



OVERALL SCORE: 45/50
RESULT: PASS. CONGRATULATIONS, WELL DONE!

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]

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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.

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.

Commented [fe2]: Minus one. Correct answers is A. Why file for bankruptcy if there is 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 [fe3]: Score Q2: 14/14. Well done!! Very comprehensive answers.

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.)

The Recast Brussels Regulation is an EU treaty providing for recognition and enforcement of foreign judgments in the Netherlands, applicable to civil and commercial matters (but not insolvency proceedings) and providing for automatic recognition of judgments given by courts of EU member states (if the relevant proceedings are within the scope of the regulation).

The Lugano Convention is a treaty that is similar in scope to the Recast Brussels Regulation, which also applies to civil and commercial matters (but not insolvency proceedings). It provides for automatic recognition of judgments given by courts of members states (being EU countries, Norway, Switzerland, and Iceland).

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.)

Generally, there is no impact on executory contracts of a Dutch party's insolvency filing (the contract continues with the insolvent party's estate). Clauses providing for termination (whether automatically or not) are an exception; they may only be exercised with the consent of the bankruptcy trustee and are otherwise unenforceable.

In the case of a WHOA filing (which is not an insolvency proceeding *per se*), such a clause is deactivated, meaning that it cannot be exercised by the debtor's counterparty (except with the permission of the court or contracts allowing for close-out netting (e.g., the ISDA Master Agreement)).

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.

From a debtor's perspective, the benefits of the WHOA include that it is free to choose the structuring and content of the WHOA, it may amend creditors' and shareholders' rights (including partial releases of payment obligations and amendments to debt documents), and if the relevant voting thresholds are met and the WHOA is approved by the court, it will be binding even on creditors and shareholders who voted against the WHOA. The WHOA is relatively quick and provides certainty because the decision of the Dutch court as to confirmation of the WHOA is not subject to appeal.

The limitations include that a debtor may not affect employees' claims under their employment contracts and secured creditors may still exercise their rights to enforce their security (albeit subject to a cool-down period, if ordered by the court).

The benefits to a secured financier of the WHOA include certainty for the debtor, which (it is to be hoped) would help it to establish a sounder financial position, it progresses the restructuring rapidly (minimising the "opportunity cost" of investment capital being tied up for long periods with distressed debtors), and security may still be enforced. It also retains a right to request the court not to confirm the WHOA, on certain grounds (albeit these are limited).

However, a secured lender may be subject to cross-class cram-down (i.e., it may vote against the WHOA but still be bound by it) and it may not be able to enforce its security during a cool-down period of up to 8 months, if ordered by the court. A court may also order that attachments are removed and secured creditors, whilst able to enforce their security, are no longer able to enforce their claims by making insolvency filings against the debtor.

The benefits to a shareholder of the WHOA include the protection of its investment (i.e., the benefits listed above for the debtor indirectly benefit the shareholder). It also retains a right to request the court not to confirm the WHOA, on certain grounds (albeit these are limited).

Similar to a secured lender, a shareholder of a debtor may be subject to cross-class cram-down (as seen recently in the WHOA restructuring of Steinhoff International Holdings N.V. and its subsidiaries) and may receive a significantly lower return than it otherwise hoped for, if its claims (e.g., in relation to shareholder loans) are compromised by the WHOA.

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

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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.)

A foundational tenet of Dutch law is that, amongst themselves, creditors of a debtor have equal entitlements for payment from the debtor's net assets (proportionally to their claims) (*paritas creditorum*). Preferential claims are created by Dutch law - not by contract between debtor and creditors. New financiers cannot, therefore, be given preferential status over other creditors.

In relation to security over a debtor's assets, security created in favour of a creditor grants that (secured) creditor the highest priority on the proceeds of the relevant secured asset(s) - whether in or out of insolvency proceedings. Security on the same asset(s) ranks equally amongst the different security interests (unless agreed otherwise) (i.e., the security interests rank *pari passu*). However, while ranking may be equal, as a general rule proceeds of sale of a secured asset are distributed to creditors who have a secured interest in that secured asset in the sequence in which such security interests were created (*prior tempore*).

Taken together, that means that the starting position for new financiers is that they can not obtain a preferential status for their debt, nor can they obtain first ranking security.

The solutions are to contractually subordinate all other creditors' claims and to contractually agree with other secured parties that the new security shall rank higher than the existing security.

Other creditors' security may only be given a lower priority in comparison to the new financiers' security by notarial deed (for a mortgage) or a private deed registered with the tax authorities in the Netherlands (for a right of pledge) stating in what way the ranking is different to the default position (as described above) and with the agreement of each secured creditor that is affected by such change to the ranking of security.

Other creditors' claims may only be subordinated (i.e., given a lower ranking than provided for by law) with the agreement of those creditors - meaning that a wide range of consents will be required from the creditors whose claims are proposed to be subordinated.

In summary, where a company is no longer able to attract funding from its existing financiers and has already pledged all its assets to those financiers, in order to give a higher

ranking to the debt provided by any new financiers and grant new security in favour of any new financiers that has a higher priority than existing security granted in favour of existing financiers, the existing financiers must agree to subordinate their debt to the new financiers' debt and agree to the new security granted to the new financiers being given a higher priority than the existing security.

The existing financiers will likely resist this approach because it will involve a release of their existing security; even if they are granted second ranking security, that may create the risk of a preference under Dutch law because it would secure existing debt. To address this possible issue, the new financiers could consider buying the debt of the existing financiers or financing the debtor to repay the existing financiers.

The agreements (from the existing financiers) described above may also be made in the context of a WHOA restructuring plan, provided that they are authorised by the court because they are deemed necessary for the continuation of the debtor's business during the restructuring. An alternative would be to consider foreign law restructuring options.

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.)

Citibank may continue making the full claim in the bankruptcy estate of Paluco BV.

The guarantee given by Paluco BV creates a claim, for Citibank, as an ordinary, unsecured creditor in the bankruptcy of Paluco BV, filed with the bankruptcy trustee of Paluco BV (if Paluco BV remained solvent, it would help Citibank to circumvent the insolvency of Paluco International SA).

Dutch law does not prevent Citibank from "double-dipping" (i.e., claiming in the insolvencies of both Paluco BV and Paluco International SA), so long as such "double-dipping" does not result in Citibank being paid more than the total sum of their claim (i.e., EUR 10 million).

As a result, under Dutch law Citibank may file its full claim in the insolvency of Paluco International SA and still demand full payment by Paluco BV. However, as a matter of Dutch law, any amount paid by Paluco BV will reduce the amount paid in the final distribution by the bankruptcy estate of Paluco International SA and any amount paid in the final distribution by the bankruptcy estate of Paluco BV will be similarly reduced.

One consequence of any payment to Citibank under the guarantee made by the bankruptcy estate of Paluco BV is that Paluco BV will then have a right of recourse against Paluco International SA (with the same ranking as Citibank - i.e., as an ordinary, unsecured claim)). Without further protection, that might have the effect of lowering Citibank's recovery in the insolvency of Paluco International SA. For that reason, Citibank will wish to analyse the guarantee given by Paluco BV (which is presumably governed by Dutch law) to confirm that it includes a provision that prevents Paluco BV from making a claim in the insolvency of Paluco International SA until the point at which Citibank has been fully repaid.

Commented [fe5]: Indeed. Great addition, not many students raise this very valid point.

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 [fe6]: 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.)

The objectives of the proposed restructuring are for CS&C N.V. to restructure its bank and bond debt in order to: (1) amend the terms of the financing by extending the maturity date(s), resetting the interest rate(s), and amending the applicable covenants; and (2) (partially) write-off the debt.

There are two Dutch restructuring tools that CS&C N.V. may avail itself of: (A) a suspension of payments (including a composition plan); and (B) an extra-judicial restructuring plan, or “WHOA”.

(A) Suspension of payment (including a composition plan)

A debtor such as CS&C N.V. may request a suspension of payments, to give it stability and “breathing space” while it attempts to agree a restructuring of the debts it owes to creditors. The board of directors of CS&C N.V. may make such a request (without the approval of its shareholders, unless there is any agreement that changes that position - CS&C N.V.’s general counsel should be asked to confirm this) if it believes it will not be able to pay its debts as and when they fall due (which CS&C N.V.’s general counsel should also be asked to opine on).

CS&C N.V. may make the request by filing a petition with the district court, which would be immediately (but provisionally) allowed. Appointments of an administrator (to manage the debtor’s assets jointly with the debtor’s board of directors) and a supervisory judge (to advise the administrator) would follow. Thereafter, a hearing would be held for the debtor and its creditors, at which a suspension of payments could be enacted for up to one-and-a-half years (with an option to extend this by the same length of time). The court may make an order for a suspension of payments unless creditors vote against it: (i) representing more than 25% of the qualifying debt at the hearing; or (ii) holding more than one-third of all qualifying debt (whether or not such debt is represented by attendees at the hearing). CS&C N.V.’s general counsel should be asked if, in principle, the debtor’s creditors might be willing not to object to a suspension of payments.

A suspension of payments could be attractive to CS&C N.V. because there are limited grounds for appeal by creditors and there are no financial tests for filing - but, from a practical perspective, CS&C N.V. should only make the filing if it believes it can satisfy creditors’ claims at some stage. The claims of ordinary unsecured creditors (CS&C N.V.’s general counsel should be asked for details of which debts are secured

Commented [fe7]: Minus 1. What is the entry requirement for jurisdiction? Is N.V. a Dutch COMI company and is that relevant?

and unsecured) would be temporarily halted and the debtor would continue to operate the business. CS&C N.V. could also explore the option of some further financing, in this context. However, any legal proceedings against CS&C N.V. will not be stayed and new proceedings may be brought.

As part of the suspension of payments proceedings, CS&C N.V. may offer a composition plan to its creditors (to bind ordinary, unsecured creditors, including where they object to it), which must be approved by a simple majority in number of attending creditors, representing at least 50% of admitted claims. Because secured creditors are not bound by it, those creditors would need to be approached in an ad hoc fashion to see if their support could be obtained.

Dutch courts are generally willing to be flexible where group companies are incorporated in foreign jurisdictions, so the suspension of payments could be used in conjunction with foreign restructuring tools. However, if the operations of the group are not with CS&C N.V., the suspension may be of limited use.

(B) Extra-judicial restructuring plan

CS&C N.V. could, equally, initiate an extra-judicial restructuring – either by filing a statement with the court or by filing a request for the appointment of a restructuring plan. The consent of CS&C N.V.’s shareholders would not be required (and, if any provision in law or the debtor’s constituent documents prevent that, they will not apply).

The debtor must satisfy a pre-insolvency test – that it is reasonably plausible that it will not be able to continue to pay its debts (again, the general counsel should be asked about this). Following the granting of the request, a cool-down period will apply. The restructuring plan may be public or undisclosed. If the latter, it will be undisclosed to the public (which may be attractive to CS&C N.V., to prevent negative creditor actions against its subsidiaries in foreign jurisdictions) the court will need to be satisfied that CS&C N.V.’s COMI is in the Netherlands (its general counsel should be asked to confirm this) – but this will mean it lacks automatic recognition.

The restructuring plan may not impact employment contracts, but may otherwise impact creditors’ claims (including secured claims, in contrast to the suspension of payments and composition plan). This would be helpful in that it could directly achieve the objectives of CS&C N.V. listed above. The plan will be approved if all creditor classes vote in favour; each creditor class will vote in favour if at least two-thirds of the total value of the claims held by that class’s creditors vote in favour of the plan. The court may approve the plan even if one or more classes of creditors vote against it (known as “cross-class cram-down”), which may be helpful for CS&C N.V. if it knows it will have a dissenting class (e.g., its shareholders). The plan process is generally quick and allows for a stay on insolvency proceedings and enforcement action for up to 8 months, which could give CS&C N.V. time to reorganise its financial affairs. Of particular interest is that the obligations of CS&C N.V.’s subsidiaries may be compromised pursuant to the plan; CS&C N.V.’s general counsel should be asked what such obligations exist.

Commented [fe8]: Minus one. Good point, but what about those subsidiaries. Will they be brought into scope of the WHOA, or of Chapter 11, or neither and why?

Commented [fe9]: Minus 2. If the COMI is in NL, then there is automatic recognition. Also, what is your assessment of the COMI based on the elaborate facts in the case study? The GC will not know what a COMI is.

(C) Conclusion

Depending on the answers to the information requests included above, each of (A) and (B) may assist CS&C N.V. in achieving its desired restructuring.

*** End of Assessment ***