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).***

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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).

The answer was D.

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.

The answer was D.

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: 6 out of 10.

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

Question 2.1 [maximum 2 marks] 1

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: Amicable out-of-court proceedings in accordance with the Commercial Code, Article L611-7 ***this statement refers to the accelerated safeguard procedure.***

Statement 2: This statement refers to the liquidation proceedings. Where a debtor must be insolvent. The statement refers to the objective of the 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.***

[In accordance with IDEM, Article L626-30-2

- ***Safeguard Procedure:*** *In order to avail of Safeguard proceedings, the debtor cannot be in a payment failure situation.*
- ***Rehabilitation Procedure:*** *The debtor must be insolvent to aval* ***(avail)*** *of this procedure.*

- ***Safeguard Procedure:*** *The judgement opening the procedure triggers the appointment of*
  - *Insolvency Judge (Judge Commissaire*
  - *Administrator*
  - *Creditor who represents creditors' interests. They can be assisted by supervising creditors (creanciers controleurs) appointed by the insolvency judge.*
- ***Rehabilitation Procedure:*** *It can be opened by the debtor, any unpaid creditor or the Public Prosecutor.*

If you compare who can open the procedure, you should also have listed this for the safeguard procedure. Alternatively, you should have listed which actors are involved in a rehabilitation procedure.

- ***Safeguard Procedure:*** *An insolvency judge (Judge Commissaire) who overseas the procedure. In complex cases, the court can appoint several supervisory judges.*
- ***Rehabilitation Procedure:*** *Only an insolvency judge can oversee this procedure and not several supervisory judges in complex cases.*

- *(1) The Maximum duration of safeguard proceedings has been lowered to twelve (12) months, whereas it used to be eighteen (18) months before the Ordinance of 2021. Rehabilitation Proceedings can last for up to eighteen (18) months sometimes.*
- *(2) Safeguard rules does apply to creditors' voting and classes. The following difference have been introduced to the rehabilitation procedure:*
  - *(2.1) Should a debtor not meet the required thresholds, the authorisation to form classes of affected parties may be requested by the administrator, without the debtors' approval.*
  - *(2.2) Any affected party may submit a draft restructuring plan to vote of the classes.*
  - *(2.3) Should the plan not be approved by al l the classes of affected parties, the court can decide to apply the cross-class cram-down mechanism at the request of the debtor or any affected party. (In the safeguard proceedings, the cross-class cram-down can be implemented by the court with the approval of debtor only)*
  - *(2.4) Should the approval of the plan through class-based consultation procedure are not achieved, the approval can occur through individual consultations of the creditors.*

- *(3) If the plan is not approved by the different classes, which includes a crossclass cram-down* ***(what do you mean by "which includes"? Instead, you could have said that a cross-class cram-down is now possible in case of classes dissenting)****, the court holds the power to reschedule the debtors' liabilities by up to ten (10) years ("term-out") – is no longer available in safeguard proceedings. However it still remains available in the rehab* ***rehabilitation*** *proceedings, subject to a minimum instalment of 10% after the 5th year. This way, providing the debtors with stronger leverage in restructuring discussions.]*

Question 2.3 [maximum 3 marks] 1

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

[

1. *It meets the European legislator's expectations of ensuring a vote on a restructuring plan in a short time frame.* ***How so?***
2. *Maximum duration of four (4) months.* ***Which procedure?***
3. *Safeguard proceedings are now available to all companies, regardless of size.]*

Question 2.4 [maximum 2 marks] 2

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

[Both proceedings are out-of-court proceedings in order to consult with the creditors for a settlement. The difference between the two (2) proceedings is the duration of both proceedings is different.

In the case of a conciliation procedure, the conciliator (conciliateur) can only be appointed for a maximum of four (4) months, renewable for one (1) additional month. Whereas, the ad-hoc's appointed representative (mandataire ad hoc) is appointed for three (3) months, but renewable several times, if necessary.

Further, the procedure for conciliation is useful for companies who have already started negotiations and it can end on the approval of a draft agreement by the court in charge of the case between the debtor and its creditors. In the ad-hoc procedure the mandataire ad hoc will end with the drafting of an agreement which were negotiated between creditors and partners and the court does not need to approve this agreement.]

Total marks: 5.5 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] 2.5

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.

[Historically it was "debtor-friendly". However, it is now "creditor-friendly". We do know that the French Bankruptcy Code has been amended since 2005. This was done in a view to reinforce creditors' rights, both in the context of out-of-court work outs as well as insolvency proceedings.

Previously it is said that directors did not take the necessary at an early enough stage to avert a financial crisis. This is where a friendly approach was taken towards the debtor. However, this is where the debtor is regarded as one to blame for the company's failure (in most occasions).

An ordinance dated 12 March 2014, reformed the bankruptcy laws with a view to favouring re-organisation at a preventive stage, strengthening the efficiency for out of court proceedings and increasing the rights of creditors.

We can refer to the following case laws:

"R. Goode, Principles of Corporate Insolvency Law (3rd ed) (2005, Sweet & Maxwell, London), at 328, where it is stated that insolvency law in the United Kingdom id predicted on the assumption that where a company becomes insolvent it is due to the failure of the management and hence those responsible for the company's plight should not be left in control." ***This is about the UK… How is this linked to the French regime?***

"C. Dupoux and D. Marks, "Chapter 11 a la Francaise: French Insolvency Reforms" (2004) 1 (2) International Corporate Rescue 74"

"M-J. Campana, "A Critical Evaluation of the Development and Reform of the Corporate Rescue Procedures in France"

In the Directive (EU) 2019/1023 of the European Parliament and of the Council dated 20 June 2019, as well as by an ordinance dated 15 September 2021 (implemented 23 September 2021) {Referred to as the 2021 Ordinance} has amended certain aspects of French bankruptcy laws, as follows:

(1) Strengthening the attractiveness of conciliation proceedings.

(2) Facilitating the approval of restructuring plans in safeguard, pre-packed safeguard of rehabilitation proceedings, with "classes of affected parties and the possibility of cramming down dissenting classes under certain conditions, classes of equity holders.]

While your answer is somewhat 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 replaced by classes***
- ***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] 2.5

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**.**

*[*Similarities:

- ***Safeguard (*sauvegarde*): Court administered proceedings.***
- ***Accelerated Safeguard (*sauvegarde acceleree*): Court administered proceedings.***

Differences:

- ***Safeguard (*sauvegarde*): The debtor is required to show that it was facing difficulties which they were not able to overcome. Maximum duration for this procedure is 12 months (six months renewable once)***
- ***Accelerated Safeguard (*sauvegarde acceleree*): This procedure is not a stand-alone procedure. It must be preceded by a conciliation process. The company cannot be insolvent to avail accelerated safeguard proceedings. Maximum duration of 4 months.***

Objectives:

- ***Safeguard (*sauvegarde*): ?***
- ***Accelerated Safeguard (*sauvegarde acceleree*): It is to preserve the company's value within the framework of a pre-pack, where a restructuring plan can be adopted by the affected creditors.]***

Both procedures aim to rescue the debtor. You could also have mentioned that 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] 0

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 directive leaves quite some room implementation, from a watered-down restructuring tool with high access threshold to a pre-insolvency debtor-friendly US-style restructuring procedure] ***Unfortunately, you are not answering the question here.***

While the first, main issue that the French Government had to consider was whether the minimum standards of the Directive should have been implemented in an/several existing procedure(s) or whether a new, standalone procedure should be created, another debate which had emerged was whether the safeguard and rehabilitation proceedings should be merged. 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.
However, despite its efficient regime, the safeguard procedure represented a mere 6% of the restructuring procedures opened in France between 2008 and 2018 due to firms preferring to enter into confidential procedures or not filing for insolvency proceedings on time and ending up in rehabilitation or liquidation proceedings.

That is why French commentators argued that more information and a clearer distinction between the safeguard and rehabilitation procedures could help increase the use of the safeguard.

Total marks: 5 out of 15.

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

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

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

Question 4.1 [maximum 5 marks] 2.5

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

[Yes, I believe Donald will benefit from the conciliation procedure as it is a process of persuading the interested parties to reach an agreement. Donald is not yet insolvent for more than 45 days.
As this is a mostly out-of-court procedure which he can open himself, he must not be worried about bad publicity.
A conciliator will then be appointed to oversee the whole procedure and also make a proposal relevant for the preservation of Donald's business, the activities and employment. Only at the end of the process, this conciliation agreement is sanctioned by the court (constatation or homologation)]

This could have been expanded further.

- ***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

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 debtor in view of the economic, social and (if applicable) environmental balance sheet, with the assistance of an appointed administrator will propose a plan without prejudice to the application in terms of the provisions of Article L622-10.

This said plan must mention the commisments to make the necessary cashflow and contributions in order to execute the plan.

The following will be determined in the draft plan:

- *Recovery according to the possibilities and methods of activities, the state of the marker as well as the means of financing available.*
- *Defines the methods of settlement of the liabilities and any guarantees that the debtor must take out to ensure their execution.*
- *It sets out and justifies the level and prospects of employments.*
- *It sets out social conditions envisaged for pursuit of activity.*

Whenever the draft provides for dismassals for economic reasons, it recalls the measures already taken and defines the actions to be taken in order to facilitate the reclassification and compensation for the employees whose employements is threatened.

It identifies, appends and analyses acquisition offers relating to one or more activities, presented by third parties.

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.]

You did not discuss the conciliation.
You did not discuss other procedures. This answer is not analytical enough.

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] 1

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

[This procedure is also and out of court procedure. Safeguards proceedings allow companies which are in difficulty, but not yet in a state of cessation of payments, to obtain a stay on payments and the suspension of judicial proceedings.

Safeguard proceedings were introduced by the 2005 Law and inspired by the U.S Chapter 11 Regime.

The safeguard proceedings can be initiated only by the debtor company and are commenced by a court decision.

An accordance to the 2014 Ordinance, there is no longer any requirement (as per die original legislation) for the debtor company to demonstrate that the difficulties which it is facing would lead to it becoming insolvent.

If a court order is made ito the safeguard proceedings this will result in a freeze on the payment of debts and on the acceleration and enforcement of security in the same way it does for reorganisation proceedings.

Some advantages to safeguard proceedings include the following:

- *There as no "hardening periods" and transactions entered into during the proceedings cannot subsequently be challenged*
- *Neither part nor all of the business can be sold without the consent of management of the company*
- *Better protection and greater powers are granted to company directors.*

Several supporting documents must be submitted to the court, which include the following:

- *annual accounts*
- *corporate identification number*
- *cash flow statement for the past month*
- *number of employees and turnover amount for the past fiscal year*
- *statement of claims and debts*
- *list of assets and liabilities, as well as any security and collateral*
- *persons who are jointly and severally liable for the company's debts*

"The accelerated safeguard is not a standalone procedure. It must be preceded by a conciliation
process. Article L628-1 of the Commercial Code provides that the accelerated safeguard procedure is opened at the request of a debtor engaged in a procedure of conciliation. The conciliation procedure must be ongoing when accelerated

safeguard proceedings are launched. Article L628-2 indicates that the court decides, after a report from the conciliator, whether or not to open accelerated safeguard proceedings. The criteria for opening accelerated safeguard proceedings are that:
- the debtor be engaged in conciliation proceedings; and
- a plan has been drafted during the conciliation phase which is likely to be adopted within
three months from the opening judgment by the creditors impacted by the plan (Commercial Code, Article L628-8).
The accelerated safeguard procedure remains subject to most of the rules of the regular
safeguard procedure.
The procedure is opened at the request of the debtor. The court may appoint one or more
judicial administrators. The opening of the procedure is subject to the constitution of creditors'
classes, as per Article L626-29 of the Commercial Code."]

You did not discuss the accelerated safeguard sufficiently. Your discussion of the safeguard procedure was irrelevant.

Article L628-1: Accelerated safeguard proceedings are opened at the request of a debtor engaged in a conciliation procedure, who demonstrates having drawn-up a draft plan aimed at ensuring the sustainability of the company. This project must be likely to receive, from the affected parties in respect of whom the opening of the procedure will take effect, sufficiently broad support to make its adoption likely within two months.

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: 3.5 out of 15.

*** End of Assessment ***

Total marks: 20 / 50