



**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.

**[Reviewer: Total score: 33/50 marks, or 66%, PASSED. Comments and feedback provided in the answers. Well done.]**

## **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: **[studentnumber.assessment6E]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. 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 **8 pages**.

## **ANSWER ALL THE QUESTIONS**

### **QUESTION 1 (multiple-choice questions) [10 marks in total] [Reviewer: 6/10 marks]**

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**

**Select the correct answer:**

In the Netherlands, Dutch law deeds of pledge on receivables are registered with the Dutch tax authorities. What is the underlying reason for this?

- (a) The registration ensures that the pledge can be invoked against third parties. **[Reviewer: incorrect. The registration is non-public, so does not have that effect. The correct answer is (d).]**
- (b) The registration is a constituent requirement and creates a valid pledge.
- (c) The registration is used by the tax authorities to levy taxes.
- (d) 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.

#### **Question 1.2**

**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 are recognised under the European Insolvency Regulation.**
- (c) These proceedings can be recognised under the European Insolvency Regulation or UNCITRAL Model Law, depending on the jurisdiction.
- (d) Based on the European Insolvency Regulation, the court in the Netherlands will automatically declare the debtor also bankrupt in the Netherlands.

### Question 1.3

#### 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 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.
- (b) File for suspension of payments 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 as a "composition plan" to the vote of the creditors.
- (c) File for suspension of payments 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.
- (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 1.4

#### Select the correct answer:

Which payments, made by a Dutch company to its shareholders, are likely to be annulled by a trustee, assuming that they are performed seven months prior to the bankruptcy of that company?

- (a) None, as the look-back period for payments is only six months. *[Reviewer: incorrect, there is no fixed lookback period, although you could argue that the 12-month period of presumption serves as such. Correct answer is (d). See guidance text.]*
- (b) Payment of dividends and repayment of shareholder loans.
- (c) All payments that were not made for arm's-length consideration.
- (d) Payment of dividends and repayment of shareholder loans, unless at the time they were made the cash flow test was met.

### Question 1.5

#### Select the correct answer:

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

- (a) The date on which the director should stop entering into new obligations.
- (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. **[Reviewer: (c) is correct, but so are (a) and (b). Option (d) should have been selected.]**
- (d) All of the above.

### Question 1.6

Select the correct answer:

Does the trustee in a Dutch bankruptcy represent the creditors?

- (a) Yes, he is independent with a principal duty of care is towards the creditors. **[Reviewer: incorrect, he does not represent anyone. Correct answer is (c)]**
- (b) Yes, he is appointed to the board with a special mandate to look after the interests of the creditors.
- (c) No, he is independent from the debtor and creditors, but acts for the benefit of the joint creditors.
- (d) No, he takes the role and position of the board and manages the estate.

### Question 1.7

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 has a different scope than the Dutch Bankruptcy Act.
- (c) The European Insolvency Regulation replaces Dutch international private law where it relates to insolvency.
- (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 1.8

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

- (a) Undisclosed pledge on receivables.
- (b) Floating charge on receivables.
- (c) Mortgage on aircraft.
- (d) Pledge on bank accounts.

### Question 1.9

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

- (a) Dutch composition agreements have been recognised under the UNCITRAL Model Law on Cross-Border Insolvency.
- (b) Dutch suspension of payments proceedings are automatically recognised under the European Insolvency Regulation.
- (c) A trustee in a Dutch bankruptcy is authorised to represent the estate in initiating foreign recovery proceedings.
- (d) Dutch bankruptcy proceedings are supervised by a foreign European court if the Dutch debtor has its COMI elsewhere in the EU.

### Question 1.10

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

- (a) The EU harmonisation directive, in the form of new Dutch legislation.
- (b) The Dutch framework for out of court restructurings, building on experience in US Chapter 11 and the UK Scheme of Arrangement.
- (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) [10 marks] [Reviewer: 7/10 marks]

### Question 2.1 [maximum 4 marks] [Reviewer: 1/4 marks]

Will a provision in a contract providing for automatic termination of the contract upon the Dutch contract party filing for insolvency be enforceable against that Dutch contract party in the Netherlands? (You should be able to answer this question in no more than 50 words.)

The rule under Dutch law is freedom of contract. The law will not terminate a contract unless for very urgent reasons.

Debtor's bankruptcy has no influence on executory contracts.

Under bankruptcy provision for termination is inoperative as it may be invoked only by bankruptcy trustee.

[Reviewer: Incorrect save for your correct statements as to the general rule. Your observation on inoperative termination provisions is very much the way it works in the U.S. and partially how it will work for a debtor that

**has filed for CERP. Outside CERP, automatic termination applies and can be enforced without limitation in bankruptcy (save for certain individual utilities contracts. In bankruptcy (which is what you are referring to, ipso facto clauses are enforceable in the Netherlands)**

**Question 2.2 [maximum 3 marks] [Reviewer: 3/3 marks]**

Why was the Netherlands considered a creditor-friendly jurisdiction, when compared to other jurisdictions, before the introduction of CERP (or even now, in situations where CERP is not applied for)? Name and summarise three independent reasons. (You should be able to answer this question in no more than 150 words).

[Netherlands is considered creditor-friendly because real security rights can be obtained easily and provide for an almost inviolable hold on the secured assets. A secured creditor can enforce their security rights without taking account of any insolvency procedure. The only limitations are the cool-down period that can be installed during a bankruptcy, suspension of payments or an extrajudicial restructuring in accordance with the DBA and the period of time that the bankruptcy trustee can set for a creditor to exercise its security rights in case of bankruptcy. In addition, the Dutch tax authorities take priority over a non-possessory pledge on certain types of movables located on the debtor's premises. Furthermore, the insolvency system being beneficial to creditors as one of its main goals is the maximisation of the insolvent estate in order to settle as much debt as possible.]

**Question 2.3 [maximum 3 marks] [Reviewer: 3/3 marks]**

Name and briefly summarise two out of the three routes to obtain recognition of a foreign judgment in the Netherlands (not an insolvency proceeding). You are free to select the country of origin of the judgment. (You should be able to answer this question in no more than 100 words.)

[1.The Recast Brussels Regulation applies to civil and commercial matters but explicitly excludes insolvency proceedings, which is covered by the EIR. A court judgment of EU member state is fully recognised within the EU if the legal proceedings are covered by regulation.  
2.Lugano Convention applies to civil and commercial matters and excludes insolvency proceedings. A judgement rendered by a court of a member state within the scope of the convention is automatically recognised. However, enforcement of the judgement requires an exequatur.]

**QUESTION 3 (essay-type questions) [15 marks in total] [Reviewer: 11/15 marks]**

**Question 3.1 [maximum 8 marks] [Reviewer: 4/8 marks]**

Explain the key fundamental problem that a “new money” financier of a Dutch borrower in financial difficulties runs into. In practice, how would the new money financier go about protecting its interests? Can you think of any other options available to the new money financier? (You should be able to answer this question in no more than 300 words.)

[ The suspension of payments will typically be financed by the debtor itself. Sometimes, emergency funding or “new money” may be provided to the debtor. As this type of financing

does not automatically result in super seniority and the creation of security rights relating to it may be at risk of avoidance.

Most corporate financing documentation in the Netherlands (and in other jurisdictions) contain an obligation for the debtor to create security rights over additional assets at the financiers' first demand (a so-called positive pledge obligation). This positive pledge is typically invoked by the financiers only once the financial position of the debtor deteriorates and it becomes clear that there may not be enough assets for all creditors to be paid. The granting of security over additional assets for the benefit of one of the creditors may then well prejudice the interests of the other creditors. If a debtor acts on this obligation and grants security over additional assets to the financiers, the legal act of vesting the security cannot be avoided, unless the limited grounds for avoidance of a due obligation have been met.

Similarly, the creation of security rights in relation to emergency funding or a loan aimed at restructuring of the debtor is in itself without prior obligation and therefore voluntary – even though it will usually not be perceived as such by the board of directors – and subject to avoidance if, despite the new funding, the additional collateralisation of assets is such a loss of recourse to other creditors that a court would find the transaction prejudicial to the interests of the other creditors.]

**[Reviewer: While you address some important points, you have omitted to address and explain the prior tempore problem of already vested security over assets of a Dutch debtor, which in itself already determines, much more than the avoidance problem, the lack of a large rescue financing market in the Netherlands. See Guidance Text.]**

**Question 3.2 [maximum 7 marks] [Reviewer: 7/7 marks: well done!]**

Will a creditor of a non-Dutch debtor, who has the benefit of a parent or cross-guarantee from a Dutch affiliate, be able to enforce under that guarantee while continuing to also make claims for the same debt with the principal debtor (in the course syllabus referred to as “double-dipping”)? (You should be able to answer this question in no more than 300 words.)

[Double-dipping rule is not to prevent a double proof of the same debt against two separate estates. The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. However, where the creditor to whom the liability is owed has already roved in the insolvency of the principal debtor, the surety's own liability is thereafter reduced to the amount for which the

creditor's proof has been admitted, less the value of any dividends that has been paid to him. Furthermore, the secured creditor may have the benefit of “double dipping”: in the event of a default, the creditor may be able to take recourse against the assets of both the debtor and each co-debtor or, if there is effectively only one pool of assets, to have two claims in that pool. Under Dutch law, double dipping is allowed to the extent that it does not result in payment of more than the total sum of the claim. This means that a creditor can file its full claim in the insolvency proceedings of the debtor and at the same time demand payment by the co-debtor or guarantor. However, the amount paid by the co-debtor or guarantor will be deducted from the final distribution by the debtor's insolvent estate, and vice versa. The DBA offers a solution to double dipping by way of allowing the restructuring of both the claim on the debtor and co-debtor through one restructuring plan and without requiring the co-debtor to go through a restructuring itself. This way of preventing double dipping is one of the main reasons an informal work out under the DBA is especially useful for the restructuring of group obligations.]

**QUESTION 4 (fact-based application-type question) [15 marks in total] [Reviewer: 9/15 marks]**



You represent a group of companies, of which the parent company is located in France. The group has issued corporate debt instruments (“bonds”) through a special purpose Dutch subsidiary, the proceeds of which were used by the Dutch subsidiary to make loans to the operational companies in the group. For tax purposes, the Dutch subsidiary has a board consisting of Dutch nationals and a small office in Amsterdam. The bonds are guaranteed by an intermediate holding company, also in France.

The parent company is exploring options to restructure the bond 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. The general counsel in Paris has asked you to advise whether they can use the French proceedings, which they are used to, also in relation to the instruments issued by the Dutch entity. In any event, the general counsel has made it very clear that he will be very disappointed in his legal advisors if he is held to open, and pay for, full legal proceedings in more than one jurisdiction. “You should have considered that before your firm advised to issue bonds in the Netherlands.”

**Using the facts above, answer the question that follows [maximum 15 marks]**

**[Reviewer: 9/15]**

Please explain whether the envisaged restructuring of the bond debt can be effected using only the French proceedings or, if that would not be possible, using only one jurisdiction. Please 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, also using most recent changes in legislation in the Netherlands, but if the questions you would need to have answered relate to French law, please do set out what these questions are. (You should be able to answer this question using no more than one A4 page.)

[Under the EIR, the courts in the Netherlands have jurisdiction over a request for the opening of insolvency proceedings or any issue relating to a public extrajudicial restructuring in accordance with the DBA if the debtor’s centre of main interest (COMI) is located in the Netherlands. It is not relevant whether the debtor is a Dutch company or private person, or whether it resides in the Netherlands. The centre of main interest is defined by a number of cumulative factors described in the EIR, but is legally presumed (subject to evidence to the contrary) to be the debtor’s domicile (in the case of a private person) or either its main establishment or statutory seat (in the case of a legal entity). Upon being satisfied that the centre of main interest is in the Netherlands, the Dutch court may open bankruptcy proceedings, suspension of payments proceedings or the debt restructuring scheme for private persons, or hear any issue relating to a public extrajudicial restructuring in accordance with the DBA. For purposes within the EU (excluding Denmark), these proceedings will be the main proceedings and, as a general rule, will cover all of the debtor’s assets and debt, regardless of their location. If the centre of main interests of the debtor is located in another EU member state, the Dutch court has jurisdiction to open territorial proceedings if the debtor has an office in the Netherlands. If main proceedings have been opened in another member state prior to the opening of the territorial proceedings in the Netherlands, these latter proceedings qualify as secondary proceedings. Territorial proceedings only affect the assets of the insolvent debtor that are located in the Netherlands. In addition to jurisdiction relating to the opening of insolvency proceedings, the courts of EU member states in whose member state insolvency proceedings have been opened also have jurisdiction for any action that

derives directly from the insolvency proceedings and is closely linked to those proceedings. Examples include legal proceedings regarding avoidance claims and director's liabilities. One of the most important consequences of the application of the EIR to cross-border insolvencies is that as soon as such insolvency proceedings have been opened by a court of an EU member state, they (or in case of an extrajudicial restructuring: the court-confirmed restructuring plan) are automatically recognised in all other EU member states by operation of law. As a result of the automatic recognition, the insolvency proceedings have the same effects in all other EU member states as under the *lex fori concursus*, subject to the exceptions listed in the EIR itself and to territorial proceedings. The recognition includes the authority of a foreign insolvency practitioner in other EU member states. In the case of territorial proceedings, the main proceedings are recognised in the EU member state in which territorial proceedings have been opened, but the assets remain unaffected by the main proceedings as they are only affected by the territorial proceedings. This does not prejudice the powers of the insolvency practitioner]

***[Reviewer: Excellent analysis of the jurisdiction implications in the question. Full points. You have however omitted to cover the other aspects of the question, which is what this means for your client: will proceedings in separate jurisdictions be unavoidable and why (assets, recourse), but more importantly: is it really a draw-back to work in separate jurisdictions, or is this actually not that dramatic, as the same negotiated plan can be submitted in the Dutch process (ref. Grupo Isolux Corsán)].***

**\* End of Assessment \***