



OVERALL SCORE: 48/50
RESULT: PASS. EXCEPTIONAL SCORE, WELL DONE!
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]

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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.

Commented [fe2]: Minus one. The correct answer is A. He is not appointed to the board.

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 [fe3]: Score Q2: 13/14. 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.)

The Recast Brussels Regulation and the Lugano Convention 2007 are both international treaties which regulate which courts have jurisdiction in civil and commercial matters. The RBR applies to 15 members of the EU (as well as some overseas territories) and dictates that judgments handed down by a court in a member state gets recognised and applies to persons domiciled in those EU member states. The Lugano Convention 2007 is similar in that it provides for the recognition and enforcement of a range of civil and commercial judgments between the EU and EFTA states. Its members states are Iceland, Norway and Switzerland.

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.)

Consistently with the fundamental principle in Dutch law to allow parties to freely contract, contractual stipulations remain in place regardless of a debtor's bankruptcy. Although that rule also applies to contractual termination clauses, a creditor may not be able to enforce it as against the debtor without the bankruptcy trustee's permission, since the clause would be rendered inoperative at the time of the doing of the triggering act. It is likely for the Bankruptcy trustee to give permission in circumstances where the debtor is Dutch and there is an understanding of the ambiguity regarding its enforceability. If the counterparties to the contract want confirmation that the debtor will honour its obligations under the contract, the creditor can request such confirmation from the bankruptcy trustee. The bankruptcy trustee will have to provide security if he confirms that the debtor will perform its obligations. Although the WHOA restructuring allows for unilateral amendment of executory contracts subject to court approval, *ipso facto* clauses are unenforceable.

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 Perspective

A WHOA agreement would permit the following and have the following benefits:

- WHOA agreements borrow elements from the UK scheme of arrangement and the US Chapter 11 and provides for an effective cram down of non-consenting minorities including capital providers and shareholders. Apart from a formal comprehensive insolvency proceeding, there are no other mechanisms that have the ability of binding dissenting capital providers to a restructuring plan.
- Insolvency proceedings have a negative stigma. A settlement agreement under the WHOA addresses that by allowing restructuring agreements to be negotiated and conducted effectively behind closed doors.
- A WHOA plan gives debtors the ability to arrange a plan that is best suited for their commercial interests since the WHOA neither prescribes nor restricts the plan's scope and content.
- Debtors can therefore negotiate terms on the basis of what makes the best commercial sense for that business and tailor the terms to meet its specific needs.
- WHOA facilitates early restructuring by,
 - o Allowing the debtor to be a debtor-in- possession while the plan is being negotiated with financiers. There is the added benefit of business continuation including the retention of employees whose employment contracts are not in any way impacted by the restructuring.
 - o The plan is available if the debtor predicts that he may have difficulties in making payments in the future.
- The brevity within which the agreement is an added benefit since it can be finalised within weeks of the plan being submitted to the affected capital providers. (This benefit also applies to creditors)
- The procedure is flexible and for example, there is no convening hearing or pre-approval required (like in a formal insolvency)
- Court involvement is limited. The court may not get involved until after approval and before that, only where the parties have requested its involvement for the purpose of giving directions.
- There are specialist judges and other professionals who are available to provide support with negotiations and other matters including person who, upon the request of the parties, can assist with drafting the plan, submitting it to creditors for approval and getting the approval from the court.

Creditor Perspective

From a creditor's standpoint (and in addition to the benefits noted above), one of the primary benefits is the freedom to negotiate the most commercially sensible terms given the lack of restriction placed on the parties. Although a creditor or dissenting creditor would be bound by the decision of others, a creditor also can request the court to reject confirmation on the basis that the capital provider will be in a significantly worse off position if it accepted the plan. If the creditor is concerned that for example, about fraud or is not satisfied with the voting process, he can raise that with the court who can refuse confirmation. The creditor should be aware that there may be circumstances where a

restructuring plan could adversely impact the creditor and which the creditor may be unable to effectively overturn.

Shareholder Perspective

Notwithstanding the cram-down provisions, shareholders do have a say in the decision-making process. The fact that the restructuring can occur behind closed doors, shareholders needn't concern themselves with the implications arising from the negativity surrounding a full insolvency proceeding such as any devalue in shares etc.

Commented [fe4]: Minus one. You were expected to also flag that the shareholder can be crammed down, but also can team up with in the money creditors to cram others.

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

Commented [fe5]: Score Q3: 12/12

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 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.)

Under Dutch law, mortgages and pledges have equal ranking. However, the distribution of the proceeds in respect of an enforcement action is determined by the order in which those pledges were created. Therefore, new financiers seeking to inject capital in an already debt-burdened company would, by virtue of the timing, rank behind other pledges in respect of the same asset. A new financier must seek to alter the ranking of the new right of pledge higher than one more of the other mortgages or pledges on that asset by stipulating in the notarial deed a date other than the date that the pledge was created. The limitations in respect of the above arises from the need for agreement from the mortgages and pledges to the change in ranking.

Another option is for the debtor to agree with the other creditors to a subrogation of their claims since it is not possible to change the ranking (as between each of creditors) by way of agreement. The limitation arises here in respect of the need for all other creditors to agree to the subrogation of their claims. Without that agreement, a debtor cannot give first priority to new lenders over assets it has already pledged to the existing financiers.

Given its common usage in developed European jurisdiction, it is possible that the previous financial arrangements already permit the debtor to take on a further pledge (up to a pre-arranged amount) with a new investor. The agreement would allow a new investor to take the first distribution if the new investor enforced its security against the already pledged asset. The ability to grant this first priority status is only possible if the existing contractual

arrangements allow for it. The other issue is that this option creates a cumbersome task of either striking out all existing security rights or having to find bespoke mechanisms for each financier to be able to take control of the collateralised asset.

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.)

Paluco BV's independent guarantee granted for the benefit of its Spanish parent constitutes a personal security under Dutch law. Whilst in general, these types of securities are easily enforceable in the Netherlands, there are special rules regarding how they may be enforced within the context of insolvency proceedings and, to address the issue of "double dipping" by a creditor who has claims in multiple bankruptcy estates.

Under Dutch law, double dipping is allowed if it does not result in payment which exceeds the total amount of the claim. Because the adjustment (for the purpose of deducting any prior payment to the creditor) would be made at the time of final distribution in the Spanish proceedings, there is no obligation on Citibank to lower its claim in the interim period i.e. in the Dutch insolvency. Citibank can therefore continue with making a claim in respect of the full amount from the guarantor in the Dutch insolvency. For the reasons outlined above, there is also no corresponding obligation on the Dutch trustee to adjust the claim as again, any adjustment will be made at the time of final distribution.

This is assuming that the granting of the guarantee was in the corporate interest of the company and that there was an appropriate reward so that it is not determined as a fraudulent preference which has the effect of undoing that transaction and voiding its creation. We are also assuming that that the debtor's Articles allow for surety undertakings for the benefit of third parties. As typical, the contract creating the personal security would have included a prohibition from making competing claims of recourse until the creditor has been repaid in full.

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: 14/14. Very practical outline, helpful distinction between topics and well argued!

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's US attorney's advice reflects the position that existed in the Netherlands prior to the enactment of the WHOA on 1 Jan 2021 in which Dutch companies were compelled to rely on foreign tools such as the UK scheme of arrangement and Chapter 11 proceedings to achieve restructuring. The New Dutch Scheme is a powerful mechanism which CS&C could use to effect the extrajudicial restructuring that CS&C is envisaging. The New Dutch Scheme borrows elements from the UK scheme of arrangements and US Chapter 11 proceedings. Therefore, CS&C can for example, implement a restructuring plan outside of any formal insolvency proceedings and can make use of the cram down mechanism in the approval of that plan.

Envisaged Debt Restructuring

It is stated that CS&C wishes to extend the maturity date of its refinancing, re-set interest rates and amend certain covenants. The WHOA neither prescribes nor does it restrict the content of any plan. Therefore, CS&C has a high degree of flexibility as to the commercial content that it wishes to include such as those stated above.

Procedure

It is open to CS&C to initiate the WHOA procedure (although it can be initiated by a creditor, shareholder or a representative of its employees). CS&C clearly falls within the definition of a "debtor" who can initiate proceedings since it is a legal entity. (Given that it is CS&C's general counsel who made the initial inquiries, I am assuming that it is CS&C who wishes to initiate the restructuring).

Public vs Private Restructuring

An important question is whether CS&C wishes its restructuring plan to be private or public. CS&C has to consider that the potential negative impact that a publicly known restructuring could have on its business. The private plan procedure would offer CS&C the opportunity to negotiate a restructuring plan with its key stakeholders behind closed doors whilst a public plan procedure would be published in the Dutch central insolvency register the trade register and the official government Gazette. To keep the restructuring private, CS&C would have to ensure that it meets the relevant threshold to enable the Dutch Court to assume jurisdiction in accordance with domestic Dutch law and for the recognition in other jurisdictions to be governed by domestic rules on private international law.

Jurisdiction of the Dutch Court

In a public restructuring, the Dutch Court assumes jurisdiction in accordance with the European Insolvency Regulation. By publication in Annex A of the EIR, the procedure is brought within the ambit of the EU insolvency regulation and therefore limits the Dutch court's jurisdiction over companies with the centre of main interests in another member state of the EU. (It is stated that we may assume that no other European jurisdictions would provide for a better single-jurisdiction proceedings. This answer therefore focuses on the private plan which would invoke domestic procedures.)

The private plan procedure would operate outside the EU insolvency regulation with jurisdiction governed by rules of domestic Dutch law and recognition in other jurisdictions governed by domestic rules on private international law. For CS&C to be able to make use of a private restructuring, either its COMI would have to be in the Netherlands or the restructuring sufficiently connected to the Netherlands. (For a public restructuring, only the first of those elements need to be met.)

COMI in the Netherlands

- The concern with CS&C is that the majority of its operations are conducted outside of the Netherlands. Helpfully, the New Dutch Scheme caters to groups of companies and would still allow CS&C to put a private restructuring plan forwards even though all but one of its companies are located outside of the Netherlands.
- The benefit of this is that the restructuring would be for the entire group of companies with the added benefit of preventing its US bondholders from double dipping i.e. the creditor taking recourse against the asset of both the debtor and another debtor within the group or, if there is one pool of assets, effectively submitting two claims.
- That being said, there may be an argument that its management is conducted in the Netherlands since

- the board actually sits in Amsterdam; and
- all board meetings take place there.

Restructuring sufficiently connected

- Examples of sufficient connection include:
 - where a substantial part of the debt subject to the restructuring is governed by Dutch law,
 - a substantial part of the assets are located in the Netherlands,
 - the debtor being part of a group of companies mainly based in the Netherlands.
- It is stated that as a listed multinational,
 - nearly all of CS&C's debt sits at the level of the Dutch parent company, but several U.S. and EU subsidiaries have guaranteed repayment of the debt,
 - Bonds are governed by New York law.
- The first factor could be enough to meet the "sufficient connection" threshold and therefore provide alternative means of proceeding with the restructuring on a private basis.

Next Steps

If CS&C wished to proceed with a restructuring plan, CS&C could

- Initiate discussions with some or all its financiers to convey what CS&C is hoping to achieve (this would inform the content and structure of the plan);
- Either formulate or instruct an officer to draft a plan;
- Submit that plan to the selected creditors and/or shareholders for approval.
- Once the plan is adopted by way of approval by all classes of creditors or by 2/3 (in value) of a voting class of creditors (or shareholders as the case may be), CS&C will obtain confirmation by the court, the effect of which, the plan will be binding on all creditors and shareholders.

*** End of Assessment ***