



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 29/50, or 58%. PASSED. I have tried to give feedback and clarification in my answers, but all of the answers are also available in the Guidance Text.]

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: 5/10 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 serve as such. 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. **[Reviewer: incorrect. It is automatically recognized without need for further recognition. Correct answer is (b).]**
- (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, look back period is 12 months (I would have approved if you had said there is no look back period. Correct answer is (d))]*
- (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. *[Reviewer: correct, but so are (a) and (c). The right answer is therefore (d)]*
- (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. **[Reviewer: this is correct, the only incorrect statement is in (d).]**
- (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: 10/10 marks]**

Question 2.1 [maximum 4 marks] **[Reviewer: 4/4 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.)

[An important deviation as compared to ordinary insolvency proceedings, in an extrajudicial restructuring, contractual provisions resulting in the suspension or termination of the contract solely based on the restructuring (so-called ipso facto clauses) are deactivated, that is cannot be invoked by the counterparty to the debtor. That will likely prove a significant feature in the preservation of going concern value. An exception applies to contracts that allow parties to set-off their obligations through close-out netting, such as an ISDA Master Agreement.]

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).

[The main reason for the qualification of the insolvency system as creditor-friendly is the same as for regarding the Dutch creditor enforcement system as such: real security rights can be obtained easily and provide for an almost inviolable hold on the secured assets. It means that security can easily be taken over assets, providing creditors with a very strong hold on the secured assets. Regardless of the insolvency of the debtor, secured creditors can enforce their claim against the secured assets almost without limitation. In addition, the Netherlands used to be considered debtor-unfriendly, as, until recently, it did not offer any mechanism to impose standstill measures without the creditors' consent. The recent incorporation in the DBA of a framework for extrajudicial restructurings has changed this and materially improves the Netherlands' appeal towards debtors (and many expect that debtors will even seek to benefit from this new option, by bringing themselves within its jurisdiction, sometime referred to as "forum shopping"). As of 1 January 2021, the DBA allows debtors to propose a restructuring plan to all or some of their creditors (and shareholders) and, when certain procedural and voting requirements are met, request court confirmation of this restructuring plan. The result is a restructuring plan that is binding on all affected creditors, regardless of their approval of the plan. Finally, the Dutch legal environment, including with regard to restructuring and insolvency, is highly professional.]

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.)

You should have identified: (i) the Recast Brussels Regulation (not applicable to insolvency proceedings); (ii) the Lugano convention; and (iii) independent recognition without a treaty, if the court finds that (i) the principal court's jurisdiction is based on internationally generally accepted grounds, (ii) proper legal procedures have been observed, (iii) the judgment does not contravene Dutch public policy, and (iv) the judgment is not irreconcilable with any prior judgment of a Dutch court or any foreign court insofar as that judgement is eligible for recognition in the Netherlands.

QUESTION 3 (essay-type questions) [15 marks in total] [Reviewer: 4/15 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.)

[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. In practice, these is relevant in the context of cross-border corporate financing transactions and the vesting of

additional security for already drawn amounts. Most corporate financing documentation in the Netherlands contain an obligation for the debtor to create security rights over additional assets at the financiers' first demand. 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. However, if the positive pledge obligation was included only recently creditors or a trustee may look to avoid the entry of the positive pledge obligation itself and argue that that act was in fact voluntary and prejudicial to the other creditors. 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 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. This may be the case if, for instance, a large unsecured financier would provide an additional, relatively small loan and obtain security over assets of the debtor covering not only the additional amount, but also the larger, earlier debt. Those assets will then no longer be available for recourse by the other creditors and if the debtor subsequently goes bankrupt, those other creditors may claim that they were better off without the additional loan but with recourse to all the debtor's assets. This is why the option, introduced by CERP, to obtain court authorisation for entering into an agreement for emergency funding and the grant of security rights for this loan is an important addition to the Dutch restructuring toolkit.]

[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: 0/7 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.)

[Secured assets of non-Dutch debtor While Dutch law does not distinguish between Dutch and foreign creditors, obviously the identity of the debtor and, if different, the person that has granted security for the debtor's obligations, is important. Dutch law security deeds typically contain an election for the courts in the Netherlands and are governed by Dutch law, but the underlying obligations for which the security is granted may well be governed by foreign law. That may lead to recognition issues and hinder the enforcement of security in the Netherlands pending recognition of the underlying obligations by the Dutch courts. Various practical work-around solutions have been developed in legal practice and the position of the pledgee is typically safeguarded due to the fact that the pledgee can send notices allowing it to exercise the main rights in relation to the secured assets pending full enforcement of the collateral.]

[Reviewer: The question relates to the ability to recover from a Dutch co-debtor, rather than a non-Dutch co-debtor, and the ability to make parallel claims. See “double dipping” explanation in the Guidance Text]

QUESTION 4 (fact-based application-type question) [15 marks in total] [Reviewer: 10/15 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: 10/15 points]

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.)

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?

[Considering that the parent company is located in France and issued corporate debt instruments through a special purpose Dutch subsidiary, the group could try informal negotiations, out-of-court restructuring negotiations, with the intention of arriving at a restructuring agreement that would be put to the courts in Dutch for approval and binding effect also on dissenting creditors. Because the court approval of the composition in the Netherlands is recognised as an insolvency judgment under the EIR, its effect vis-à-vis the bondholders had pan-European effect. The Dutch court may assume jurisdiction if the debtor has its current registered corporate seat in the Netherlands. If this is not the case, the court has jurisdiction if the debtor conducts a profession or business in the Netherlands without having its registered corporate seat in the Netherlands. In the case of extrajudicial restructuring, the Dutch court can also assume jurisdiction if the restructuring is sufficiently connected to the Netherlands. If a Dutch court finds that it has jurisdiction, it will apply Dutch insolvency law to the request for the opening of insolvency proceedings. As a result, the rules relating to the requirements for the allowance of an insolvency request and to the authority to file such a request are the same as those which apply to purely Dutch insolvencies. Dutch law takes a universalist approach to Dutch insolvency proceedings, effectively requiring the courts to take authority over all aspects thereof, regardless of the cross-border aspects. On the other hand, when it comes to the effect of foreign insolvency proceedings in the Netherlands, the cross-border comity principle - used, for instance,

in the UNCITRAL Model Law on Cross-Border Insolvency is absent, territorialism prevails. The Netherlands have not implemented the UNCITRAL Model Law and there is no expectation for that to change in the near future. Therefore, foreign insolvency proceedings and their effects will not be recognised in the Netherlands, unless certain conditions have been met. Dutch assets are not affected by any moratorium or stay indicated by foreign insolvency proceedings. Furthermore, the legal consequences of the insolvency proceedings under the foreign law applicable to that insolvency cannot be invoked in the Netherlands, in so far as this would limit creditors in their recourse on Dutch assets. Local proceedings are often necessary. Any other legal consequence of foreign insolvency proceedings may, however, be invoked. A general limitation on the execution of Dutch assets and the use of powers by a foreign insolvency practitioner is Dutch mandatory law.

However, if the group chose to submit it to French courts, would that agreement bind on creditors of the financing company which the French courts did not exercise any jurisdiction? Would that agreement be recognised at all outside French? Would it be a proceeding under the European Insolvency Regulation (EIR)?]

[Reviewer: You touch on many important points, including in jurisdiction, but should have made the explicit consideration that under EIR, it is COMI that determines where the debts of the Dutch issuer can be restructured, and that COMI for the Dutch issuer is likely in the Netherlands. Half points awarded on the jurisdiction point as you have covered it to some extent.]

*** End of Assessment ***