



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.

TOTAL SCORE: 37/50, OR 74%. PASSED. 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: 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.)

Under Dutch Law, contract stipulations of parties will prevail until there is a reason to cancel it. An example for cancelling contractual clauses is the inoperativeness of clauses ipso facto, which means, clauses by which parts agree on termination of contract or netting or set-off provisions, due to the beginning of an insolvency proceeding. These clauses in a contract providing for automatic termination upon the filing for insolvency proceedings will not be effective in Dutch Law.

[Your answer applies only to the situation under CERP (which requires an active call thereon by the debtor), or in relation to employment and lease contracts, as well as utilities. Ordinary contracts stay in place, with their ipso facto.]

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).

Some reasons by which the Netherlands was considered a creditor-friendly jurisdiction are the following:

1. First reason is that secured creditors may enforce their securities in almost every scenario, even if their debtors are in face of or in an insolvency proceeding. There are 2 limitations for securities enforcing in face of bankruptcy, (1) as a consequence of a cool-down period ordered by the supervisory judge that may be set off during 2 months and a possible once extension. In this event, secured creditor may not enforce its security without authorization from the Court; and (2) the trustee may establish a period to enforce securities, whether the creditor does not enforce it, the trustee may dispose of over secured assets and the creditor will retain its priority.
2. Second reason was that under the Dutch Law, there was not any mechanism to impose standstill measures without the creditors' consent, but it changed with the DBA that began to be enforced upon January 1, 2021, which creates the extrajudicial restructuring.
3. Third, creditors may set off a claim against an obligation of the same nature even when the debtor is in bankruptcy.

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.)

Three ways are Recast Brussels Regulation, the Lugano Convention, and cases in which a treatment is not applicable. For purposes to answer this question, I refer to both treatments.

First, Recast Brussels Regulation applies for recognition of a foreign judgment related to civil and commercial matters. Is applicable to members of the European Union (without Denmark). Pursuant to this regulation, a judgment may be recognized as a judgment issued in the Netherlands.

Second, Lugano Convention applies to European Union, Iceland, Norway, and Switzerland. Pursuant to this convention, a judgment may be recognized automatically. Nonetheless, its foreclosed requires an exequatur, but with fewer requirements than an exequatur ordinary proceeding.

QUESTION 3 (essay-type questions) [15 marks in total] [Reviewer: 10/15 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.)

Generally, the commencement of an insolvency proceeding is associated with financial distress. For that reason, companies frequently pursue some new money to turn around their business and overcome financial difficulties. Nonetheless, the debtor

may pursue financing if it may grant securities and preference for reimbursements of the loan.

Some insolvency frameworks as for instance the Bankruptcy Code of the United States, Chapter 11, allow debtor in possession financing without prior authorization from the Bankruptcy Code, unless security will be required case in which may grant it over collateral or not collateral assets. It is granted over the collateral asset, the Court will verify if exist adequate protection in favor of the old creditor and its consent.

However, in the Netherlands, the law does not grant a priority to new money. Thus, the creditor of fresh money and the debtor have to negotiate for granting securities over assets not granted in security in favor of other creditors, and just for ensuring compliance with the new obligation. Another option is granting security over secured assets, prior to the first secured creditor's consent, because it will imply a subordination for the old creditor. However, it does not apply for granting pledges, but just for mortgages.

If security will be granted to ensure other obligations, for instance, obligations subject to the insolvency proceeding, the Court will consider it prejudicial to other creditors. Thus, pursuant to CERP, the debtor and the creditor must obtain prior authorization to pursue the DIP financing.

[Reviewer: all correct, but I would have expected a note pointing towards prior tempore rule and avoidance of transactions that benefit certain creditors in view of bankruptcy. Both are pointed out as the single biggest hurdles in Dutch DIP financing.]

Question 3.2 [maximum 7 marks] [Reviewer: 6/7 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.)

Creditors may pursue different sorts of securities, including personal securities as joint liability from any other debtor. It carries as a consequence that the creditor may recover its debt in full from any other than the principal debtor. Another guarantee may consist in a suretyship or comfort letters. In those cases, the secured creditor may enforce its security against the principal debtor or the joint and several debtors, or both.

If any debtor is in an insolvency proceeding, the creditor will be deemed as a secured creditor just if it has security over any asset of the debtor in insolvency. On the contrary, if the creditor has not have security, that creditor will be treated as an unsecured creditor but may enforce against the joint and several debtors outside of the insolvency scenario.

In addition, if both debtors (principal, and joint, and several) are in insolvency (for instance, when Company Group is in insolvency, and some are located in Netherland and other members are in other States), creditors may request the payment of their credits in any or both proceedings (double-dipping). Thus, for answering the question, a creditor of a non-Dutch debtor, who has the benefit of a parent or cross-guarantee from a Dutch affiliate, will be able to enforce that guarantee against that debtor and continuing its claims for the same debt against the principal debtor.

If payment is made in favor of the creditor, the other joint and several debtors may pursue reimbursement in the insolvency proceeding of the principal debtor.

[Reviewer: Correct, but would have liked to see that the total recovery is limited to one's overall claim and that each claim is immediately reduced with the amount already recovered]

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]

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.)

This is a question involving a cross-border insolvency framework. Both Netherlands and France are members of the EU. Thus, in this case, is applicable the EIR Recast.

Pursuant to this law, there are some aspects that need to be addressed to answer whether: (1) a restructuring proceeding can be opened in France to negotiate bond debts, including Netherlands bonds creditors; and (2) Group of Companies must open two or just one proceeding, and if it is not necessary to open two proceedings, how to recognize and eventual judgment.

First, it is necessary to review if under France Law a restructuring proceeding could be opened and just to negotiate with bond creditors. For that purpose, Schedule of the EIR Recast establishes which proceedings may be deemed as insolvency proceeding and if the French Proceeding fall in that schedule, it will be deemed for purposes of this case.

Additionally, a reorganization or restructuring plan must fulfill all requirements pursuant to the France Law to be approved or enforceable. While negotiation occurs, foreign representatives of insolvency proceeding from France could request before the Court in the Netherlands (1) recognition of the foreign proceeding as a main insolvency

proceeding pursuant to the EIR Recast; (2) measures to suspend enforcements or actions of debt collection against Dutch subordinated company.

The Dutch Court may recognize that proceeding as the main insolvency proceeding if it fulfills the requirement of Article 3, EIR Recast by which “The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties”. The recognition implies that Netherlands proceedings effects will apply in this territory. ***[Reviewer: You were expected to be a bit more specific on the fact that the COMI question is vital here: is it even realistic to consider that the COMI of the bonds issuer could be in France? If not, then a French Proceeding on the Dutch issuer, would not be possible.]***

However, if the French proceeding does not fall into described in the schedule of the EIR Recast, the negotiation may be adopted and request to the Court of Netherlands to order a temporal suspension of debt collections proceedings against the subordinated company, as occurred in the case of the Isolux Corsán Group. ***[Reviewer: Correct – this scenario is very much like Isolux Corsán. And what about CERP in the Netherlands as an alternative?]***

Thus, regarding the second question, if the French Proceeding could be deemed as the main insolvency proceeding, is not necessary to open two proceedings, but the insolvency practitioner must request for applying of measures as suspending debt collection proceedings against the debtor pursuant to Netherland rules. Finally, the reorganization plan will be applicable to bond creditors in Netherland automatically, because it will be deemed as a judgment pursuant to the EIR Recast.

REFERENCES

REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast)

*** End of Assessment ***