INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

OVERALL SCORE: 34/50
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: 7/10.

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.

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.

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

(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 1.3

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.

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

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.

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.

Commented [fe4]: Minus one. Correct answer is B. C and A are incorrect.

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.

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]

Commented [fe5]: Score Q2: 11/14. Well done!

Question 2.1 [maximum 4 marks]

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.)

If the judgement is rendered by a State Member to the EU, Recast Brussel Regulation would apply to the matter if not related to insolvency proceedings.

If the judgement is rendered by a State that is not a member to the EU and has no treaties or conventions settled with Netherlands, recognition will rely on courts discretion.

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.)

No, 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 would not be enforceable.

In case the procedure undertaken is WHOA, creditor could enforce the contract provision, unless there a cool-down granted by court is in place.

Commented [fe6]: Minus 3. You were expected to note that pacta sunt servanda, termination provisions continue to apply in bankruptcy, but that in WHOA actually ipso facto clauses cease their effect. The cooling off period is for enforcement of rights.

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.

Debtor's perspective: One of the benefits of WHOA is that debtor remains in control of its business activities during the whole proceeding, what, in the insolvency proceedings provided for in DBA might suffer at least some interference from the administrator or trustee, as well as the Dutch court.

Despite WHOA not being classified as an 'insolvency proceeding' under Dutch laws, court may grant a cool-down period in which not only unsecured but also secured creditors measures against debtor's assets can be stayed. In other insolvency proceedings, however, the stay would only apply to unsecured creditors.

Also, court may not be involved from the very beginning of the procedure, as it occurs in the insolvency proceedings provided for in DBA.

Besides that, it is easier for debtor to open an extrajudicial restructuring, since it can be authorized solely by the board of directors, whilst the insolvency proceedings provided for in DBA also demand the authorization of shareholders to do so.

Secured financiers' perspective: One benefit of the WHOA is that creditors, including secured financiers could commence the procedure, however in this case court would appoint a plan expert to design and negotiate the plan or an observer, and the plan will later be ratified by court.

Also, in case there is no decision granting a cool-down, there is no objection to the enforcement of claims by creditors.

Shareholder' perspective: One benefit of the WHOA is that shareholders could commence the procedure, however in this case court would appoint a plan expert to design and negotiate the plan or an observer, and the plan will later be ratified by court.

As it happens with debtor's management, shareholders also retain their powers (but effectively lose their influence).

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

Commented [fe7]: Score Q3: 6/12

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.)

Considering the situation described above, debtor could search the market for a player interested in financing debtor's operations and engage in negotiations with its secured creditors who have pledged all the debtor's assets to obtain their consent to subordinate their payment to the payment of the new financier.

Therefore, the possibility to hold a 'super senior' pledge would attract the new financier, what would then allow the maintenance of debtor's activities and consequent payment of the 'junior' financiers.

Commented [fe8]: Minus one. 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. And personal securities was not the real question, but I will maintain points given the elaborate and accurate way you put them to work.

One of the problems of this option is that, most corporate financing documentation in the Netherlands and in other jurisdictions provide for the positive pledge obligation, that means, the obligation of debtor to create security rights over additional assets at financiers first demand. This positive pledge obligation can be deemed void by creditors or trustee in an insolvency proceedings scenario if recently undertaken.

Also, if assets are not available for encumbrance, personal security could be granted to the new financier. Dutch law provides for several species of personal security, the three most used are: joint and several liability, independent guarantee for financial obligations, and generic guarantee by company's shareholders.

In Netherlands distressed financing history, lenders are used to dealing with personal securities. However, grantor should only grant the personal security when in its corporate interest and if needed for adequate consideration to prevent any risks of the security be rendered void. It is also important to confirm whether the articles of association forbid any kind of personal security for the benefit of third parties.

This type of security could attract new financiers to the point it would then have the right, in case of default, to enforce its claims against both original debtor and personal grantor.

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 bankruptcy. 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.)

According to the scenario describes above, Citibank has recovered EUR 3 million from the Paluco company registered before Spanish jurisdiction, which is also a State governed by ERI Recast, as a member State to the EU.

EIR Recast adopts a modified universalism approach that by providing that there should be only one main insolvency proceeding governed by local rules but that the filing of secondary insolvency proceedings is allowed. However, according to EIR Recast Article 23 (2), Citibank could only share in distributions undertaken in the Spanish insolvency proceedings in case creditors holding the same priority have obtained an equivalent dividend in the Dutch proceeding, under the penalty of disregarding creditor parity.

Commented [fe9]: You may want to read this again. The one proceeding vs parallel proceedings applies to a single debtor, in this case there are various debtors in the group.

That means if creditors in enrolled at the Dutch insolvency proceedings could recover more than 30% of their claims, 50% for example, Citibank would have the right to receive 20% of its claim in the Dutch insolvency proceeding.

Commented [fe10]: Please refer to the Guidance Text on double dipping and allowing for recovery from various estates, but no more than the nominal amount of the claim.

Anyhow, the amount recovered by Citibank (EUR 3 million) needs to be subtracted from the total amount Citibank intends to recover (EUR 10 million) and considering for purposes of both the Dutch and the Spanish insolvency proceeding, considering the applicable *lex concursus*.

The maintenance of the EUR 3 million already received by Citibank would imply on an undue enrichment of the bank when compared to the remaining creditors subject to such insolvency proceedings.

Commented [fe11]: Minus 5 on this question for the reasons mentioned above.

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. 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 [fe12]: Score Q4: 10/14

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.)

First, it is also worth to consider that a Chapter 11 would not be recognized by Netherland courts since, the only foreign insolvency proceedings that can be recognised are the ones filed in foreign member States to the EU, as per the EIR Recast. In order to bind and restructure Dutch debt, an insolvency proceeding or extrajudicial reorganization under WHOA would have to be filed within Dutch jurisdiction. If CS&C holds no assets within Dutch territory the filing would not be necessary since there would assets to be subject to creditors' constraints.

Also, it would be necessary to confirm whether Dutch insolvency law would apply to the matter and if CS&C could be considered a debtor for purposes of application of DBA provisions. In regard to the first topic, Dutch courts hold jurisdiction in regard to the commencement and ruling of an insolvency proceeding if debtor has its registered office or territory, if it is carrying on business within, or for extrajudicial restructuring purposes, if the proceeding is 'sufficiently connected' to Netherlands territory. Hence, in view that CS&C has its registered office in Amsterdam, is carrying on business within Dutch territory and is 'sufficiently connected' to Netherlands, there is no doubt Dutch courts hold jurisdiction to open a CS&C insolvency proceeding or extrajudicial restructuring.

Commented [fe13]: Minus 2. Should we consider whether also the COMI would be in the NEtherlands, and what would you analysis of the same be?

Concerning the second topic revolving around the classification as a debtor, according to DBA a debtor is understood as a legal or private entity or a private person conducting an independent profession of business for purposes of suspension of payments and extrajudicial restructuring. On its turn, for purposes of bankruptcy a debtor can file for such a proceeding regardless of being a legal entity or a private person.

With that said, CS&C should bear in mind that DBA provides for three different types of insolvency proceedings, two that would apply to a corporate entity: bankruptcy and suspension of payments. Further, it is also possible to undertake a framework that allows extrajudicial restructuring plans to bind the creditors subject to such procedure after court confirmation (WHOA). CS&C need to consider the effects of each of such proceedings and decide which would better fit its interests.

A few relevant aspects to consider is that the insolvency proceedings provided for in DBA: (i) in bankruptcy proceedings debtor will lose control of the business activity and respective assets, whilst in the suspension of payments debtor and the administrator are jointly responsible for administration of assets and in an extrajudicial restructuring remains in control of its business activities during the whole proceeding; (ii) in bankruptcy and in suspension of payments, creditors cannot enforce their rights against the debtor, with exception to secured creditors if a cool-down measure is not granted by court, whilst in extrajudicial restructuring court could only grant a temporary cool-down binding both secured and unsecured claims.

CS&C could always seek for work-outs or undisclosed restructuring process and other measures that do not involve Dutch courts and are grounded in private contractual freedom of parties, that do not have the benefits of court protection but also can be more expedite and do not attract unwanted attention related to the stigma related to insolvency proceedings and public extrajudicial restructuring.

Commented [fe14]: Minus 2. What do we do with the other guarantors? Do we still need Chapter 11 in parallel, or even more proceedings elsewhere?

*** End of Assessment ***