INSOL INTERNATIONAL FOUNDATION CERTIFICATE in INTERNATIONAL INSOLVENCY LAW

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 of 46/50 marks, or 92%. PASSED. Very well done, excellent 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: **[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: 10/10 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.

(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.

(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.

(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.

(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.)

Any provision providing for the automatic termination of a Dutch-law governed contract upon a debtor's filing for insolvency is essentially rendered inoperative following the fact that it may only be utilised with the consent of the appointed bankruptcy trustee. However, sometimes these *ipso facto* clauses come in the form of undertakings or representations and whilst these may remain in contracts where the relevant party is Dutch is currently unclear and questionable whether these provisions will be enforceable. ***[Reviewer: Incorrect save for your reference to ipso facto. this 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).

- Under Dutch law, there is no difference between Dutch and non-Dutch creditors and there are no substantive provisions that disadvantage non-Dutch creditors. Indeed, the enforcement of rights for Dutch and non-Dutch creditors is essentially the same with most court proceedings based on written documentation only and can be conducted in Dutch or English (and sometimes other languages)
- Security can easily be taken over assets and this allows creditors to have a strong hold over secured assets. Secured creditors can enforce their claims over the secured assets at any times essentially without limitation.
- Creditors have the option to see "summary proceedings" outside of insolvency where they can obtain a judgment which has preliminary standing to provide the creditor with an executory title which can be used for collections and executory attachments and so is often used to enforced creditor rights in practice.

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.)

- Recast Brussels Regulation - This regulation applies to all judgments (save for exceptions including insolvency proceeding judgments) made by a court of an EU member state and provides that such judgments shall be fully recognised within the EU and that such judgments will be executed in the Netherlands as if it were a judgment of the Dutch courts. As such, a French commercial dispute judgment will be, so long as the French proceedings are within the scope of the Recast Brussels Regulation, recognised in the Netherlands.

- Lugano Convention - The Lugano Convention is currently between the EU, Iceland, Norway and Switzerland and is similar to the Recast Brussels Regulation. A commercial or civil judgment made in a contracting state is automatically recognised in another contracting state. However, for enforcement this requires an "exequatur" which will be granted unless a ground exists which can include (i) breach of Dutch public policy, (ii) procedural irregularities, or (iii) there exists a prior existing judgment by another contracting state's court providing a different judgment. As such, a Swiss commercial dispute judgment will be automatically recognised in the Netherlands and also capable of enforcement so long as none of the grounds noted above exist.

QUESTION 3 (essay-type questions) [15 marks in total] ***[Reviewer: 14/15 marks]***

Question 3.1 [maximum 8 marks] ***[Reviewer: 7/8 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.)

As a provider of "new money" to a company in financial distress a key priority for such a lender will be to ensure that they have the appropriate security in place and that their transaction is not voided as an avoidance.

As a general rule, under Dutch law it is the case that secured mortgages and pledges provide creditors with the highest priority on the proceeds of the secured assets and the priority amongst mortgages and pledges is determined in accordance with their date of creation. It is possible to alter the ranking of mortgage securities with the consent of all mortgagees but this is not the case for pledges as they cannot be altered by agreement. As such, a "new money" lender coming in will be, if all is left as it is, at the back of the queue in terms of their ability to take out new security (there may be no new assets to secure the loan against), and in terms of the distribution of payments upon the enforcement of a secured assets.

There are two key options that "new money" lenders can consider:

- A "new money" lender will want to review the debtor's pre-existing financial arrangements to ascertain whether it provides and allows for the debtor to obtain "new money" lending (often capped at a specific and relatively low amount (which can be increased by consent)) which will then be permitted to take the "top slice" of the proceedings of any enforcement of the secured assets. This is essentially a "pre-approved" contractual subordination that is provided for when the "old money" was lent to allow for "new money" at times of financial distress of the debtor.

- A "new money" lender coming into a distressed situation will want to ensure they have what is known as "super senior" security and, under Dutch law, it is possible for the "new money" lender to obtain the consent of all other secured lenders to contractually subordinate their claims in favour of the "new money" financing. This is often difficult to achieve, but not impossible by any means.

[Reviewer: Well done, but would have looked to see addressed either the option to ask the court for pre-approval to address avoidance risk, or that waiver of existing rights means the informal hardening period (12-month look back period) starts over, which is inattractive in a distressed environment.]

Question 3.2 [maximum 7 marks] ***[Reviewer: 7/7 marks]***

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.)

Under Dutch law, a creditor will be able to enforce its rights against the non-Dutch principal debtor whilst also making a claim under the guarantee against the parent or cross-guarantee from a Dutch affiliate. However, under Dutch law, the creditor will not be allowed to "double-dip" in that it is not allowed to receive payment of more than the total amount of the debt in question. ***[Reviewer: In the Netherlands, having more than one go on your claim we consider "double dipping" already, not necessarily that a creditor would then obtain more than the principle amount owed to him. Terminology matter, no points deducted for that.]***

Specifically, and in the scenario where the Dutch guarantor is in insolvency proceedings in the Netherlands, the creditor can pursue the non-Dutch principal debtor for the debt but it can also file a claim in the insolvency proceedings of the Dutch guarantor. The amount payable by the

estate of the Dutch guarantor will be reduced by the amount paid by the principal non-Dutch debtor (or vice versa).

As such, the parallel claims are allowed, but "double-dipping" is not.

Additionally, the Dutch Bankruptcy Act provides for a way to prevent "double-dipping" in restructurings by allowing both a claim on the debtor and the co-debtor through only one restructuring plan without requiring the co-debtor to be involved in the restructuring plan itself.

QUESTION 4 (fact-based application-type question) [15 marks in total]
[Reviewer: Excellent answer, 15/15 marks, well done!]

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]

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 Recast European Insolvency Regulation 2015/848 (EIR) the French courts would need to establish that DutchCo's (defined below) centre of main interest is in France in order to open main insolvency proceedings in relation to the DutchCo. The centre of main interest is defined in EIR with reference to a plurality of factors, and is said to be where the debtor conducts the administration of its interest on a regular basis and which is ascertainable by third parties, and there is a presumption that it is where the main establishment is located (Article 3(1), EIR).

The known facts are:

- The French parent company's ("FrenchCo") Dutch SPV subsidiary (the "DutchCo") has issued the bonds (as defined in the question). The bonds are guaranteed by an intermediate French holding company ("FrenchInterCo") (FrenchCo, DutchCo, and FrenchInterCo, together, the "Group"). We do not know the governing law of the bonds.

- The DutchCo has used the proceeds of the bonds to make loans throughout the Group. We do not know which companies within the FrenchCo's group that DutchCo has lent money to. This could be to companies in the Group in France (into FrenchCo and/or FrenchInterCo), and/or the Netherlands, and/or in the EU, and/or beyond the EU.
- The DutchCo has a board of Dutch nationals and an office in Amsterdam.

In light of the fact that the DutchCo is a Dutch incorporated company with operations in the Netherlands then, on the known facts, it is unclear on what basis the French courts would be able to assert jurisdiction over DutchCo in order to open "main proceedings" under EIR in relation to the DutchCo. Rather, on the facts provided, the likely centre of main interest for the DutchCo is in the Netherlands.

As such, the French courts would only be able to open proceedings in relation to DutchCo if the DutchCo had an office in France (see Article 3(2), EIR). These proceedings would be "territorial proceedings" and would only affect the assets of the DutchCo that are located in France. On our facts we are not aware of the DutchCo having an "establishment" in France. This would be a question for the client. However, the utility of a French secondary insolvency proceeding in relation to DutchCo would be limited given that secondary proceedings only effect assets within the territory of the Member State where those secondary proceedings are opened; and, on our fact, we do not know whether the DutchCo has assets in France.

In light of the fact that the likely centre of main interest of the DutchCo is in the Netherlands it needs to be considered whether the Netherlands is a jurisdiction that can be used to restructure the bonds and, if so how. To that end, there are two routes that may be of use to the DutchCo/Group:

1. Suspension of Payments and Composition Agreement
2. Extrajudicial Restructuring Plans

<u>Suspension of Payments and Composition Agreement</u>

The case law created by *Grupo Isolux Corsan* C/13/16/37-S is useful on this point as it relates to the restructuring attempts by a Spanish headquartered group over various debts including those of a Dutch subsidiary. In *Grupo Isolux Corsan* the mechanism by which the group restructured its debts was to have the Dutch subsidiary apply to the Dutch courts for a suspension of payments and, in so doing, benefitted from the automatic stay while it finalised the negotiations with its creditors before finally offering a "composition agreement" in the Dutch suspension of payment proceedings. This composition agreement was the same agreement as had been agreed in Spain with the necessary consents to be a Spanish restructuring agreement. However, because the Dutch courts approved the composition agreement this resulted in it having pan-EU effect under the EIR.

Applying *Grupo Isolux Corsan* to our facts, in terms of jurisdiction, on our facts it seems highly likely given that the presumption is that a company's centre of main interest will be where it is incorporated, that DutchCo's centre of main interest will be in the Netherlands. As such, the Dutch courts will likely open "main proceedings" under EIR in relation to the DutchCo.

Once jurisdiction is established, and mirroring *Grupo Isolux Corsan,* it would be possible for the DutchCo to apply for a suspension of payments before the Dutch Courts (and therefore benefiting from the automatic stay) before offering a composition agreement in those Dutch proceedings which was on the same terms as the Group's general restructuring agreements reached elsewhere. The composition agreement can include, if agreed with creditors, the 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. In order to be successful, the composition plan will need to be approved by a simple majority in number of the admitted creditors at the meeting and eligible to vote and be at least 50% of the value of

the admitted claims that has a right to vote. If this threshold is not met then the DutchCo can still request the approval of the composition plan by the courts if other requirements are met (i.e. 75% of those at the meeting voted for the plan and those that rejected it do so unreasonably). If the composition agreement is ultimately accepted then it will bind all ordinary unsecured creditors and will have pan-EU effect under the EIR and will be recognised and enforceable across all jurisdictions in the EU.

Extrajudicial Restructuring Plans

Another option available to the Group could be to pursue an extrajudicial restructuring under Dutch insolvency law. In doing so the DutchCo could proceed with either a public restructuring process or an undisclosed restructuring process.

If the DutchCo proceeds with a public restructuring process then the resulting judgment being a "court-confirmed restructuring plan" will be automatically recognised across the EU under EIR. Under an undisclosed process, here the court will only assume jurisdiction if the DutchCo has a centre of main interest in the Netherlands, or there is a "sufficient connection" to the Netherlands which can include the governing law of the debt. An undisclosed restructuring plan does not benefit from EIR automatic recognition like a court-confirmed restructuring plan (but it is likely to be recognised in other jurisdictions under Recast Brussels, UNCITRAL Model Law, or private international law) but the key advantage to it is that the details of it are not publically disclosed. We do not know what the governing law of the bonds are and this will be a question for the client and whether we can establish the DutchCo's centre of main interest or "sufficient connection" with the Dutch courts is a gateway test to then deciding whether to opt for a public restructuring plan (and then have EU wide recognition) or an undisclosed plan (and have the benefits of privacy).

Once the route is decided then DutchCo could offer it up to its creditors (i.e. the bondholders) and it would need to be approved by at least two-thirds of the total value of the claims held by those who voted in each class. If all classes approve the plan then the court must declare it binding subject to certain requirements but if only one class approves it then the court may consider the plan and still declare it universerally binding in a "cross-class cram-down". Whether to pursue the extrajudicial restructuring route is a question for the client as it will be critical to understand from them whether there is generate appetite from the creditors of the Group, and specifically the DutchCo's creditors, to accept a restructuring plan.

*** End of Assessment ***