INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6E

THE NETHERLANDS

[OVERALL SCORE: 29/50, BEING 58%. PASS. CONGRATULATIONS.]

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]: [6/10 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.

Commented [FH2]: Minus one mark. Correct answer is (A). C is almost correct, as he does not represent creditors, but is appointed by and solely at the instruction of the court.

(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.

Commented [FH3]: Minus one mark. Correct answer is (b). A is a correct statement (I described a few of those judgments recognised under Chapter 15 in the guidance text).

(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 [FH4]: 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.

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 [FH5]: Minus one mark. C is incorrect, as the EIR will never have as a result automatic but parallel bankruptcies in different member states. The EIR aims to prevent those to the extent possible.

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 [FH6]: [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.)

If a judgement was made in Iceland the order would automatically be recognised under the Lugano Convention.
If a judgement was made in an EU member state, like France, the judgement would automatically be recognised under the Recast Brussels Regulation that are within the regulation's scope.

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.)

It will be enforceable unless the debtor files for a suspension of payments in the Netherlands. Suspension of payments only applies to ordinary unsecured creditors. If the financier is a secured or preferential creditor, they can continue to enforce their rights subject to a potential cool down period prohibiting enforcement.

Question 2.3 [maximum 3 marks] [2 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 introduction of the WHOA has improved the position of creditors by introducing a specialised pool of judges that hear extrajudicial recoveries which ensures that highly trained and internationally renowned judges hear the cases.

Creditors are not limited in the actions available to be taken against a debtor because of the informal nature of the WHOA process including such as when an automatic stay is granted under bankruptcy or suspension of payments.

Commented [FH7]: 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)

Cost savings are inherent in the nature of the WHOA process as there is not administrator or supervisor appointed incurring costs that come out of the creditors pool. This would hope to result in a better outcome for the creditors.

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

Commented [FH8]: [8/15 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.)

The difference between the US and Netherland when it comes to DIP financing is the difference in priority provided to the new financier. In the US, the debtor is allowed to grant super priority to the financing party with secured rights allowing them first right of distribution on enforcement. In the Netherlands, a debtor is unable to grant super priority to financiers that have already been pledged.

In order for the financier to have their interests protected, outside of formal bankruptcy the other secured creditors can agree to be subordinated below the new financier. The secured creditors will rank in order of creation subject to prior tempore rule where the most recent secured creditor will want priority although has to be agreed with the other secured parties. Mortgages can change the priority of secured creditors by registering a notary deed that outlines the creditors consent and change in priority. Currently for pledges, the practice is to temporarily waive all pledge and reregister them in the order agreed with the new financier. To prevent the claims be avoided in bankruptcy there are layers of pledges with secured parties. If the court was approached during a WHOA process, the courts could authorise the legal act of new security rights to prevent it being avoided once in formal proceedings.

Other ways the financier may protect their interest is through buying out the debt of other existing pledges (if minor) to work around having to get their agreement. If the company was already subject to proceedings the trustee or administrator may approach the court to seek to set the priorities amongst secured creditors to protect the new financier's interest.

Question 3.2 [maximum 7 marks] [0 marks awarded]

Commented [FH9]: [Not accurate. The answer I was looking for and given by others was that Dutch law allows for double-dipping, and indeed allows Citibank to maintain its full 10mln claim in the bankruptcy of BV, despite having received 3mln already in Spain. Dutch law views these as two different claims, whereby the original claim against the Dutch company only falls away once the creditor has been paid in full. Subject to not being able to recover more than the 10mln it is owed, the creditor therefore has a disproportionately high share in the proceeds]

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 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.)

Paluco International SA (PSA) is the parent company and a shareholder guarantee was provided to Citibank for Paluco BV (PBV) likely pursuant to article 2:403 of the Dutch Civil Code. This type of guarantee provided to Citibank will be joint and several liability for PBV and is general in nature. While the guarantee is in place, it does not make Citibank a secured creditor of PBV, still sitting with an unsecured ordinary claim filed with the bankruptcy trustee. This then allows Citibank to circumvent the priority regime and take action against PSA for the funds.

The payment by PSA to Citibank will give Citibank priority in the bankruptcy despite being an unsecured claim against PBV. Once PSA pays the EUR 3 million to Citibank, PSA would ordinarily have the same ranking in the bankruptcy of PBV as Citibank for that amount. Under Dutch law, PSA would only have a claim once Citibank was paid in full to avoid a circular claim against PSA again for distributions in PBV. It is common practice in Netherlands under guarantees that would prevent PSA claiming in the estate of PBV until Citibank is paid in full. As a result of this, Citibank's claim will be automatically deducted by EUR 3 million for any distribution in the bankruptcy of PBV and PSA will rank as a creditor for EUR 3 million after Citibank is paid in full.

[Note to candidate: not accurate. The answer I was looking for and given by others was that Dutch law allows for double-dipping, and indeed allows Citibank to maintain its full 10mln claim in the bankruptcy of BV, despite having received 3mln already in Spain. Dutch law views these as two different claims, whereby the original claim against the Dutch company only falls away once the creditor has been paid in full. Subject to not being able to recover more than the 10mln it is owed, the creditor therefore has a disproportionately high share in the proceeds]

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 [FH10]: [6/15 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 options available from a Dutch law perspective to deal with the group restructuring and whether only Dutch proceedings are required include extrajudicial restructuring, bankruptcy of groups of companies and suspension of payments.

Extra judicial restructuring is likely going to be the most suitable instrument to use with only Dutch proceedings. They are are informal insolvency proceedings and have a different legal framework to bankruptcy. They can be initiated by the debtor, its creditor, shareholders or employee's representatives. For extra judicial restructurings under the Dutch Bankruptcy Act the best option for the bank and bond debt will likely be for any party to file for a request for a plan expert herstructureringsdeskundige, with the district court and creditor support. This will enable a party overseeing the process and the successful appointment. Issues to be determined when considering the extra judicial restructuring include:

1. The entry requirements for the process include a light insolvency test where it is likely the debtor will be unable to pay its debts. The companies will need to determine if they meet this test and whether they meet this definition.
2. The debtors COMI needs to be clarified and the resulting choice between disclosed or undisclosed proceedings which impacts recognition and the need for other proceedings. The debtors COMI will impact automatic recognition under throughout the EU under disclosed proceedings or will need recognition under Recast Brussels Regulations, UNCITRAL Model Law or private international law. With the bonds issued in Netherlands, the main financiers being Dutch banks, a Dutch board that sit in Netherlands and the bank debt sits with the Dutch entity it could be said that the Netherlands are its COMI. While the facts mention the main trading entities are Germany and France, further information would be required to determine what its COMI is and to determine the application of the DBA or EIR recast and subsequent procedure. EIR recast applies only to proceedings in other member states and would therefore not provide recognition to any US proceedings. The US will be able to recognise foreign proceedings to the extent they have adopted Model Law. Disclosed proceedings would be recommended as a result.
3. Which creditors are going to be impacted under the restructuring. When considering the restructuring plan to put forward, the creditors who will be a party to the plan need to be considered. The restructuring plan can provide for partial release of payment obligations, an amendment to terms of debt even if governed under foreign laws, debt for equity swaps or exchange of debt instruments. Voting is limited to those creditors impacted and may not impact all creditors. It should therefore be considered what debts are going to be impacted as they will be voting on any proposal and support is likely needed. These elements would all be integral for bank and bond debt restructuring.
4. Which entities in the group will be included in the restructuring plan. For the other companies, including non-EU entities such as the German parent, they must also meet the light insolvency test if they are to be joined to the plan and the Dutch court would have jurisdiction if those group companies would offer a restructuring plan under the DBA themselves. This would group the parent guarantees or sureties without the German parent having to go through a restructuring themselves. In this case the grouping would allow the entire group to be restructured through the Dutch plan, prevent bondholders double dipping and a coordinated single restructuring plan.

Commented [FH11]: Yes, but I think you mean for the Dutch BV. Remember that COMI is determined for each legal entity independently. So where is COMI for the other entities? And what does it mean if their COMI is outside the Netherlands? Can they rely on COMI of their affiliate (no)?

Commented [FH12]: This is a very material comment, that would have better been at the core of your answer: the GC's comments drive you to a comparison of how you could overcome the fact that this is a multinational group where in principle, debtors each need to file in the jurisidction in which they have their COMI. Only if you can find a consolidating venue also allowing nexus-based jurisdiction, and are able to secure recognition, then can you proceed with the GCs desired single-process restructuring.

Commented [FH13]: Do you mean to address the GCs concerns about costs, impact etc? I would have mentioned that you can negotiate only once, even agree a single (German?) restructuring plan and put it to the vote in the Netherlands.

The consolidation of bankruptcies of group companies is not provided for in Dutch insolvency law. It is also limited to all companies being bankrupt and in the Netherlands which does not apply here with the other entities in the group.

Dutch law does not provide for consolidation of the suspension of payments proceedings for group of companies due to the lack of consolidation of the proceedings for multiple companies. As such suspension of payments is unlikely to be an option for using only Dutch proceedings.

*** End of Assessment ***