



OVERALL SCORE: 33/50
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: 5/10.

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.
- (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 [fe2]: Minus one. Correct answers 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.

Commented [fe3]: Minus one. Correct answers 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.

Commented [fe4]: Minus one. Correct answers is D. Proceedings are automatically recognised, not can be recognised.

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 answers 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.

Commented [fe6]: Minus one. Correct answers is A. Why file for bankruptcy if there is a restructuring agreement?

(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 [fe7]: 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.)

Recast Brussels Regulation applies to civil and commercial matters from EU member states and judgements from EU member states are recognised in Netherlands if the supporting legal proceedings are within the scope of the regulation.

Lugano Convention applies to the EU, Iceland, Norway and Switzerland in relation to civil and commercial matters.

Commented [fe8]: Minus one, as you were expected to flag that these provide for automatic recognition.

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.)

Ipso facto clauses are not automatically enforceable against the insolvent contract party meaning that the contract is still valid and not affected by the onset of insolvency. The insolvent party's trustee may give permission to the non-insolvent party to enforce it. The Ipso facto clauses cannot be activated under WHOA.

Commented [fe9]: Minus two. I think you confused the ability to invoke the termination clause with the ability to continue. Pacta sunt servanda, so the clause is valid giving the counterparty the right 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.

The debtor: Offers the debtor the opportunity to restructure. The process is fast, and the debtor determines the content of the restructuring plan.

The secured financiers: They cannot enforce their rights during a period called the cool-down period. The secured creditors in limited circumstances with the approval of courts enforce their rights against the debtor.

Shareholders:

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 to 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.)

New financiers to a financially distressed company would prefer to ensure in exchange of finances a security is gained. However, provision of new security over the assets of the distressed company raises the question whether Dutch's claw-back will be applicable. Creating a security over the assets of the company with existing security would result in prejudicing the other creditors' rights if the new financier is aware of their existence. As a result, there will be creation of fraudulent preference where the 'new' security is set aside under Dutch preference or claw-back laws.

The new financiers will not have a preferential status above the other creditors unless the other creditors agree to this. One option to create a collateral for new financiers is to identify and strike out existing securities. Once they are struck out collateral can be issued to the new financiers. The other option is to identify assets with value which is more than the existing collateralised claim. Those assets can be used as collateral for the new financiers. In both situations the rules on preferential treatment of the new financiers are still applicable as discussed above.

The other option is to apply to the court to authorise the new financial and collateral following WHOA incorporated into DBA. The limitation of this approach is the new collateral should not materially harm the interest of the existing creditors. If the existing creditors are harmed then no new collateral can be assigned for the new financing.

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

Commented [fe10]: Minus 2. You were expected to note at least that the secured creditors have the ability to approve or even initiate a plan, and cross-out the shareholders (either as an advantage to the creditors or a disadvantage to the shareholders), or the ability to team up with higher classes.

Commented [fe11]: Score Q3: 10/12

Commented [fe12]: Minus two. Not very accurate, as there is no striking of security and taking debt on already collateralised assets is near impossible in practice. 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.

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 guarantee by Paluco International SA (SA) affords Citibank a personal security. The effect of the personal guarantee is Citibank can claim the full repayment of the loan, EUR 10 million, from SA. The other option is for Citibank to sue Paluco BV (BV) as the party to the loan contract. Under Dutch law there is a 3rd option. The option is Citibank can sue both SA and BV at the same time if Citibank is a secured creditor. Evidence is required as to whether on giving the loan did Citibank receive collateral. The process of claiming against BV and SA at the same time is called 'double dipping'. Double dipping does not give Citibank a right to be paid a total of EUR 20 million (EUR 10 million from each). In double dipping, Citibank is entitled to a total of EUR 10 million from both claims. This means the EUR 3 million from SA will be taken from the EUR 10 million owed. The remainder EUR 7 million will be reduced from the BV's final distribution or SA's final distribution. There is no need to amend the claim against BV.

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 [fe13]: Score Q4: 11/14

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.)

CS&C is likely to be termed as a foreign company if it was incorporated outside Netherlands. The client should provide information on CS&C's place of incorporation. If it is assumed CS&C is incorporated in Ohio, US then the company is termed as a foreign company in Netherlands. As a foreign company, CS&C may be able to utilise restructuring in the Netherland if certain requirements are met. The Dutch court has to be satisfied that it has jurisdiction over CS&C's restructuring. Since the centre of main interest is located outside the EU the applicable law is the Dutch Civil Code and DBA.

Commented [fe14]: Minus two. The facts state that country of incorporation (ie registered seat) is Netherlands, but what about the guarantors? do we still need chapter 11?

The Dutch court can assume jurisdiction if the registered office of CS&C is located in Netherland. If the registered office is not located in the Netherlands, the courts look at if CS&C's business is conducted in the Netherlands without registered seat in Netherlands. From the facts it is not clear whether CS&C's registered seat is located. The client is required to provide information on the registered office. CS&C's business is conducted in US and other EU countries thus may be difficult to show operations in Netherlands for the purposes of Dutch courts assuming jurisdiction. The other option is to show CS&C's sufficient connection to Netherlands for Dutch Courts to assume jurisdiction under DCC. Sufficient connection can be established by various evidence including but not limited to: substantial CS&C's debt is governed by Dutch law; substantial CS&C's assets located in Netherlands; or CS&C is part of a group of companies mainly based in the Netherlands. CS&C's debt is governed by NY law not Dutch law and there is no information on the location of its assets, thus the two cannot be used to establish sufficient connection to Netherlands. However, CS&C is part of CS&C N.V which is mainly based in Netherlands. CS&C NV is mainly based in Netherlands because operations seat, the board meetings and board members are in Netherlands. Additionally, all board members are Dutch. Therefore, it can be assumed that CS&C is sufficiently connected to Netherlands because of its parent company CS&C NV thus can utilise Dutch law for its reorganisation.

The restructuring available to CS&C is undisclosed extrajudicial restructuring according to the DCC which is the WHOA process. The reason for the option that it will be

undisclosed is because CS&C's COMI is outside the EU. As a result the information for the restructuring plan will not be disclosed to the public. The requirements for commencing an extra judicial restructuring must be met. CS&C must show that it will not be able to continue to pay its debts. Information is required on the financial condition of CS&C. If it is proved CS&C's inability to meet its financial obligations, CS&C can file at the Dutch court a statement to stating its wish to commence extrajudicial restructuring. The date of filing marks the commencement of extrajudicial restructuring.

Under Dutch law, CS&C ought to offer a restructuring plan to its creditors who will be affected by the proposed changes in the plan. The holders of the bank and bond debt. Extension of maturity date of debt, re-set of interest, amendments of the covenants and forced write-off of debt can be included in the plan. However, the creditors must approve the plan. For the creditors to approve the plan, relevant information of the plan must be given to them (as stated above). Voting will be done via different classes of creditors that are affected by the proposed plan. It is essential for CS&C to provide information of creditors with the bond and bank debt that will be affected by the proposed terms of the plan. CS&C's creditors with security will be in one group, another group can be unsecured creditors. One of more groups of CS&C's creditors can refuse the plan and it will not be binding. For examples creditors whose debt will be written-off. However, the proposed plan can be adopted even where there is opposition via 'cross-class cram down'. Cross-class cram down applies where approval by majority of the classes will result in the court applying the proposed plan to classes which did not approve.

Commented [fe15]: Minus one. what advantages does WHOA have over Chapter 11, and what disadvantages?

*** End of Assessment ***