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] 1

Consider the following two statements:

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

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

Which insolvency procedures do these statements refer to?

[Accelerated safeguard[1]]

What about the second statement? It was referring to liquidation proceedings.

Question 2.2 [maximum 3 marks] 1.5

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

[

1. *Rehabilitation procedure is opened if a debtor is in a debt payment failure while the opening of the safeguard procedure is conditional on the difficulty that the debtor is not in a position to overcome (a more relaxed criterion);*

2. *If the debtor does not comply with the required thresholds the administrator in rehabilitation is entitled to request the insolvency judge for authorisation to form classes of the affected parties **(what about safeguard proceedings?)**;*

3. *Any affected party may submit a draft plan to the approval of the classes **(in which procedure?)**;*

4. *Since 7 August 2015, the court in rehabilitation can order a forced increase of the capital or a forced sale of shares (three months after the commencement of rehabilitation), whereas in the safeguard the capital increase is provided only by the approved plan[2]]*

Question 2.3 [maximum 3 marks] 3

[1] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.4.2, page 34
[2] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Sections 6.4.2-6.4.3, pages 28-39.

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

[

1. *Accelerated safeguard is available to all companies regardless of their size;*

2. *Creditors' committees were replaced by classes of creditors;*

3. *Accelerated financial safeguard was abrogated because there are no longer committees of credit institutions[3]]*

Question 2.4 [maximum 2 marks] 2

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

[

1. *The insolvency practitioners in the two procedures are the ad hoc representative (in ad hoc mandate) and the conciliator (in conciliation);* ***What is the difference in their role?***

2. *Unlike in the ad hoc mandate, the conciliation agreement is ratified by court at debtor's request;*

3. *Unlike conciliation, the ad hoc mandate cannot be converted into the accelerated safeguard;[4]*

4. *The conciliator's mandate lasts for four months and is subject to one month's prolongation, while the ad hoc mandatory is appointed for three months and the term can be renewed several times.[5]]*

Total marks: 7.5 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] 3

[3] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.4.2, page 34.
[4] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.4.1, pages 27-28.
[5] Greffe du Tribunal de Commerce de Paris. Ad Hoc Mandate or Conciliation. Available at: ad-hoc-mandate-or-conciliation (greffe-tc-paris.fr)

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.

[Even though the law reforms aimed at strengthening the position of creditors, France can still be considered a debtor-friendly jurisdiction.

The court takes a leading role at the restructuring proceedings instead of allowing debtor and creditors to negotiate certain restructuring conditions.

The test for insolvency is a mere payment failure obligation (cashflow bankruptcy) unlike in the other jurisdictions, such as Mexico, where balance-sheet insolvency requirements should be met as well. Accordingly, it is easier for the debtor to claim for insolvency in France and introduce a stay on enforcement actions which prevent creditors from ordinary execution of their claims. In 2008, this criterion has been relaxed and the debtor can initiate the safeguard proceedings (a counterpart of the formal bankruptcy proceedings) even before they are in a payment failure situation.

The insolvency procedures can be initiated only by the debtor and creditors have no such right.

The liquidation proceeding can be terminated even before the assets have been sold out if further sale of assets is disproportionate as compared to the challenges of sale of assets. After the liquidation is over, the creditors cannot execute the remaining debts.[6] Full satisfaction of creditors' claims is not among the objectives of the insolvency regulation.[7]

The creditors' class distribution may be ignored while distributing the proceeds due to the absolute priority which is given to the creditors who voted against the safeguard plan.[8]

Still, recent reforms have reinforced the creditors' status. First, Law dated 26 July 2005 has allowed their more active participation in the liquidation proceedings. Law dated 12 March 2014 and Macron Law dated 6 August 2015 have enabled the redistribution ("rééquilibrage") of assets in favour of the creditors as compared to the shareholders.[9]

[6]M. Houssin. Le DROIT FRANÇAIS EST-IL CREDITOR FRIENDLY? Available at: View of Le droit français est-il creditor friendly ? (imodev.org)
[7] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 4.2.2, pages 7-8.
[8] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.4.2, page 33.
[9]M. Houssin. Le DROIT FRANÇAIS EST-IL CREDITOR FRIENDLY? Available at: View of Le droit français est-il creditor friendly ? (imodev.org)

Therefore, generally, French insolvency legislation is debtor-friendly though the recent reforms have reinforced the creditors' rights.

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**.**

[Among the similarities of the safeguard and accelerated safeguard procedures are:

1. *Both procedures are conducted under the court supervision and involve creditors' representatives and an administrator;*

2. *Both procedures involve working out the safeguard plan;*

3. *Both procedures are not confidential;*

4. ***Both procedures allow the "post-money" privilege which is granted to the investors who granted money to the debtor;***

Differences between the two procedures are the following:

1. ***Unlike safeguard, which is a standalone procedure, accelerated safeguard is possible only if the debtor was engaged in the conciliation proceedings;*** [10]

2. ***The judge initiating the safeguard proceedings, launches the observation period to assess the business and calculate the amount of debts in order to work out the restructuring plan;***

3. ***Unlike in safeguard proceedings, formation of classes for all debtors in the accelerated safeguard proceedings is mandatory.***

The objectives of the accelerated safeguard are:

1. ***to reconcile the advantages of the out-of-court, confidential and contractual conciliation proceedings and the court supervision while implementing the conciliation agreement and fitting in the creditors dissenting from the conciliation agreement;*** [11]

2. ***to preserve the company value within a procedure in which a restructuring plan can be adopted with the participation of the involved creditors;***

3. ***to reach an agreement with the creditors in a speedy way.***

The objective of the safeguard is to create a restructuring mechanism which prevents the payment failure. [12]***]***

Question 3.3 [maximum 5 marks] 2

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 my opinion it is not a reasonable idea because despite obvious similarities (approval of the restructuring plan at the end of the procedures, court-based proceedings) the objectives of the proceedings are different.

[1010] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.1.4, page 16
[1111] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.1.4, page 16
[12] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.4.1, pages 28-36.

While the safeguard proceedings primarily aims at preventive restructuring of the debtor which is not yet in the payment failure, the rehabilitation aims at restoring the debtor which is already insolvent and thus involves more imperative tools.

Furthermore, despite similarities, the French government has amended the legislation so that there are additional differences between the two procedures related to duration, formation of creditors' classes, right to submit a restructuring plan to the administrator, application of the cross-class cram-down procedure, the court power to reschedule the debtor's liabilities if the restructuring plan in rehabilitation is not approved. It means that the government aims at preserving both procedures.[13]]

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 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.

[Donald is a professional person, and his debts are connected only to his professional activities.

[13] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.4.3, pages 36-39.

Therefore, insolvency procedures, including conciliation, applicable to corporate entities are applicable to his insolvency.[14]

Conciliation is an out-of-court rescue procedure which allows a debtor to negotiate their debts with the creditors under the supervision of a conciliator on the confidential and contractual basis.

Donald will benefit from the conciliation, because:

1. ***this procedure will allow him to remain in control of his affairs, while the conciliator chosen by him and appointed by the court will oversee the negotiations between Donald and his creditors. Therefore, conciliation will not scare off his clients.***

2. ***conciliation together with another important proceedings ad hoc mandate are out-of-court confidential procedures, which means that conciliation will bring Donald no bad publicity.***

   Even if Donald requests that the court sanction the conciliation agreement, which means that the latter becomes public, such publicity is mitigated by the fact that the new money providers will enjoy a new money privilege if a court-assisted proceedings starts. Besides, the clients will see that Donald has additional investors which will positively affect his reputation.

3. ***Conciliator is a professional who will assess Donald's business and give their professional advice in respect of Donald's professional activity. If Donald does not know what to do anymore, professional advice would be an asset.]***

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.

[Conciliation proceedings are out-of-court proceedings which are opened at Donald's request in case he has not been insolvent for more than 45 days. A conciliator is appointed who supervises the proceedings.[15]

At the end of the proceedings Donald will reach a conciliation agreement with his creditors. Donald can request the court to either approve the conciliation agreement

[14] Commercial Code, Art. L611-1.

[15] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.1.2, page 15.

(confidentiality is preserved) or sanction the agreement (publicising the judgement). Conciliation proceedings can be converted into accelerated safeguard.[16]

The advantages of the conciliation proceedings are confidentiality, out-of-court settlement of debts and professional advice of conciliator in respect of the business strategy.

Furthermore, Donald can benefit from accelerated safeguard proceedings which conciliation may be converted into.] ***You were also expected to discuss the ad hoc mandate and the safeguard.***

Question 4.3 [maximum 5 marks] 3

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

[Conciliation can be converted into accelerated safeguard whose rationale is to implement amicable settlements reached in terms of conciliation to the insolvency proceedings.[17]

The conciliation agreement is converted into a safeguard plan. The procedure cannot last more than 4 months.

The accelerated safeguard can be opened at Donald's request if he proves the three following circumstances:

1. *He has been engaged to the conciliation proceedings;*
2. *The conciliation agreement has been made up and it aims at sustainability and rescue of the company;*
3. *The conciliation agreement is likely to be supported by the involved parties within two months following the opening judgement.*
4. *He is not insolvent for more than 45 days.*

The judge opens the accelerated safeguard proceedings on the basis of the conciliator's report on the likelihood of approval of the restructuring plan by the creditors. Further, the restructuring plan is prepared that should be approved by a sufficient number of the involved parties. The accelerated safeguard permits to

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16 Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.4.1, page 28.

17 Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.1.4, page 16.

preserve the advantages of confidential and contractual out-of-court conciliation and at the same time reconcile the opinions of the dissenting creditors.[18]]

A bit more information needed.

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: 10 out of 15.

*** End of Assessment ***

Total marks: 37.5 / 50

[18] Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, Section 6.4.2, pages 34-36.