



OVERALL SCORE: 36/50
RESULT: PASS. CONGRATULATIONS!

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6E

THE NETHERLANDS

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: 202223-336.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 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. 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 **9 pages**.

ANSWER ALL THE QUESTIONS

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

Commented [fe1]: Score Q1: 6/10.

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

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 [fe2]: Minus one. Correct answer is B.

Question 1.2

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.

Commented [fe3]: Minus one. Correct answer is B.

Question 1.3

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.

Question 1.4

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 1.5

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 [fe4]: Minus one. Correct answer is D.

Question 1.6

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 1.7

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.

Commented [fe5]: Minus one. Correct answer is A.

Question 1.8

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 1.9

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 1.10

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 2 (direct questions) [14 marks]

Question 2.1 [maximum 4 marks]

Commented [fe6]: Score Q2: 14/14. Excellent job! I will ignore the funny name of our WHOA...

Name and briefly summarise two out of the three routes to obtain recognition of a foreign non-bankruptcy/insolvency judgment in the Netherlands. Please identify, in each case, how the country of origin of the judgment is relevant in your answer. (You should be able to answer this question in no more than 50 words.)

We can mention: (i) the treaty **Recast Brussels Regulation** and (ii) the **Lugano Convention**.

On both cases, the a judgment given by a court that is a member of each treaty is fully and automatically recognised if the procedure on which it is based is within the scope of the regulation.

If the judgement is given by a State that is not a member of the treaties identified above, recognition will not be automatic and can only be enforced if the creditor obtains an *exequatur*. The judgement should also be in accordance with Dutch law.

Question 2.2 [maximum 4 marks]

Will a provision in a contract providing for a unilateral right for the counterparty to amend or terminate the contract upon the Dutch contract party filing for insolvency, be enforceable against that Dutch contract party in the Netherlands? And in the case of a filing under the WHOA? (You should be able to answer this question in no more than 50 words.)

Yes, in general it is possible to the counterparty to amend or terminate the contract after an insolvency proceeding is filled, if there is a clause providing this situation and if it is not null and void. In the case of filing under the WHOA, the clause is deviated, meaning, they cannot be invoked by the counterparty.

Question 2.3 [maximum 6 marks]

In a non-consensual restructuring, the WHOA can play a material role in binding non-consenting stakeholders. Describe, from (in turn) the perspective of the debtor, the secured financiers and the shareholder, how each of them could benefit from the WHOA (and may indeed seek to run a WHOA rather than another type of scheme) or rather be adversely affected in its position by a WHOA.

The Wide Out of Court Composition Agreement ("WCOA") is an extrajudicial proceeding, incorporated in the Dutch Bankruptcy Act and has been in effect as of 1 January of 2021.

Debtor: The introduction of WHOA proceeding allows the debtor to restructure its debts with limited court involvement, characterised as a debtor-in-possession procedure, meaning, the debtor stays in control of his company and allows the debtor to design the restructuring plan in a more suitable way to adhere your interests, - it is also valid to give unequal treatment of some creditors.

This restructuring measure preserves the value of the company and its assets, as well as offering the possibility of faster resolution of financial problems.

A relevant point is that the debtor can bind a non-consenting minority of creditors of any class, or even an entire dissenting class, to a restructuring agreement, as long as the quorum required is fulfilled.

Another advantage is that he can request a cool-off period in which no creditor is allowed to recover its claims against the debtor's assets without court authorization.

The debtor may face adverse issues if the plan is not approved by creditors - subject to the required quorum and if in a cross-class cram-down hypothesis, the creditors and shareholders who voted against the plan can request the court to deny confirmation on the basis of certain limited grounds.

Secured Financiers: Relating to the secured creditors, since WHOA is not a formal insolvency proceeding, the creditors in this situation are not limited to enforce their credits, except when the cool-down is granted by a court, meaning, in this period secured creditors may not enforce security rights, save for court permission.

Also, the WHOA can provide more chances of recover the debt through a restructuring agreement.

Creditors who provide financing in order to comply with the debtor's restructuring have benefits on payment.

On the other hand, since the restructuring plan in an out-of-court proceeding can bind the non-consenting creditors, they may face difficulties in blocking or rejecting some clauses or even the entire plan.

Shareholders: The debtor's board of directors, without shareholders consents, may initiate the debtor-in-possession scheme - extrajudicial restructurings. There is no need of shareholders consent to present the WHOA plan and for the execution of a court-confirmed plan. But, it important to know that shareholders still vote on the plan elaborated.

However, the WHOA proceeding allows a more clear and tailored negotiation between the debtor and the shareholders, matching the needs of both parties.

The WHOA plan may have adverse effects on shareholders if the instrument provides for ownership dilution, through debt-for-equity swaps or capital reduction.

QUESTION 3 (essay-type questions) [12 marks in total]

Commented [fe7]: Score Q3: 7/12

Question 3.1 [maximum 6 marks]

In the aftermath of COVID, the Dutch State, through dedicated vehicles, has provided funding to certain companies that were considered too big too fail, but not able to attract the required liquidity financing ('fresh money') from commercial parties. In return, it demanded security, like any other new financier coming on board in an already debt-burdened company.

In a situation where a company is no longer able to attract funding from its existing financiers, and has pledged to those financiers all its assets already, how would you go about addressing the demand for recourse by any new financiers? Please explain not only

the options, but also the restrictions, in the Dutch legal system. (You should be able to answer this question in no more than 300 words.)

The debtor who is willing to attract new financiers can benefit from the US-style "DIP Financing" or "super senior" basis by subordinating a creditor - which can only happen with his consent. In many cases, the current financing agreements permit the debtor to obtain limited new secured financing, which is then given priority to receive the initial proceeds if the security is enforced.

The debtor can also request, in a DBA scenario, court authorisation for entering into an agreement for emergency funding and the grant of security rights for the loan - in this case, the financier will not have a *super senior* status. The measure aims to grant all legal acts deemed necessary to continue the debtor's business during the restructuring, provided that such legal acts serve the interests of the debtor's joint creditors and that no material harm is caused to the interests of any individual creditor.

The debtor, however, must be aware that those measures may have limitations imposed by the Dutch Legal System on the priority of new financiers' claims. If the act results in prejudice of its creditors, it can be avoided under fraudulent preference laws.

Question 3.2 [maximum 6 marks]

Assume that Citibank has an unpaid, contingent claim of EUR 10 million in the bankruptcy estate of a Dutch company, Paluco BV, pursuant to a cross-guarantee provided to Citibank by that Dutch company. The principal debt guaranteed by that Dutch company is with its Spanish parent company Paluco International SA, also bankrupt. 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 Dutch trustee lower Citibank's claim, or does Citibank need to lower its claim, or can it simply continue making the full claim and why? Please explain. (You should be able to answer this question in no more than 300 words.)

The Dutch Company and the Spanish company are, in the case given, co-debtors of Citibank, having the same amount in both bankruptcy proceedings. With that in mind, as soon as the creditor has been partially paid, the Dutch trustee must reduce the paid amount from the total listed in the Dutch Bankruptcy proceeding.

This situation is guaranteed by the benefit of "double dipping", i.e. in the event of default, it is possible to collect from the co-debtor, however, under Dutch law, this modality must respect the total amount of the debt. In case of payment by one of the parties, it should be deducted from the amount due, in favour of the best interests of the creditors involved in the insolvency procedure.

QUESTION 4 (fact-based application-type question) [14 marks in total]

You represent engineering giant Columbus Steelworks & Coal company, more commonly known under their brand name CS&C, with their operational hub in Columbus, Ohio, U.S.

Commented [fe8]: Minus two. You were expected to also flag the main issue, which is that under Dutch law, priority in security is determined by the time of vesting and cannot be altered thereafter without consent.

Commented [fe9]: this is not accurate. That would then prevent double dipping, right?

Commented [fe10]: Minus 3. Not sure you grasp the issue. The full amount can be claimed twice, but no more aggregate recovery than the full amount (once).

The parent however is for historical tax reasons, a Dutch company: CS&C N.V., with its seat in Amsterdam, the Netherlands and listed in New York on the NY stock exchange. The board actually sits in Amsterdam, or at least that is where all board meetings take place, even though each of them except the three Dutch nationals (who live in Amsterdam) also regularly sit in with their teams in Ohio.

Aside from large U.S. operations, the CS&C group is mainly active in the EU: France, Germany, Poland, Italy and Spain. The group is financed by a large consortium of banks and bondholders, headed by JP Morgan and Bank of America, and includes bonds governed by New York law. As listed multinational, nearly all the debt sits at the level of the Dutch parent company, but several U.S. and EU subsidiaries have guaranteed repayment of the debt.

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, but it starts to appear that this may become a much more difficult process possibly also involving a forced write-off of the debt. The general counsel flies up and down between Amsterdam and Columbus, and is a Fellow of INSOL International. He has approached you, because his incumbent counsel in the U.S. has advised that the only reasonable option is to use a Chapter 11 process, but he questions whether the European angle does not permit an alternative route. He wants to have all options on the table and asks you to design an alternative to the US Chapter 11.

Using the facts above, answer the question that follows [maximum 14 marks]

Commented [fe11]: Score Q4: 9/14

Explain whether the envisaged restructuring of the bank and bond debt can be effected using Dutch proceedings (the question whether other European jurisdictions would provide for a better single-jurisdiction proceedings is outside the scope of this Module, but you may assume that 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.)

There are some questions that must be addressed to the General Consul:

- Analyse the guarantees given by the parent groups, especially if there is any clause providing the applicable jurisdiction;
- Analyse if the bonds instrument does not contain clauses that could hinder the initiation of insolvency proceedings in the Netherland;
- Understand if the parent company is facing any insolvency situation;
- Level of transparency and disclosure regarding creditor and stakeholders
- Analyse the tax consequences of the restructuring for the companies involved

With regard to the restructuring options available for the case in question, we can mention:

The company can initiate an extrajudicial procedure in the Netherlands under WHOA (Dutch Scheme), which will provide an agreement between parties involved in the procedure, especially the financial creditors, such as bondholders.

It is important to say that there are two options for out-of-court restructuring, the public restructuring process and undisclosed restructuring process. The first one demands that the COMI is the Netherlands and will be automatically recognised in the EU, since it must be in accordance with EIR Recast rules and principles. The second one, on the other hand, can be initiated when the debtor has its COMI in the Netherlands or is in any other way sufficiently connected to the Netherlands. In this case, the restructuring plan lacks automatic recognition, but will likely be recognised in accordance with recast Brussels Regulation, UNCITRAL Model Law or private international law.

In the case given, seems like the Undisclosed restructuring proceeding is possible.

In the out-of-court scenario, the debtor is allowed to elaborate its plan as it fits, meaning, he is free to determine the content and structure of the plan, including the obligations of the debtor and of its group members (parent company, subsidiaries or sister companies), except employment contracts.

As an example of successful use of the Dutch Scheme is Conservatorium Holdings LLC¹.

As a formal insolvency proceeding, we can suggest the suspension of payments, which can grant some benefits to the distressed company, such as conceiving to the debtor a breath to structure a composition plan with its ordinary creditors. This proceeding does not apply to secured or preferential creditors; however, the debtor can request a cool-down period, meaning that if granted by the court, any claim can be enforced against the company - even preferential and secured claims.

The debtor benefits from a suspension of payments, which shields them from any disruptive actions taken by their unsecured ordinary creditors. This protective measure allows the debtor to focus on reorganizing and restructuring their debt while aiming to sustain their business or certain aspects of it, while the company remains in control of its activities.

In this procedure, the court will authorize the payment suspension and appoint an administrator to manage the debtor's assets with the board of directors, authorize and consent, when necessary, to certain legal acts arising from the debtor. The court will also appoint a supervisory judge who supervises the conduct of the administrator and the suspension of payments.

The court will determine a hearing where creditors and the debtor will appear to define the suspension of payments. If the legal quorum is met, there are no indications that the debtor intends to harm its creditors, and if the future solvency of the company is verified, the court will set the suspension of payments.

¹ <https://www.nortonrosefulbright.com/en-nl/knowledge/publications/9c340bd2/the-netherlands>

Commented [fe12]: Minus 5. What is your analysis of the COMI and why? IS there a distinction between the Parent and the guarantors in the EU? Or outside the EU? Do we still need Chapter 11 next to it?

Commented [fe13]: Will we be able to bring the European guarantors into the scheme as well? Definitely not in a suspension of payments.

The composition plan is widely used in cross-border restructuring of international groups. Besides Isolux, we can mention the Steinhoff NV case as successful suspension of payments proceedings.

As happened in Isolux case, the debtor, to ensure acceptance of the composition plan, it may submit the draft to the global creditors before starting the vote.

In other words, the debtor may negotiate with its senior creditors and submit the agreement for approval to the Dutch Court, provided that it does not violate its public policy and does not conflict with Dutch law, and that it complies with the Dutch approval and voting criteria for this type of restructuring procedure. As a rule, the criteria set for approval of the agreement in Dutch law are lower than in other jurisdictions.

It is important to keep in mind that the Dutch court's approval of the composition plan gives recognition throughout Europe under EIR Recast and recognition through the US under Chapter 15 of the US Bankruptcy Code.

Commented [fe14]: Indeed. Not yet when you wrote this, but now we have a precedent under Ch15.

*** End of Assessment ***