



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 out of 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 proceeding.

Statement 2: 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.

First variation on the nature and severity of the difficulties encountered. For rehabilitation proceeding to be opened, the debtor must be in a payment failure situation, which means he or she is late on the payments that are due. This is a more severe situation than a momentary cash flow problem under safeguard. Under safeguard, the debtor is not late on the payments, but he or she will likely be late in the future if nothing is done.

Second variation related to the administrator's power. Although in both proceedings (safeguard and rehabilitation) the court appoints an administrator, the power of the administrator varies a lot. In safeguard procedure the administrator supervises and/or assist the debtor to prepare the recovery plan. On the other hand, in a rehabilitation the administrator can also decide if he or she terminates or continues the contracts of the debtor.

Finally, the last variation is regarding who may submit a draft of the plan. In rehabilitation procedure any interest party may submit a draft of the plan, to be voted by the creditors, while in the safeguard procedure, the draft of the plan must be submitted by the debtor.

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

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

*First, the Order of 15 September 2021, which followed the EU Directive on Preventive Restructuring Frameworks 2019, made the accelerated safeguard procedure the core framework of preventive restructuring within the meaning of the Directive (**especially combined with the conciliation**). This new legislation ensures the voting of a restructuring plan in a short timeframe. The maximum duration of accelerated safeguard is now four months.*

Second, the Order of 15 September 2021 changed the maximum duration of safeguard proceedings. Now, the maximum duration of safeguard proceeding has been lowered to 12 months, whereas the rehabilitation proceedings can last for up to 18 months.

Third, in the rehabilitation procedure any affected party may submit a draft restructuring plan to the vote of the classes (article 631-19 of French Commercial Code).

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

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

*Threshold to avail to each proceeding. While the debtor cannot be insolvent to avail of an *ad hoc* mandate, in the conciliation proceedings the debtor must not have been insolvent for more than 45 days. For instance, if the debtor is insolvent for 30 days, the conciliation proceeding is available, whereas the *ad hoc* mandate is not.*

*Ratification by the court. Unlike the *ad hoc* mandate proceeding, a conciliation agreement is ratified by the court at the request of the debtor. The court can either approve the agreement (constatation) or it can sanction the agreement (homologation), which involves publicising the judgment. When there is a homologation, the sanctioning confers more legal advantages than a mere approval if afterwards is opened an insolvency proceeding.*

Total marks : 10 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] 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.

Is more accurate to say that at present, France insolvency law is mainly debtor-friendly, despite recent law reforms brought by Order of 15 September 2021 which increased the protection of creditors.

Traditionally, France has often been characterised as a “restructuring-biased” jurisdiction due its comprehensive body of insolvency procedures, all governed by Title VI of the Commercial Code (Code de Commerce). Additionally, to liquidation proceedings, French insolvency law has many kinds of restructuring procedures, which are predominantly focus on the rescue of ailing businesses, with a view to preserving employment.

The current corporate insolvency law system - foreseen in Part VI of the French commercial Code (Des difficultés des entreprises) - Articles L610-1 à L696-1 of the Commercial Code - is comprised of the following procedures:

- “(1) Ad hoc mandate (mandat ad hoc);*
- (2) Conciliation;*
- (3) Safeguard (sauvegarde);*
- (4) Accelerated safeguard (sauvegarde accélérée);*
- (5) Judicial rehabilitation (redressement judiciaire);*
- (6) Liquidation; and*
- (7) Bankruptcy”*

In the reform of French Insolvency Law made by Order of 15 September 2021 the accelerated safeguard has been restructured to provide a faster and more effective restructuring proceeding. Additionally, the possibility of cross-class cram-down if one of creditors rejects the restructuring plan represents a second chance to the debtor to have its plan approved and put in force. So, until 2021, creditors had fewer possibilities to intervene in the insolvency, which was primally focused on the rescue of ailing businesses and to preserve employment. That’s why is possible to say that France insolvency law is mainly debtor-friendly.

However, the recent law reforms brought by Order of 15 September 2021 also increased the protection of creditors. Let’s check some of these protections.

Now there is a greater participation of the creditors in the accelerated safeguard proceeding, that nowadays demands a previously attempt of conciliation. There was also an improvement of the classes of creditors since the insolvency practitioner must have in mind the criteria of economic interest in the formation of these classes of creditors.

It's important to highlight that to use the cross-class cram-down (when the criteria of the majority of all creditors affected by the plan were not met), the interest of the dissenting class must be preserved. Thus, the dissenting class must be treated fairly.

The Order of September 2021 also introduced a "post-money" (post-commencement funding) privilege which did not exist previously. The idea is to encourage creditors and third party to invest "new money" into the debtor. This privilege benefits claims arising from a cash contribution to the debtor in some situations, like for the implementation of the safeguard plan adopted by the court. This is also pre-money privileges in certain conditions.

Finally, Order of September 2021 also lowered the observation period in safeguard proceeding, which also benefits the creditors, because the observation period brings with it a stay on enforcement actions while the company continues to trade.

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 safeguard procedure was inspired in the American Chapter 11 of the USA Bankruptcy Code. 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's a debtor-in-possession proceeding (the original managers are kept ahead of the company) and through a safeguard plan (which is discussed between the debtor and its creditors) the goal is to overcome the financial difficulties of the company.

The accelerated safeguard is a pre-pack variant of the safeguard. The proceeding is opened when there is already an agreement between the creditors and the debtor in order to be presented to the court to be approved (constatation) or to be sanctioned (homologation).

The main similarity between safeguard and the accelerated safeguard is that the purpose of both proceeding is the same: to renegotiate the company's debts in order to overcome the encountering difficulties, preserving the company's value.

Among the differences, it's important to point out that, differently to the safeguard proceeding, the accelerated safeguard is not a standalone procedure, because the debtor must have been engaged in a previously in a conciliation procedure.

While in the safeguard the debtor shall be not in a payment failure (although is facing economic difficulties), the fact that the debtor is in a payment failure situation does not forbid the opening of accelerated safeguard. However, the debtor must not have been in a payment failure situation for more than 45 days, which is the same criterion of the conciliation procedure.

This two-stage approach (conciliation followed by accelerated safeguard proceeding) combines confidentiality and contractual flexibility of the conciliation with the possibility of a court order to bind dissenting creditors, if the conditions of cram-down are met.

Finally, the voting conditions and adoption of the plan by the classes of affected parties in the accelerated safeguard are the same established in the traditional safeguard foreseen in Book VI of the Commercial Code. On the other hand, in the accelerated safeguard there should be constituted a class of affected parties (which is not the case under safeguard proceedings). Besides, in accelerated safeguard there is a short "deadline, since the plan must be adopted within two months of the opening judgment, otherwise the procedure is closed".

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.

Despite the fact that safeguard and rehabilitation proceeding are both kinds of restructuring proceedings and have similar rules for the observation period and the proceeding to propose and approve the restructuring plan, there are relevant difference between these two procedures, especially after the legal reforms that took place in 2021.

First of all, the safeguard procedure is a pre-insolvency proceeding, which means that the company is currently paying its debts as the fall due, nevertheless is already possible to identify severe financial problems that in the future the company won't be able to overcome. On the other hand, rehabilitation proceeding applies when the debtor is already failing in paying its debts.

Another very important difference is the power of the administrator. In the safeguard proceeding the administrator will supervise and / or assist the management to prepare the plan. On the other hand, in the rehabilitation, the administrator has the exclusive

power to continue or terminate the debtor's contracts and not only assist the management of the debtor in the daily business and supervise such management.

The role of the creditors is not the same in these proceedings. In the rehabilitation proceeding, the creditors may propose a plan of restructuring, whereas in a safeguard proceeding to debtor is the only one who can propose a plan to be voted by the creditors.

Due to its big differences, it doesn't seem a reasonable idea merge these two different proceedings.

A good answer overall. 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 : 15 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] **3**

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

Yes, he can benefit from a conciliation procedure.

All the debts mentioned in this question are debts related to Donald's professional liabilities (office rent, professional loan, etc) and, thus, the conciliation procedure may apply, in light of Article 611-17 of the Commercial Code. Furthermore, article 611-5 states that the conciliation procedure is applicable to companies or individuals that work in a self-employed professional activity, including a subject liberal profession, which is Donald's situation.

Besides, for conciliation proceedings, the debtor must not have been insolvent for more than 45 days, which is the case. Actually, Donald hasn't got late in his payments (at least for now).

Some information missing:

- **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] 5

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.

The conciliation procedure aims to encourage companies and individuals that are not yet insolvent to negotiate workouts with their creditors at an early stage and on a confidential and contractual basis. In the conciliation procedure, the debtor remains in control of its affairs, but there will be an insolvency practitioner (conciliator) who will oversee the negotiations. The conciliation will make a proposal which intends to preserve the business, the economic activity, and the employments.

*Unlike the *ad hoc* mandate proceeding, a conciliation agreement is ratified by the court at the request of the debtor. The court can either approve the agreement (constatation) or it can sanction the agreement (homologation), which involves publicising the judgment. When there is a homologation, the sanctioning confers more*

legal advantages than a mere approval if afterwards is opened an insolvency proceeding.

The major advantages of opening a conciliation proceeding are that is voluntary, amicable and confidential procedures governed by Articles L611-4 to L611-16 of the Commercial Code. Given that is a confidential proceeding, Donald should not worry about any bad publicity that could scare off his clients. Besides, if the parties reached to an agreement, the debtor may have its liabilities renegotiated so that Donald may pay them in the long term.

Finally, it must be pointed out that additionally to the conciliation procedure, there are other insolvency proceeding available to Donald.

Ad hoc mandate proceeding is similar the conciliation proceeding, and it is governed by Articles L611-1 to L611-3 of the Commercial Code. Ad hoc mandate is also a voluntary, amicable, and confidential procedures to reorganize the debts. However, this proceeding is not ratified by the court at the request of the debtor.

The safeguard proceeding is also available because Donald is an individual who work in an independent professional activity (article L620-2 of the French Commercial Code), and he has not failed to pay its debts (article L620-1 of the French Commercial Code).

Finally, the conciliation procedure may be followed by an accelerated safeguard proceeding, as it will be explained below.

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, he can, based on article 628 of the French Commercial Code.

The accelerated safeguard procedure is a variant of the safeguard proceeding. The purpose of both is the same: reorganize the debtor's liabilities through a safeguard plan so that he or she will be able to pay them as they fall due.

Unlike safeguard, the accelerated safeguard is not a standalone procedure and can only be opened following conciliation proceedings. Thus, Donald can only open an accelerated safeguard proceeding if he had opened before a conciliation proceeding.

The accelerated safeguard brings together an out-of-court, amicable proceedings (conciliation) and an insolvency proceeding (safeguard). The idea is to discuss the

possible solutions to overcome the cashflow problems during the conciliation and to implement them in the accelerated safeguard proceeding.

The accelerated safeguard is pre-pack proceeding since there is already a previous negotiation on how to deal with the cashflow problems. This agreement is adopted in the form of a safeguard plan. This proceeding has a maximum duration of four months, and it intends to preserve the company's value, the business activity, and the employments.

The opening of an accelerated safeguard proceedings is decided by the court based on a report prepared by the conciliator, expressing their own opinion on the chances of a restructuring plan being adopted by the creditors concerned.

The advantage of this proceeding is the combination of "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".

This proceeding also protects new financing during the conciliation process if conciliation agreement has been sanctioned by the court. In this case, investors will have a priority of payment over pre- and post-commencement claims in the event of subsequent court-administered proceedings.

Total marks : 13 out of 15.

*** End of Assessment ***

Total marks : 48 / 50