INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6A

FRANCE

This is the summative (formal) assessment for Module 6A ***of this course and must be submitted by all candidates who*** selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 6A. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***

2. ***All assessments must be submitted electronically in*** Microsoft Word format***, using a standard A4 size page and an 11-point Arial or Avenir Next font. This document has been set up with these parameters*** – please do not change the document settings in any way**.** DO NOT ***submit your assessment in PDF format as it will be returned to you unmarked.***

3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***

4. ***You must save this document using the following format:*** [studentID.assessment6A]**.** ***An example would be something along the following lines: 202223-336.assessment6A.*** Please also include the filename as a footer to each page of the assessment ***(this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name.*** Assessments that do not comply with this instruction will be returned to candidates unmarked**.**

5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments.*** Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.**

6. ***The final submission date for this assessment is*** 31 July 2023**.** ***The assessment submission portal will close at*** 23:00 (11 pm) BST (GMT +1) on 31 July 2023**.** ***No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

7. ***Prior to being populated with your answers, this assessment consists of*** 9 pages**.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow***. Select only*** ONE ***answer. Candidates who select more than one answer will receive no mark for that specific question.***

Question 1.1

What is the main difference ***between the safeguard procedure and the rehabilitation procedure?***

(a) The main difference lies in the person who can request the opening of the procedure (creditors of the company in the case of the safeguard and the company's director(s) in the case of rehabilitation proceedings).

(b) The main difference lies with in court that will deal with the case (the commercial court for the safeguard and the specialised commercial court for rehabilitation proceedings).

(c) The main difference lies in the duration of the procedures (10 months for the safeguard procedure and 18 months for rehabilitation proceedings).

(d) The main difference lies in the condition required to open the proceedings (insolvency for rehabilitation proceedings and no state of insolvency for the safeguard).

Question 1.2

What are the pre-insolvency mechanisms ***available to companies under French insolvency law?***

(a) Ad hoc mandate, conciliation, safeguard and accelerated safeguard.

(b) Ad hoc mandate, conciliation, safeguard, accelerated safeguard and rehabilitation.

(c) Ad hoc mandate, safeguard and rehabilitation.

(d) Ad hoc mandate and conciliation.

Question 1.3

What are the conditions for a company in financial difficulties to resort to an ad hoc mandate?

(a) A debtor must not be in a state of insolvency (in a payment failure situation).

(b) A debtor must prove that it has not been insolvent for over 45 days and that it is not encountering difficulties that it is not able to overcome.

(c) A debtor must be insolvent.

(d) A debtor must prove that it has engaged in conciliation proceedings first, which have failed.

Question 1.4

Who can request the opening of an ad hoc mandate procedure?

(a) The debtor's creditors.

(b) The president of the court.

(c) The director(s) of the company.

(d) The director(s) of the company or the company's auditor.

Question 1.5

What are the conditions for a company in financial difficulties to resort to conciliation proceedings?

(a) A debtor must not be in a state of insolvency (in a payment failure situation) and must not encounter difficulties that it is not able to overcome.

(b) A debtor must not have been in a state of insolvency for longer than 45 days.

(c) A debtor must prove that it has availed of an ad hoc mandate first, which has failed.

(d) The rescue of the company must be deemed impossible by its directors.

Question 1.6

Can the president of the court impose a conciliation procedure on a debtor company?

(a) Yes, at the request of the creditors.

(b) Yes, at the request of the Public Prosecutor.

(c) Yes, at the request of a contractual third party.

(d) No, never.

Question 1.7

What are the conditions for a company to avail of safeguard proceedings?

(a) When the company is not in a state of insolvency (in a payment failure situation) but is experiencing difficulties which it is not able to overcome.

(b) When the company has not been in a state of insolvency for longer than 45 days.

(c) When the company is insolvent.

(d) When the company is insolvent and the company has attempted conciliation or *ad hoc* mandate proceedings which have failed.

Question 1.8

During liquidation proceedings, which creditors are barred from enforcing their rights to obtain payment from the debtor?

(a) All pre-filing creditors.

(b) Pre- and post-filing creditors.

(c) Pre-filing creditors, except (i) claims secured by a security interest conferring a retention title right, (ii) claims assigned by way of a Dailly assignment of receivables, (iii) claims secured by a *fiducie* agreement, and (iv) set-off and close-out netting of financial obligations.

(d) Post-filing creditors, except (i) claims secured by a security interest conferring a retention title right, (ii) claims assigned by way of a Dailly assignment of

receivables, (iii) claims secured by a *fiducie* agreement, and (iv) set-off and close-out netting of financial obligations.

Question 1.9

Minago, a company, is facing financial difficulties but is not yet in a state of insolvency. Some of its suppliers are demanding the payment of their invoices but Minago's directors believe that this would lead to the company's insolvency. Which procedure(s) is / are available to the company?

(a) *Ad hoc* mandate.

(b) Conciliation and *ad hoc* mandate.

(c) Rehabilitation proceedings.

(d) *Ad hoc* mandate, conciliation and safeguard proceedings.

Question 1.10

In relation to the recognition of judgments under French law, choose the accurate statement:

(a) Foreign judgments can only be enforced if they have been subject to a procedure of *exequatur*. The granting of *exequatur* to a foreign judgment is left at the discretion of the court.

(b) Foreign judgments can only be enforced if they have been subject to a procedure of *exequatur*. For a foreign judgment to be granted *exequatur*, three conditions must be met: (i) the original judgment must be devoid of any fraudulent intention, (ii) the judgment must comply with international public policy, and (iii) the foreign court or tribunal who issued the judgment must have been competent to do so.

(c) Even if foreign judgments have not been granted *exequatur*, there are some ways in which they can be recognised and enforced by French authorities. It is, for example, possible for the French court to recognise a foreign judgment if there are also local insolvency proceedings pending against the same debtor.

(d) Once *exequatur* has been conferred, the foreign judgment is considered a French judgment.

Total marks: 10 out of 10.

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

Question 2.1 [maximum 2 marks] 2

Consider the following two statements:

Statement 1: A procedure which does not stand alone and can only be opened following conciliation proceedings.

Statement 2: The objective of this procedure is to appoint a professional who will seize and realise the assets of the debtor and distribute the proceedings to creditors or proceed to a sale of the business.

Which insolvency procedures do these statements refer to?

[Statement 1 above refers to the accelerated safeguard. Statement 2 above refers to the liquidation proceedings.]

Question 2.2 [maximum 3 marks] 3

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

[Length of time: With respect to the rehabilitation procedure, the insolvency judges open a six-month period and it can be renewed up to 18 months. On the other hand, with respect to the safeguard procedure, the length of time is a six-month period and it can be renewed up to 12 months.
Cram-down mechanism: The safeguard procedure applies to creditor's voting and classes. On the other hand, with respect to the rehabilitation procedure, even if the rehabilitation plan is not approved by the statutory creditors' majority, the court can determine to apply to the cross-crass cram-down mechanisms, provided that the statutory requirements are met.
Court's power: If the debtor cannot obtain the approval from the requisite classes, the court's power to reschedule the liabilities of the debtor is not available under the safeguard procedure. On the other hand, such power is available under the rehabilitation procedure.
]

Question 2.3 [maximum 3 marks] 2

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

[The first new element is the accelerated safeguard combined with the conciliation procedure was established. ***Explained this a bit more. Both procedures already existed before 2021.***
The second one is even if the rehabilitation plan is not approved by the requisite creditors, the court can determine to apply to the cross-crass cram-down mechanisms at the request of the debtors or the affected parties, provided that the statutory requirements are met.
The third one is if the debtor cannot obtain the approval from the requisite classes, the court's power to reschedule the liabilities of the debtor is not available under the safeguard procedure, though such power is available under the rehabilitation procedure.]

Question 2.4 [maximum 2 marks] 2

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

[Condition: If a solvent debtor is likely to face financial difficulties, ad hoc proceedings can be open. On the other hand, if a debtor must not have been insolvent ***(syntax)*** *for more than 45 days, the conciliation can be opened.*
Court's involvement: With respect to the conciliation, the court can approve the conciliation agreement at the request of the debtor. On the other hand, with respect to the ad hoc proceedings, the court does not need to approve such agreement.]

Total marks: 9 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.

[It should be evaluated that French insolvency law is "debtor-friendly" even if the Order of 15 September 2021 has become effective. The Order of 15 September 2021

has changed the court power to impose a debt term-out dissenting creditors under the rehabilitation procedure, i.e., even if the rehabilitation plan is not approved by the requisite creditors, the court can determine to apply to the cross-crass cram-down mechanisms at the request of the debtors or the affected parties, provided that the statutory requirements are met (C.Com., L. 631-19). This change has the creditor-friendly aspect because the affected parties, including creditors, may request the court to make such decision. However, this regime ignores the creditors opposing the rehabilitation plan. Furthermore, we should note that the debtor can also request the court to determine to apply to the cross-crass cram-down mechanisms. As a result, even if the debtor cannot obtain the approval from the requisite creditors, cross-crass cram-down mechanisms which are in line with what the debtor expected may be worked.

In addition, the maximum duration of safeguard proceedings has been changed from 18 months to 12 months by the introduction of the Order of 15 September 2021 (C.Com., L. 631-17 and L. 621-3). Although this change may cause the fast restructuring, there are some cases that a debtor wishes to accelerate the restructuring. On the other hand, there are some cases that creditors would like to analyse the debtor's situation and/or restricting plan by taking more time. Therefore, it is not necessary to evaluate that lowering the maximum duration of safeguard proceedings make French insolvency law creditor-friendly.

]

While your answer is correct, it should have been expanded upon further to make it more convincing. For example, for increased protection of creditors, you could have mentioned:

- ***Creditors committees***
- ***New safeguards in place in case of cross-class cram-down by the court***
- ***The reduction of the observation period in safeguard proceedings***
- ***New-money and post-money privileges.***

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

Studies reported that firms that filed for safeguard proceedings were better off than those that went into rehabilitation proceedings. 62% of safeguard proceedings result in a successful restructuring plan, while only 27% of rehabilitation proceedings succeed. Although the difference can be explained by different factors, the reputation of the safeguard also contributes to its success. Since firms under safeguard have a greater change of survival, the opening of this procedure does not drive away

stakeholders – customers, creditors, employees, suppliers – which in turn increases the firm's chances of survival.

Question 3.2 [maximum 5 marks] 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**.**

[As the accelerated safeguard procedures have been adopted in the form of safeguard, the voting conditions and adoption of the plan by the classes of the affected parties in the accelerated safeguard procedures are similar to the (traditional) safeguard procedures, both of which remain the flagship of Book VI of the Commercial Code. Also, However, there are some differences between those proceedings. Firstly, with respect to the accelerated safeguard procedures, the constitution of classes of affected parties is mandatory and automatic. On the other hand, with respect to the (traditional) safeguard procedures, such constitution is not mandatory except for the company that meets the following criteria:

(i) more than 250 employees and an annual turnover of more than 20 million euro; or

(ii) an annual turnover of more than 40 million euro (C.Com., L. 626-29 and R. 626-52).

Furthermore, although the accelerated safeguard proceedings cannot be opened without the conciliation proceedings, there is no such requirement under the traditional safeguard proceedings.

The objective of the traditional safeguard proceedings is to prevent the formal restructuring process. On the other hand, in addition to such objective, that of the accelerated safeguard proceedings is to preserve the debtor's value within the regime of the pre-pack combined with the conciliation proceedings in a speedy method, which can be showed in the adoption of the short deadline of the approval of the plan within 2 months of the opening judgement.]

Question 3.3 [maximum 5 marks] 3

During the debates surrounding the implementation of the EU Directive on Preventive Restructuring Frameworks 2019, some commentators have suggested that the safeguard and rehabilitation procedures should be merged. Consider whether this was a reasonable idea**.**

[The suggestion that the safeguard and rehabilitation procedures should be merged was not reasonable because of the differences between them. As opposed to the rehabilitation proceedings, in order to open the safeguard proceedings, the debtor have to be solvent but experiencing difficulties which it is not able to overcome.

Therefore, the safeguard proceedings can be regarded as pre-insolvency mechanism. To efficiently promote such pre-insolvency mechanisms, the safeguard proceedings are more debtor-driven. For instance, the safeguard proceedings allow only the debtor to propose a plan and/or cross-class cram-down, although a party impaired the plan have the right to propose an alternative plan and creditors can ask the court to make the order of the cross-class cram-down. Furthermore, the maximum duration is 12 months for the safeguard proceedings and 18 months for rehabilitation proceedings. In summary, in relation to the situation to be opened, a party who can initiate proceedings and the duration, there are significant differences between the safeguard and rehabilitation procedures. Thus, even if the safeguard procedures are merged with rehabilitation procedures, the result would just re-name the safeguard with another rehabilitation procedures which are significantly different from the existing rehabilitation procedures, resulting in no reasonable merger.]

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.
To strengthen your answer, you could have relied on figures. Studies reported that firms that filed for safeguard proceedings were better off than those that went into rehabilitation proceedings. 62% of safeguard proceedings result in a successful restructuring plan, while only 27% of rehabilitation proceedings succeed.

Total marks: 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] 1.5

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

[Assuming that Donald is an individual contractor engaged in commercial activity for the professional part of his assets and he must not have been insolvent more than 45 days, he may benefit from a conciliation procedure. This is because the conciliation

procedure which is an out-of-court procedure keep the confidentiality, provided that the conciliation agreement is approved by the court, rather than sanctioned by the court. As a result, Donald can restructure his financial position without the bad publicity or bad reputation.]

More information was required. E.g.

- ***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] 2

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.

[In order to open the conciliation procedure, Donald is an individual contractor engaged in commercial activity for the professional part of his assets and he must not have been insolvent more than 45 days. When the petition is accepted, a conciliator will be appointed by the court or chosen by Donald and then the conciliator will make any proposal related to the preservation of the business or the pursuit of its economic activity. Assuming that he wishes the confidentiality, the conciliation agreement will be approved by the court, resulting in the preservation of the confidentiality.
If he does not care the publicity, the conciliation agreement can be sanctioned by the court. Also, assuming that Donald is a craftsman or independent professional, the following corporate liquidation is available, depending on his financial conditions: ad hoc mandate, safeguard, accelerated safeguard and rehabilitation procedure. To provide Donald with further advice, we need to collect more information.]

Rehabilitation proceedings will only be opened to Donald if his company is insolvent. More information about each procedure was required.
***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.***

Question 4.3 [maximum 5 marks] 2.5

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

[Assuming that Donald is a craftsman or independent professional, he can open accelerated safeguard proceedings. However, it should be noted that he must negotiate the restructuring plan with his creditor in the context of the conciliation proceedings before opening the accelerated safeguard proceedings. The accelerated

safeguard can be opened based on the report prepared by the conciliator, demonstrating that the restructuring plan is likely to be adopted by the requisite creditors. After the open of the accelerated safeguard, if the plan is approved by the two-third majority, the court can approve it and determine to apply to the cross-crass cram-down mechanisms. Such cramdown mechanisms are advantageous for Donald because he does not need to obtain the approval from all creditors. Furthermore, as a benefit of the accelerated safeguard proceedings, Donald may make easier to obtain the new financing because the new financing brought forward during the conciliation proceedings can be protected by the sanction of the conciliation agreement by the court.]

More information was expected.

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: 6 out of 15.

*** End of Assessment ***

Total marks: 35.5 / 50