



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.**

The answer was A.

Question 1.3

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

- (a) A debtor must not be in a state of insolvency (in a payment failure situation).**
- (b) A debtor must prove that it has not been insolvent for over 45 days and that it is not encountering difficulties that it is not able to overcome.**
- (c) A debtor must be insolvent.**
- (d) A debtor must prove that it has engaged in conciliation proceedings first, which have failed.**

Question 1.4

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

- (a) The debtor's creditors.**
- (b) The president of the court.**
- (c) The director(s) of the company.**
- (d) The director(s) of the company or the company's auditor.**

Question 1.5

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

- (a) A debtor must not be in a state of insolvency (in a payment failure situation) and must not encounter difficulties that it is not able to overcome.**
- (b) A debtor must not have been in a state of insolvency for longer than 45 days.**
- (c) A debtor must prove that it has availed of an *ad hoc* mandate first, which has failed.**
- (d) The rescue of the company must be deemed impossible by its directors.**

Question 1.6

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

- (a) Yes, at the request of the creditors.**
- (b) Yes, at the request of the Public Prosecutor.**
- (c) Yes, at the request of a contractual third party.**
- (d) No, never.**

Question 1.7

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

- (a) When the company is not in a state of insolvency (in a payment failure situation) but is experiencing difficulties which it is not able to overcome.**
- (b) When the company has not been in a state of insolvency for longer than 45 days.**
- (c) When the company is insolvent.**
- (d) When the company is insolvent and the company has attempted conciliation or *ad hoc* mandate proceedings which have failed.**

Question 1.8

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

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

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

Question 1.9

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

- (a) *Ad hoc* mandate.
- (b) Conciliation and *ad hoc* mandate.
- (c) Rehabilitation proceedings.
- (d) *Ad hoc* mandate, conciliation and safeguard proceedings.**

Question 1.10

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

- (a) Foreign judgments can only be enforced if they have been subject to a procedure of *exequatur*. The granting of *exequatur* to a foreign judgment is left at the discretion of the court.
- (b) Foreign judgments can only be enforced if they have been subject to a procedure of *exequatur*. For a foreign judgment to be granted *exequatur*, three conditions must be met: (i) the original judgment must be devoid of any fraudulent intention, (ii) the judgment must comply with international public policy, and (iii) the foreign court or tribunal who issued the judgment must have been competent to do so.**
- (c) Even if foreign judgments have not been granted *exequatur*, there are some ways in which they can be recognised and enforced by French authorities. It is, for example, possible for the French court to recognise a foreign judgment if there are also local insolvency proceedings pending against the same debtor.
- (d) Once *exequatur* has been conferred, the foreign judgment is considered a French judgment.

Total marks: 10 out of 10.

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

Question 2.1 [maximum 2 marks] **2**

Consider the following two statements:

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

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

Which insolvency procedures do these statements refer to?

Statement 1 refers to the accelerated safeguard procedure; these proceedings may be opened upon a debtor's request, provided that the debtor is engaged in the conciliation procedure, a conciliation agreement has been drawn up, and that agreement is likely to receive support from the impacted creditors within 2 months of the judgment commencing the proceedings.

Statement 2 refers to liquidation proceedings; these proceedings may be opened where a debtor is insolvent. A liquidator is appointed to take control of the assets, sell them, and pass the proceeds on to creditors. Alternatively, the liquidator may seek to sell the business as a whole.

Question 2.2 [maximum 3 marks] **3 Very good answer**

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

The rehabilitation procedure, which is governed by Title III of Book VI of the Commercial Code, follows the structure and content of the safeguard procedure, except for certain variations.

The principal threshold difference between the two is that a debtor cannot avail itself of the safeguard procedure if it is in a payment failure situation. By contrast, the rehabilitation procedure requires that the relevant debtor is in a payment failure situation and, as a result, the rehabilitation procedure is relevant to situations that are significantly more severe than the safeguard procedure is. This is reflected in the fact that only the debtor can petition the court to open safeguard proceedings, whereas (in addition to the debtor), any unpaid creditor or the Public Prosecutor may request that the court open rehabilitation proceedings against the debtor.

One consequential variation is that, where the maximum timespan of safeguard proceedings is 12 months, rehabilitation proceedings may take as long as 18 months. That distinction is relatively recent (until the Ordinance of 15 September 2021,

safeguard proceedings could last up to 18 months as well) and serves to distinguish the safeguard and rehabilitation proceedings from each other to reflect their slightly different purposes; the maximum 18 months for rehabilitation proceedings allows debtors further time to negotiate a restructuring plan with its creditors.

*Another variation is that, whilst the voting thresholds and cross-class cram-down mechanism are equal as between the safeguard and rehabilitation proceedings, in the case of safeguard only the debtor may submit a draft plan and the debtor's approval of the forming of classes and the exercise of cross-class cram-down is required *whereas* in the case of rehabilitation proceedings the authorisation to form classes may be requested by the administrator without the debtor's approval, any party affected by the procedure may submit a draft plan for the classes to vote on (even as an alternative to a plan proposed by the debtor (i.e., a competing plan)), and the court may decide to apply the cross-class cram-down mechanism upon the requested of any affected party. In fact, the formation of classes is compulsory in all rehabilitation proceedings, which is not the case in safeguard proceedings; in the latter, only companies that (i) employ over 250 employees and have a turnover greater than EUR 20 million or (ii) have a turnover greater than EUR 40 million must form classes.*

A further difference between the two procedures is that, where the plan is not approved by the requisite classes of creditors (including where not approved by cross-class cram-down), in rehabilitation proceedings the court retains the power to reschedule the liabilities of the debtor by up to ten years, whereas this option is not possible in safeguard proceedings (although it was until the Ordinance of 15 September 2021).

Question 2.3 [maximum 3 marks] **3 Good answer.**

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

Ordinance No 2021-1193 of 15 September 2021 (the "2021 Ordinance") served as a transposition, into France law, of the EU Directive on Preventive Restructuring Frameworks 2019. In doing so, the 2021 Ordinance provided for the accelerated safeguard procedure to meet the requirements set out in the EU Directive on Preventive Restructuring Frameworks 2019 for a restructuring tool that could be voted on in a short timeframe.

The 2021 Ordinance introduced the concept of classes of creditors in both the safeguard and rehabilitation proceedings (with slight variations between the two). The grouping of classes is on the basis of a sufficient equality of economic interests between creditors grouped in the same class, which may vary depending on the nature of the debtor's business and liabilities.

On a related note, the 2021 Ordinance introduced protective measures for the application of cross-class cram-down. For instance: (i) the debtor must consent for the court to apply cross-class cram-down (in a restructuring plan); (ii) creditors that dissented from the plan must be repaid in full wherever a lower-ranking class is entitled to payment or to retain an interest; and (iii) the court must, prior to ordering a cross-class cram-down, be satisfied either that a majority of the classes (including one class that is secured or otherwise senior to ordinary unsecured creditors) voted for the plan or one of the affected classes has voted in favour of the plan.

The 2021 Ordinance also introduced the capacity for debtors in safeguard proceedings to secure post-commencement financing that benefits from a priority ranking ahead of other creditors, where such financing is made in cash for the implementation of the plan or a modification of the plan, or is otherwise authorised by the court. The financing benefits from being payable in priority to most other creditors (excluding certain debts such as wages and legal fees), even if the debtor enters into subsequent restructuring proceedings.

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

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

*The conciliation and *ad hoc* proceedings are both voluntary and amicable procedures, introduced in 2005 to foster workouts between not-yet-insolvent debtors and creditors (with the influence of appointed insolvency practitioners), on a confidential basis.*

*The first significant difference between the two is that a conciliation agreement reached as part of conciliation proceedings will be ratified by the court upon the debtor's request, whereas *ad hoc* proceedings are not ratified by the court. The court's ratification can take either a public or private form.*

*The second significant difference between the two is that, to begin conciliation proceedings, the debtor cannot have been insolvent of a period of more than 45 days, whereas for *ad hoc* proceedings the debtor may not be insolvent at all. The result is that, depending on their financial circumstances, some debtors may be able to avail themselves of both proceedings or only of conciliation proceedings.*

Total marks: 10 out of 10.

QUESTION 3 (essay-type question) [15 marks]

In addition to the correctness, completeness (including references to case law, if applicable) and originality of your answers to the questions below, marks may be awarded or deducted on the basis of your presentation, expression and writing skills.

Question 3.1 [maximum 5 marks] **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.

France remains biased towards restructurings and the protection of creditors’ positions - albeit perhaps less so than has historically been the case.

*France has a range of restructuring and insolvency tools that are designed, in whole or in part, to rescue businesses that encounter financial distress; these include pre-insolvency tools such as the *ad hoc* mandate (*mandat ad hoc*) and conciliation, as well as safeguard (*sauvegarde*), accelerated safeguard (*sauvegarde accélérée*), and judicial rehabilitation (*redressement judiciaire*). The range of these alone surpasses many other jurisdictions’ restructuring frameworks.*

French law provides for debtor-in-possession procedures, which are safeguard proceedings and rehabilitation proceedings. A demonstration of French insolvency law being friendly to debtors is that the former provides for a debtor-in-possession procedure where the debtor is not in a payment failure situation and the latter provides for a debtor-in-possession procedure where the debtor is in a payment failure situation. Debtors have a wide variety of restructuring proceedings to choose from, which are applicable to a wide variety of situations that a debtor might find itself in. In that way, French insolvency law caters to many different debtors.

The French bias towards a debtor-friendly restructuring regime can also be demonstrated by relatively recent developments:

- (1) in 2014, Ordinance No 2014-326 introduced the accelerated safeguard proceeding, emphasised pre-insolvency proceedings, and reformed the framework for creditors to file proofs of claims. Whilst that introduction did increase creditors’ rights in insolvency proceedings, its substance was primarily focused on promoting and strengthening preventative measures and pre-insolvency proceedings.*
- (2) only two years later, in 2016, the Law on the Modernisation of 21st Century Justice emphasised the promotion of a rescue culture - thereby favouring debtors over creditors.*

(3) even more recently, Ordinance 2021-1193 (the “2021 Ordinance”) provided for the conciliation procedure to benefit from a stay on enforcement actions and claims (in favour of debtors).

On the whole, then, it would be more accurate to say that French insolvency law is debtor-friendly, rather than creditor-friendly.

That is not to say that there are no creditor-friendly aspects, however. For instance, the 2021 Ordinance reduced the maximum duration of safeguard proceedings from 18 months to 12 months (the consequence of which is that creditors need not be subject to a stay on enforcement actions for as long as previously) and provided for affected creditors to have the right to propose alternative draft restructuring plans, where rehabilitation proceedings are concerned (which affords creditors a greater licence to dispute a debtor’s proposed draft restructuring plan).

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.

*The accelerated safeguard procedure is, for the most part, subject to the same framework as applies to the “regular” safeguard. As with the “regular” safeguard procedure, accelerated safeguard proceedings: are opened at the debtor’s request; trigger an automatic moratorium, or stay, on creditors taking enforcement action against the debtor (pursuant to Article L611-11 of the Commercial Code), during which time a rehabilitation plan may be proposed to stakeholders; involve the debtor remaining in possession of its business and assets; and include the appointment of one or more administrators (*administrateur judiciaire*) to supervise and/or assist the management of the debtor company to prepare the rehabilitation plan.*

The exceptions to that general principle are set out in the Commercial Code, Book VI, Chapter VIII. The single most significant difference is that a debtor must be engaged in conciliation proceedings in order to open accelerated safeguard proceedings. Consequently, whereas “regular” safeguard proceedings may not be opened if the debtor is in a payment failure situation, accelerated safeguard proceedings may be opened provided that the same threshold as for conciliation proceedings is met (that is, the debtor must not have been subject to a payment failure situation exceeding 45 days, pursuant to Article L628-1 of the Commercial Code).

The opening of accelerated safeguard proceedings is a decision made by the court, which will have regard to a report prepared by the conciliator - containing the

conciliator's independent opinion on the likelihood of the proposed plan being adopted by the affected creditors (pursuant to Article L628-2 of the Commercial Code).

Whereas the objective of "regular" safeguard proceedings is designed to provide a moratorium during which a debtor may negotiate a rescue of its business and affairs, the objective of accelerated safeguard proceedings should be viewed as part of a package, together with conciliation proceedings. The combination of conciliation and accelerated safeguard proceedings allows a debtor to negotiate the proposed plan with creditors during the conciliation "phase" (which may help to ensure confidentiality, whilst maintaining the flexibility of the debtor and creditors contracting freely and on a commercial basis), provides a route for a debtor to secure a cross-class cram-down and protected new rescue financing with a priority of payment over other claims (if the conciliation agreement is sanctioned by the court, at the cost of it becoming public knowledge). Finally, as the name suggests, the purpose of accelerated safeguard proceedings are to achieve a resolution within a brief timeframe (four months, as against the 12 months available for "regular" safeguard proceedings), which may provide a debtor and its creditors with the momentum to agree commercial negotiations efficiently and allow a debtor to resume its business in a shorter timeframe (thus fulfilling the "rescue" element of the conciliation and accelerated safeguard proceedings).

Question 3.3 [maximum 5 marks] **4**

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

*Safeguard and rehabilitation proceedings are, for the most part, quite similar; the processes, observation period (*période d'observation*), roles of stakeholders, and legal rules retain many similarities.*

Those similarities, however, may be misleading because safeguard and rehabilitation procedures have different roles to play in the French restructuring and insolvency framework.

The key difference between the two is that, to avail itself of safeguard proceedings, a debtor may not be insolvent (i.e., in a payment failure situation); by contrast, a debtor must be insolvent to avail itself of rehabilitation proceedings.

Recent changes to safeguard proceedings, including the shortening of its maximum duration to 12 months pursuant to the Ordinance 2021-1193, have served to emphasise safeguard proceedings as a debtor-driven pre-insolvency option for debtors - in contrast to the longer term of 18 months for rehabilitation proceedings.

*Otherwise, another significant difference is that rehabilitation proceedings promote creditor engagement to an extent not undertaken by safeguard proceedings; in rehabilitation proceedings, a creditor may propose its own plan (*plan de sauvegarde*) (as an alternative to the plan proposed by the debtor) and may petition the court to order a cross-class cram-down (which a debtor may only propose to the court).*

Despite their similarities, then, the safeguard and rehabilitation procedures achieve different things by emphasising different elements and perspectives. The question arises: are these differences extensive enough to merit having separate procedures (rather than one combined procedure) for safeguard and rehabilitation?

Since the introduction of the changes made by the Ordinance 2021-1193, the two procedures have become more different, rather than less different. Clearly, therefore, there is an intention for the two procedures to serve different purposes.

If they had been merged, legislators would have had to compromise on:

- (1) the duration of time to allow for the procedure (i.e., 12 months or 18 months), or otherwise allow flexibility (which might reduce certainty for creditors and debtors and lead to worse outcomes as a result);*
- (2) creditor engagement, which would be undesirable because it is eminently logical for a pre-insolvency procedure to curtail creditor engagement and a post-insolvency procedure to promote it to a greater extent; and*
- (3) the entry threshold itself (i.e., pre-insolvency or post-insolvency), which would have undermined the purposes of both procedures.*

Finally, having two different procedures may help to “future-proof” in case of further changes to EU legislation (for instance, if at a later stage the EU introduces legislation requiring a “pre-insolvency” debtor-in-possession tool and a “post-insolvency” debtor-in-possession tool). This may help French insolvency law to retain some flexibility for further changes in the future.

Therefore, whilst it is understandable that certain market commentators believed the two procedures should have been merged (because of their similarities), it was prudent to retain both as separate procedures to ensure their efficacy and impact.

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: 14 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.

Yes, Donald can benefit from a conciliation procedure.

The conciliation procedure is available to debtors who are natural (self-employed) persons or legal persons; in his role as an independent architect, Donald may be acting either as a natural (self-employed) person or via his own corporate entity.

The conciliation procedure is open to a debtor that is experiencing legal, economic, or financial trouble. That is the case in this scenario, because Donald is struggling to pay his expenses, in particular the rent for his office premises, and he is concerned about a liability - all of which amounts to an economic or financial difficulty.

The conciliation procedure is not open to a debtor that has been insolvent for more than 45 days. Under French law, the threshold for a debtor being insolvent is known as a payment failure situation (*cessation des paiements*), which is a cash flow test that assesses whether a debtor is unable to pay their debts as those debts fall due, taking into account the debtor's available assets, credit lines, and moratoria. It does not appear that Donald has been unable to pay his debts as they fall due (although Donald is struggling to pay his expenses, we are not told that he has been unable to pay any). Therefore, Donald has not been insolvent at all - never mind for more than 45 days - although he might become insolvent in the near future.

Therefore, Donald meets the eligibility criteria to benefit from a conciliation procedure, and he may make a request to the court accordingly.

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.

The objective of conciliation is for a debtor to negotiate a workout with its creditors before becoming insolvent (or within a short timeframe of becoming insolvent), confidentially and on a contractual basis.

*Upon making an application to court to open conciliation proceedings, a conciliator (*conciliateur*) is appointed - the appointment will be made either by Donald or by the court. The conciliator is an independent insolvency professional, whose role is to oversee the conciliation procedure and to make any proposal that is relevant for the preservation of the business (in this case, Donald's business as an independent architect). Otherwise, Donald will remain in control of his affairs.*

*Thereafter, Donald will be able to negotiate a conciliation agreement with his creditors, in relation to his liabilities. Once the substance of the conciliation agreement has been agreed (with the help of the conciliator), Donald will have the options of requesting that the court either approve the agreement (*constatation*) or sanction the agreement (*homologation*). If the court were to approve the agreement, the procedure would remain confidential; if the court were to sanction the agreement, the procedure would become public knowledge but, in the event of accelerated safeguard proceedings being opened at a later time, the impact of the conciliation proceedings would be greater because investors would be able to inject new money with a priority ranking.*

Given Donald is concerned that bad publicity may scare off prospective clients, it may be more attractive for him to request that the court approve the conciliation agreement (such that the proceedings remain confidential).

In summary, the conciliation proceedings would be advantageous to Donald because they would allow him the "breathing space" to negotiate a contractual agreement with his creditors to help to preserve his business, include the involvement of a professional (i.e., the conciliator) to help him to negotiate with his creditors and business partners with a view to a mutually beneficial arrangement, and could be kept confidential and out of the public sphere.

The other insolvency procedures that Donald might avail himself of are:

- (a) *if acting by a corporate entity, and provided that Donald's business is not yet insolvent, the ad hoc mandate (which, similarly to conciliation proceedings, would provide Donald with a platform to enter into contractual negotiations with creditors), safeguard proceedings, or (following conciliation proceedings) accelerated safeguard proceedings; or*
- (b) *if acting in his personal capacity, a personal bankruptcy (whether a personal recovery with or without judicial liquidation).*

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.

Accelerated safeguard proceedings are only available to corporate entity debtors that are already in conciliation proceedings (i.e., it is not a standalone procedure). Assuming that Donald's independent architect business meets those criteria, Donald would be able to open accelerated safeguard proceedings.

Conceptually, the purpose of accelerated safeguard proceedings is to allow for the implementation (in insolvency proceedings) of a restructuring solution that has been agreed, between the debtor and its creditors, during the period of the conciliation proceedings.

Accelerated safeguard proceedings are similar to safeguard proceedings, with some variations. Accelerated safeguard proceedings have a maximum duration of four months and an objective of preserving the debtor's value where a restructuring plan can be agreed by the debtor's affected creditors (in this case, Donald's landlord and lender(s)).

Conciliation proceedings may be opened at the request of a debtor where the debtor is engaged in conciliation proceedings, a conciliation agreement has been drawn up, and such agreement must be likely to have the support of the affected creditors in the period of two months following the opening of the proposed accelerated safeguard proceedings. When assessing the application for opening, the court will consider a report prepared by the conciliator as to the feasibility of the success of the proposed accelerated safeguard proceedings (including the plan that has been prepared).

The advantage is that this two-fold approach combines the confidentiality of the conciliation proceedings with the speed, contractual flexibility, and finality of the accelerated safeguard proceedings. If the conciliation agreement has been sanctioned by the court, there is also the added benefit that part of the accelerated safeguard proceedings may be the injection of new capital into the business of the debtor at a higher priority to other lenders. This may encourage lenders to provide some capital to stabilise the business, albeit at the cost of the debtor losing the confidentiality aspect of the conciliation proceedings.

Donald might have to assist with the composition of classes - albeit that aspect should not prove difficult, given the number of his creditors appears rather low. There will also be pressure to agree the plan within the tight two month deadline because, without any agreement, the accelerated safeguard proceedings will be closed.

Total marks: 15 out of 15.

*** End of Assessment ***

Total marks: 49 / 50