INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6E

THE NETHERLANDS

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

CONGRATULATIONS AND GOOD JOB!]

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]: [7/10 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.

Commented [FH3]: Minus one Mark. Correct answer is (b). D is incorrect as the WHOA only adds a chapter and does nothing to change the liquidation bankruptcy, suspension of payments, natural persons bankruptcy etc.

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.

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.

Commented [FH4]: MInus one mark. Correct answer is (d). B is incorrect as liquidation bankruptcy is recognised under the EIR, not under Brussels (recast).

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 [FH5]: [9/10 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 Brussels Regulation (recast) – It allows the court in the Netherlands to automatically recognise and enforce judgment of another member state in relation to civil and commercial matters. There is no need to make a separate recognition application for a member state judgment to be recognised in the Netherlands. *Exequatur* is no longer necessary.

- Lugano Convention (signed in 2007) involving Iceland, Switzerland, and Norway. Its effects are akin the Brussels Regulation. The judgment (relating to civil and commercial matters – insolvency proceedings are excluded) delivered by any of the member state can be recognised in the Netherlands. However, to enforce the judgment, an *exequatur* is required.

- Where the judgement falls outside the provision of the Brussels Regulation and Lugano convention, and a creditor seeks to have its judgement recognised in the Netherlands, it may still do so. However, the creditor is required to obtain an *exequatur*. The court in the Netherlands will hear the parties to the judgement and decide whether it is within the Dutch law to provide recognition (whether there is any impediment to the recognition).

Commented [FH6]: Very comprehensive and accurate, good job!

Question 2.2 [maximum 4 marks] [3 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.)

- Under the Dutch law, parties are free to contract on terms they see fit. If an event is stipulated as an Event of Default, the court will give effect to it. For example, if filing for a moratorium or filing for bankruptcy or bankruptcy protection constitutes an Event of Default, with the consequence that a contract will be terminated (ipso facto clause / acceleration clause), the court will give effect to it unless exceptions apply.

- The exceptions are in relation to (a) employment and lease contract and (b) contracts that relate to the provision of essential services.

- The acceleration of the debt (not being an essential services) by the creditor is not likely to come within the exceptions. Therefore, the creditor should be able to rely on the acceleration of the debt clause to enforce against the debtor.

Commented [FH7]: I would have expected you to mention the restrictions in WHOA. Otherwise good answer.

Question 2.3 [maximum 3 marks] [3 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).

Commented [FH8]: Very elaborate answer. Full marks as you cover a wide array of advantages, but you could have done with a more to-the-point answer (guidance was 150 words, not 850).

- Background - WHOA was introduced and incorporated into the DBA on 1 Jan 2021.

- WHOA in brief – It is described that WHOA is a debtor-in-possession restructuring scheme akin to US Chapter 11 or English Scheme of Arrangement. The debtor remains in control of the management of the company while working out a restructuring (composition) plan for agreement with its stakeholders (creditors). There is (very) little court involvement – court may be requested to assist in the process. While it is a debtor-in-possession process, it contains features that may (will) improve the position of creditors. They are explained below.

- Preservation of business value as a going-concern – When a company is in financial distress and not able to pay its debt as it falls due, a creditor who is owed money will take action to recover the money owed to it. A secured creditor may take legal proceeding to force-sell the assets charged to it. While it may benefit the (secured) creditor who takes the legal (recovery) action against the debtor, it may not benefit the creditors collectively if the business has to be shut down (forced into liquidation) due to the action of a (few) creditors. A "private consensual restructuring" is difficult (almost impossible) if the debtor needs to obtain consent from every creditor who is owned money. WHOA benefits the creditors collectively in that it provides a legal framework (process) that enables the debtor to "resolve or settle" the debts with creditors collectively as a group.

- Requisite majority / consent – Not all creditors need to agree (consent) to the restructuring scheme. The requisite majority required is 2/3 of value of creditors voting in favour of it. Only votes provided (cast) are counted. Creditors who do not vote are not counted. Further, there is no requirement for majority in number to vote in favour. WHOA overcomes the problem of "private consensual restructuring" where virtually all creditors need to consent. Creditors who object (dissenting creditors) are cram-down by the 2/3 majority of creditors in value. This avoids a "hold-out" by certain creditors or prevent creditor(s) holding the debtor to "ransom". The hold-out has the (potential) undesirable consequence of value destruction of the debtor's business, which is not in the interest of creditors collectively.

- Cross-class cram-down – This is another feature that may benefit the creditors collectively. As an illustration, Class A votes against the restructuring plan, but Class B and C vote in

favour with the requisite majority. The court may order a "cross class cram-down". The effect is that the restructuring scheme takes effect, and the dissenting votes of Class A is ignored, provided that the court is satisfied that it is in the interest of creditors collectively. Certain safeguards may be provided to dissenting Class A creditors before a cram-down is ordered. For the cross-class cram down to apply – the scheme should not contravene (a) no creditor worse off rule compared to a liquidation scenario and (b) absolute priority rule.

- Cooling-off period – A cooling-off period may be provided by the court. The cooling-off period is for a period of 4 months, with extension of up to another 4 months. During this period, the court may order (stay order) that no legal proceeding may be commenced or continued against it. The stay order can also apply to secured creditors. This gives the debtor a "breathing space" to work out its financial affairs with creditors. It protects the debtor from suits which may have the undesirable consequence of forcing the company into liquidation, which is not in the interest of the creditors collectively.

- Other protection for creditors –

    - The court can refuse ratification (sanctioning) of the restructuring scheme if the scheme offends the principle of (a) no creditor worse off rule compared to a liquidation scenario and (b) absolute priority rule – creditors must be paid ahead of shareholders.

    - The court may order the appointment of an "Observer" – the role of the Observer is to "supervise or monitor" the restructuring scheme. The Observer represents (look after) the interest of the creditors collectively.

    - The court is empowered to review and have regard (decide) in relation to the division of classes of creditors (creditors' classification), admission of debt of creditors for voting and determination of liquidation value, as these factors may have an adverse impact on creditors.

    - It may be possible that there exists an executory contract between a debtor and a creditor – for example, a half-completed ship. The buyer of the ship (creditor, if the ship is not completed due to potential damages) may want to provide funding so that the debtor has the necessary funding to complete the ship. WHOA allows the court to sanction the funding so that the funding does not become an avoidance issue, if the debtor eventually is placed in an insolvency proceeding. Completing the half-completed ship is likely to be benefit the creditors collectively, as the debtor is able to collect the sale proceeds from the buyer (who would otherwise be a creditor for breach of contract arising from the incomplete ship) and thereby improve the financial position of the debtor.

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

Commented [FH9]: [13/15 awarded]

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.)

- DIP Financing – It is a debtor-in-possession (DIP) financing that is available when a debtor is under Chapter 11 protection. The DIP financing framework provides the debtor an avenue to raise funding which may be vital to fund its business activities to keep the business of the debtor alive. The funding raised under DIP financing usually takes security that has priority over existing debt or security. Without the accorded priority, it would be difficult for a distressed debtor to raise funding. The DIP funder may share the security with the existing lender, or it may also have a higher priority than the existing secured lender. DIP financing is subject to the approval of the court to make sure that there are sufficient safeguards (adequate protection) to the existing secured lender. Suppliers and customers who do business with the debtor need to be comfortable that the debtor has the necessary funding to fulfil its contractual obligations. Without the assurance, it would be difficult for the debtor to persuade suppliers and customers to continue their business relationship with the debtor.

- Hot market - The funding under DIP is done at market or premium interest rates. There is a pool of distressed investors, who are specialists in investing in distressed assets (debtors) and are familiar (comfortable) on how to protect their positions – these investors typically are professionals who are able (comfortable) with cash flow (incoming and out-going) review and good visibility on whether the funding amount will be repaid and adequately protected. They typically have a good "feel" on whether there is a good chance that the debtor could be turnaround (successful in restructuring), albeit their lending is usually at premium interest rates.

- The Netherlands – why funding is "confined" to the shareholder and / or the existing financiers? Under the Dutch law, a debtor is not able to provide security to rank ahead of the existing security already provided to secured creditor(s), without the consent of the existing security holder (secured lender). Without appropriate security (or new security that is unencumbered or being able to rank ahead of the existing security), it would be difficult to find a new lender who is prepared to lend to a distressed debtor. Therefore, funding typically comes from the existing shareholder(s) or financier(s) as they have existing vested interests to see that the distressed debtor has the necessary funding (working capital) to keep the business alive. If the business is not kept alive while the distressed debtor pursue restructuring, the distressed debtor might end up in liquidation, with business value destroyed or substantially impaired.

- New financier – how does he protect his interests? Financing given to a distress debtor may later be a subject of avoidance transaction (undue preference). To overcome this difficulty, financing provided to the distress debtor with approval of the court under WHOA will not be subject to avoidance. The new financier may take new security or with consent of the existing secured lender, to share the security equally or in priority to the existing secured lender. As an illustration – the distress debtor has a half-completed ship and needs the working capital to complete it. The existing secured lender is not prepared to advance more lending. A new financier may provide the funding, and with the consent of the existing lender, take the security in priority over the existing secured lender. To avoid the new lending from being attacked as an "avoidance transaction", the new financier may seek the court to confirm and approve it. The court is likely to approve it if it is of the view that it is in the interest of collective creditors. In the event of default, the new financier will take the "first bite" of the security, thus protecting his interest with the new funding.

Question 3.2 [maximum 7 marks] [5 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

Commented [FH10]: While you correctly reference the double dipping, the point of double dipping (and reason that it is not allowed in other countries) is that the creditor can share in the estate proceeds in either bankruptcy for the full amount of his claim, not the reduced amount. So subject to the overall cap in 10mln, which you reference correctly, the creditor can increase his share of proceeds in the Dutch entity by maintaining his claim at 10mln, thereby increasing his overall recovery beyond what he would have received if he had only 7mln to claim.

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 Citbank 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.)

- The claim by Citibank for EUR 10 million against Paluco BV and its parent company Paluco International SA constitutes what is known as "double dipping".
- This is allowed under the Dutch law, to claim against both the borrower and the guarantor at the same time provided that it does not result in a situation in which Citibank is paid twice or exceeding the total amount owed.
- On the facts, Citibank has been paid EUR 3 million leaving unpaid claim of EUR 7 million. As the unpaid amount is at reduced sum of EUR 7 million, the trustee will lower Citibank's claim to EUR 7 million (EUR 3 million has been extinguished). Citibank claim is also limited to EUR 7 million (Citibank needs to lower its claim to EUR 7 million).
- The double dipping (at reduced sum) - Citibank's claim of UER 7 million against Paluco BV (bankruptcy estate) and the holding company Paluco International SA remains.

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 [FH11]: [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.)

Whether restructuring of the bank and bond debt can be effected using only Dutch proceedings)

- Under DBA, a WHOA restructuring can be done via public restructuring process or disclosed restructuring process.
- Public restructuring process – to qualify under public restructuring process, the debtor must have its COMI in the Netherlands or the restructuring is "sufficiently connected" to the Netherlands. Substantial connection includes a situation where a substantial part of the debt under restructuring is governed by Dutch law, or a substantial part of the debtor's assets is located in the Netherlands.
- On the facts, the debt was extended to a special purpose vehicle of a Dutch entity. In short, the Dutch entity is the borrower. It is noted that Mignon Finance BV has a board consisting of Dutch nationals and a small office in Amsterdam.
- Given the above, Dutch court should have jurisdiction, although the creditor (bond) is be governed New York law.
- On the basis that the Dutch court has jurisdiction, the effect the restructuring is that, it will be added to the list of insolvency proceedings of the EU Insolvency Regulation. The decision of the court will be automatically recognised in EU, which includes Germany.
- As to whether the decision of the court can bind the bond holders which is governed by New Law – application can be made under Chapter 15 of the US Bankruptcy Code for the decision of the Dutch court to be recognised in the US. The WHOA scheme can run parallel with Chapter 15 and seek to align the restructuring timeline under WHOA and Chapter 15.
- Undisclosed restructuring process - If the restructuring is done in an "undisclosed process" (it is not subject to publication requirement and therefore the restructuring will stay out of public eye), the successful outcome of the restructuring does not have automatic recognition in EU. However, it will likely to be recognised under Brussels Regulations, UNCITRAL Model or private international law. It may seek recognition in the EU after the restructuring is successful.
- COMI - A debtor without a COMI in the Netherlands cannot use the public restructuring process. It can only use the undisclosed version.
- Therefore, even if it is argued that the COMI (for the purpose of restructuring) is not in the Netherlands, Mignon Fashion may still carry out WHOA restructuring via a undisclosed process. Upon approval of the restructuring, it can seek recognition in EU, US (under UNCITRAL Model Law) and other countries where the Netherlands have a private treaty arrangement or where courts in countries where they recognise foreign judgements.
- Location of COMI – COMI is not defined under the Model Law on Cross-Border Insolvency. In the US under Chapter 15, Article 16 provides that in the absence of proof to the contrary, the debtor's registered office is presumed to be its COMI. On the facts, COMI would be presumed to be Germany. While the debtor's registered office is presumed to be its COMI, it is not conclusive (it may be rebutted) for the purpose of determining its COMI. Evidence

Commented [FH12]: You note many valid points, and tick many boxes in coming to the answer. I have to say that the notions are a bit scrambled and it is difficult to understand how you are proposing MF to approach this. For instance and starting with: what is MF looking to achieve and what are the issues we will run into? What does a Dutch WHOA based on COMI of the Dutch debtor mean for the rest of the group? Will they also be protected? Your client will want to read which problems need to be addressed and why that requires multi-jurisdictional considerations. How do the proceedings in various countries relate? Does automatic recognition of the Dutch WHOA over the MF BV mean that also the non-Dutch entities are protected from creditor action? What does Chapter 15 have to do with it? Can the WHOA do the debt rescheduling?

may be adduced to proof to the contrary that the registered office shall not be the debtor's COMI. This can be rebutted – relevant factors to take in account when determining COMI are – location of headquarters, location of management, location of primary assets, location of majority of debtors and creditors. On the facts, the location of the "headquarters" seems to be in Amsterdam (the Netherlands) where the directors meet.

- Cross-border recognitions – (a) if the case is done in the Netherlands and recognition is sought outside the Netherlands or (b) if the case is done outside the Netherlands and the recognition is sought in the Netherlands. This is generally not an issue – (a) based on legal provisions and treaties as explained above and (b) past legal cases: see *Yukos Oil* [2019]; *Grupo Isolux Corsan* [2016]; *PTIF* [2018]; and *ENNIA* [2018].

Information I need from the client and on issues you may run into - COMI, countries involved –

- I would like to have information as mentioned above to determine the COMI of Mignon Finance. Without the definitive determination that the COMI is the Netherlands, there is a risk to that WHOA restructuring (public version) may be held to be invalid.

- If COMI is not, a restructuring scheme under WHOA (private version) can be done. After approval of the WHOA (private version), Mignon Finance can seek recognition of the scheme in EU, US, countries in which the Netherlands have treaties with. For countries in which the Netherlands do not have treaties with, Mignon Finance may apply and seek recognition. I therefore will want to find out whether the debts involve those countries in which the Netherlands do not have treaties with (to find out whether these countries are likely to recognise WHOA scheme, although there are no treaties).

Can Germany proceedings be used (need support of French proceedings)?

- Assuming that Germany is the COMI, a scheme can be done under EIR. The scheme approved EIR will have automatic recognition in EU (including the Netherlands).

- An application will still need to be made in the US for the scheme to be recognised under Chapter 15.

Group Restructuring

- It is noted that the debts are guaranteed by the German parent and by a whole bunch of EU guarantors, including main trading companies in France and Germany.

- Under WHOA, the obligation of the debtor and its group members (parent company, subsidiary, and sister company) can all be combined (integrated) into one restructuring plan, without each of the guarantor pursuing a different (separate) restructuring scheme themselves. This will be a big advantage for Magnon Finance and the guarantors.

- This can (should) address the concern of the German counsel on paying an additional set of legal fees in another jurisdiction)

Scheme under Suspension of Payment?

- The debtor management will be in the joint control of the debtor and an Administrator, with supervision by a bankruptcy Judge.
- The advantage under the suspension of payment scheme is that it is automatically recognised by EU. Also, stay of legal proceeding applies, giving Mignon Finance "breathing space".
- However, the debtor (Magnon Finance) losses partial control over the management of the company; the Administrator has a say on the management of the company. This may not a good option to pursue if Magnon Finance is of the view that having control of the management is essential to the value preservation of the company.

*** End of Assessment ***