



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: 47/50, OR 94%. PASSED. EXCELLENT JOB, IMPRESSIVE!

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: 9/10 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. [Reviewer: Not correct, as the EIR provides for automatic recognition, i.e. option (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.
- (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: 8/10 marks]

Question 2.1 [maximum 4 marks] [Reviewer: 2/4 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.)

ANSWER

Court Confirmation of Extra-Judicial Restructuring Plans (CERP) incorporated via the Dutch Bankruptcy Act (DBA/WHO) ensures that ipso facto clauses remain inoperative and that they may be invoked only with the permission of the bankruptcy trustee. Contractual provisions resulting in termination of contracts solely based on a bankruptcy event are ineffective. [Reviewer: Correct, but outside CERP (ie. In any of the other insolvency proceedings), ipso facto clauses are simply enforceable (save for utilities, lease, employment).]

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).

ANSWER

Three reasons why the Netherlands considered a creditor-friendly jurisdiction, when compared to other jurisdictions are as follows:

1) Position of secured creditors is strong under the DBA.

Pledge and mortgage-holders may independently exercise their security rights despite the fact that the debtor is subjected to an insolvency procedure providing the secured creditors a strong hold-on secured assets only subject to the moratorium under the cooling-off period and time set by the trustee within which to exercise the security right in case of bankruptcy.

2) Lower level of sacrifice for creditors through higher debt settlement.

Since the administrator and trustee act in the interest of the general body of creditors, higher debt settlement is key goal of the insolvency process achieved through maximisation of proceeds from sale of assets.

3) Set-off of pre/post insolvency period claims

DBA permits set-off of pre/post insolvency period ordinary course claims making provisions for avoidance ineffective.

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.)

ANSWER

1) Under the Recast Brussels Regulation

Covers foreign judgment dealing with civil and commercial matters. A judgement handed out by an EU court in a member state is automatically recognised in other EU member states if the supporting legal proceedings are within the scope of the Regulation.

2) Under the Code of Civil Procedure

Where there is no treaty or regulation, court will accept judgement, if, jurisdiction of original court is on internationally accepted grounds, not opposed to Dutch public policy, not in conflict with prior judgements and due process of law has been followed.

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.)

ANSWER

Under the DBA, a debtor has no ability to provide super senior preference to new money financiers over existing lenders in an explicit manner. Transactions violating prior tempore rule can be clawed back by the insolvency professional as a vulnerable transaction (actio pauliana).

New money financier (from the existing lead bank) can protect its interest by ensuring that loan documentation have a positive pledge clause featuring as part the original loan documentation and not as a new introduction through amendment or re-set of loan covenants at a time when the debtor is under financial stress. Mortgage ranking can be changed with prior consent of the mortgagees for raising new money finance. For pledges, the process is more complex will need waiver of all existing pledges for creating the new pledge and this process is fraught with risk where an attachment may be made in between the waiver of the pledge and creation of the pledge for the new money. Alternately, the existing pledge-holders could be settled where debt is nominal and finance can be raised simultaneously.

DBA permits running of the business as a going concern and raising estate credit. New money financiers can be provided super priority status with the consent of other secured and preferred creditors. Alternately, new money finance may also be given status of an estate claim and rank ahead pre-existing preferential creditors (demonstrating criticality of emergency finance for the survival of the business hence priority status is justified).

Under the CERP, the new money financier can provide finance backed by collateral and the court may assent to it subject to the interest of the joint creditors being safeguarded and no harm being done to the interests of any individual creditor. Further, the court's authorization assists to prevent avoidance action in subsequent formal insolvency proceedings.

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.)

ANSWER

Guarantor's liability is co-extensive with that of the principal debtor in as much as the lender may proceed against the principal debtor, or the guarantor, or both in no particular sequence. Recourse may be limited by contract, however, this is rarely the case.

Under DBA, notwithstanding the cooling-off period, double dipping is allowed to the extent it does not result in payment of more than the sum total of the claim against the debtor (*rule against double dividend out of one estate*). Professor Fletcher in *The Law Of Insolvency* has mentioned "*Where the creditor to whom the liability is owed has already roved in the insolvency of the principal debtor, the surety's own liability is thereafter reduced to the amount for which the creditor's proof has been admitted, less the value of any dividends that have been paid to him*".

DBA's unique offering, allowing integration of obligations of the main debtor and group members towards the main debtor's creditors into a single restructuring plan, meaning parent guarantees can be restructured in the restructuring plan without the guarantors having to go through a separate restructurings. This solution prevents lenders from double-dipping and aids restructuring through one plan. In case of cross-border insolvencies, Dutch court assumes jurisdiction where debtor does not have COMI in the Netherlands subject to restructuring being sufficiently linked to the Netherlands and group companies meeting the light insolvency test.

Under CERP, group companies without COMI in the Netherlands may restructure under the undisclosed option where there is sufficient connection to Netherlands or where group's financing structure has a Dutch debtor or group is financed by Dutch bonds, the entire group

debt could be restructured through one plan allowing creditor a single dip against the consolidated group assets.

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

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.)

ANSWER

For resolving judicial conundrum regarding COMI, reference should be made to the guidance given by CJEU in the *Eurofoods IFSC case* regarding uniform autonomous interpretation of Centre Of Main Interest (COMI) and the entity by entity approach to determine COMI (Article 1(1) of the EIR Recast).

The Dutch subsidiary is supervised by board consisting of Dutch nationals with an office (registered in Netherlands) in Amsterdam and has raised group finance through bonds. From comprehensive assessment of facts, it is visible and ascertainable to third parties that the COMI of the Dutch subsidiary is in Netherlands establishing legal certainty for Dutch courts to assume jurisdiction. Further, the Dutch subsidiary may use the court confirmed restructuring plan (CERP) since substantial portion of the bond debt is subject to restructuring governed by DBA. The legal framework for CERP is designed to apply to cross border insolvencies of group companies even if all, but one group companies lie outside the Netherlands subject to criteria of them passing the light insolvency test and the Dutch court has jurisdiction over operational group companies when they offer a restructuring plan under DBA.

The DBA offers two types of proceedings, public and undisclosed proceedings. Public proceedings under the CERP is automatically recognised within the EU because it is placed on the Annex A of the EIR Recast. Forum shopping under the EIR Recast is not prohibited

per se, however, there is aversion to the harmful or abusive forms which prejudice the debtor's creditors (*Recital 29 – EIR Recast*). For undisclosed proceedings, the Dutch court will assume jurisdiction according to the Dutch Civil Code either based on COMI or based on criteria of sufficient connection to Netherlands determined on (1) substantial portion of the group debt is subject to restructuring under Dutch law (2) substantial part of the group's assets are located in Netherlands (3) the debtor is part of a group that is mainly based in Netherlands. Recognition for undisclosed can be obtained through the Recast Brussels Regulations, Lugano Convention in the EU, through UNCITRAL Model Law, international treaties or each jurisdictions private international law in case of non-EU jurisdictions.

The Dutch subsidiary can use either (public or undisclosed) of the CERP proceedings listed above since it qualifies on the COMI criteria as well as substantial portion of the bond debt can subject to restructuring governed by DBA.

With reference to French safeguard proceedings, Sauvegarde is one of 112 insolvency proceedings listed in the Annex A of the EIR Recast referred in 2(4) of the EIR Recast and covered by the material scope of EIR Recast as the parent company is located in France; COMI is in France and French safeguard proceedings are applicable. However, whether French safeguard proceedings have the legal framework designed to apply to cross border insolvencies of group companies where group companies' lie outside the France needs to be determined? Additionally, whether French safeguard proceedings also offer integration of obligations of the main debtor and the group members towards the main debtor's creditors into a single restructuring plan meaning inter-group guarantees can be restructured in the restructuring plan without the guarantors having to go through a separate restructurings needs to be checked ? Swiftness of the restructuring process with regard to timelines, decision on preliminary disputes, availability cross cramming provisions and settling of class constitution will be additional factors to determine process jurisdiction benefits.

Prima facie, CERP under Dutch Law should be used to address this case because of the following benefits:

- Access to single composite plan for the group without need for individual restructuring
- Have the composition plan voted in Netherlands with lower majority giving it recognition in EU through EIR Recast, treaties and UNCITRAL MLCBI in other jurisdictions where identical restructuring agreements may not have been recognised or where court approval isn't forthcoming
- Align time-table of Dutch proceedings with group-wide restructuring timelines
- Use undisclosed proceedings to avoid publicity and negative connotation

*** End of Assessment ***