



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: Refers to the Accelerated Safeguard Proceeding (Article L628-1 and following of French Commercial Code).

Statement 2: Liquidation Proceeding (Article L640-1 - L640-6 of French Commercial Code)

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.

Even though the safeguard procedure and the rehabilitation procedure are court-based, collective, and debtor-in-possession proceedings, there are some differences between them, notably related to: (i) severity of difficulties encountered; (ii) nature; (iii) requirements to start the procedure; (iv) administrator's power, among others. .

*Firstly, according to the safeguard **safeguard** procedure the debtor must not be in a state of default or unable to meet its payment obligations, meaning the company must be solvent. On the Rehabilitation Procedure, on the other hand, the debtor must be insolvent, experiencing a payment failure situation.*

The Safeguard procedure is a hybrid mechanism, which aims to rescue the company in financial difficulties and also prevent a restructuring process. The debtor is a legitimate party to request the initiation of the procedure herein mentioned. On the contrary, the Rehabilitation procedure can be opened by the debtor, any unpaid creditor or the Public Prosecutor.

*It is to highlight **t** the difference in relation to the administrator's power. On both procedures, the Court will appoint an administrator. However, in a safeguard procedure, the administrator will supervise and assist the debtor with the restructure plan while in a rehabilitation procedure, the administrator has powers to continue or terminate the debtor's contracts.*

Another valid difference to be pointed out lies in the ability for any interested party to present a draft plan for voting by classes, whereas in the safeguard procedure, this authority rests solely with 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.

The Order of 15 September 2021 ("Order") transposing the EU Directive on Preventive Restructuring Frameworks 2019 has the objective of enhancing the effectiveness of restructuring proceedings, by a reform on Book VI of French Commercial Code.

Among several elements, we can list:

- *The core framework of preventive restructuring, in line with the Directive's intent, is now centered around the accelerated safeguard procedure. This approach fulfills the European legislator's vision of facilitating a prompt vote on a restructuring plan by requiring compulsory conciliation as the initial step. In addition to being a procedure that can be requested by any company, regardless of its size.*
- *The Order also introduced a "post-money" privilege in the safeguard procedure, which means creditors who provided cash contribution to the debtor during the observation period; for the implementation of the safeguard plan or for modification of the plan are beneficiary of guarantees.*
- *Establishment of new class formation where in the accelerated safeguard proceeding is compulsory for all debtors, while in the safeguard proceeding it is only mandatory for companies that have over 250 employees and a turnover higher than EUR 20 million or a turnover of over EUR 40 million (independent of the number of employees).*

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

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

*Conciliation and *ad hoc* proceedings are voluntary, amicable and confidential proceedings provided for in Articles L611-1 to L611-16 of the French Commercial Code.*

The main distinction between these proceedings lies on the outcome of the Conciliation process. The results can be ratified by the Court upon the debtor's request. The Court can either approve (constatation) or sanction (homologation) the agreement. If the court sanctions a conciliation agreement, the results will become public and binding all parties involved. In the latter scenario, the sanction bestows greater legal benefits compared to a simple approval, especially if a subsequent insolvency proceeding is initiated. For instance, in the event of an accelerated

safeguard procedure being opened later on, creditors who have extended “new money” will enjoy certain privileges of payments.

Another difference is the duration of the procedures. In the conciliation proceeding, the conciliator appointed by the Court can act for a period of 4 month, renewable for more 1 month. The ad hoc representative can act for 3 month period, renewable as much as needed for accomplishing his assignment.

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] **4**

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.

Initially, French insolvency regime was known to be “debtor-friendly”, which has as its scope the continuation of the company, preserving its economic and financial importance (from the maintenance of jobs, payment of taxes, the value of the assets, among others), counting with several types of restructuring procedures.

However, French insolvency law has passed through several reforms, being the latest the Order of 15 September 2021. Those reforms brought some provisions to protect creditor’s interests and provide more active role for creditors on pre-insolvency and insolvency proceedings such as, assurance of creditor’s participation in accelerated safeguard proceedings, improvement of classes of creditors, security of creditors. The changes introduced include a reduction in the observation period for safeguard proceedings and the establishment of pre and post-money privileges. etc.

Another relevant example is that even in cases where the court employs cross-class cram-down to compel the approval of a restructuring plan, if the criteria of the majority of all affected creditors are not met, the interests of the dissenting class must still be safeguarded.

As a result, one can deduce that in the past year, the protection of creditors has been enhanced in French insolvency law.

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] 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.

Safeguard proceedings provide a means for financially stable debtors encountering insurmountable difficulties to undergo restructuring under court supervision at a preventive stage. It is a collective, debt in possession procedure.

Accelerated Safeguard, on the other hand, is a type of safeguard procedure, which does not stand alone, depending on a previous conciliation proceeding. The objective of the procedure is to safeguard the company's value through a process known as a "pre-pack," wherein a restructuring plan can be adopted with the involvement of affected creditors.

*The main similarities between **those** two proceedings relies on the fact that they are a collective, debtor in possession and court supervision procedure, aiming to maintain the company's activity, employments as well.*

On the other side, the main difference is related to the initiation of the procedure. In an Accelerate Safeguard procedure, is mandatory to have a previous conciliation procedure, following the same criteria used to start a conciliation. The decision to open an accelerated safeguard proceeding is taken by the court based on the report

given by the conciliator. In this case, the agreement reached in the conciliation procedure works as a safeguard plan.

Also, classification of creditors is a remarkable difference between those proceedings. French insolvency system has been widely criticized for the lack of definition of its classes of creditors, and since the adoption of the EU Directive on Preventive Restructuring Frameworks 2019 with the Order of 15 September 2021, the so-called "class of claims" has been introduced. However, in the accelerated safeguard procedure, its application is compulsory for all creditors, while in the safeguard procedure it is not, with the exception of companies that have over 250 employees and a turnover greater than EUR 20 million or a turnover of over EUR 40 million (independent of the number of employees).

It is to be mentioned that accelerated safeguard is designed to be more expedited than safeguard procedure.

Both procedures share the common objective of facilitating the restructuring of distressed companies; they differ significantly in their application, timeline, and extent of creditor involvement, making them suitable for addressing distinct stages of financial distress.

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.

It is undeniable that safeguard and rehabilitation procedures share similarities in their rules for the, observation period and the presentation and approval of the restructuring plan. However, they also present significant differences, especially after the reform implemented in the French Insolvency System in 2021.

From the beginning, there is a fundamental distinction: the safeguard procedure serves as a pre-insolvency measure, whereas rehabilitation is applicable only when the company is already insolvent.

Other significant differences between these procedures are worthy of highlighting. In the rehabilitation procedure, the administrator possesses broader powers, including the exclusive authority to terminate or continue contracts. In the safeguard, the administrator's role is limited to assisting the debtor in devising the restructuring plan and supervising the overall process.

Another valid difference to be pointed out lies on the ability for any interested party to present a draft plan for voting by classes, whereas in the safeguard procedure, this authority solely rests with the debtor.

Given these fundamental differences between rehabilitation and safeguard procedures, it does not seem reasonable to merge the two proceedings. Each procedure caters to distinct situations, and maintaining their individuality allows for a more tailored approach to handling pre-insolvency and insolvency cases effectively.

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 : 13 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 is eligible to benefit from a conciliation procedure according to French Insolvency law, once conciliation is available to independent professionals according to article 611-2-1 of French Commercial Code.

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.

A conciliation procedure is flexible, voluntary and, to some extent, confidential. The main goal is to facilitate negotiations between the debtor and its creditors through an agreement, under the supervision of the conciliator.

The conciliation procedure is initiated by the president of the court, over the debtor's request, who appoints a conciliator for a period not exceeding 4 months, but which he may, by a reasoned decision, extend by one month at the request of the conciliator. It is also to be noticed that the conciliator's duties are: supervise the negotiation between the debtor and its creditors to find mutually agreeable solutions and can make relevant proposals for the preservation of the debtor's activity.

Once the conciliation is successful, an agreement will be produced with the assistance of the conciliator and approved, if it is the case, by the court.

In the case given, it is important to say that the conciliation is a confidential procedure, where the debtor can negotiate with his creditors in a safe space, supervised by a conciliator nominated by the court, tailoring and implement solutions to address his financial issue. That being said, Donald's clients that are not part in the conciliation procedure may not know about his financial situation.

It is important to highlight that if Donald, a natural person, is struggling for paying his personal debts, meaning non-professional, he cannot be subject to insolvency proceedings. Instead, he will be subject to a regime called over-indebtedness of individuals, governed by the consumer code Article L711-1.

*Besides conciliation, Donald can avail from Safeguard (Article L620-2), Rehabilitation (Article L631-2) and Liquidation (Article L640-2). **If Donald is not insolvent, rehabilitation will not be available to him. You forgot to mention the ad hoc procedure.***

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.

As seen before, in order for the accelerated safeguard proceeding to be initiated, it is imperative that the debtor has gone through the conciliation process and the debtor, implementing the restructuring solutions negotiated in the extrajudicial procedure in the context of subsequent insolvency proceedings. Another requirement is that the debtor must not be insolvent for more than 45 days at the time of its initial application for the commencement of conciliation proceedings.

The opening of the accelerated safeguard proceeding triggers common effects of the safeguard proceeding, such as: automatic stay, appointment of courts agents.

*However, according to article L628-1, this procedure is aimed at creditors who, when submitting the restructuring plan in the context of conciliation and in conjunction with the analysis of the debtor's accounts, demonstrate that the nature of the indebtedness makes it likely that a plan will be adopted only by creditors with the status of financial companies, credit institutions and the like, as defined by decree of the *Conseil d'Etat*, as well as by all holders of a claim acquired from them or from a supplier of goods or services and, if applicable, bondholders, making the procedure exclusive to these creditors.*

Proceedings may only be opened in respect of a debtor whose accounts have been certified by a statutory auditor or prepared by a chartered accountant.

Knowing this, the accelerated safeguard procedure would not apply to Donald's case.

Total marks : 8.5 out of 15

*** End of Assessment ***

Total marks : 41.5 / 50