



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6E
THE NETHERLANDS

[OVERALL SCORE: 39/50, BEING 78%.

PASS. CONGRATULATIONS AND WELL DONE!]

This is the **summative (formal) assessment** for **Module 6E** 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 6E. 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. 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.assessment6E]**. An example would be something along the following lines: 202122-336.assessment6E. **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

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

Commented [FH1]: [8/10 awarded]

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

Select the **correct answer**:

Does the administrator in a Dutch suspension of payments represent the creditors?

- (a) No, he is independent from the debtor and creditors.
- (b) No, he takes the role and position of the board.
- (c) Yes, he is independent with a principal duty of care is towards the creditors.
- (d) Yes, he is appointed to the board with a special mandate to look after the interests of the creditors.

Question 1.2

Select the **correct answer**:

Which transaction by a Dutch company with a company that is controlled by the same shareholder (that is, an affiliate) is most likely to be annulled by a trustee, assuming that it is performed four (4) months prior to the bankruptcy of that company?

- (a) None, the counterparty to that transaction does not meet the definition of affiliate.
- (b) Incurrence of debt at an opportunistically high interest rate.
- (c) A sale of an asset at arm's length price, but with the purchase price to be paid much later.
- (d) Both (b) and (c), if at the time the transaction was made, the company could foresee a liquidity shortfall.

Question 1.3

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

- (a) Dutch restructuring judgments have been recognised under the UNCITRAL Model Law on Cross-Border Insolvency.
- (b) The Dutch court has to co-operate and share authority with a foreign European court if the Dutch debtor has its COMI elsewhere in the EU.

- (c) Dutch suspension of payments proceedings are automatically recognised under the European Insolvency Regulation.
- (d) A trustee in a Dutch bankruptcy is authorised to represent the estate in initiating foreign asset recovery proceedings.

Question 1.4

Select the correct answer:

In the Netherlands, Dutch law deeds of pledge on receivables are registered with the Dutch tax authorities. What drives this practice?

- (a) The registration is used by the tax authorities to levy taxes.
- (b) The date stamp placed by the tax authority register is used to determine date of establishment in the event of more than one right of pledge over the same asset.
- (c) The registration ensures that the pledge can be invoked against third parties.
- (d) The registration is a constituent requirement and creates a valid pledge.

Question 1.5

Which of the following security rights does not exist under Dutch law:

- (a) Undisclosed pledge on intellectual property.
- (b) Mortgage on real property.
- (c) Floating charge on bank accounts.
- (d) Pledge on future receivables.

Commented [FH2]: Minus one mark. The correct answer is (c): a floating charge is not a Dutch security right.

Question 1.6

Select the correct answer:

Assume that a Dutch legal entity is a member of an international group of companies. Assume further that the parent company seeks to impose a restructuring agreement on all its creditors, including those of the Dutch legal entity. Which of the following is the best route for achieving this?

- (a) File for a WHOA in parallel to similar filings in other jurisdictions, try to align timelines with those of the leading proceedings and put the restructuring plan to the vote of the creditors in the WHOA proceedings.

- (b) File for bankruptcy in the Netherlands simultaneously with similar filings in the parent jurisdiction, then ask the court to appoint the parent's trustee as trustee in the Dutch bankruptcy and put the restructuring plan as a "composition plan" to the vote of the creditors.
- (c) File for a WHOA simultaneously with similar filings in the parent jurisdiction, ask the court to appoint the parent's trustee and creditor committee also in the Dutch bankruptcy and put the restructuring plan to the vote of the creditors.
- (d) File for bankruptcy in the Netherlands simultaneously with similar filings in the parent jurisdiction, ask the court to align timelines with those of the parent proceedings and put the restructuring plan as a "composition plan" to the vote of the creditors.

Question 1.7

Which of the following **most accurately describes** the WHOA?

- (a) The EU harmonisation directive, in the form of new Dutch legislation.
- (b) An extrajudicial restructuring framework that can be tailored to the needs of the debtor or the petitioning creditors.
- (c) A modern toolkit for insolvency practitioners who intend to take control over debtors in the Netherlands.
- (d) A complete overhaul of the Dutch insolvency legislation from creditor-friendly to debtor-friendly.

Question 1.8

Select the **correct answer**:

What is the "reference date" as used in Dutch director-liability cases?

- (a) The final deadline for the director to file bankruptcy and avoid personal liability.
- (b) The date on which the director is deemed to have known, or should have known, that the company would no longer be able to satisfy its future obligations as they fall due and would not be able to provide sufficient recourse.
- (c) A date established in hindsight by the Court by reference to the equity of the company.
- (d) All of the above.

Commented [FH3]: Minus one mark. The correct answer is (b). A is incorrect as the passing of the reference date does not automatically lead to personal liability, and (c) is incorrect as equity of the company does not play a role in Dutch bankruptcy laws.

Question 1.9

Select the **correct answer**:

Which of the options below describes the treatment under Dutch international private law of liquidation bankruptcy proceedings in another EU member state?

- (a) These proceedings can be recognised by a Dutch court under the European Insolvency Regulation.
- (b) These proceedings can be recognised under the Brussels regulation (recast) or UNCITRAL Model Law, depending on the jurisdiction.
- (c) Based on the European Insolvency Regulation, the court in the Netherlands will automatically declare the debtor also bankrupt in the Netherlands.
- (d) These proceedings are recognised under the European Insolvency Regulation.**

Question 1.10

Which of the following statements is **incorrect** (“the Netherlands” in each case being interpreted to mean only the European part of the Kingdom)?

- (a) The European Insolvency Regulation has force of law in the Netherlands.
- (b) The European Insolvency Regulation replaces Dutch international private law where it relates to insolvency.**
- (c) The European Insolvency Regulation has a different scope than the Dutch Bankruptcy Act.
- (d) The use of “COMI” in the European Insolvency Regulation means that the Dutch courts no longer have to decide about jurisdiction on European companies.

QUESTION 2 (direct questions) [10 marks]

Commented [FH4]: [8/10 awarded]

Question 2.1 [maximum 3 marks] [3 awarded]

Name and briefly summarise two out of the three routes to obtain recognition of a foreign judgment in the Netherlands (not an insolvency proceeding). You are free to select the country of origin of the judgment. (You should be able to answer this question in no more than 50 words.)

The Recast Brussels Regulation is applicable to both civil and commercial matters. A judgment handed down by a court of a member state of the European Union is fully recognised if the legal proceedings are within the scope of the regulation. The Recast Brussels Regulation is not applicable to insolvency proceedings.

The Lugano Convention’s objective is similar to that of the Recast Brussels and also applies to civil and commercial matters and excludes insolvency proceedings. It applies to members of the EU, and also Iceland, Norway and Switzerland.

Question 2.2 [maximum 4 marks] [4 awarded]

Financing documentation customarily includes an Event of Default that is triggered upon the debtor filing for a moratorium, for bankruptcy or for bankruptcy protection. Will an acceleration of the debt by the creditor be enforceable against the debtor in the Netherlands? (You should be able to answer this question in no more than 50 words.)

The filing of a moratorium freezes all debts against the company, with no enforcement action allowed, save for from secured creditors who may enforce upon their security. If the enforcement of their security does not provide full payment for their debt, the remaining debt value can be submitted as a claim to the bankruptcy trustee. Unsecured creditors must file their claims with the bankruptcy trustee.

Question 2.3 [maximum 3 marks] [1 awarded]

The WHOA is widely considered a debtor-driven, debtor-friendly instrument. Name three ways in which the WHOA has also improved the position of **creditors** in a restructuring. (You should be able to answer this question in no more than 150 words).

The WHOA is not a formal insolvency proceeding, creditors are not limited in taking recourse in whichever way is open to them.

The WHOA stipulates that a class of creditors may not get less under a composition plan than it would have received under the Dutch Civil Code's ranking system or under contractual arrangements.

The Court can reject a restructuring plan under the WHOA if creditors are worse off than they would have been in a liquidation scenario of the Company, if the statutory order of priority is ignored under the restructuring plan without sufficient commercial rationale, or if the Company does not receive an amount of cash exceeding the amount of cash it would have received in the Company's liquidation.

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

Question 3.1 [maximum 8 marks] [8 awarded]

DIP financing is a hot market in the US and in other jurisdictions. In the Netherlands, however, there is hardly a market for new financiers to provide rescue financing. Instead, it is mostly upon the shareholder and / or the existing financiers to extend additional credit to the debtor. Can you explain the issue? In situations where there is a new financier, how does that financier protect his interests, given the issue you explained? (You should be able to answer this question in no more than 300 words.)

Dutch law does not currently provide for super-senior status to emergency funding. The existing pledge will have to be removed in order to allow for more senior funding. This is unlikely in practice as existing financiers will have to release their existing security, weakening their position. This creates a higher risk for the lender, and can hence lead to more expensive borrowing for the Debtor or stricter terms upon the funding.

Debtor in Possession financing has the ability to be protected from avoidance actions on the basis that the court grants authorisation. The court grants authorisation if the financing is required for the business to continue through the scheme process, and if the financing is in the best interest of the unsecured creditors.

Security rights are ranked in their order of creation, known as the *Prior Tempore* rule. The rule cannot be overridden other than with respect to mortgages, but only in the event that the prior mortgagee consents.

Commented [FH5]: This is not a true advantage. In fact, creditors are severely limited because the WHOA too can include a stay, but also creditors lose the right to individually accelerate, at the benefit of the majority (many in the Dutch market that this is the main benefit for creditors: that an outlier does not frustrate their restructuring efforts)

Commented [FH6]: This is not a different point than your last point, and many other advantages could have been mentioned: costs, less frustration from outliers, deal certainty, expert pool of judges, etc.

Commented [FH7]: [15/15 awarded]

If security is granted after one or more security rights have been created over the same asset in favour of other creditors and the last security right is supposed to take a higher ranking, then the latter creditors have to agree to this change in priority. In practice, it can be more challenging to grant security over assets to DIP financiers.

The financier could urge the company to seek to gain US Chapter 11 recognition if possible in order to address issues existing surrounding any pledges. A wider pool of lenders would be familiar with the US Chapter 11 regime and this could provide additional financing options for the debtor.

Further, depending on the seniority of the debt, and I note that the more junior the debt – the more chance of success, the financier could seek to remove any existing pledges in place.

The lender could use an independent guarantee (sui generis) to act as a guarantor in the financing.

Question 3.2 [maximum 7 marks] [7 awarded]

Assume that Citibank has an unpaid claim of EUR 10 million in the bankruptcy estate of a Dutch company, Paluco BV, and also has a claim in the Spanish estate of its parent company Paluco International SA under a parent guarantee issued by SA for the unpaid obligations of BV. Both bankruptcies have been running for years. Assume that Citibank finally gets its first recovery out of the Spanish bankruptcy: EUR 3 million. Will that automatically reduce Citibank's claim in the estate of the BV, will the trustee lower Citibank's claim, or does Citibank need to lower its claim, or none of the above? Please explain. (You should be able to answer this question in no more than 300 words.)

All cross-border insolvency proceedings that re opened within the EU are governed by the European Insolvency Regulation recast (EIR).

The creditor may have the benefit of 'double-dipping' their creditor claim, in which Citibank may claim against both Paluco BV and Paluco International SA. Dutch law allows for both claims to be pursued, on the basis that the total monies received does not exceed the total sum of the claim, EUR10m in this case.

In practice, this means that Citibank may file its full claim of EUR10m in the estate of Paluco BV, and also claim the amount within the estate of Paluco International SA.

The trustee is to ensure that Citibank's total claim receivables remains at EUR10m, but it must not receive more than EUR7m in proceeds, due to the EUR3m being received from the parent Co.

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

You represent pan-European retailer *Mignon Fashion*, with Germany and France as its main operational countries, but active in 23 European countries. The parent of the group is incorporated in Germany. The group is financed by a large consortium of banks and bondholders, headed by ING Bank and Deutsche Bank, and includes bonds governed by New York law. The bank debt is extended to Mignon Finance BV, a Dutch special purpose vehicle. This same entity has also issued the group's New York law governed bonds. The debt liabilities of Mignon Finance BV have been guaranteed by the German parent and by a whole bunch of EU guarantors, including the group's main trading companies in France and Germany. For tax purposes, Mignon Finance BV has a board consisting of Dutch nationals and a small office in Amsterdam.

The parent company is exploring options to restructure the group's financing debt, which will in any event include an extension of the maturity date, a re-set of the interest rate and an amendment of the covenants. The general counsel in Stuttgart, Germany, has asked you to advise whether they can use the Germany *Schutzschirm* proceedings, which they are used

to, also in relation to the instruments issued by the Dutch entity, and assumes they need some support in the form of French proceedings as well. In any event, the 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 yet another jurisdiction. "You should have considered that before your firm advised to issue bonds in the Netherlands."

Using the facts above, answer the question that follows [maximum 15 marks]

Commented [FH8]: [8/15 awarded]

Explain whether the envisaged restructuring of the bank and bond debt can be effected using only Dutch proceedings (the question whether Germany provides for single-jurisdiction proceedings is outside the scope of this Module, but the answer is "no"). Elaborate on the questions that you will need to answer (and information you need from the client), and on issues you may run into. You are required to answer the question only from a Dutch law perspective and to consider the suitability of various instruments available in the Netherlands. (You should be able to answer this question using no more than one A4 page.)

The restructuring of the bank and bond debt would be subject to the EIR. Once the Dutch proceedings have been opened, they are automatically recognised in all EU member states. The recognition includes the recognition of the Dutch practitioner in the foreign states. **As such, specific French or German proceedings will not be required.**

The COMI of Mignon Finance BV is in the Netherlands, as the entity is incorporated there, operates from an office in Amsterdam and its board consists of Dutch nationals.

As the COMI of Mignon Finance BV is in the Netherlands, the Dutch court may open the proceedings in accordance with the DBA. These proceedings will be the main proceedings and will cover the assets and debt of the debtor throughout Europe, excluding Denmark. I would seek to gain further information if a Danish entity is one of the entities included as a guarantor to the debt liabilities.

The Dutch WHOA is a new financial restructuring tool which, with the Court's approval, can bind a restructuring plan upon creditors or shareholders, regardless of their vote. An advantage of using the WHOA is that there is only 1 plan required for the group restructuring. This would be useful for the Mignon group. The total debt of the group would be considered when planning for, and preparing the calculations for the creditor compromise for the group. The restructuring plan that encompasses all debts for the creditors allows a pragmatic restructuring proposal to be made. The WHOA was introduced in January 2021, so is still a relatively new procedure that may not have been tested fully through the Court system. Despite all of the group companies being included within the restructuring, the compromise will need to be tailored for each entity within the group that.

The Dutch suspension of payments is a debtor-filed insolvency proceeding under Dutch insolvency law. The regime is designed in order to provide the debtor with stability whilst it negotiates with creditors to restructure its debts whilst continuing operations. As legal proceedings are not stayed with a suspension of payments, I would seek to understand the extent to any potential future, and current litigation the group is party to, in advance of providing a firm recommendation that this is the most appropriate tool. Also, Dutch law does not provide for consolidation of suspension of payments proceedings of group companies.

I would seek to gain information to the viability of the operating entities, are they profitable and cash flow generative?

A Dutch composition plan should be considered as an option to the debtor. Through a composition plan, all unsecured creditors would be bound, provided that a sufficient majority have voted in favour of the plan. The plan must be accepted by a simple majority in number, which represent at least half of the admitted claims that have the entitlement to vote. The composition plan would allow for the parent German entity to lead the negotiations with the creditors, bond holders and banks, yet without having a Dutch bankruptcy administrator involved in the proceedings. The negotiations would be able to be held in German language,

Commented [FH9]: It appears you are ignoring the fact that there are various entities: Dutch proceedings are recognised indeed, but only over the BV with Dutch COMI (or you should have mentioned that others would have sufficient nexus, but that does not seem to be your point, as you refer to a German Schutzschirm as lead)

and within the timeframe that the German court decides. The agreement would then need to be filed with the Court, and voted on again by the creditors. The approval by the Dutch court has the additional benefit of recognition in the US under Chapter 15 and also under the UNCITRAL Model Law. This process would allow the Schutzschirm proceedings to be the main proceedings, and yet have legal standing and authority within the Netherlands. I would seek to understand which proceedings would be more effective in the circumstances, the Schutzschirm, or any French proceedings.

*** End of Assessment ***

Commented [FH10]: The Schutzschirm proceedings will itself have standing in the Netherlands to the extent it relates to the German entity and any assets or liabilities of it in the Netherlands, but not on the Dutch company. I miss the link between the Dutch WHOA (you mention a Dutch composition plan, but also a suspension of payments, which are you using?) and the German Schutzschirm: do we need both and if so, how do they interrelate?]