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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6F**

**BELGIUM**

This is the **summative (formal) assessment** for **Module 6F** 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 6F**. 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 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, although some lecturers may indicate the maximum length they are looking for. 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.assessment6F]**. An example would be something along the following lines: 202223-336.assessment6F. **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 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. 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**

In Belgium, the court system is divided into several layers. How many layers are there in this regard?

Choose the **correct answer**:

1. The Belgian court structure is a two-tier system.
2. The Belgian court structure is a three-tier system.
3. The Belgian court structure is a four-tier system.
4. The Belgian court structure is a five tier-system.

**Question 1.2**

Which option below describes the treatment of insolvency proceedings in the United Kingdom under Belgian law?

Choose the **correct answer**:

1. These proceedings are eligible for recognition under the European Insolvency Regulation.
2. These proceedings are automatically recognised under the European Insolvency Regulation.
3. These proceedings can be recognised under the European Insolvency Regulation or the UNCITRAL Model Law.
4. These proceedings may be recognised in compliance with the Belgian Code of Private International law.

**Question 1.3**

Which insolvency regimes are applicable to individuals in Belgium?

Choose the **correct answer**:

1. Bankruptcy, liquidation and judicial reorganisation.
2. Bankruptcy and judicial reorganisation.
3. Liquidation and collective debts settlement.
4. Bankruptcy, judicial reorganisation and collective debts settlement.

**Question 1.4**

Which payments made by a Belgian company to its shareholders are likely to be set aside by a trustee, assuming that these payments were made seven months prior to the bankruptcy of the company?

Choose the **correct answer**:

1. None, as the look-back period (“suspect period”) for payments is only six months.
2. Payment of dividends and repayment of shareholder loans.
3. All payments that were not made for arm’s-length consideration.
4. Payment of dividends and repayment of shareholder loans.

**Question 1.5**

Which one of the following options is considered as a rescue regime in Belgium?

Choose the **correct answer**:

1. Bankruptcy.
2. Judicial reorganisation.
3. Collective debts settlement.
4. Judicial reorganisation and collective debts settlement.

**Question 1.6**

Is there a Belgian insolvency regime that is a DIP (debtor-in-possession) regime?

Choose the **correct answer**:

1. Yes, namely collective debts settlement.
2. Yes, namely bankruptcy.
3. Yes, namely judicial reorganisation.
4. No, as all of the insolvency regimes are considered to be PIP (practitioner-in-possession) regimes.

**Question 1.7**

Which one of the following statements is **incorrect**?

1. Termination clauses in contracts are valid in the case of bankruptcy.
2. Termination clauses in contracts are valid in the case of judicial reorganisation.
3. Termination clauses in contracts are valid in the case of liquidation.
4. Existing agreements are not automatically terminated by virtue of a bankruptcy.

**Question 1.8**

Which one of the following statements is **incorrect**?

1. Bankruptcy entails a *concursus* under Belgian law.
2. Corporate liquidation entails a *concursus* under Belgian law.
3. As a general rule, judicial reorganisation entails a *concursus*.
4. The (supervised) transfer of all or part of the business in the framework of a judicial reorganisation entails a *concursus*.

**Question 1.9**

Choose the **correct statement**:

1. Under Belgian law, cross border insolvencies are dealt with under the UNCITRAL Model Law on Cross-Border Insolvency.
2. Under Belgian law, cross border insolvencies are dealt with under the European recast regulation.
3. Under Belgian law, cross border insolvencies are dealt with under with the European recast regulation, the Belgian Code of Private International law, and any international (bilateral) convention as the case may be.
4. Under Belgian law, cross border insolvencies are dealt with under the Belgian Economic Code.

**Question 1.10**

Choose the **correct statement**:

1. A company that is in a state of cessation of payments can only benefit from the bankruptcy regime.
2. A company that is in a state of cessation of payments can only benefit from corporate liquidation.
3. A company that is in a state of cessation of payments can benefit from the collective debts settlement.
4. A company that is in a state of cessation of payment can benefit from the bankruptcy regime, the judicial reorganisation regime and the corporate liquidation regime.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 2 marks]**

Compare the treatment of existing contracts under judicial reorganisation to the treatment thereof under bankruptcy. (Candidates should restrict their answers to no more than 100 words.)

In case of judicial reorganisation, contracts can not be terminated by creditors since the goal is to revive the business as a going-concern (debtor-friendly procedure), but the debtor has the right to terminate contracts during the suspension period if it is in the interest of the estate. However, contracts under bankruptcy are generally treated in a creditor-friendly way as the purpose is to liquidate assets: contracts are terminated if it is agreed so or if the contract is *intuitu personae*; according to BEC, Art XX.139, §1, s 1, the trustee retains the powers to continue or no with an existing agreement.

**Question 2.2 [maximum 4 marks]**

What is the status and the rights of a mortgagee in the event of the judicial reorganisation of its debtor (the mortgagor)? (Candidates should restrict their answers to no more than 100 words.)

In case of judicial reorganization of the debtor (mortgagor), according to Art. XX50 of the Belgian Economic Code, the mortgagee is subject to a stay on enforcement due to the moratorium provided to the debtor to reorganize its estate. However, the security right remains valid and the rights of the mortgagee can be suspended for no more than 24 months (with another 12 months extension possible). That considered, the mortgagee still has the right to receive interest payments on the claim and qualifies as an extraordinary creditor protecting the mortgagee from any forced haircut on its claim during the reorganization plan.

**Question 2.3 [maximum 4 marks]**

Name and briefly summarise the ways in which judicial reorganisation may commence under Belgian law. (Candidates should restrict their answers to no more than 150 words.)

The goal of judicial reorganization is to maintain the continuity of the business under court supervision. It is typically commenced at the request of the debtor (which has short or long-term financial issues or be already in a state of bankruptcy) that petitions the court to open the proceeding, upon which a moratorium is granted for up to 6 months. It can be commenced by 3 court-supervised processes: (i) by amicable settlement which allows the debtor to negotiate, under the supervision of a delegated judge, an amicable settlement with at least 2 or more of its creditors; (ii) by collective agreement which allows the debtor to submit a reorganization plan to be voted by a majority of creditors and later sanctioned by the court; and (iii) by way of a transfer of all or part of the business under court supervision which allows the court to order the transfer of all or part of the activities, with or without the consent of the debtor, if the debtor is bankrupt or a reorganization plan has failed.

**QUESTION 3 (essay-type questions) [15 marks in total]**

**Question 3.1 [maximum 8 marks]**

Is Belgian insolvency law creditor- or debtor-friendly? Motivate your answer by providing a few concrete examples (Candidates should restrict their answers to no more than 400 words.)

Belgian insolvency law is generally more creditor-friendly but has equally important features of a debtor-friendly regime. In terms of being creditor-friendly, creditors in bankrupt or defaulting estates can terminate or suspend the performance of contracts. This is in reference to the *exceptio non adimpleti contractus* that enables a creditor to stop performing a contract when the debtor defaults (right of retention). For instance, if a telecom company that sources semi-conductors from suppliers is declared bankrupt, the supplier can seek to terminate these valuable agreements and suspend delivering materials until its claim has been settled. Additionally, creditors can ask the court to transfer part or all of the business if the debtor is bankrupt, has failed to file for judicial reorganisation, or if a reorganisation plan is not approved by the creditors. For instance, a bank, that has not been able to agree on a restructuring plan with a debtor and carries a large exposure to the company, could petition the court to transfer parts of the business to an investor and recover its claims. An additional creditor-friendly feature is the ability of creditors, during judicial reorganisation, to retain titles under certain circumstances, effect set-off, enforce receivable pledges, and enforce security over financial collateral despite a moratorium being in place. For instance, a working capital financing company that was not paid by a manufacturing business over successive instalments can enforce on its receivable pledge notwithstanding the moratorium granted to the debtor. A final argument towards the credit friendliness of the regime is the concursus principle of fair sharing of the proceeds from the corporate liquidation of the debtor’s assets according to the claim stack of the creditors, which is a key driver of corporate liquidation.

However, the Belgian insolvency regime can be considered debtor-friendly to some extent. Indeed, the judicial reorganisation procedure is a debtor-in-possession process initiated by the debtor, the purpose of which is a rescue of the business, and offers different avenues to salvage the business, including by way of amicable settlement, by way of collective agreement or by transfer (I would argue it is to be considered debtor-friendly if used by the debtor). Additionally, there is a possibility of expedited pre-packaged reorganisation based on the law of 21 March 2021 introducing the Pre-Pack Law which offers an expedited path to a DIP debtor-driven restructuring process. As for individuals, the collective debt settlement procedure is considered debtor-friendly as it is focused on human dignity to enable the individual to pay their debts and restore their financial health.

**Question 3.2 [maximum 7 marks]**

Under Belgian insolvency law, would it be advisable to obtain a personal guarantee in order to be protected against the insolvency of a debtor? Provide reasons for your answer. (Candidates should restrict their answer to no more than 300 words.)

The personal guarantee falls under the type of personal security that is governed by Art 2011-2043octies of Belgian Civil Code. The person can be jointly or severally liable for the debt of the principal debtor, which entails different levels of risks for the guarantor. In general, outside insolvency, a creditor that benefits from a personal guarantee can enforce its rights out of court provided that a court judgment is obtained against the guarantor. Under Belgian law, indeed, personal security is fully enforceable if the main debtor is insolvent. These rules are governed by Arts 2043bis-2043octies and some exceptions thereof. Irrespective of whether the creditor benefitting from the personal guarantee is a preferred creditor in the context of a bankruptcy or winding-up or an extraordinary creditor in the case of a judicial reorganisation, the fact that the creditor carries in its arsenal a personal guarantee when the main debtor is insolvent improves its position compared to other ordinary creditors *ceteris paribus.* By enforcing against the personal guarantee, the creditor increases its changes of recovery, allowing the creditor to take a recourse both against the debtor and guarantor, thus double-dipping, and as a result increases their chances of higher recovery and potentially efficiency and time to recovery. Consequently, yes, it is advisable under Belgian insolvency law to obtain a personal guarantee in order to be protected against the insolvency of a debtor. The personal guarantee increases the potential and recourses for recovery and therefore can act as a strong security inside and outside insolvency proceedings.

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

You represent a group of companies, the parent company of which is located in France. The group is engaged in the business of worldwide car manufacturing.

The parent company has issued corporate debt instruments (bonds) through a special purpose Belgian subsidiary, the proceeds of which were used by the Belgian subsidiary to make loans to the operational companies in the group. The Belgian subsidiary has a board consisting of Belgian nationals and has a small office in Brussels. In fact, the board of each company in the group consists of the same Belgian nationals. The bonds are guaranteed by an intermediate holding company, which is also located in France. The parent company and its subsidiaries also benefit from significant credit facilities, mainly granted by the Belgian entity of the bank BNP Paribas (that is BNP Paribas Fortis). Over the last few years these credit facilities have been intensively used and have been increasingly difficult to repay.

The parent company is exploring options to safeguard the group’s activities as the overall indebtedness of the group has dramatically increased over the years. The contemplated restructuring should take place sometime in the second half of 2022. The parent company’s general counsel in Paris has asked you to advise whether they can use French proceedings, which they are used to, in relation to the bonds issued by the Belgian entity. In any event, general counsel has made it very clear that he will be very disappointed in his legal advisors if he is held to open, and pay for, full legal proceedings in more than one jurisdiction.

**Using the facts above, answer the question that follows.**

Explain what would be the most suitable insolvency proceedings to utilise in Belgium, should this restructuring be dealt with in Belgium (regardless of any private international law / conflict of laws issue). Further, based on the Belgian rules that are applicable, also discuss where the envisaged restructuring can be commenced with. Students should elaborate on any issues that may be encountered. Students are required to answer the question from a Belgian law perspective only.

(Candidates should restrict their answers to no more than two (2) A4 pages.)

**The most suitable insolvency proceedings to utilise in Belgium:**

The parent company should seek a voluntary reorganisation in Belgium, as a preventive measure, on the basis of Book XX of the Belgian Code of Economic Law. Judicial reorganisation by way of collective agreement appears to be the most suitable insolvency proceeding to utilise because it is a debtor-in-possession court-supervised procedure, which is primarily voluntarily, aimed at safeguarding the group’s activities of car manufacturing that carries multiple countries and probably a large workforce. Judicial reorganisation by way of collective agreement is well-suited to deal with this complex capital structure that involves bonds, loans and multiple credit facilities benefiting and guaranteed by various levels in the legal structure; this proceeding will facilitate the preparation of a comprehensive reorganisation plan and matches with the company’s need to agree and implement the restructuring plan in the second half of 2022, while commanding an overall suspension of creditors’ enforcement rights during the moratorium period, which is a critical issue given the large indebtedness of the group and the various creditors involved at various levels. For instance, the bondholders and BNP Paribas Fortis could agree to a deferral of their payments for up to 24 months and receive only interest during that period, which will reduce the burden on the group’s internal cash flows. Once the reorganisation plan is drafted, it must be submitted for vote to the bank and bondholders who must approve by more than 50%, for creditors that represent more than half of the principal. The plan could consider various solutions such as reduction of interest and principal or conversion of debt to equity. Once the plan is approved, it is sanctioned by the Belgian court and the company will be required to abide by the agreed plan. If the reorganisation plan fails to be approved or is not respected by the company, creditors may revoke the approval of the plan or the company could be forced into bankruptcy or corporate liquidation.

**Where the envisaged restructuring can be commenced with:**

Since the group of companies are all located in the European Union, the main framework to consider is the Recast European Insolvency Regulation EU 2015/848 (EIR). With a view to have as few proceedings as possible and as much recognition as possible, and using the notion of COMI and its interpretation under Belgian law, Belgium can be considered as the location of the main proceeding as the COMI analysis suggests that (i) the registered office of the Belgian subsidiary is in Belgium; (ii) it appears that the debtor conducts the administration of its interests on a regular basis from this Belgian entity (it is possible that the main bank account is in Belgium given that the facilities are raised from a Belgian subsidiary i.e. BNP Paribas Fortis) on grounds that the board is held in Belgium and the same board members administer all other entities in the group, which lends credence to the “head office function” theory; and (iii) it could be argued that the COMI of the group is in Belgium as ascertained by third parties in light of the above facts. As a result, the judicial reorganisation’s main proceeding can be commenced in Belgium where the Belgian subsidiary is located in light of its registered office in Brussels. However, given that there is an intermediate holding company located in France guaranteeing the bonds and the other credit facilities are borne by the parent company and the French subsidiaries as well, arguably, there is a strong aspect of cross-border insolvency to be considered: as a result, secondary proceedings could be opened in France. Once the judicial reorganisation is opened in Belgium and in light of EIR, this commencement triggers the automatic recognition in all other Member States, including France, on the principles of the *lex fori concursus.*

**\* End of Assessment \***