



**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: 44/50, OR 88%. 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.)

These provisions may only be invoked with permission of the bankruptcy trustee. Counterparties may request the trustee to confirm whether the debtor's obligations will be met. If confirmation is given, security must be provided for performance of the debtor's obligations. If not, the performance cannot be claimed from the counterparty.

**[Your answer applies only to employment and lease contracts, as well as utilities. Ordinary contracts stay in place, with their ipso facto. I was also looking for a note that under CERP, ipso facto is no longer allowed, which is an important element of the debtor protection offered under CERP]**

### 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 Dutch insolvency system aims to maximise the insolvent estate for purposes of settling as much debt as possible. This goal serves to orientate the system to being more creditor friendly.

Creditors can take security over assets fairly easily which provides them with a strong hold over these secured assets. Rights against secured assets can be enforced almost without limitation irrespective of the solvency of the debtor. AND can only be affected by the implementation of the so-called cool-down period, suspension of payments or extra-judicial restructuring.

The right of set-off is also extended during during insolvency proceedings. During bankruptcy and suspension of payment proceedings, a creditor may set-off a claim against a debtor against any claim for performance against it, provided that both are of a similar nature, regardless of whether the claim is due and payable and the creditor is authorised to perform its obligation.

**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.)

The Recast Brussels Regulation applies to civil and commercial judgments (excluding insolvency). If the supporting legal proceedings are within the Regulation's scope, judgments by EU member states are automatically recognized. If it aligns with a Dutch measure with similar goals and consequences, the judgment may be executed.

Under the Lugano Convention these judgments are also automatically recognised. Enforcement thereof requires an *exequatur*. Which will be granted unless the judgment is irreconcilable with a judgment previously granted, the debtor is not afforded sufficient opportunity to defend/oppose, or enforcement conflicts with public policy.

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

**Question 3.1 [maximum 8 marks] [Reviewer: 8/8 marks, answer well composed!]**

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.)

Most cross-border financing transactions require the financier to be provided with security or additional security for already drawn amounts. This poses two difficulties under Dutch law.

Security rights rank *pari passu* with priority in respect of the distribution of proceeds being determined by order of creation. Priority of ranking can only be altered by agreement between a debtor and a creditor to subordinate the creditor's claim. Consequently,

debtors are unable to provide financiers providing “new money” financing with priority rights over assets which have already been pledged or mortgaged to other creditors. Rather than establishing priority by agreement or contract, ranking must be created through agreement and with the consent of creditors whose claims are to be subordinated. In the case of mortgages, a notarial deed stating the change in priority must be registered and in with pledges, all prior pledged must be temporarily waived and recreated after the pledge which must have priority has been created.

A positive pledge obligation, in terms of which security rights are created by the debtor on first demand by the creditor often forms part of such financing transaction. It is usually invoked only after the debtor is experiencing financial difficulties and when solvency issues appear to exist. The security so granted may be vulnerable under avoidance provisions as they are usually invoked whilst a debtor is experiencing solvency issues and the granting of security over assets to a specific creditor may very well be seen to be to the detriment of the general body of creditors. Loans for emergency funding aimed at restructuring a debtor may thus be capable of being set aside under avoidance provisions. To overcome this, court authorisation must be obtained under CERP for the conclusion of an agreement for emergency funding subject to the granting of certain security rights.

**Question 3.2 [maximum 7 marks] [Reviewer: Strong answer, 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.)

The Dutch legal system allows so-called “double dipping” provided that it does not result in payment in an amount greater than the creditor’s claim. The creditor may thus, in the event of default, simultaneously take recourse against the assets of the debtor and the guarantor. If the debtor is insolvent, a claim can be filed in the insolvency proceedings whilst demanding performance from the guarantor. If one pool of assets exists in respect of the debtor and the guarantor, the creditor may lodge two claims in that pool – one in respect of its claim against the debtor and one in respect of its claim against the guarantor. Any amounts received from either the debtor or the guarantor will be deducted from the amount or distribution payable by the other party, as the case may be.

Should the debtor be restructured under Dutch law, the Dutch Bankruptcy Act prevents “double dipping” by allowing the restructuring of relate obligations under a single restructuring plan. By doing so, both the claims against the principal debtor and the guarantor can be restructured simultaneously without the necessity of restructuring the guarantor as a separate entity.

It bears mentioning that “double dipping” is treated differently in different jurisdictions. Thus, if the debtor is subject to a jurisdiction other than the Netherlands, the relevant provisions which apply in that jurisdiction must be considered in respect of any claims made by the creditor.

**QUESTION 4 (fact-based application-type question) [15 marks in total] [Reviewer: 12/15 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.)

Under the European Insolvency Regulation (recast) (“EIR”) a court confirmed restructuring plan will be automatically recognised in all other EU states by operation of law. Once a French court has confirmed the group’s restructuring (provided that there are appropriate mechanisms under which the entire group may be restructured under French law) it will be automatically binding in the Netherlands as both jurisdictions are EU member states. If territorial proceedings are opened in the Netherlands simultaneously with main insolvency proceedings in France, Dutch assets will have to be dealt with under the local proceedings.

Alternatively, to French proceedings a composition plan can also be utilised under Dutch law rather than opening local Dutch proceedings. Dutch courts have proven to being amenable to accommodating foreign proceedings by allowing the timetable of Dutch restructuring to be aligned with the applicable time periods in foreign restructuring proceedings. Composition plans are often used to restructure the debts of a Dutch legal entity forming part of an international group of companies, such as the Dutch subsidiary in this scenario. **[Reviewer: You were expected to be a bit more specific on the fact that the COMI question is vital here.]** The Dutch subsidiary is a party to the group’s financing agreements, may be vulnerable to acceleration of obligations by creditors and creates exposure to the rest of the group through the intercompany loan granted to other subsidiaries. Utilising this avenue, the group can negotiate its restructuring plan in France (being the parent company’s main jurisdiction) and, after it has been voted on, file same as a composition agreement in Dutch proceedings. The voting thresholds which will be required in respect of the composition plan in the Netherlands will traditionally be lower than in the jurisdiction of the parent company as it will only require a simple majority on number and amount of creditor votes. The Dutch court must also approve the composition plan and can

do so irrespective of whether the restructuring plan has been approved in the parent company's jurisdiction. Thereafter the composition plan will be automatically recognised throughout the EU under the EIR and may be recognised in the US under Chapter 15 or the UNCITRAL Model Law on Cross Border Insolvency. The process discussed hereinbefore was successfully utilised in the matter of *Grupo Isolux Corsán*, where a restructuring agreement negotiated and concluded in Spain was approved as a composition plan in the Netherlands by creditors and the local courts. Simultaneously with presenting and obtaining approval of the composition plan the Dutch subsidiary should consider whether to apply for a suspension of payments, thereby obtaining temporary protection against disruptive actions by ordinary creditors. It bears mentioning, however, that Dutch law does not provide for the consolidation of suspension of payment proceedings in respect of groups of companies.

The general counsel may also consider the extra judicial restructuring of the group under Dutch law. This will enable the restructuring of the obligations of other group members towards the creditors of the Dutch subsidiary's creditors, if any, as well as group finance obligations such as guarantees, if any, can be included in the restructuring plan without restructuring the members themselves. The Dutch court may assume jurisdiction over the group companies' liabilities if they ... This route may also be pursued in respect of a debtor who does not have its centre of main interest in the Netherlands, provided that the restructuring is sufficiently linked to the jurisdiction and, as such, the entire group of companies may be restructured under a Dutch restructuring plan.

The writer is of the view that the general counsel should present a composition plan under Dutch law, coupled with a stay of proceedings or "cool-down" period in order to protect against the execution of rights by secured creditors in the Netherlands. Obtaining approval of the composition plan would be relatively easy, whereafter it will be binding in all EU states.

**\* End of Assessment \***

