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.

The answer was A.

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.

The answer was D.

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: 8 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 refers to accelerated safeguard procedure.

Statement 2 refers to liquidation procedure.

Question 2.2 [maximum 3 marks] 1.5

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

The main variations between a safeguard procedure and rehabilitation procedure are that the company must not be insolent in safeguard procedure whereas in Rehabilitation procedure the company is insolvent. The other main variation between the two is that the Rehabilitation procedure can be opened by the debtor, creditor or public prosecutor unlike the safeguard procedure.

You were required to list three. You could also have mentioned:

- the constitution of classes of creditors: during safeguard proceedings, the constitution of classes of creditors is not mandatory, except for companies that meet one of two criteria (they employ over 250 employees and have a turnover greater than EUR 20 million; or they have a turnover of over EUR 40 million). At the request of the debtor, the supervising judge may nonetheless constitute classes of affected parties for debtors that fall below the threshold. During rehabilitation proceedings, if the debtor does not meet the required criteria, the authorisation to form classes of affected parties may be requested by the administrator from the insolvency judge, *without the debtor's approval*.
- draft plan: during safeguard proceedings, only the debtor, with the approval of the administrator, may submit a draft plan to the vote of the classes. During rehabilitation proceedings, any affected party may submit a draft plan to the vote of the classes.
- cross-class cram-down: during safeguard proceedings, if the plan has not been approved by all classes of affected parties, the court can decide to apply the cross-class cram-down mechanism at the request of the debtor or the administrator with the debtor's consent. During rehabilitation proceedings, if the plan has not been approved by all classes of affected parties, the court can decide to apply the cross-class cram-down mechanism at the request of the any affected party.

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.***

1.) Introduced classes of creditors
2.) Introduced post money (post commencement funding) privilege
3.) Introduction of the possibility to cross-class cram down dissenting creditors during Safeguard proceedings

Question 2.4 [maximum 2 marks] 2

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

1. *The first difference is that for ad hoc, the company must not be insolvent whereas for conciliation proceedings the company must be insolvent for not more than 45 days.*
2. *In a conciliation, it is required that a conciliation agreement approved by the Court must be executed whereas there is no such requirement for Ad hoc proceedings.*

Total marks: 8.5 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] 0.5

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.

Though French insolvency law has evolved to increase the protection afforded to creditors in recent times, it is more accurate to say that at present French Insolvency law is debtor-friendly. This is because in comparison with other jurisdictions, French law offers low level of protection for creditors compared to other stakeholders.

This is too short an answer. While your answer is correct, it should have been 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.***

You could also have mentioned that the first French pre-insolvency process was introduced as early as 1984. Since then, the French legislator and Government have been exceptionally prolific in regularly modernising the French preventive restructuring landscape. The French regime is thus known for its developed and sophisticated preventive restructuring framework, with no less than five preventive procedures available to debtors experiencing difficulties but not yet insolvent. Such a position has earned France the label of a "restructuring-biased" jurisdiction. However, 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."
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.

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**.**

A company may commence a safeguard procedure when it is not insolvent. The objective of the safeguard procedure is to meet negotiate a plan in meeting the creditor's claims.

The accelerated safeguard procedure on the other hand is different from the safeguard procedure in that it is only commenced after conciliation procedure has failed and the company must be insolvent to come this procedure. Unlike the safeguard procedure, the accelerated safeguard procedure is not a standalone procedure.

The two procedures above are similar in that the aim for both is to negotiate the claims and come up with restructuring solutions that can be implemented during the subsequent insolvency proceedings.

You could have expanded upon your answer.

Subject to some variations, found in Chapter VIII of Book VI of the Commercial Code, the accelerated safeguard is subject to the rules applicable to the traditional safeguard. The first substantial variation is that, to open safeguard proceedings, the debtor must be engaged in conciliation proceedings. The fact that the debtor is in a payment failure situation does not preclude the opening of accelerated safeguard; the same criterion is used as that of the conciliation, that is the debtor must not have been in a payment failure situation for more than 45 days.

Overall, the voting conditions and adoption of the plan by the classes of affected parties are defined within the framework of the traditional safeguard, which remains the flagship of Book VI of the Commercial Code. The specificities of the accelerated safeguard, therefore, 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] 3.5

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**.**

The suggestion that the safeguard and rehabilitation procedures should be merged is not a reasonable idea. This is because though both procedures have a lot of similarities, they serve different purposes. The Safeguard procedures comes in to assist companies that are not in a payment failure situation but are facing difficulties that they are not able to overcome. The purpose of the safeguard proceedings is to help the company avoid insolvency by working on creditor's claims and safeguarding the employees and company's interests.

The rehabilitation proceedings on the other hand deals with companies that are already facing payment failure situations and are struggling with more problems that just monetary cash flow experienced in safeguard situations. The merging of these two proceedings would not serve their useful purpose.

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 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.

Donald can benefit from a conciliation procedure. This is because the conciliation procedure is meant to help the debtor to preserve the business, its activities and employment. A conciliation procedure is an out of court procedure and will not expose Donald to bad publicity.

Your answer is insufficient.

- ***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] 0.5

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.

A conciliation procedure is an out of court procedure commenced at the request of the debtor. At the time of commencement, the company must not have been insolent for more than 45 days. A conciliator is appointed by the Court and his role is to come up with solutions to reserve the business, its activities and its employees. When the conciliation proceedings fail, Donld could avail another procedure called accelerated safeguard procedure.

You did not discuss conciliation sufficiently. You also did not discuss whether he could avail of any other 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] 0.5

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

If conciliation fails, Donald can open accelerated proceedings. Accelerated Safeguard proceedings are proceedings that are only resorted to following conciliation procedure. The advantages of the accelerated safeguard procedure are that they bridge the gap between the out of court proceedings and Court proceedings and can develop restructuring solutions that will be implemented in the context of the subsequent insolvency proceedings.

It is if conciliation is successful that Donald will be able to open accelerated safeguard proceedings. Your answer is lacking information.
The accelerated safeguard is not a standalone procedure. Rather, accelerated safeguard proceedings are opened at the request of a debtor who can demonstrate that:

(1) it is engaged in the conciliation procedure;

(2) a conciliation agreement has been drawn up, aimed at ensuring the sustainability and rescue of the company; and

(3) the agreement must be likely to receive support from the affected parties within two months of the opening judgment.

The objective here is for the debtor to reach an agreement with its creditors in a speedy fashion.

Subject to some variations found in Chapter VIII of Book VI of the Commercial Code, the accelerated safeguard is subject to the rules applicable to the traditional safeguard. The first substantial variation is that to open safeguard proceedings, the debtor must be engaged in conciliation proceedings. The fact that the debtor is in a payment failure situation does not preclude the opening of accelerated safeguard – the same criterion is used as that of the conciliation (that is the debtor must not have been in a payment failure situation for more than 45 days).

The decision to open accelerated safeguard proceedings is taken by the court on the basis of the report prepared by the conciliator, expressing its own opinion on the likelihood of the restructuring plan being adopted by the creditors concerned.

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: 25 / 50