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**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]**

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)?

1. The European Insolvency Regulation has force of law in the Netherlands.
2. The European Insolvency Regulation replaces Dutch international private law where it relates to insolvency.
3. The European Insolvency Regulation has a different scope than the Dutch Bankruptcy Act.
4. 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**?

1. Dutch restructuring judgments have been recognised under the UNCITRAL Model Law on Cross-Border Insolvency.
2. 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.
3. Dutch suspension of payments proceedings are automatically recognised under the European Insolvency Regulation.
4. 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:

1. Undisclosed pledge on intellectual property.
2. Mortgage on real property.
3. Floating charge on bank accounts.
4. 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?

1. None, the counterparty to that transaction does not meet the definition of affiliate.
2. Incurrence of debt at an opportunistically high interest rate.
3. A sale of an asset at arm's length price, but with the purchase price to be paid much later.
4. 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?

1. These proceedings can be recognised by a Dutch court under the European Insolvency Regulation.
2. These proceedings can be recognised under the Brussels regulation (recast) or UNCITRAL Model Law, depending on the jurisdiction.
3. Based on the European Insolvency Regulation, the court in the Netherlands will automatically declare the debtor also bankrupt in the Netherlands.
4. 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?

1. The final deadline for the director to file bankruptcy and avoid personal liability.
2. 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.
3. A date established in hindsight by the Court by reference to the equity of the company.
4. All of the above.

**Question 1.7**

**Select the correct answer**:

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

1. No, he is independent from the debtor and creditors.
2. No, he takes the role and position of the board.
3. Yes, he is independent with a principal duty of care is towards the creditors.
4. 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?

1. 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.
2. 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.
3. 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.
4. 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?

1. The registration is used by the tax authorities to levy taxes.
2. 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.
3. The registration ensures that the pledge can be invoked against third parties.
4. The registration is a constituent requirement and creates a valid pledge.

**Question 1.10**

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

1. The EU harmonisation directive, in the form of new Dutch legislation.
2. An extrajudicial restructuring framework that can be tailored to the needs of the debtor or the petitioning creditors.
3. A modern toolkit for insolvency practitioners who intend to take control over debtors in the Netherlands.
4. A complete overhaul of the Dutch insolvency legislation from creditor-friendly to debtor-friendly.

**QUESTION 2 (direct questions) [14 marks]**

**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.)

[Type your answer here]

**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.)

[Type your answer here]

**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.

[Type your answer here]

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

**Question 3.1 [maximum 6 marks]**

In the aftermath of COVID, the Dutch State, through dedicated vehicles, has provided funding to certain companies that were considered too big too fail, but not able to attract the required liquidity financing ('fresh money') from commercial parties. In return, it demanded security, like any other new financier coming on board in an already debt-burdened company.

In a situation where a company is no longer able to attract funding from its existing financiers, and has pledged to those financiers all its assets already, how would you go about addressing the demand for recourse by any new financiers? Please explain not only the options, but also the restrictions, in the Dutch legal system. (You should be able to answer this question in no more than 300 words.)

[Type your answer here]

**Question 3.2 [maximum 6 marks]**

Assume that Citibank has an unpaid, contingent claim of EUR 10 million in the bankruptcy estate of a Dutch company, Paluco BV, pursuant to a cross-guarantee provided to Citibank by that Dutch company. The principal debt guaranteed by that Dutch company is with its Spanish parent company Paluco International SA, also bankrupty. Both bankruptcies have been running for years. Assume that Citibank finally gets its first recovery out of the Spanish bankruptcy: EUR 3 million. Will that automatically reduce Citibank's claim in the estate of the BV, will the Dutch trustee lower Citibank's claim, or does Citibank need to lower its claim, or can it simply continue making the full claim and why? Please explain. (You should be able to answer this question in no more than 300 words.)

[Type your answer here]

**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]**

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.)

[Type your answer here]

**\* End of Assessment \***