



OVERALL SCORE: 43/50
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]

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.**
- (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 answer is C.

Question 1.4

Select the **correct answer**:

Which transaction by a Dutch company with a company that is controlled by the same shareholder (that is, an affiliate) is most likely to be annulled by a trustee, assuming that it is performed four (4) months prior to the bankruptcy of that company?

- (a) None, the counterparty to that transaction does not meet the definition of affiliate.
- (b) Incurrence of debt at an opportunistically high interest rate.
- (c) A sale of an asset at arm's length price, but with the purchase price to be paid much later.
- (d) Both (b) and (c), if at the time the transaction was made, the company could foresee a liquidity shortfall.

Question 1.5

Select the **correct answer**:

Which of the options below describes the treatment under Dutch international private law of liquidation bankruptcy proceedings in another EU member state?

- (a) These proceedings can be recognised by a Dutch court under the European Insolvency Regulation.
- (b) These proceedings can be recognised under the Brussels regulation (recast) or UNCITRAL Model Law, depending on the jurisdiction.

(c) Based on the European Insolvency Regulation, the court in the Netherlands will automatically declare the debtor also bankrupt in the Netherlands.

(d) These proceedings are recognised under the European Insolvency Regulation.

Question 1.6

Select the correct answer:

What is the "reference date" as used in Dutch director-liability cases?

(a) The final deadline for the director to file bankruptcy and avoid personal liability.

(b) The date on which the director is deemed to have known, or should have known, that the company would no longer be able to satisfy its future obligations as they fall due and would not be able to provide sufficient recourse.

(c) A date established in hindsight by the Court by reference to the equity of the company.

(d) All of the above.

Question 1.7

Select the correct answer:

Does the administrator in a Dutch suspension of payments represent the creditors?

(a) No, he is independent from the debtor and creditors.

(b) No, he takes the role and position of the board.

(c) Yes, he is independent with a principal duty of care is towards the creditors.

(d) Yes, he is appointed to the board with a special mandate to look after the interests of the creditors.

Question 1.8

Select the correct answer:

Assume that a Dutch legal entity is a member of an international group of companies. Assume further that the parent company seeks to impose a restructuring agreement on all its creditors, including those of the Dutch legal entity. Which of the following is the best route for achieving this?

(a) File for a WHOA in parallel to similar filings in other jurisdictions, try to align timelines with those of the leading proceedings and put the restructuring plan to the vote of the creditors in the WHOA proceedings.

(b) File for bankruptcy in the Netherlands simultaneously with similar filings in the parent jurisdiction, then ask the court to appoint the parent's trustee as trustee in the Dutch bankruptcy and put the restructuring plan as a "composition plan" to the vote of the creditors.

(c) File for a WHOA simultaneously with similar filings in the parent jurisdiction, ask the court to appoint the parent's trustee and creditor committee also in the Dutch bankruptcy and put the restructuring plan to the vote of the creditors.

(d) File for bankruptcy in the Netherlands simultaneously with similar filings in the parent jurisdiction, ask the court to align timelines with those of the parent proceedings and put the restructuring plan as a "composition plan" to the vote of the creditors.

Question 1.9

Select the **correct answer**:

In the Netherlands, Dutch law deeds of pledge on receivables are registered with the Dutch tax authorities. What drives this practice?

(a) The registration is used by the tax authorities to levy taxes.

(b) The date stamp placed by the tax authority register is used to determine date of establishment in the event of more than one right of pledge over the same asset.

(c) The registration ensures that the pledge can be invoked against third parties.

(d) The registration is a constituent requirement and creates a valid pledge.

Question 1.10

Which of the following **most accurately describes** the WHOA?

(a) The EU harmonisation directive, in the form of new Dutch legislation.

(b) An extrajudicial restructuring framework that can be tailored to the needs of the debtor or the petitioning creditors.

(c) A modern toolkit for insolvency practitioners who intend to take control over debtors in the Netherlands.

(d) A complete overhaul of the Dutch insolvency legislation from creditor-friendly to debtor-friendly.

QUESTION 2 (direct questions) [14 marks]

Commented [fe4]: Score Q2: 10/14.

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.)

The Recast Brussels Regulation where the foreign judgment is delivered by the court of an EU member state - automatic recognition.

The Lugano convention but applies to countries in the EU, Iceland, Norway and Switzerland. Automatic recognition but requires a further step to enforce by the appointment of an exequatur.

Question 2.2 [maximum 4 marks]

Will a provision in a contract providing for a unilateral right for the counterparty to amend or terminate the contract upon the Dutch contract party filing for insolvency, be enforceable against that Dutch contract party in the Netherlands? And in the case of a filing under the WHOA? (You should be able to answer this question in no more than 50 words.)

No; where the contract is executory in nature it remains in place with the estate and cannot be terminated save with the bankruptcy trustees permission. The same scenario applies under WHOA – the contract cannot be terminated by the counterparty to the estate.

Commented [fe5]: Minus 4. Not accurate. Under WHOA there is no estate, and 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.

- (a) The debtor: the plan can be achieved without publicity and remain undisclosed and not subject to any publication requirement. Shareholder approval to enter into the process is not required. It is a flexible process.
- (b) Secured financiers are not limited in their enforcement rights. However, they may be subject to a "cool down period" and should one apply then they may not enforce on their security unless they apply for and obtain court permission to enforce. In addition, where a secured creditor has initiated insolvency proceedings those proceedings are stayed. They may also dissent to the

plan but nonetheless be subject to it should other creditors in their class approve – they could be “crammed down”.

- (c) Shareholder: shareholder approval of the process is not required which may potentially negatively affect shareholder control of the debtor, such as it may exist. Alternatively, the plan offers a way to preserve shareholder value through a quick and less expensive procedure given the limited role of the court.

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

Commented [fe6]: 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.)

New recourse may be achieved by agreement with the existing financiers as to the order of priority between them and the new financier. It would be worth exploring with existing secured creditors as to whether they would agree to their claims being subordinated to the new financing. Absent agreement, there is no mechanism in Dutch law to provide for first ranking priority in relation to the new financing. Security rights under Dutch law rank in sequence of their creation. If a new security right is created after the other already existing security rights over the same asset, and the new security right is to take priority, the existing financiers must agree to a change in priority.

There is also a risk that the new financing and any security provided under it could be at risk of avoidance by a trustee in a subsequent bankruptcy. There is the option of obtaining court authorisation under the WHOA procedure for the new financing. The financing must be necessary to continue the debtor's business and be in the interest of creditors with no material harm done to any one creditor.

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.)

Citi may continue making the full claim, or “double dip”. Under Dutch law, Citi has the ability to claim in both bankruptcies for the full amount subject to the stipulation that the total payment that Citi receives cannot be more than the claim of €10m. The amount paid by SA will be deducted from the final distribution of BV’s estate.

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 [fe7]: Score Q4: 13/14

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 questions that the US general counsel is likely to have will include:

1. Can the restructuring bind dissenting bondholders?

2. If some bondholders move to enforce on the guarantees, is it possible to stay their enforcement?
3. Are the guarantees provided by the two subsidiaries outside of the scope of the restructuring?
4. Can a Dutch restructuring with New York law governed contracts?
5. Will a Dutch restructuring agreement be subject to court approval?
6. Will a Dutch restructuring agreement cover the other EU countries in which we operate? And can it be brought to the US and be recognised in the US?

Initial Instructions would be sought on the solvency of the group and in particular the Dutch parent company, CS&C N.V ("NV") to see if it meets the pre insolvency test– is it reasonably plausible that the debtor will not be able to continue to pay its debts? The first option to consider is the WHOA process which may be characterised as a debtor in possession proceeding under the DBA. Although not a formal insolvency proceeding, it can bind, subject to certain conditions, non-consenting creditors to an out of court restructuring plan. NV may commence the procedure and file a statement in the local Amsterdam District Court. Ultimately the restructuring plan is confirmed by the Amsterdam District Court. However court involvement is kept to a minimum. An application may be brought at the start to appoint a plan expert to assist in negotiating the plan with the bond holders.

The ability of bond holders to enforce their claim is not limited in any way but should they move to enforce, may be limited to a cool down period by order of the court which can last up to eight months. Any request to open insolvency proceedings against NV will be stayed as well.

It is noted that the seat of NV is in Amsterdam and directors meetings are held there. NV's COMI is presumed to be its seat which means that the company can avail of a public restructuring plan. The Amsterdam District Court will assume jurisdiction in accordance with the EIR recast. The court confirmed restructuring plan will be automatically recognised in all other EU countries. It will also be recognised in the US under Chapter 15 of the US Bankruptcy Code.

Commented [fe8]: Minus one, as you were expected to dive into the comi discussion a bit more, this fact pattern is far from a walk in the park.

Commented [fe9]: Lucky you. That was not yet clear at the time you wrote this, but now we have the first precedent.

With regard to the EU and US based subsidiaries, their guarantee obligations can be integrated into the restructuring plan. Both companies must meet the pre insolvency test. The subsidiaries finance obligations, the guarantees, can be included in the WHOA restructuring plan without the subsidiaries having to go through a plan themselves.

The restructuring plan can amend creditor rights and the terms of the debt instrument even where governed by NY law. Approval of the plan is required by at least one class before court confirmation may be sought – two thirds of the total value of claims. The court decision on confirmation is final and not subject to appeal.

The second option to consider is NV applying for suspension of payments with the Amsterdam District Court. NV would benefit from the automatic stay while it negotiates with its bondholders. NV can formalise the agreement in a composition agreement in the Dutch suspension of payments proceeding. The composition agreement, if it is approved (by a simple majority on number and amount), would have court approval in the Netherlands and be recognised as an insolvency judgment under the EIR, meaning that its effect on bondholders would have effect throughout the EU.

The status of the Dutch suspension of payments proceeding as an EIR proceeding means that this proceeding, including the approved composition agreement, would be recognised throughout the EU and accepted as a foreign main proceeding under Chapter 15 of the US Bankruptcy Code.

*** End of Assessment ***