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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 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**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 applies to the Dutch preventive restructuring framework or WHOA?

1. The implementation of the EU directive on harmonisation of preventive restructuring frameworks into Dutch legislation, which replaces the suspension of payments.
2. A new scheme that allows creditors to take ownership of companies in the Netherlands without a court process, as long as they are financially in-the-money creditors.
3. A complete overhaul of the Dutch insolvency legislation from creditor-friendly to debtor-friendly.
4. A restructuring framework that can be tailored to the needs of the debtor or the petitioning creditors.

**Question 1.2**

**Select the correct answer**:

Which transaction by company A having its COMI in the Netherlands on the one hand, and company B controlled by the same person on the other hand, is most likely to be challenged by a bankruptcy trustee, assuming that such transaction is performed four months prior to the bankruptcy of company A?

1. None, the counterparty to that transaction does not meet the definition of affiliate.
2. Incurrence of emergency funding at a higher interest rate than the existing debt, after a market process in which no financier was willing to fund the emergency loans.
3. A sale of an asset at arm’s length price, with the purchase price set-off against loan receivables.
4. Both options (b) and (c), if at the time the transaction was made, the company could foresee a liquidity shortfall.

**Question 1.3**

Which of the following statements is **incorrect** in relation to a petition for bankruptcy made to the Dutch court?

1. Dutch bankruptcy judgments have been recognised under the UNCITRAL Model Law on Cross-Border Insolvency.
2. The Dutch court (as the court where the petition is made) has shared authority over the debtor 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. The trustee, if appointed, is authorised to represent the estate in initiating foreign asset recovery proceedings.

**Question 1.4**

Which of the following statements is **incorrect**?

1. The European Insolvency Regulation has force of law in the Netherlands (where “the Netherlands” is interpreted to mean only the European part of the Kingdom).
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 in respect of European companies.

**Question 1.5**

Which one of the following security rights **does not exist** under Dutch law:

1. Undisclosed right of pledge on intellectual property.
2. Right of mortgage on registered aircraft.
3. Security transfer of ownership of inventory.
4. Right of pledge on future receivables.

**Question 1.6**

**Select the correct answer**:

Following the EU harmonisation directive, many EU member states have now put in place some form of preventive restructuring framework and placed it on Annex A to the European Insolvency Regulation. Which of the below describes the status of those under Dutch international private law?

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

**Question 1.7**

**Select the correct answer**:

In the Netherlands, Dutch law deeds of pledge on intellectual property 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 registration gives third party effect, meaning that it ensures that the pledge can be invoked against third parties.
3. The date stamp placed by the tax authority register is used to determine the date of establishment in the event of more than one right of pledge over the same asset.
4. The registration is a constituent requirement for the pledge.

**Question 1.8**

**Select the correct answer**:

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

1. The final deadline for the managing directors to file bankruptcy and avoid personal liability, and if they don't, for the supervisory directors to instruct them to.
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 1.9**

**Select the correct answer**:

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

1. No, the administrator takes the role and position of the board.
2. No, the administrator is independent from the debtor and creditors.
3. Yes, the administrator has a principal duty of care towards the creditors.
4. Yes, the administrator is appointed to the board with a special mandate to look after the interests of the creditors.

**Question 1.10**

**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 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.
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 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.
4. File for a WHOA in parallel to similar filings in other jurisdictions, align timelines with those of the principal venue and put the restructuring plan to the vote of the creditors in the WHOA proceedings.

**QUESTION 2 (essay-type questions) [12 marks in total]**

**Question 2.1 [maximum 6 marks]**

You represent a bank with a loan receivable claim of EUR 10 million that was registered in the bankruptcy estate of a Dutch company, Pie-in-the-Sky BV, which loan was guaranteed by its Spanish parent company, Doubtful Ventures SA, also bankrupt. Both bankruptcies have been running for years. Assume that the bank gets its first recovery (distribution) out of the Spanish bankruptcy in the amount of EUR 3 million. What will the effect be on the bank’s claim in the bankruptcy of Pie-in-the-Sky? Will that automatically reduce the bank’s claim, will the Dutch trustee lower the bank claim proactively, or does the bank 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 answer here]

**Question 2.2 [maximum 6 marks]**

In the aftermath of Covid-19, 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 (so-called “fresh money”) from commercial parties. In return, the Dutch State 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 answer here]

**QUESTION 3 (direct questions) [14 marks]**

**Question 3.1 [maximum 4 marks]**

Name and briefly explain the workings of 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 answer here]

**Question 3.2 [maximum 4 marks]**

Will a provision in a services agreement (not a utilities or other special regime) 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 if it files for suspension of payments? 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 answer here]

**Question 3.3 [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 answer here]

**QUESTION 4 (fact-based application-type question) [14 marks in total]**

You represent the global market leader in slot gaming machines, McLaren-Casino Group, with their operational headquarters in France and in the US. The parent however is for historical tax reasons a Dutch company named McLaren Casino International Holding NV, with its registered seat in Amsterdam, the Netherlands and is listed in New York on the NASDAQ stock exchange. The board 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) live and regularly work with their teams in either France or the US (and the Chief Risk and Legal officer, also a member of the board, lives in Argentina).

The group is mainly active in the US and in the EU: France, Germany, Poland, Italy and Spain. South America and the Middle East are up and coming. 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 a listed multinational, nearly all the debt sits at the level of the Dutch parent company, but several US 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 Buenos Aires, Argentina, and is a Fellow of INSOL International. He has approached you, because his incumbent counsel in the US has advised that the only reasonable option is to use a Chapter 11 process (“it works great also for non-US companies, is perfect in this situation and we can do it in a cost-efficient way”), but he questions whether the European angle, whether France or Netherlands, will even allow them to use (only) a Chapter 11 or might even offer an alternative route. He wants to have all options on the table and asks you to design an alternative to the US Chapter 11, and also to advise whether the cross-border aspects of the guarantor pool require specific attention.

**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 France or 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 answer here]

**\* End of Assessment \***