INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

OVERALL SCORE: 37/50
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: 8/10.

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.

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

(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.

(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.

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.

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.

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

(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 [fe4]: Score Q2: 7/14.

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.)

In terms of the Recast Brussels Regulation a judgment granted by a court in a EU member state is fully recognised within the EU if the legal proceedings fall within the scope thereof;

In terms of the Lugano Convention a judgment rendered by a member state (EU, Iceland, Norway and Switzerland) within the scope of thereof is automatically recognised.

The treaties are only applicable if the foreign judgment originated in a member state.

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.)

A provision providing for termination due to the debtor's bankruptcy or request for bankruptcy is rendered inoperative unless it is invoked with the bankruptcy trustee's permission.

WHOA does allow for the unilateral amendment of executory contracts, which amendment is subject to court approval.

Commented [fe5]: Minus 4. Not accurate. Under WHOA, there is an ipso facto prohibition (1 mark), whereas in bankruptcy the contract may be terminated (pacta sunt servanda). The obligation to keep servicing an estate applies only to essential contracts, not all executory contracts (vast majority able to terminate).

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: WHOA allows a debtor to, with the consent of the majority of a class of creditors or of a higher-ranking class of creditors, bind non-consenting minority creditors of any class or an entire non-consenting class to an out-of-court restructuring agreement. He therefore no longer has to motivate an out-of-court restructuring plan to his creditors to agree thereto.

Secured financiers: WHOA is not a formal insolvency proceeding and as such creditors are not prohibited from taking recourse in any available way, including through the enforcement of security rights, unless the court orders a cool-down period which prevents secured creditors from enforcing their security rights.

Shareholder: Shareholders retain their powers in a WHOA process, as it is a debtor-in-possession procedure, however they lose their material influence as the board of directors loses its power to dispose of assets and contractually bind the debtor.

Commented [fe6]: Minus 3. Board does not lose control over assets and bind the debtor. That is in suspension of payments, not WHOA. You were expected to also flag the absolute priority rule, or ability to form classes and do a cross-class cram down of the shareholder or lower classes (whether raised as benefit or disadvantage)

Commented [fe7]: Score Q3: 12/12

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

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.)

In terms of Dutch law creditors have equal right to be paid from the proceeds of a debtor's assets in proportion to the claims. Real security can however be created over various asset classes in the form of *inter alia* mortgages or pledges. Creditors who hold mortgages or pledges over assets of debtors are secured creditors with the highest priority on the proceeds of the asset over which they hold security. In terms of the *prior tempore* rule the ranking of secured claims is determined by the sequence in which they were created. Therefore, a real security created first in time will rank higher than any security rights created over the same asset thereafter.

It is only possible to change the ranking of real security rights if the other affected mortgagees or pledgees consent to the said change in ranking. Therefore, if a security right is supposed to rank higher than security rights created before it, the creditors whose security was created first, must agree to the change in ranking.

As a result of the application of the *prior tempore* rule, Dutch law therefore does not provide super senior status to emergency funding either. Emergency funding or distressed financing cannot enjoy preferential status or first ranking unless the other secured creditors agree to subordinate their claims to the new financing.

The debtor can provide recourse to new financiers in one of two ways:

1. Obtain consent from the existing financiers that the ranking of claims can be amended or that they will subordinate their claims to the new financing;
2. If the existing financing agreements allows for a debtor to attract new secured financing in a limited amount, which new financing will be paid first from the proceeds of the security if same is enforced, the debtor will be able to provide first priority security to the new financier, which priority security will be capped at the limited amount established by the terms of the agreements.

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 bankrupty. 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.)

In Dutch Law a company that provides cross-guarantees accepts joint and several liability with the principal debtor. Therefore, Paluco BV accepted joint and several liability with Paluco International SA.

The fact that Paluco BV provided a guarantee for the debt of Paluco International SA does not grant Citibank the status of a secured creditor in the bankruptcy of Paluco International SA. Citibank therefore has the right to file an ordinary unsecured claim in the bankruptcy of Paluco International SA.

Since double dipping is allowed under Dutch Law, Citibank may take recourse against the assets of both the principal debtor and the co-debtor. The guarantee therefore further entitles Citibank to take recourse against Paluco BV as the guarantor / co-debtor in respect of the principal debt. As Paluco BV is also bankrupt, Citibank may take recourse against the bankrupt estates of both entities. Citibank is therefore able to file its full claim in both

insolvency proceedings, however the amount paid by the one bankrupt estate will be deducted from the final distribution of the other bankrupt estate, and *vice versa*.

In terms of the Dutch Bankruptcy Act the claim of Paluco BV and the claim of Paluco International SA can further be restructured in terms of one restructuring plan in order to prevent double dipping. Paluco BV will fall within the scope of WHOA. As the main debtor's centre of main interests ("COMI") is outside of the Netherlands, a Dutch court may assume jurisdiction, as the restructuring of Paluco International SA is sufficiently linked to the Netherlands through Paluco BV whose COMI is located inside the Netherlands. The entire group debt may therefore be restructured under WHOA through one restructuring plan.

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 [fe8]: 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.)

In terms of the Dutch Law an alternative to the US Chapter 11 was created in terms of the Act on Court Confirmation of Extrajudicial Restructuring Plans ("WHOA"). WHOA in effect features elements of the US Chapter 11 procedure and the UK Scheme of Arrangements. WHOA is available to a debtor who considers it reasonably plausible that it will be unable to pay its future debts that become due and payable ("light insolvency test").

Under WHOA CS&C N.V. may offer an extrajudicial restructuring plan to the creditors in relation to the bank and bond debt and may determine the contents and structure of the said plan.

The procedures under WHOA is available in two versions:

1. Public version –
   It is a procedure in the public domain and has been added to Annex A of the European Insolvency Regulations Recast ("EIR Recast") and therefore Dutch courts will assume jurisdiction in relation to debtors whose centre of main interests ("COMI") is in the Netherlands. These procedures are as a result automatically recognised throughout the European Union ("EU"). In relation to non-EU debtors, the procedure is governed by Dutch law and can be recognised under the UNCITRAL Model Law, international treaties or private international law.
2. Undisclosed version –
   It is a procedure outside the public domain and is exempt from publication requirements. It is governed by the Recast Brussels Regulation. Dutch courts will therefore assume jurisdiction if the debtor (or one of the debtors in the group of companies) has its COMI in the Netherlands. If the debtor (or one of the debtors) is outside of the EU it can be recognised under the can be recognised under the UNCITRAL Model Law if the jurisdiction does not require reciprocity, as the Netherlands has not adopted the Model Law)

The public version and the undisclosed version can be combined by a group of companies.

Commented [fe9]: Minus 2. What is your analysis of the COMI of the parent and of the guarantors in the group and what does that mean?

CS&C N.V. will be allowed to, with the consent of the majority of a class of creditors or of a higher-ranking class of creditors, bind non-consenting minority creditors of any class or an entire non-consenting class to an out-of-court restructuring agreement. As WHOA is a debtor-in-possession procedure. Therefore during the restructuring process the management of CS&C N.V. will remain in full control of the business.

Alternatively, once the restructuring plan is approved by at least one class of creditors (if creditors representing at least two-thirds of the total value of the claims on which were voted, voted in favour of the plan), CS&C N.V. will be able to request that a court confirms the restructuring plan in which case the restructuring plan will bind all the affected creditors, regardless of their consent, by confirmation of the restructuring plan and the plan will therefore include a cross-class cram-down. As CS&C N.V. is a Dutch Company with its seat in Amsterdam in the Netherlands, its COMI is in the Netherlands and Dutch Courts will have

jurisdiction under the EIR Recast in relation to the public version. Once confirmed by the court, the restructuring plan resulting from the WHOA will be automatically recognised in EU where the company is active, being France, Germany, Poland, Italy and Spain and where subsidiaries guaranteed repayment of the debt. As the banks and bondholders, as well as subsidiaries who guaranteed repayment of the debt are based in the US, the restructuring plan will further be able to be recognised under the UNCITRAL Model Law, as the US has adopted same.

Commented [fe10]: Minus 2. Is that true also for group companies (guarantors) in those countries, or only for the Dutch company if it has assets in those countries? Would the dutch court have jurisidction over those group members?

WHOA further allows debtors to obtain court authorisation for certain legal acts and consent will be granted for any act that is necessary for the continuation of the business during the restructuring process if the said act is in the interests of the creditors and it does not prejudice the interest of any individual creditor. CS&C N.V. will therefore be able to apply to court for consent to include an extension of the maturity date, a re-set of the interest rate and an amendment of the covenants or forced write-off of the debt and if any of these acts are found to be in the interests of the creditors and necessary for the continuation of the business, the court will grant such consent. These acts as performed with court authorisation, as well as set-offs performed in the day-to-day business are protected from avoidance.
WHOA is not a formal insolvency proceeding and as such creditors are not prohibited from taking recourse in any available way, including through the enforcement of security rights during the restructuring process, unless the court orders a cool-down period which prevents secured creditors from enforcing their security rights. CS&C N.V. will also be able to apply for such a cool-down order to prevent the bondholders from enforcing the security rights while the restructuring process is pending.

In considering what has been stated hereinabove, the restructuring plan in terms of WHOA can certainly be used to restructure the bank and bond debt and will benefit the entire group structure of CS&C N.V.

*** End of Assessment ***