



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: 202122-336.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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 **8 pages**.

ANSWER ALL THE QUESTIONS

Commented [CMS1]: TOTAL : 44.75 marks

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

Commented [CMS2]: Well done, 10 marks!

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**:

(a) The Belgian court structure is a two-tier system.

(b) The Belgian court structure is a three-tier system.

Commented [CMS3]: Correct, 1 mark

(c) The Belgian court structure is a four-tier system.

(d) 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**:

(a) These proceedings are eligible for recognition under the European Insolvency Regulation.

(b) These proceedings are automatically recognised under the European Insolvency Regulation.

(c) These proceedings can be recognised under the European Insolvency Regulation or the UNCITRAL Model Law.

(d) These proceedings may be recognised in compliance with the Belgian Code of Private International law.

Commented [CMS4]: Correct, 1 mark

Question 1.3

Which insolvency regimes are applicable to individuals in Belgium?

Choose the **correct answer**:

(a) Bankruptcy, liquidation and judicial reorganisation.

(b) Bankruptcy and judicial reorganisation.

(c) Liquidation and collective debts settlement.

(d) Bankruptcy, judicial reorganisation and collective debts settlement.

Commented [CMS5]: Correct, 1 mark

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**:

(a) None, as the look-back period ("suspect period") for payments is only six months.

Commented [CMS6]: Correct, 1 mark

(b) Payment of dividends and repayment of shareholder loans.

(c) All payments that were not made for arm's-length consideration.

(d) 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**:

(a) Bankruptcy.

(b) Judicial reorganisation.

Commented [CMS7]: Correct, 1 mark

(c) Collective debts settlement.

(d) 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**:

(a) Yes, namely collective debts settlement.

(b) Yes, namely bankruptcy.

(c) Yes, namely judicial reorganisation.

Commented [CMS8]: Correct, 1 mark

(d) 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**?

- (a) Termination clauses in contracts are valid in the case of bankruptcy.
- (b) Termination clauses in contracts are valid in the case of judicial reorganisation.**
- (c) Termination clauses in contracts are valid in the case of liquidation.
- (d) Existing agreements are not automatically terminated by virtue of a bankruptcy.

Commented [CMS9]: Correct, 1 mark

Question 1.8

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

- (a) Bankruptcy entails a *concursum* under Belgian law.
- (b) Corporate liquidation entails a *concursum* under Belgian law.
- (c) As a general rule, judicial reorganisation entails a *concursum*.**
- (d) The (supervised) transfer of all or part of the business in the framework of a judicial reorganisation entails a *concursum*.

Commented [CMS10]: Correct, 1 mark. This is only in the case of a transfer that there is a (limited) *concursum*

Question 1.9

Choose the **correct statement**:

- (a) Under Belgian law, cross border insolvencies are dealt with under the UNCITRAL Model Law on Cross-Border Insolvency.
- (b) Under Belgian law, cross border insolvencies are dealt with under the European recast regulation.
- (c) 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.**
- (d) Under Belgian law, cross border insolvencies are dealt with under the Belgian Economic Code.

Commented [CMS11]: Correct, 1 mark

Question 1.10

Choose the **correct statement**:

- (a) A company that is in a state of cessation of payments can only benefit from the bankruptcy regime.
- (b) A company that is in a state of cessation of payments can only benefit from corporate liquidation.

(c) A company that is in a state of cessation of payments can benefit from the collective debts settlement.

(d) 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.

Commented [CMS12]: Correct, 1 mark

QUESTION 2 (direct questions) [10 marks]

Commented [CMS13]: 8,25 marks

Question 2.1 [maximum 2 marks]

Commented [CMS14]: 1.25 marks

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

According to Article XX.56 of the Belgian Code of Economic Law ("BCEL"), existing contracts remain **valid** and cannot be terminated or modified for reasons of initiating **judicial reorganization proceedings**.

For **bankruptcy**, the contracts are not terminated automatically, unless the contract has a termination **clause**. Alternatively, the appointed **trustee** may decide whether the existing contracts, concluded prior to the declaration of bankruptcy, should be terminated for the sake of the bankruptcy estate, see Article XX.139 BCEL. Contract parties may demand the trustee to take a decision within 15 days. If s/he remains silent, the contract is considered terminated.

Commented [CMS15]: Correct but not complete. There is a possibility for the debtor to suspend the contract + a possibility for the creditor to terminate it after sending out a proper notice of default which remained a dead letter for 15 days.

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)? (Students should restrict their answers to no more than 100 words).

It should be noted that the mortgagee is an **"extraordinary creditor"** in case of a suspension of payments under Article I.22, 14° and 15° BCEL.

Any measure of enforcement is stayed during the judicial reorganization with a **moratorium**, see Article XX.50 BCEL. This moratorium cannot last more than 24 months from the date of the approval of a reorganization plan (homologation).

However, according to Article XX.74 BCEL, during the suspension of payments, the mortgagee can still receive payment for the **interests** on its claim.

Other measures need the mortgagee's **consent** before implementation, including reducing the amount needed to be repaid.

Commented [CMS16]: Perfect, 4 marks!

Question 2.3 [maximum 4 marks]

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

A judicial reorganization (such as amicable or collective agreements or transfer of assets) under court supervision begins with a **request by the debtor** to the court, see Article XX.41 BCEL, which lists the required information – and its exceptions - for a valid application. These include, among others, a description of events leading to the application and proof of threatened continuity, two most recent annual accounts and a balance sheet (not older than 3 months), list of creditors, proposals and measures for restoring the financial situation, and a budget describing the revenues and expenses during the moratorium.

With the **exception of the procedure of transfer of assets under court supervision**, the public prosecutor, the creditor(s), or other third parties may **not** initiate judicial reorganization proceedings.

Commented [CMS17]: Good answer. Nevertheless, you could also have discussed the specific conditions for opening the judicial reorganisation (i.e. the continuity must be threatened in the short or medium term). You could also have added that a cessation of payments is not an obstacle to the opening.

Commented [CMS18]: 3 marks

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

Commented [CMS19]: 13 marks

Question 3.1 [maximum 8 marks]

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

Whether Belgian insolvency law is creditor or debtor-friendly **depends on the tool** and procedure that is used when the business is in distress, as each differs in its aims, safeguards, and in the priority the procedure gives towards either creditors' or debtors' interests.

The out-of-court amicable and the judicial reorganization procedures are part of a debtor-friendly regime. The debtor remains (partially) in possession, has many restructuring tools in its power, and can make use of safeguards in order to ensure a smooth restructuring process without interruptions.

In the past decade, the Belgian legislator has developed an interest in establishing and improving the rescue and restructuring regime. For example, Belgium previously had no codified legislation on restructuring but rather a combination of codes and piecemeal laws. This is now – at least partially – merged in the Belgian Code of Economic Law (Book XX). As such, there a focus towards establishing a preventive approach in the Belgian insolvency and restructuring landscape, unlike the initial creditor-friendly and bankruptcy-oriented legal framework, see 1851 Bankruptcy Act (amended in 1946), which was primarily aimed at liquidation and asset sales of the distressed business for distributing the proceeds among creditors.

With the current debtor-protective restructuring framework, the debtor can impose a moratorium upon creditors without their individual consent. This is one of the key elements of a debtor-friendly approach and results in the debtor's interests taking priority over the creditors. These are unsecured creditors but could also include – with limited exceptions – secured creditors, which are relatively more protected and may, in principle, require payment within a reasonable period or enforce their claims.

One other important note is that the interests of the creditors are not completely disregarded and are even balanced with the debtor's interests in order to avoid any potential abuse by the distressed debtor.

The collective debts settlement procedure is also a debtor-friendly regime as it aims to provide (not corporate but natural) debtors with human dignity.

However, **bankruptcy (for both natural and legal persons) and liquidation (only for legal persons) are considered more creditor-friendly** as its main objective is to liquidate and sell off assets for the benefit of the creditors.

As such, while there is a general tendency towards a debtor-friendly regime, Belgian insolvency law **cannot be classified as debtor-friendly as a whole but should rather be assessed by the type of law or tool in question.**

Commented [CMS20]: Excellent! 8 marks

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. (Students should restrict their answer to no more than 300 words.)

A **personal guarantee** (*cautionnement* or *borgtocht*) is codified in Article 2011 of the Belgian Civil Code ("BCC"). This guarantee is an agreement between a third person, the guarantor, and a creditor and binds the guarantor to the creditor for paying the debt of the debtor in case the debtor cannot fulfil its duty of repayment. The agreement should be reached based on the parties explicit and consensual will under the principle of contractual freedom. **Apart from these conditions, there are no other formalities, see Article 2015 BCC.** This i

In case of an **insolvency**, the guarantee is meant as a protection against a potential insolvency of the (main) debtor. However, on the one hand, such a **guarantee does not entitle** the creditor to a preferred creditor position in bankruptcy and liquidation proceedings, nor to an extraordinary creditor position in judicial reorganization proceedings.

On the other hand, creditors with a personal guarantee are still better off than ordinary creditors as the guarantee is **fully enforceable without limits, including the insolvency of the debtor**, see Article XX.175 BCEL. After payment, the guarantor can then proceed to take a recourse against the main debtor as ordinary creditor. **One exception is that the guarantor cannot make competing claims until the original creditor has been paid in full.**

Moreover, the creditor may also make use of the so-called "**double-dipping**" act, which enables the creditor to take recourse against both the main debtor (file full claim in the insolvency proceedings) and the guarantor (demand payment) at the same time, on the condition that it does not exceed the total sum of the claim.

As such, a personal guarantee has many benefits and could be recommended for the creditor to receive a certain degree of protection against a potential insolvency of the debtor.

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.

Commented [CMS21]: 5 marks

Commented [CMS22]: Not mentioned in the Guidance Text and not accurate (see article 1326 BCC).

Commented [CMS23]: With the exception of personal guarantee without consideration.

Commented [CMS24]: Not completely accurate. It is merely and usually contractually agreed on.

Commented [CMS25]: 13.5 marks

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.

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

Question 1: The parent of the car manufacturing group of companies (henceforth: "CarManu") has its seat in France and has a Belgian subsidiary. For the sake of the first question, the private international law and conflict of law issues will be set aside, and the focus will remain on the Belgian insolvency framework. CarManu has three options under the judicial reorganization framework. Prior to resorting to the judicial proceedings, it can attempt to restructure privately by way of **out-of-court amicable agreements**, with the optional assistance of a business mediator. The downside is that there is no moratorium implemented and any (other) creditor may enforce its claim without limits. If such negotiations fail, the debtor may always resort to judicial reorganization.

The other pre-procedural option – recently implemented in the Belgian national framework – is the **pre-pack**. It is recommended to **combine a pre-pack procedure with a subsequent judicial amicable agreement or a collective agreement**. The official proceedings are opened and conducted at a pace. CarManu may draw up preparatory agreements prior to commencing official and public judicial reorganization proceedings. The company may seek the assistance of a judicial representative to facilitate the reorganization. S/he enters into negotiations and may seek a (private) intervention from the enterprise court for a suspension of payments (which, as discussed above, is not available for out-of-court amicable agreements). This may be a better option for CarManu to follow as this procedure provides a judicial backing, sufficient protection, and a fast resolution. Once an acceptable agreement is reached, the pre-pack phase is successfully completed and converted into judicial reorganization proceedings. These processes are either **judicial amicable agreement** – aimed at obtaining an agreement with two or more creditors that will be binding solely on the parties to the agreement – or a **collective agreement** – aimed at drafting a plan that will be approved by the majority of creditors representing a majority of the claims. Once the plan is approved, the plan is also binding on dissenting creditors. This shows the wide variety of tools and combinations a distressed enterprise may use in Belgium.

As such, considering that CarManu seems to have one main creditor, BNP Paribas Fortis Belgium, perhaps following the pre-pack trajectory followed by a judicial amicable agreement is the most viable option. One would not immediately recommend the collective agreement proceeding as it is subject to many formalities and legal obligations (eg reorganization, voting, and homologation conditions, including the approval of a meeting of creditors) and may unnecessarily prolong the process, but it is the next best alternative. Lastly, in this particular case, the **transfer of all or part of the activities under court supervision procedure** is not the best choice as the parent company highlights the importance of safeguarding the group's activities. Therefore, it is recommended to opt for a **pre-pack followed by a judicial amicable agreement**.

Question 2 & 3: However, before discussing which restructuring options to use in Belgium, it is important to consider whether the (main) proceedings could, in fact, be opened in Belgium. As CarManu is an enterprise group with – according to the facts of the case – a subsidiary in Belgium and France, with the parent company located in France, the case remains within the borders of the European Union. As such, this cross-border case does not – from the Belgian perspective – trigger the Belgian Code of Private International Law but falls **under the scope of the European Insolvency Regulation Recast 2015/848 ("EIR Recast")**. According to the EIR Recast, main proceedings can be opened in the jurisdiction in which the company has its **Center of Main Interests (COMI)**. According to **Article 3(1) EIR Recast**, a COMI is situated where the debtor – in this case CarManu – "conducts the

Commented [CMS26]: Very good!

Commented [CMS27]: 5 marks

Commented [CMS28]: Question 2: 5 marks

Question 3: 3,5 marks

administration of its interests on a regular basis and which is ascertainable by third parties". The second paragraph also provides a presumption to assess the COMI of a corporation, stating that "the place of the **registered office** shall be presumed to be the center of its main interests in the absence of proof to the contrary" and save for any forum shopping in the three-month suspect period. In [Case C-341/04 Eurofood IFSC Ltd](#), the CJEU stated that the COMI should be identified by reference to objective criteria that are ascertainable by third parties in order to ensure legal certainty and foreseeability ([paragraph 33](#)). As such, the registered office presumption can only be rebutted if objective factors which are ascertainable by third parties could lead to the conclusion that the COMI is located elsewhere than the registered seat – such as in the case of shell companies ([paragraphs 34&35](#)). The latter concerns a "time" condition, meaning that the debtors' activities need to be regular and lasting.

An earlier interpretation of this presumption was rather stringent in Belgium (see, *Court of Appeal of Liège 28 April 2011, T.B.H. 2012/2, February 2012, pp. 165-172*). The court of Verviers ruled that it did not have jurisdiction to open proceedings as the registered office, the address, and a bank account – and hence, the COMI - of that company was located in another EU Member State. Following the [Case C-396/09 Interedil Srl, in liquidation v Fallimento](#), the Belgian interpretation softened and a new "head office function" approach was developed to locate the COMI of group enterprises. The CJEU had stated that the mere presence of company assets, contracts (concluded with a financial institution), etc located in a Member State other than that in which the registered office is situated cannot be interpreted "as sufficient factors to rebut the presumption (...) unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's [COMI] is located in [an]other Member State" ([paragraph 53](#)). Both the Belgian *Parfip, Brussels Commercial Court, 7 June 2017* case and the *Maxi Toys, Mons Enterprise Court, 18 May 2020* case developed the head office function approach. The location of the activities of the debtor such as undertaking strategic, executive, and administrative decisions concerning accounting, branding, or corporate marketing etc is the location of its head office as it corresponds to the debtor's center of supervision and management of its interests ascertainable by third parties, ie the COMI. In these cases, facts such as the management and control bodies, the bank accounts, financial means, operating companies were determining factors in establishing the head office function.

Applying these to the case in question, CarManu only has a special-purpose subsidiary in Belgium, which was only meant for issuing bonds to make loans for the operational companies of the group (which seem to be located elsewhere). The board of directors of each company within CarManu are of Belgian nationality. The main credit facility is the Belgian BNP Paribas entity, of which not only the Belgian subsidiary but also the parent and other operational companies benefit from. Other than these facts, no (other) operational activities are conducted in Belgium.

As such, taking the abovementioned factors into consideration along with the fact that the parent CarManu wishes to open a single proceeding, **CarManu should open restructuring proceedings in France**, as the COMI seems to be located there. Even though the bonds are mainly issued by the Belgian entity, according to the EIR Recast, the CJEU Caselaw, and in this case, more importantly, the Belgian interpretation (head office function approach in Parfip and Maxi Toys) this would be insufficient to rebut the registered office presumption. This would also work in favor of CarManu as they are accustomed to the French proceedings. However, one should take into account that CarManu may **encounter some issues**. There are currently no universal approaches in cross-border insolvencies, meaning that secondary proceedings may still be commenced in Belgium as CarManu has a subsidiary. Nonetheless, the subsidiary will have to meet the criteria of an "establishment" under Article 2(11) EIR Recast, which is "any place of operations where [it carries out] a non-transitory economic activity with human means and assets". If these criteria are fulfilled, secondary proceedings may commence in Belgium next to the main proceedings in France, with (Belgian) territorial scope.

Commented [CMS29]: This is an assumption on your end. Based on the facts of the case which are reported, there are (way) more determining factors pointing to Belgium. Nevertheless, this is true that the location of several operational activities are unknown and may be determining to locate the COMI.

*** End of Assessment ***