedure. Most of the decisions in the French insolvency system are given to the court or non-creditors parties, for example, in the liquidation procedure, article L641-1 Cdc the Public Ministry could propose a liquidator and can even block the appointment of the conciliator or ad hoc mandatary as the liquidator of a debtor that previously passed through a conciliation or an ad hoc mandate.

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 in recent years, 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] **5**

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.

The main similarities between safeguard and accelerated safeguard are:

- 1. Both are court-based and are aimed at preventing the debtor from going bankrupt and allowing it to continue its business operations.**
- 2. Both procedures involve the appointment of a judicial administrator who is responsible for overseeing the proceedings and ensuring that the interests of all stakeholders are protected.**
- 3. Both procedures involve the preparation of a safeguard plan that outlines how the debtor will restructure its business and repay its debts.**

The main differences are:

1. *Duration of the proceedings. The accelerated safeguard procedure is designed to be faster than the regular safeguard procedure, with a maximum duration of three months compared to 6-18 months for the regular safeguard procedure.*
2. *involvement of creditors. In the accelerated safeguard procedure, creditors have limited participation and cannot challenge the safeguard plan proposed by the debtor, while in the regular safeguard procedure, creditors have more participation and can challenge the plan.*
3. *Requirements to opt-in. Safeguard procedure is standalone insolvency procedure, while to opt-in to an accelerated safeguard, the debtor must pass through a conciliation procedure first.*

The objective of the two proceedings is to prevent the debtor bankruptcy and to allow it to continue its business operations, but the accelerated safeguard focus on the preservation of the business value through the pre-pack nature.

Question 3.3 [maximum 5 marks] **4**

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.

The merger of safeguard and rehabilitation procedures could be a good idea, thinking on the unification and simplification of the insolvency framework. Currently, the two procedures have different eligibility criteria, timelines, and levels of creditor participation, which can be confusing for debtors and may lead to inefficiencies in the system. Merging the procedures could create a more streamlined process that is easier for debtors to understand and use.

But there are also reasons to not consider the merger as a reasonable idea. The rehabilitation procedure is designed to provide a high level of protection to creditors, while the safeguard procedure is more debtor-friendly. Merging the procedures could result in a loss of the protections afforded to creditors in the rehabilitation procedure. Also, another concern is the length and complexity of the procedures. Rehabilitation proceeding is longer than a safeguard and could be problematic for small debtors that doesn't have the resources to afford a complex procedure.

In the end, I think that both procedures can exist separately, the safeguard oriented to companies with more chances to be saved and SMEs (considering the non-bankruptcy requisite to open a safeguard), and rehabilitation procedure oriented to companies that are in a bankrupt situation but with chances to be saved.

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 : 11 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] **0.5**

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

Yes, because he is not insolvent, and not have been insolvent for more than 45 days. Also, Donald exercises as an independent professional, complying with the definition of article L611-5 Cdc

Insufficient answer:

- **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 not have been 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 (for example, 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] **3**

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.

Donald must present to the court a request exposing his economic, financial, social, and patrimonial situation, with his financial needs and means. The court president appoints a conciliator (which can be proposed by Donald) for a term of up to 4 months. Also, as Donald is an architect, probably the decision of the opening of the proceeding must be communicated to professional college or association. Once appointed, the conciliator must promote agreements between Donald and his debtors and inform the court about the progress. Once an agreement is convened, the court takes note of the agreement (after hearing the debtor, parties' creditors, the social and economic committee, and the conciliator) and will approve or sanction it. After the approval, the conciliation procedure is terminated.

The advantage of the conciliation is to be an early stage and contractual procedure to negotiate with the creditors. Plus, the agreement will have the approval of the court, that prevents future debt enforcement actions from creditors.

However, confidentiality is not as strong as on the ad hoc mandate procedure, so if Donald is worried about bad publicity and clients' losses, maybe the ad hoc mandate could be a better fit for his situation, as he doesn't need to inform the social and economic committee or a professional college about the designation of an ad hoc mandatary, and neither need the approval of an agreement by the court. However, an agreement arrived after an ad hoc mandate isn't enforceable against future creditors actions.

You should have discussed the ad hoc mandate further and also, the safeguard procedure.

Conciliation:

- **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 and safeguard).

Question 4.3 [maximum 5 marks] 5

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

Yes, but only if Donald opts for the conciliation procedure because accelerated safeguard, introduced in 2014 but with a broad scope after the Order of September 2021, isn't a standalone procedure. To open an accelerated safeguard the debtor must demonstrate that he is engaged in the conciliation procedure, a conciliation agreement has been drawn up, and the agreement must be likely to receive support from the affected parties within 2 months of the opening judgement. Also, the conciliator must present a report about the conciliation progress and adoption perspectives to the court.

The main advantage of the accelerated safeguard is his pre-pack character with two stages. A plan is prepared and approved by enough affected parties (through the conciliation), and in the second stage is possible to bind dissenting creditors by the cross-class cram-down applicable to safeguards procedures (including the accelerated

safeguard). Also, as the name implies, the deadline to adopt a plan is shorter, because the plan must be adopted within 2 months of the opening judgement, according to article L628-8 Cdc.

Total marks : 8.5 out of 15.

*** End of Assessment ***

Total marks : 38.5 /50.