



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6E**

**THE NETHERLANDS**

**[OVERALL SCORE: 33/50, BEING 66%.**

**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]: [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.

Commented [FH2]: Minus one mark. The correct answer is (b): The Dutch court never shares authority, it simply will not have authority except for assets located locally. (a) is actually correct, I elaborated on a number of few examples 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 [FH3]:** 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.

### 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.

**Commented [FH4]:** Minus one mark. The correct answer is (b), i.e. that statement is incorrect as the EIR only applies to companies with their COMI in the EU, and Dutch international private laws continues to apply to other situations.

### QUESTION 2 (direct questions) [10 marks]

**Commented [FH5]:** [8/10 awarded]

#### Question 2.1 [maximum 3 marks] [3 marks 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 recognition can be obtained through (i) the Recast Brussels Regulation (for judgment by an EU member state) and (ii) the Lugano Convention (for judgment by an EU member state, Iceland, Norway and Switzerland). Both are applicable to the judgment concerning civil and commercial matters (excluding insolvency proceedings).

#### Question 2.2 [maximum 4 marks] [2 marks 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.)

Although such acceleration provisions will remain in place upon a moratorium or bankruptcy, it is uncertain whether the acceleration of the debt by the creditor be enforceable against the debtor in the Netherlands.

**Commented [FH6]:** Most others shed a bit more light on the situation, explaining that contractual obligations continue, that there is a difference between secured creditors and unsecured creditors and/or that the new Dutch WHOA changes the treatment of ipso facto clauses.

#### Question 2.3 [maximum 3 marks] [3 marks 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) Under the WHOA, the court may authorize a creditor to conduct certain legal acts such as entering into an agreement with the debtor for rescue financing and obtaining security rights for the loan. Such legal acts with the court's authorization will not be subject to avoidance under the subsequent insolvency proceedings.

(ii) A creditor may initiate the WHOA process. Under the WHOA initiated by a creditor, the court appoints a plan expert, who will develop a restructuring plan and negotiate it with relevant

parties, or an observer, who will monitor the preparation and negotiation of a restructuring plan for the sake of creditors' collective interests.

(iii) As a general rule, creditors' power to enforce their rights is not limited because the WHOA is not a formal insolvency proceeding although the enforcement can be suspended during the cooling-off period except for the court's permission.

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

Commented [FH7]: [9/15 marks awarded]

**Question 3.1 [maximum 8 marks] [4 marks 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.)

Commented [FH8]: While you explain the practical outcome accurately, the key issue is that priming of security (or subordinating claims of existing secured holders to those of the DIP) is simply not possible, under the *prior tempore* rule.

The US Chapter 11 may grant super priority for DIP financiers, under which the DIP financiers' claims may prevail over any other claims including administrative costs or be secured by collaterals with the same ranking as or a higher ranking than the existing security rights. The Dutch insolvency law does not offer super priority status to DIP financing in this way. If a DIP financier wishes to take security rights over an asset with a higher ranking than the existing security rights, approval from the existing security rights holders will be required. Therefore, in the Netherlands, it is more difficult for a DIP financier to provide credit to the debtor than under the US insolvency proceedings.

In practice, it is not uncommon that existing financing arrangements provide that the lenders allow a certain amount of the proceeds of the security enforcement to be provided for new secured financing. If there is such an arrangement, DIP financiers may rely on it to protect their interests. Without such an arrangement, DIP financiers need to obtain consent from other creditors whose claims will be subordinated by DIP financiers' new security rights by explaining that the DIP financing will improve the debtor's going concern value so that the other creditors will be better off even with the subordination.

**Question 3.2 [maximum 7 marks] [5 marks 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.)

Under Dutch law, where a creditor's claim is secured by a guarantee, the creditor can exercise the full amount of its claim against both the original debtor and the guarantor unless the recovery from them exceeds the amount of the claim. Therefore, in this case, the fact that Citibank received EUR 3 million as the recovery from the SA's estate under the Spanish bankruptcy will not automatically reduce Citibank's claim in the BV's estate under the Dutch bankruptcy, the trustee will not lower Citibank's claim, or Citibank does not need to lower its claim. However, the amount paid from the parent guarantor's estate (EUR 3 million) must be deducted from the distribution by the debtor's estate.

Commented [FH9]: Fully agree with what you wrote, except the last sentence. There is no deduction from any distribution, but there is a cap on the amount to be distributed (in nearly any bankruptcy highly unlikely that distributions will ever reach 100%).



**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] [10 marks 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.)

Under Dutch law, there are two proceedings that can be used to restructure the debts of a company: (i) suspension of payments and (ii) WHOA.

(i) Suspension of payments is a formal insolvency proceeding, under which the debtor's assets are jointly managed by an administrator appointed by the court and the board of the debtor (therefore, suspension of payments is not a debtor-in-possession procedure).

(ii) WHOA is not a formal insolvency proceeding but an informal work-out, under which, in principle, the debtor's management maintains its control over the debtor's business (debtor-in-possession procedure).

\* Dutch law has another formal insolvency proceeding, bankruptcy, but as it is generally aimed at liquidation of the debtor, the explanation about bankruptcy is omitted here.

In practice, a Dutch company with its group's financing arrangement may use (i) suspension of payments for the group's debt restructuring as follows. First, the group negotiates and enters into a restructuring agreement with its creditors in the group's main jurisdiction. Thereafter, the debtor files the same restructuring agreement as a composition plan under the Dutch suspension of payments. In that case, the administrator and the court only need to

review it by a limited scope such as whether there are any fundamental conflicts with Dutch law, public policy and order.

Also, a group of companies (even if the group includes debtors outside the Netherlands) may use the WHOA to restructure the group's debts. A restructuring plan under the WHOA process can deal with not only the obligations of Dutch companies in the group but also the obligations of other group members. As long as the restructuring is "sufficiently linked to the Netherlands", whether the debtor has its COMI in the Netherlands, the Dutch court has jurisdiction over the group.

In the case at hand, it appears possible for the group to negotiate with the creditors and establish a restructuring plan to restructure all the group's debts (including guarantee obligations) by utilizing the WHOA process. As the BV has a board consisting of Dutch nationals and a small office in Amsterdam, the primary debtor of the group is the BV, and the creditors include a Dutch bank (ING Bank), it is highly likely that the restructuring is considered to be "sufficiently linked to the Netherlands".

**\* End of Assessment \***

**Commented [FH10]:** Correct description. The question that comes to mind in the situation of a multinational, and raised by the GC, is whether this Dutch WHOA process will then be recognized (and protect the debtors sufficiently) also in the other main operating countries. I was looking for the second part of that analysis as well: the recognition/sorting effect of any restructuring approval.