



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?

Concerning statement 1, reference is made to accelerated safeguard proceedings ('sauvegarde accélérée'). It is, indeed, not a separate procedure and thus follows the conciliation procedure.

As per statement 2, reference is made to liquidation proceedings where the appointed liquidator will take over the task of seizing and realizing the debtor's assets. Subsequently, the liquidator will distribute the proceeds to creditors or pursue a sale of the business.

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.

The first difference between the safeguard procedure and the rehabilitation procedure relates to the fact that the former cannot be used by a debtor who is in a cessation of payments situation ('payment failure situation'). For the debtor to benefit from rehabilitation proceedings, it must be insolvent and not just in a temporary in nature cash flow difficulty (Code de Commerce, Articles L620-1 and L631-1).

The second difference concerns the person who can apply for the proceedings. In the event of a safeguard procedure, it is only the debtor who can apply to the court. In the case of rehabilitation proceedings, these can be opened by any creditor who remains unpaid, the debtor (the company's management) or by the Public Prosecutor (Code de Commerce, Articles L620-1 and L631-5).

The third difference lies in the extension of the duration of the observation period, which for safeguard proceedings can extend up to twelve months, whereas for rehabilitation proceedings, the corresponding period can extend up to 18 months (Code de Commerce, Articles L621-3 and L631-7).

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.

With respect to the Order of 15 September 2021, several important changes were introduced. Below only a few will be presented for the purposes of this question.

First of all, the conciliation procedure was enhanced permitting a stay on enforcement proceedings and actions, in accordance with Article L611-7 of the French Commercial Code.

*Secondly, if classes of creditors have been created in the light of rehabilitation proceedings, an affected party has the right to suggest an alternative draft plan in the context of the restructuring of the business. This plan can be voted by the classes (*Code de Commerce*, Article L631-19). This feature has been introduced so to permit the diversification of the rehabilitation procedure from the safeguard procedure.*

*In addition, the Order of 15 September 2021 introduced for the first time a privilege for post-commencement financing (or funding) whose holders have contributed new cash to the company (*Code de commerce*, Article L622-17).*

Question 2.4 [maximum 2 marks] **0.5**

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

*The first difference between *ad hoc* proceedings and conciliation concerns the way the court ratifies the conciliation agreement upon request by the debtor. On the one hand, the *constatation* procedure relates to the approval of the conciliation agreement by the court and the preservation of confidentiality. On the other hand, the *homologation* procedure consists in the sanctioning of the agreement by the court which entails making the court decision public.*

*Another difference is linked to the *homologation* procedure itself. In the event, for instance, there is a conversion of conciliation proceedings to accelerated safeguard proceedings, a 'new money' privilege is conferred to investors who transfer goods, services or money to the distressed company during conciliation proceedings. The '*privilege de conciliation*' provides payment priority against all pre-commencement as well as post-commencement claims in case of court-assisted proceedings after conciliation. This *privilege* extends to the fact that such claims cannot be written-off or postponed in the safeguard or rehabilitation plan, including in the contexts of 'cross-class cram-down' or 'cram-down', unless the investors' consent is obtained. **Your***

explanation is more focused on the conciliation rather than a comparison of both procedures.

You could have mentioned:

(1) Both procedures are open to companies experiencing difficulties, whether legal, economic or financial. However, a conciliation procedure can also be requested if the debtor has been in a situation of insolvency (situation of payment failure), yet for less than 45 days.

(2) The duration varies between both procedures. Conciliation proceedings are opened for a maximum of four months. This duration can be extended by one month. The ad hoc mandate, on the other hand, has no limit of duration.

(3) An ad hoc agreement will never be published or made public. A conciliation agreement, however, 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.

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] **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.

The majority of insolvency law mechanisms in France have focused on the restructuring perspective of a debtor's financial distress, at the same time giving the impression of a highly 'debtor-centered' insolvency law system. Several reforms have taken place in the recent years and throughout the following analysis we will attempt to shed some light on whether these developments have shaped a 'debtor-centered' or a 'creditor-centered' insolvency system. Title VI of the French Commercial Code elaborates on the

existing insolvency procedures. Certain aspects from the Consumer Code will also be surveyed.

The restructuring reform of 2014 (Ordinance n. 2014-326 of 12 March 2014) aimed at strengthening preventive measures, the effectiveness of proceedings prior to the insolvency of the debtor as well as creditors' rights during the insolvency process. At the same time, Law n. 2016-1547 of 18 November 2016 concentrated on reinforcing the rescue of the debtor's business and on important principles, such as confidentiality, impartiality and transparency. The *Pacte* law of 2019 (*Plan d'action pour la croissance et la transformation des entreprises*, Law n. 2019-486 of 22 May 2019) paved the way for the adoption in France of the EU Directive on Preventive Restructuring through Ordinance n. 2021-1193 of 15 September 2021. The reforms of 2014 and 2016 together with the law of 2005 (Law n. 2005-845 of 26 July 2005), the 2008 Ordinance (Ordinance n. 2008-1345 of 18 December 2008) and the law of 2015 (Law n. 2015-990 of 6 August 2015) have structured a more favorable to creditors insolvency law system. Nevertheless, several commentators argue that the French insolvency system still constitutes a more "debtor-friendly" environment limiting creditor protection and their interests. Some examples that demonstrate the enhancement of the protection of the creditors' role are the following.

First of all, with respect to the stay on enforcement actions in the case of consumer bankruptcy (**the module is about corporate insolvency**), some limitations exist in that: a maximum two-year duration of the stay is imposed; the continuation of the stay is conditioned upon the results of the overall procedure; and creditors can request a lift of the stay by the competent judge. Furthermore, this procedure generally seeks the creditors' approval of the plan. At the same time, if there is no plan, the debtor can either request imposed or recommended measures by the bankruptcy commission or make no request. In this case, the bankruptcy procedure is considered completed and creditors can subsequently continue to pursue proceedings against the debtor (*Code de la Consommation*, Article R733-1). (**Why are you referring to the Code de la Consommation and not the Code de Commerce?**)

In the area of conciliation proceedings, an interesting privilege is conferred on investors transferring goods, services or money to the distressed company during those conciliation proceedings. More specifically, in the case of a conversion of conciliation to accelerated safeguard, new money investors will be subject to a priority of payment against all claims relating to the period before and after the commencement of proceedings as these proceedings would involve proceedings administered by the court (*privilège de conciliation*). This is possible not through an approval of the conciliation agreement (*constatation*), but by sanctioning said agreement (*homologation*). These claims cannot be written-off or postponed via a rehabilitation or safeguard plan, unless the investors consent.

Concerning the safeguard procedure, the latter should involve the entirety of creditors. The interests of creditors are represented by representatives of creditors (*mandataires judiciaires*) whose work can be supported by *créanciers contrôleurs*

*(supervising creditors) designated by the insolvency judge. Creditor representatives should set forth their comments to the classes regarding the safeguard plan, while the safeguard plan *per se* should be proposed to and voted by creditors. In the period preceding the Order of 15 September 2021, creditors were categorized as bondholders, primary suppliers and credit institutions. Following the 2021 reform, while in safeguard proceedings the formation of classes of creditors is not obligatory, in the context of accelerated safeguard proceedings classes of creditors constitute a mandatory characteristic of the procedure. However, in case of safeguard proceedings in which the debtor company has more than 250 employees, a turnover of more than 20 million euro or generally a turnover of over 40 million if it doesn't have 250 employees at least, then this formation of classes becomes compulsory. Interestingly, for debtor companies that do not meet the conditions set out above, the debtor can request from the supervising judge the formation of affected parties' classes. The insolvency practitioner will be tasked with the responsibility of forming creditor classes and include within each class creditors comparable between themselves (*communauté d'intérêt économique suffisante*). In this light, there will be rights *in rem* classes distinct from all other creditors as well as equity holders classes. The Ordinance of 2021 also provided for the respect of subordination agreements in a pre-judgment context. In addition, significant safeguards against the possibility of 'cross-class cram-down' dissenting creditors in safeguard proceedings have been made available after the 2021 reform. The consent of the debtor is first of all required. Furthermore, creditors of a certain class voting against the plan should be repaid in full if a lower class will be paid or if it maintains an interest. This is known as the 'absolute priority rule'. At the same time, notwithstanding the negative vote of one or more than one classes of creditors for the adoption of a plan, the court should assess whether any condition from the following is fulfilled. If the majority of the affected parties' classes voted the plan and if one, at a minimum, class concerns a class of secured creditors or a class that comes before unsecured creditors, then the 'cross-class cram-down' mechanism can be effected. Similarly, the 'cross-class cram-down' can be effected even if at a minimum one class voted in favor of the plan. Such class(es) should not refer to the class of equity holders or to the class that would not be paid nor maintain any interest in a distribution in a sale of the company scenario or liquidation procedure. Regarding impaired parties voting against the plan, they should not be in a worse situation in respect of the plan compared to the situation that these parties would face in terms of a sale of business or a liquidation proceeding. For the cross-class cram-down to be effected upon equity holders not having approved the plan, some conditions must be fulfilled as well. First of all, the debtor should employ more than 150 employees or have a turnover of more than 20 million euro. Secondly, these holders of one or more dissenting classes should not be expecting to receive payment or to maintain any sort of interest in the context of a (hypothetical) distribution procedure in liquidation proceedings or in a sale of the business. Thirdly, in the event of a capital increase by cash contribution or debt compensation, the issued shares should be given in priority to the shareholders, in proportion to their existing shareholding. Lastly, the transfer, entirely or partly, of the rights of equity holders' dissenting classes should not be provided for in the plan. Another advantage for creditors involves the post-money privilege introduced via the Order of 15 September*

2021 (post-commencement financing, Code de Commerce, Article L622-17). This privilege in the light of the safeguard procedure cannot be postponed or written-off if restructuring proceedings are subsequently opened, unless their holders consent. Very specific claims can rank higher than the aforementioned privilege.

Contrary to accelerated safeguard proceedings, in a rehabilitation proceeding a creditor who hasn't been paid, or the Public Prosecutor, also has the right to request the commencement of such proceedings. A particularity of rehabilitation proceedings lies in the stay on enforcement. Such a stay concerns only proceedings or secured and unsecured claims that refer to the period prior to the decision opening the proceeding. In order to be subjected to the stay, claims should be linked to a cash payment default only and not to a specific performance. It is possible that, if the debtor cannot attain the thresholds indicated above, the administrator may also request authorization to establish impaired parties' classes, regardless of the debtor's consent. Moreover, any impaired party can suggest a plan to be voted by the classes. However, if all impaired parties' classes have not approved the plan, the court can apply a 'cross-class cram-down' if this is requested by any impaired party, including the debtor and the administrator, the latter with the consent of the debtor. Also, if there is no approval of the plan via a consultation procedure through classes there may be an individual consultation process for the plan to be approved.

*In the field of liquidation proceedings, an automatic stay is imposed. The entirety of pre-petition creditors are not entitled to obtain any payment by the debtor through enforcement proceedings. However, the existence of certain exceptions to this rule should be emphasized. These refer to, namely, security interests with retention rights (this situation releases the encumbered asset in retention which returns to the insolvency estate), claims linked to a 'cession de bordereaux Dailly' (Daily assignment of receivables), claims linked to a trust agreement (*fiducie*) and, in the field of financial contracts, close-out netting and set-off of financial obligations. As per Article L649-9-1, there is no debtor-in-possession provision, something that has been considered a favorable measure to preserve creditors' interests. Moreover, the liquidator can pursue legal proceedings as well as continue said proceedings to the benefit of creditors.*

*Some other illustrations clearly demonstrate a more 'debtor-friendly' insolvency law system in France. This is, for instance, evident in consumer (personal) bankruptcy, where, pursuant to Article L711-1 of the French Commercial Code, only an individual can initiate an over-indebtedness procedure, while a stay on enforcement actions can also be implemented (*Code de la Consommation*, Articles L721 and L722). As part of the overall protection of the debtor's position, the sale of the debtor's family house in the context of personal bankruptcy should not be pursued. The Consumer Code elaborates on a personal recovery procedure with liquidation, in which, pursuant to Article R742-17, the 'jugement d'orientation' (orientation judgment) launches a holistic assessment of the debtor's financial condition, including his assets and the way he conducts his life. This process results in the suspension of any enforcement actions on behalf of creditors as well as in the verification of the claims.*

The French Commercial Code is equipped with the following restructuring procedures that reinforce the argument that France constitutes a 'restructuring-biased' jurisdiction: ad hoc mandate, conciliation, safeguard procedure, accelerated safeguard procedure and rehabilitation procedure. Both ad hoc mandate and conciliation proceedings focus on debtors who are not in a payment failure situation and who thus remain in business. Both procedures concentrate on the negotiation of workouts between debtors and creditors. Moreover, it is either the competent court that appoints a conciliator, in the context of conciliation proceedings, or it is the debtor that can select that professional. The same is true for the ad hoc representative in the field of an ad hoc mandate. As per the safeguard procedure, a stay is imposed and a rehabilitation plan is set forth with the debtor being a debtor-in-possession. With respect to the absolute priority rule in safeguard proceedings, there are some exceptions to this concept to the extent that said exceptions are considered pivotal to achieving the purpose of the safeguard plan while respecting affected parties' interests that should not be excessively impaired. In terms of accelerated safeguard proceedings, these can be opened only by the debtor upon demonstration of certain conditions. This procedure has largely been influenced by the EU Directive on Preventing Restructuring frameworks of 2019, transposed in France through the 2021 Order. Similarly, in this context, the court can order a 'cross-class cram-down' procedure for dissenting creditors. Generally speaking, a significant element to be taken into account is the fact that this procedure allows the debtor to continue trading. In addition, if a contract between the debtor and its creditor(s) is permitted to continue, then notwithstanding the payment default on behalf of the debtor, the creditor will be compelled to continue to perform its obligations. Lastly, where there is no approval of the plan by the required classes, the court has a possibility to postpone the liabilities of the debtor for up to 10 years but only for rehabilitation proceedings and not for safeguard proceedings. This is conditioned upon an installment of 10%, at a minimum, following the fifth year, thus putting the debtor in a more favorable position during the restructuring discussions. If impaired parties' classes have not approved the plan, the court can apply a 'cross-class cram-down' if this is requested by any impaired party, including the debtor and the administrator, the latter with the consent of the debtor. Also, in case there is no approval of the plan via a consultation procedure through classes, there may be an individual consultation process for the plan to be approved. To the benefit of debtors, specific tools for the early detection of financial distress were further developed.

From the preceding analysis, it follows that the French insolvency law system is primarily based upon the existence of restructuring mechanisms for distressed debtors. As it has been argued, the reforms of the insolvency system have undoubtedly developed an environment accommodating creditors in a fair manner. Nevertheless, it seems that these reforms, and insolvency law in general, have given importance to both creditor- and debtor-centered mechanisms. As a concluding remark, it should be noted that the regimes set forth are neither completely 'debtor-friendly' nor fully 'creditor-centered', but rather a combination of frameworks of fairness for both parties in which both debtor restructurings and creditor opportunities are furthered.

While a lot of the information provided is correct, you seem to have mostly restated all of the information in the Guidance Text. You were meant to select only relevant information. It was not particularly useful or relevant to discuss the Code de la Consommation and personal bankruptcy; neither was it relevant to discuss liquidation proceedings.

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.

With the Ordinance of 2010 (Law n. 2021-1193, 15 September 2021) accelerated financial safeguard proceedings were incorporated into accelerated safeguard proceedings. The safeguard procedure was introduced in 2005, while the accelerated safeguard procedure was introduced in 2014 as a prepack solution very much resembling the safeguard procedure. The latter procedure was subject to reforms in 2008, 2014 as well as in 2016.

*For the safeguard procedure to be initiated, the debtor should not be in a cessation of payments (or payment failure) situation. It should be experiencing a challenging financial situation and should not be in a position to pursue any alternative solutions. The safeguard procedure is a court-assisted and non-confidential procedure involving the entirety of creditors. Most important, a stay on enforcement is imposed for the purpose of preparing a safeguard plan (Code de Commerce, Articles L622-7 and L621-3). Only the debtor, who in the conduct of these proceedings will become a debtor-in-possession, has the right to request the commencement of the procedure. The decision opening the proceeding will designate an administrator, an insolvency judge as well as a representative of creditors. The latter professional may be aided by *créanciers contrôleurs* (supervising creditors). The six-month observation period can be extended initially via a court decision and subsequently upon the Public Prosecutor's request. During the observation period the debtor company's situation is holistically assessed, restructuring measures are applied to the extent necessary and a determination takes place regarding the debts to be paid back with respect to the rescue process upon termination of the observation period. Notwithstanding the stay on enforcement, the debtor company should pay the post-petition debts. In any case, during the observation period no worsening of the debtor company's financial situation should happen. In view of the court-centered nature of this procedure, a hearing can be organized after the commencement of the proceeding so to ensure that the debtor company won't increase its debts and will continue trading. In the event there is a determination by the court regarding a worsening of the debtor's financial situation, the court will halt the company's trading. The legal representative of the company takes up the process of the verification of claims. The administrator is in charge of the restructuring part of the process. The safeguard plan comprises a variety of restructuring tools and is voted by creditors. Its terms are previously communicated to creditors through a meeting or a written consultation.*

The overall procedure in the context of safeguard proceedings, e.g., the drafting of the plan, the consultation process by creditors, the process of approval or rejection, the creditors' classes particularities as well as the 'cross-class cram-down' specificities, is followed by accelerated safeguard proceedings as well. In addition, regardless of whether or not the formation of classes is a mandatory element (see below), the procedure of categorizing creditors in the same group relies on the principle of 'comparable economic interests' (communauté d'intérêt économique suffisante; Code de Commerce, Article L626-30). With the administrator's support, the debtor prepares a draft plan to be considered by impaired parties. Employee representatives and creditor representatives bring forward their comments before the classes. The plan will be considered approved in case two-thirds of the totality of claims, maintained by voters in each class, have supported the plan with a positive vote. At this point, the court can either reject the plan or sanction it to the extent that it considers the proposal appropriate and that the debtor company may be successfully restructured. Upon the debtor's consent, or through the administrator having obtained the consent of the debtor, the plan can be sanctioned with the possibility to 'cross-class cram-down' those creditors that are opposing the plan (Code de Commerce, Article L626-32). The 'cross-class cram-down' mechanism is subject to the absolute priority rule. Exceptions to this rule relate to whether such deviations are justified for making the plan successful provided that interests of affected parties are not irreparably harmed. In addition, the court should examine whether the following factors are fulfilled. If the majority of the affected parties' classes voted the plan and if one, at a minimum, class concerns a class of secured creditors or a class that comes before unsecured creditors, then the 'cross-class cram-down' mechanism can be effected. Similarly, the 'cross-class cram-down' can be effected even if at a minimum one class voted in favor of the plan. Such class(es) should not refer to the class of equity holders or to the class that would not be paid nor maintain any interest in a distribution in a sale of the company scenario or liquidation procedure.

The following constitute the main important differences among the safeguard procedure and the accelerated safeguard procedure. After the Ordinance of 15 September 2021, the formation of creditor classes in accelerated safeguard proceedings became mandatory. In terms of safeguard proceedings, the formation of such classes remained optional. Interestingly, for companies having more than 250 employees and a turnover exceeding 20 million euro creditors classes have to be formed in respect of safeguard proceedings. Moreover, if the company has more than 40 million euro turnover, the formation of creditors classes also becomes mandatory. In safeguard proceedings, nonetheless, the formation of impaired parties classes with respect to debtors not meeting the criteria set out above can be implemented by the supervising judge upon the debtor's request. At the same time, with respect to accelerated safeguard proceedings it can be said that the procedure concentrates on a prepack version of the already well-known safeguard procedure. A conceptual difference lies in the expeditious character of these proceedings that last, at a maximum, four months. In addition, prior to the commencement of accelerated safeguard proceedings, a conciliation procedure should be launched first (Code de

*Commerce, Article L628-1). Therefore, for the accelerated safeguard procedure to be initiated the debtor should demonstrate: that a conciliation procedure has commenced; that a conciliation agreement has been prepared focusing on promoting efficiency and the restructuring of the debtor company; and that the conciliation agreement is possibly going to be supported by impaired parties during the first two months after the decision opening the accelerated safeguard proceeding. Interestingly, the situation of the debtor being in a cessation of payments position does not exclude the commencement of accelerated safeguard. As in the case of conciliation, and contrary to the safeguard procedure, the debtor should not be in a cessation of payments position for more than 45 days. It is the court that decides whether or not to open accelerated safeguard proceedings after examining a relevant report in which the conciliator elaborates on the possible success of the restructuring plan. Of course, the conciliation stage before the accelerated safeguard process involves much flexibility from a contractual aspect and from the perspective of confidentiality. A major difference refers to the protection conferred on new money investors within the conciliation process, instituting a privilege in the event of the subsequent commencement of court-led proceedings. The application of this privilege, which entails a higher ranking of said investors vis-à-vis pre-commencement as well as post-commencement claims, is conditioned upon the sanctioning of the conciliation agreement (*homologation*). Unless the investors' consent is given, these claims cannot be subject to write-off or postponement by a safeguard (or rehabilitation) plan, including in the event of a cram-down or a 'cross-class cram-down' process.*

As per the objectives of these two procedures, the following should be highlighted. With respect to the safeguard procedure, this process is dedicated to debtors who are not in a payment failure situation and does not involve any conciliation process before the opening of the proceeding. As a standalone procedure, the purpose is to establish a rehabilitation plan to be adopted by creditors. It operates as a non-confidential court-led procedure.

On the other hand, the accelerated safeguard procedure involves a prepack variation of the safeguard procedure. Its main objectives focus on preparing a restructuring plan and obtaining a vote by creditors in an expeditious manner. A conciliation procedure must be initiated beforehand. This prepack variation of the safeguard proceedings seeks to preserve the company's activity.

Again, you should have been more succinct and should only have selected information which highlight the similarities or differences, rather than talking about both procedures in a general manner. This was a comparative exercise.

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

During the debates surrounding the implementation of the EU Directive on Preventive Restructuring Frameworks 2019, some commentators have suggested that the

safeguard and rehabilitation procedures should be merged. Consider whether this was a reasonable idea.

In this section we attempt to shed some light on the reasons why merging the safeguard procedure with the rehabilitation procedure should or should not be pursued. This idea was put forward during the discussions on the implementation of the EU Directive on Preventive Restructuring mechanisms of 2019.

The safeguard procedure, formally introduced in 2005 and subsequently reformed in 2008, 2014 as well as in 2016, is available to debtors experiencing only financial distress and not a cessation of payments situation. This could be interpreted as a situation in which there is no alternative solution for the debtor. The procedure is non-confidential, it imposes a stay on enforcement actions and it promotes the drafting of a safeguard plan. The decision commencing the safeguard procedure results in the designation of a representative of creditors, an insolvency judge and an administrator. As per the observation period, this can be extended via a court decision beyond an initial six-month period. It can be extended for a second time following the Public Prosecutor's request. The observation period entails, first of all, an assessment of several important aspects regarding the company. In addition, a determination of the amounts owed that should be repaid at the end of the observation period also takes place. The implementation of restructuring measures for the purpose of rescuing the debtor company also concerns that period. An important consideration is that the debtor company is permitted to trade and, at the same time, the court in a first hearing should be convinced that the situation of the company is not worsening. Debts incurred after the decision opening the safeguard proceeding should be paid. The legal representative is the primary actor with respect to the verification of claims. While the representative of creditors focuses on any existing dispute, the administrator is tasked with supporting the distressed debtor with respect to its rescue. Following the preparation of the safeguard plan, the creditors are requested to vote after the plan has been proposed to them through a meeting or a written consultation. Of course, if for accelerated safeguard proceedings the formation of creditor classes is mandatory, in the context of safeguard proceedings such a formation remains optional, while being mandatory only if certain thresholds are met. An important consideration regarding the plan lies in the possibility for the court sanctioning it (either upon request of the administrator who has obtained the debtor's consent or upon the debtor's request) to 'cross-class cram-down' creditors disagreeing with the plan, subject to certain requirements, including the absolute priority rule. Moreover, the post-commencement financing privilege, known as post-money privilege, was introduced by the Ordinance of 15 September 2021 in the light of safeguard proceedings. In any case, if there is no viable solution or to the extent that there has been a worsening of the situation of the debtor, the opening of liquidation or rehabilitation proceedings can be ordered by the court at any time throughout the observation period.

Accelerated safeguard proceedings are based upon the preparation of a restructuring plan in an expedited manner. The debtor must initiate conciliation proceedings prior to the opening of accelerated safeguard. These proceedings very much resemble and are based upon the safeguard procedure explained above. For the opening of this procedure the debtor should not be in a cessation of payments situation more than 45 days. The 'cross-class cram-down' element and the privilege of conciliation are both available during the process. The latter privilege concerns the context of subsequent court-assisted proceedings, such as rehabilitation proceedings.

Rehabilitation proceedings have been introduced by Law n. 85-88 of 25 January 1985 and have been described as being based upon the safeguard procedure's principles. The debtor company should be in a cessation of payments situation, while any creditor who has not been paid, the Public Prosecutor as well as the debtor, can file a petition for said proceedings. Resembling accelerated safeguard, in rehabilitation proceedings the debtor can request the opening of such a procedure during the first 45 days after its insolvency. The continuation of trading, the stay, the preparation of a restructuring plan, the sanctioning of the latter until the observation period expires, the formation of impaired parties' classes to the extent necessary and the six-month observation period, constitute notable similarities with the safeguard procedure.

Notwithstanding these similarities, some differences should also be set out. First of all, it is important to understand that if in safeguard proceedings the debtor should not be in a payment failure situation, in rehabilitation proceedings this does not apply. Instead, the debtor should be in a cessation of payments situation and apply for rehabilitation proceedings in the first 45 days of its insolvency. Secondly, if in safeguard proceedings the debtor is the only person permitted to request the opening of the procedure, in rehabilitation proceedings not only the debtor can request the opening of such a procedure but a request can be made by any unpaid creditor as well as the Public Prosecutor. Thirdly, the total duration of safeguard proceedings amounts to twelve months, while for rehabilitation proceedings this period cannot last longer than eighteen months. Fourthly, the appointed administrator has the power to terminate a contract or continue the performance of the latter. This practically means that the creditor will have to continue performing his obligations at a time when the debtor has already entered the phase of insolvency. In addition, the judge will either make an order for the company to continue trading via a rehabilitation plan or will order the full or partial sale of the company's assets by means of a sale plan. If the latter circumstance is unsuccessful, the judge may order for the rehabilitation proceeding to be converted into liquidation.

Despite the almost identical voting process of the rehabilitation plan with the safeguard plan, some diversions should be stressed. Firstly, if the debtor cannot attain the thresholds indicated above, the administrator may also request authorization to establish impaired parties' classes, regardless of the debtor's consent. Secondly, any impaired party may suggest a plan to be voted by the classes. Moreover, if all impaired parties' classes have not approved the plan, the court can apply a 'cross-class cram-down' if this is requested by any impaired party, including the debtor and the

administrator, the latter with the consent of the debtor. Also, if there is no approval of the plan via a consultation procedure through classes there may be an individual consultation process for the plan to be approved. These modifications came with the Ordinance of 15 September 2021.

In the event the plan has not been voted by the required classes, a particular procedure has been instituted linked to the possibility for the court to reschedule the company's debts for up to 10 years. This is a characteristic of rehabilitation proceedings and it is conditioned upon a 10% instalment, at a minimum, after five years (Code de Commerce, Article L626-18).

Moreover, the powers of the court with respect to particular debtor companies have been enhanced after 2015, known as the period in which the Macron law was adopted. Following three months after the decision opening the proceeding, the mechanisms of 'dilution forcée' or 'cession forcée' may be ordered by the court. The first mechanism refers to a forced capital augmentation, and the second mechanism refers to a forced sale of shares belonging to dissenting shareholders. The second option is pursued at the Public Prosecutor's or the administrator's request, if certain conditions are cumulatively met. These are as follows: the debtor company employs more than 150 employees or is considered a company controlling (concept of 'entreprise dominante') one or more companies that in turn have at a minimum 150 employees; the transfer of the debtor's activity would be harmful for the economy and the employment dimension; the mechanism of 'cession forcée' seems to constitute the best solution in order to circumvent the previously mentioned harmful situation and to permit the debtor company to continue trading after the possibilities of total or partial sale have been assessed; and, there has been a refusal on the part of the impaired parties to follow the share capital modifications in the context of the rehabilitation plan that has been proposed benefiting one or more persons determined to follow the plan (Code de Commerce, Article L631-19-2). Both the forced capital increase and the forced sale of shares follow specific procedures in rehabilitation proceedings.

After examining the safeguard procedure and the rehabilitation procedure, it can be said that these two mechanisms, while initially presenting similar aspects, have incorporated different rules and processes in their respective cases. Merging the two procedures and basing such a concept on the existence of certain common principles mentioned above seems rather inconsistent with the objective of each mechanism, which appears quite distinct for each procedure. In fact, the different levels of debtor insolvency between these two procedures and the different options, for instance, that can be pursued at the end of the observation period during the rehabilitation procedure, show that in the light of a proper, efficient and effective rescue of the debtor's business, these two procedures should remain separate.

Total marks: 10.5 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] **5**

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

Introduced in 2005, conciliation proceedings are voluntary in nature and available to both natural and legal person debtors. Natural person debtors can apply in case they are exercising an independent profession, including a liberal profession (Code de Commerce, Article L611-5). The debtor in order to benefit from a conciliation procedure should prove that it is facing a "legal, economic or financial difficulty" that has already taken place or will take place. Most important, the debtor cannot be in a cessation of payments situation more than 45 days (Code de Commerce, Article L611-4). The main elements of this procedure are, firstly, that it is considered an out-of-court procedure; secondly, that it is requested solely by the debtor; thirdly, that there is a conciliator's appointment; and, fourthly, that a proposal is prepared (Code de Commerce, Article L611-7). The purpose of the procedure is to structure a plan together with the debtor's creditors as early as possible, thus retaining the characteristics of the contractual nature and confidentiality. In accordance with Article L611-7, the debtor has the control of its business and is, therefore, considered a debtor-in-possession.

The conciliation agreement can be approved by the court, in which case the confidentiality principle will remain, or it can be sanctioned by the court, in which case the decision will be subjected to a publication procedure. The first scenario is known as 'constatation', and the second scenario is known as 'homologation'. In the second case, there is indeed a negative aspect regarding the consequences of publicity. However, in case court-assisted proceedings are subsequently opened, the existence of a conciliation procedure with a homologation agreement will result in certain important advantages. The conciliation privilege constitutes a significant example. Investors providing money to the debtor company (or goods or services) in the context of conciliation proceedings will rank before claims incurred prior to the opening judgment and after the latter. In the event of a rehabilitation or safeguard plan, no writing-off or postponement of these claims can be pursued even in the light of a cram-down or cross-class cram-down, unless the investors' consent is obtained.

An independent professional, Donald, began having financial difficulties in early 2022. He is having problems in paying his expenses, including his professional rent. Donald finds himself in a rather uncomfortable situation since he cannot find any

alternative. He is also afraid of the fact that he may not be able to perform his obligations with respect to his professional loan.

Donald may benefit from a conciliation procedure in the following way. First of all, as per the relevant requirements, reference is made to an independent professional and in particular an architect (liberal profession). This falls under the requirement of Article L611-5 with regard to the natural person debtor that can apply for the procedure. In addition, for the procedure to commence, Donald should prove that he is not in a cessation of payments or payment failure situation more than 45 days. In accordance with the facts of the case, Donald is not insolvent but experiences certain cash flow problems. The fact of preparing a plan for his creditors at an early stage together with the fact that he remains in control of his activity constitute two important benefits of the process. Donald can request the court to approve the conciliation agreement or sanction it. In the second scenario, there will be an opportunity for investors financially contributing to its activity to obtain a conciliation privilege, as it has been laid down previously. In case his financial situation is not such as to trigger subsequent court-assisted proceedings, such as accelerated safeguard proceedings, and where no investors are necessary or contributing, then Donald may benefit from the simple 'constatation' procedure, in which confidentiality is ascertained and publication of the decision is not pursued.

Question 4.2 [maximum 5 marks] 5

Explain to Donald the way conciliation proceedings run and the advantages of opening such procedure. Further advise him whether he could also avail of any other insolvency procedure.

Conciliation proceedings are available to debtors who are not in a payment failure situation, but who, nevertheless, experience cash flow problems. The underlying scope is to propose a plan to creditors early enough taking into account the contractual nature of the process and the confidentiality principle. The debtor is the person applying to the court for this procedure. From a practical standpoint, the debtor becomes a debtor-in-possession and thus continues to be in control of its business. From a procedural standpoint, a conciliator, who will supervise negotiations with creditors, will be appointed by the court or selected by the debtor (Code de Commerce, Art. L611-7). The conciliator will specifically bring forward any proposal directed towards the rescue of the business, the preservation of employment and the continuation of trading. The conciliation agreement is then approved or sanctioned by the court. The difference, in this context, is that if there is mere 'constatation' of the agreement then confidentiality is preserved. On the contrary, if a 'homologation' procedure is pursued then the decision will be made public, potentially creating a certain inconvenience in terms of the already financially distressed position of the debtor. We previously supported that in case Donald fears publicity issues, then a preferable way forward would be to request a simple 'constatation' procedure.

Undoubtedly, there are many benefits relating to conciliation, the most important ones being the voluntary and amicable elements as well as its confidential character. Of course, the conciliation procedure is available to persons that are insolvent, but not for more than 45 days, and can accommodate both natural person debtors as well as legal person debtors. In particular, the procedure is also applicable to the debtor who is an independent professional practicing a liberal activity (Code de Commerce, Art. L611-5). In accordance with the facts of the case, the fact that Donald can continue his activity is another important aspect. In addition, in case of new money providers, i.e. investors financially contributing to the activity, a privilege of conciliation is automatically applicable. Under these circumstances, the holders of such claims in eventual court-assisted proceedings will be conferred a privilege to rank before pre- and post-commencement claims in respect of priority of payment. No writing-off or postponement of these claims can be effected without the consent of the investors, including in the context of cram-down or cross-class cram-down processes.

*Other insolvency procedures that could be examined in the present case are the following. First of all, an *ad hoc* mandate could constitute another interesting solution. This is again an amicable and voluntary procedure aiming at negotiating a plan with creditors. The debtor in order to benefit from the process must not be insolvent. Throughout the procedure, a *mandataire ad hoc* is nominated who will propose anything related to the preservation of the activity and of the business, including the preservation of employment.*

Since Donald is an independent professional (architect) and, therefore, is considered an individual exercising a liberal profession, the safeguard procedure may also be an option. However, this alternative is linked to a more formal, i.e. court, procedure. Again the debtor remains in control of its business (debtor-in-possession). Most important, the debtor must not be in a cessation of payments situation. The decision opening the procedure launches the designation of an insolvency judge, an administrator and representatives of creditors. A safeguard plan is at the end of the process sanctioned by the court.

After the conciliation procedure, accelerated safeguard proceedings can also be commenced. This is a procedure dedicated to those debtors who have already opened a conciliation procedure, in which a conciliation agreement has been prepared and where that agreement is probably going to be supported by the impaired parties in the succeeding two months after the judgment opening the accelerated safeguard proceeding (Code de Commerce, Art. L628-1). The overall idea centers around a first negotiation phase, where a solution will be prepared, and a second phase where this solution will be implemented in a more formal way, through court-assisted proceedings, i.e. accelerated safeguard proceedings.

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.

Safeguard accelerated proceedings are largely based upon the safeguard procedure. Nevertheless, contrary to the latter procedure, they do not concern a standalone process. Accelerated safeguard proceedings were introduced in 2014 and can be initiated after conciliation proceedings have been previously commenced. They are thus considered to be a combination of the purely out-of-court, voluntary and amicable nature of the conciliation procedure with the formal proceeding of accelerated safeguard. The scope of the overall process lies in the negotiation of restructuring alternatives in the conciliation stage and the adoption of these alternatives in the subsequent stage of formal accelerated safeguard proceedings.

From a procedural perspective, the proceedings last four months and can be opened by all debtor companies. The debtor should show the existence of a conciliation procedure, the preparation of a conciliation agreement and that during the two months after the opening of the accelerated safeguard procedure impaired parties are likely to support the conciliation agreement (Code de Commerce, Art. L628-1). More specifically, the debtor in order to benefit from the proceeding does not have to be in a payment failure situation and, if he is, the rule is not to exceed 45 days. The conciliator drafts a report regarding the probability of the success of the plan among impaired parties, that comprises the restructuring alternatives (Code de Commerce, Art. L628-2). The court takes into account the aforementioned report and decides upon the opening of the proceeding. The safeguard procedure and the accelerated safeguard procedure share the same voting processes and adoption of the plan. Moreover, an important thing to bear in mind is the fact of the mandatory formation of classes of impaired parties in accelerated safeguard, contrary to the traditional safeguard procedure under which the constitution of classes remains optional. If the procedure is unsuccessful, then accelerated safeguard proceedings close without the opportunity to convert these proceedings.

In the present case, Donald can open accelerated safeguard proceedings only after he has applied for conciliation proceedings first, as indicated above. There are several advantages especially with respect to the fact that the amicable nature of the conciliation procedure is combined with the adoption of a plan in a formal procedure. In addition, confidentiality, the contractual element, the power of the court to pursue a cross-class cram down process in the safeguard phase as well as the protection of new money providers with respect to the conciliation privilege ('privilège de conciliation') if the plan has been sanctioned through a homologation procedure, constitute further important advantages. Indeed, in the latter scenario new money providers will benefit from a priority of payment in case a court-assisted proceeding is afterwards initiated. New money providers' claims will rank higher than those claims involving the period prior and after the commencement of the proceeding. Such claims cannot be postponed, written-off or be subjected to any cram-down process, unless

investors give their consent. Generally, Donald can benefit from the accelerated safeguard proceeding also because he is not in a cessation of payments situation.

Total marks: 15 out of 15.

*** End of Assessment ***

Total marks: 44 / 50