INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6E

THE NETHERLANDS

[OVERALL SCORE: 42/50, BEING 84%. 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]: [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]: [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 Recast Brussels Regulation treaty and the Lugano Convention treaty both apply to civil and commercial matters, but both exclude insolvency proceedings.

Under the Recast Brussels Regulation, a judgment handed down by an EU member state court is automatically recognisable in the Netherlands if within scope of the regulation. The Lugano Convention is similar, but parties to the treaty are the EU, Iceland, Norway and Switzerland and an *exequatur* is required before a judgment from one of these parties can be recognised in The Netherlands.

Commented [FH5]: Recognised vs recogniseable not entirely spot on, but close enough and for purpose of this question, sufficient. No points deducted.

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.)

Upon filing for bankruptcy or the granting of a moratorium, enforcement proceedings cannot be initiated by unsecured creditors and any ongoing proceedings will be stayed, unless they have relief from the court. Unsecured creditors can then only register their claims with the trustee. Secured creditors, however, may accelerate their debt and commence enforcement proceedings.

Commented [FH6]: I would have expected you to mention the restrictions on ipso facto clauses 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).

i. A court judgment confirming implementation of a WHOA plan is automatically recognisable in EU member states, so this is beneficial to any creditors based in EU member states.
ii. WHOA is a restructuring procedure that is outside of formal insolvency. The debtor's management remains in control of the business throughout the procedure and no administrator or supervisor is appointed. This avoids the costs of an office holder being incurred by the debtor's estate and improves the likelihood of a return to creditors in contrast to bankruptcy proceedings.
iii. The court has the power to enforce cross-class cram down in a WHOA procedure. So even if one class of creditors or shareholders votes against the plan, the court can make the plan binding on all classes of creditors and shareholders, including those dissenting classes.

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

Question 3.1 [maximum 8 marks] [6 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.)

Pursuant to Dutch Law, creditors have equal rights to be paid from the net proceeds of the debtor's assets on the basis of *paritas creditorum*. Priority on claims ensues from mortgage and pledge, preferential rights and other legal stipulations.

Mortgage and pledge security give the secured creditor superior priority on the proceeds of the debtor's asset that the mortgage or pledge is granted over. The distribution of the net sale proceeds is determined by the sequence in which the mortgage and/or pledge is created (*prior tempore*). Any new financier would, therefore, be lower down the priority ranking.

Further, in a number of other jurisdictions, such as the US and some developed European countries, existing financing agreements often allow the debtor to attract new and secured funding, but of a limited amount, which in turn would receive superior priority status and entitles the new financier to receive the first portion of proceeds of an enforcement of security. Under Dutch Law, however, a debtor is not able to grant first priority to new financiers over assets that are already subject to pledges in favour of existing financiers. This creates an issue because the provision of new financing to distressed debtors would not have the benefit of security, unlike what the new financier(s) may receive in other jurisdictions, so there would be greater financial risk to new financiers. Therefore, financing for a distressed debtor in the Netherlands is more likely to come from an existing financier, a shareholder or another party with a vested interest.

A new financier may protect their interests if the debtor and existing secured creditor(s) agree to subordinate their claims to the new financing, and effectively agree to lower their priority ranking. Commonly, new financiers would seek all creditors to agree to subordination.

Commented [FH7]: [13/15 awarded]

Commented [FH8]: [6/8 awarded]. good answer, but with a slight step missing , which is that financiers could agree to waive and re-take in different order, but that that would result in a new hardening period starting (also jeopardizing the secured position of existing lenders

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.)

Citibank receives the benefit of "double dipping", which is a concept permitted under Dutch Law, whereby Citibank can claim in the bankruptcy estate of Paluco BV ("**BV**") for EUR 10 million and may also at the same time claim in the bankruptcy estate of Paluco International SA ("**SA**") for the same amount of EUR 10 million.

Whilst double dipping is allowed under Dutch Law, it is only permitted to the extent that it does not result in payment of more than the total sum of Citibank's claim of EUR 10 million.

In this instance, we know that Citibank has received a recovery of EUR 3 million from the estate of SA. Although Citibank has received this distribution, neither Citibank or SA's trustee will reduce Citibank's claim in SA's bankruptcy, so the claim against SA will remain as EUR 10 million, but Citibank will only be entitled to receive further distributions up to EUR 7 million from SA's bankruptcy estate (plus any statutory interest that it may be entitled to under Dutch law).

Although Citibank has received a recovery towards its EUR 10 million debt from SA as the parent guarantor, Citibank's claim in BV's bankruptcy estate will not need to be reduced by Citibank or BV's trustee, so the claim will still remain as EUR 10 million. However, similar to the circumstance in SA's bankruptcy, Citibank will only be entitled to receive a maximum distribution from BV's estate of EUR 7 million; and it should be noted that if future distributions are made to Citibank from SA's estate, the maximum distribution Citibank may receive from BV's estate will reduce. This is effectively the double dip rule preventing Citibank from receiving in excess of the quantum of its original claim of EUR 10 million.

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]

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 *Mignon Fashion* Group (the "**Group**") could explore the feasibility of engaging in informal, out of court negotiations with the banking group and the bondholders with a view to reaching a restructuring agreement. If a restructuring plan is agreed informally, this would remove the need for formal proceedings in multiple jurisdictions. One of the main issues that the Group would face in this instance, however, is the fact that the restructuring attempts are informal and there would be no moratorium or stay of proceedings in place; therefore, entities within the Group, in particular, BV and the guarantors for its liabilities, would be susceptible to legal proceedings being brought by the bank or bondholders to enforce their debts.

The entities within the Group should take steps to protect themselves against creditor action in order to give the Group time and better ability to prepare a restructuring plan for the bank and the bondholders (and any other existing creditors) to consider. In order to do so, in the first instance, BV should make an application to the Dutch Court for suspension of payments, which is a formal proceeding under Dutch insolvency law.

BV would benefit from filing a petition for suspension of payments because it would be immediately allowed (albeit just on a preliminary basis) and a moratorium would come into effect upon the filing of such a petition, which would provide protection to BV while it prepares a restructuring plan. Following this, the Dutch court would then set a hearing date to consider definitive suspension of payments for BV; however, there is risk that BV's creditors could attend and object to this.

Assuming BV successfully obtains a definitive suspension of payments order, the Group would need to consider which of its other entities are at risk of creditor proceedings being brought, with one of the main ones being the German parent company which has guaranteed BV's debt liabilities. It is also noted that BV's debts have been guaranteed by EU guarantors, including some of the Group's main trading companies in France and Germany.

Whilst BV has protection under its moratorium, the other Group entities that are liable are not protected. Although it is not seen as desirable to open proceedings in more than one jurisdiction, it would be in the best interests of the Group to do so in parallel with the suspension of payments proceedings so as to obtain the benefits of moratorium and a stay on proceedings in each of the other respective jurisdictions. With the other Group entities being based in EU member states, this is advantageous as any formal insolvency proceedings that are commenced in each member state would likely be automatically recognised in the other member states.

Commented [FH9]: **[12/15 awarded]** Excellent answer. Small deduction for the fact that you have not mentioned the clear alternative of a Dutch WHOA, which also provides for consolidated restructuring also for non-Dutch COMI debtors (based on nexus, which there is given the financing company), and for the fact that you have passed over the question whether the scope of the restructuring actually requires such a heavy instrument as SoP, or an informal WHOA is also sufficient.

Commented [FH10]: good catch!

The Group should open parallel proceedings in the jurisdictions that the guarantors are based in and attempt to align all proceedings and timelines with that of the suspension of payments whilst the Group prepares a composition plan in the Netherlands that can be proposed to the creditors. The composition plan should incorporate all liabilities that the German parent company and the other EU guarantors are subject to and seek a compromise with the creditors that, upon completion, releases all of these parties from any future liabilities for the existing debts.

Upon preparing a composition plan and proposing the same to the bondholders and the bank (as well as any other creditors), if it the plan is accepted by the creditors and the Dutch court, the composition plan is automatically recognisable under the EIR as an insolvency judgment and has the same effects in all EU member states under the *lex fori concursus* principle; the effects of the composition plan would, therefore, be pan-European. There is, however, the risk that the creditors may reject the composition plan, or the requisite threshold do not approve the composition plan, in which case the Dutch suspension of payments proceedings would later terminate and a restructuring would likely be unachievable.

Another matter to consider is that the bonds issued are governed by New York law, so there is an element of risk that insolvency proceedings could be sought by the bondholders against BV and the debt guarantors through the New York courts, which do not automatically recognise European proceedings or insolvency judgments, as EU member state courts would. However, as the Dutch suspension of payments and subsequently approved composition plan are EIR-proceedings, as seen in the *Grupo Isolux Corsan* case, it is likely that these proceedings would be swiftly recognised by the New York court as a foreign main proceeding. The Group should, therefore, seek Chapter 15 recognition of the suspension of payments proceedings and composition plan in the US following the commencement of each.

One issue for the Group to consider is that, given the bonds are governed by New York law, creditors could argue that this gives rise to BV's centre of main interest being in the US, which could cause disruption to the proposed Group restructuring; however, given that the Group's operations are largely carried out across EU members states, the Group should be able to argue against this and discredit such a view. That said, the Group should move swiftly to obtain the US Chapter 15 recognition.

*** End of Assessment ***