



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: 36/50, OR 72%. 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) 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: 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.)

The stipulation aimed at the automatic termination of the contract due to the filing for an insolvency proceeding **remains effective** taking into account that the contracting party is Dutch. Given this circumstance, it is possible to inquire the bankruptcy trustee about the enforceability of the contract (Hengst, 2020). [Reviewer: Correct. I would have expected to see a reference to the word *ipso facto* clause, as well as a note that under CERP, this is exactly opposite, ie. not enforceable.]

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).

Before the introduction of the CERP, Netherlands was considered as a creditor friendly jurisdiction for the following reasons:

1. **Before CERP the debtor could not bind creditors with an out-of-court restructuring agreement:** Thanks to CERP, now the debtor can force creditors into an agreement. The debtor may impose an out-of-court restructuring agreement to the creditors who did not consent to the agreement or to the dissenting class of creditors, provided that the following conditions are met: (i) the agreement was accepted by the majority of that class or (ii) the agreement succeeded in obtaining the majority's consent of a higher ranking class (Hengst, 2020).
2. **Impossibility of imposing measures aimed at obtaining the suspension of payments without the consent of the creditors:** Before the CERP, there was no way to impose any kind of standstill measures unless the creditor's consent was obtained (Hengst, 2020).
3. **Lack of a mechanism to meet the needs of an expedited proceeding:** Since this mechanism allows the debtor to imposed an out-of-court restructuring agreement on some creditors (provided that the debtor has the required majorities), the process is faster because the obstructing minorities will not prevent the confirmation of the restructuring plan by the court (Grujter & Dunki Jacobs, 2021).

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.)

For this particular case, I am going choose as a country of origin France.

- **Route No.1- Recast Brussels Regulation:** Within the framework of the Recast Brussels Regulation, a judgment rendered by a French court is recognized in the Netherlands as long as its content excludes aspects related to insolvency proceedings and refers to civil or commercial matters. The execution of the judgment will be carried out as if the judgment had been rendered by a Dutch court (Hengst, 2020)
- **Route No.2 – Lugano Convention:** The scope of application of Lugano Convention is restricted to those matters related to civil and commercial law except for the aspects related to insolvency proceedings. Pursuant to the aforementioned convention, a judgment rendered in France will be automatically recognized as long as its content is within the scope of the convention (Hengst, 2020).

However, it is important to highlight that enforcement of the judgment demands an exequatur, which is generally granted unless there are grounds for refusal. In this regard, it is important to bear in mind that there are 3 grounds on which exequatur may be denied: (i) the enforcement of the judgment involves a flagrant conflict with the public policy rules, (ii) the judgment cannot be reconciled with a previous judgment that involved the same parties and was ruled by a court located in a member state, and (iii) the debtor cannot defend its position because of an incorrect filing to initiate the principal procedure (Hengst, 2020).

QUESTION 3 (essay-type questions) [15 marks in total] [Reviewer: 8/15 marks]

Question 3.1 [maximum 8 marks] [Reviewer: 1/8 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.)

The problem that a new money financier faces derive from the Dutch principle that requires equal treatment among the creditors "paritas creditorum". The following are the sources of priority among creditors: (i) mortgage, (ii) pledge, (iii) preferential rights, and (iv) other legal stipulations (Hengst, 2020).

[Reviewer: as explained in the guidance text, the problem circles around the prior tempore role in vesting security: it means that already pledged assets are no longer available as recourse for new money lenders, as well as around avoidance risk (claw-back).]

Regarding the available options, it is pertinent to highlight that it is possible to modify the creditor's ranking as long as all creditors provided their consent to **subordinate** their claims (Hengst, 2020). **[Reviewer: this is only correct in relation to mortgage rights (very limited in scope), and does not apply to all other asset classes.]**

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

Will a creditor of a non-Dutch debtor, who has the benefit of a parent or cross-guarantee from a Dutch affiliate, be able to enforce under that guarantee while continuing to also make claims for the same debt with the principal debtor (in the course syllabus referred to as “double-dipping”)? (You should be able to answer this question in no more than 300 words.)

In order to answer this question, it is necessary to clarify the concept of "double-dipping". The double dipping is a possibility granted to the secured creditor and allow him to pursue one of the following alternative: (i) take recourse against the debtor's assets and co-debtor's assets, and (ii) present both claims in the pool of assets if there is just one pool. Under Dutch law, this instrument may be used as long as the payment does not exceed the total amount of the claim. By virtue of the above, in the case that the payment is made in favour of the creditor, the co-debtor can request a reimbursement in the insolvency proceeding of “principal” debtor (Hengst, 2020).

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.)

Both, Netherlands and France are members of the European Union and for that reason; the EIR Recast is applicable in this case. Thus, it is necessary to define (1) if the agreement that will be negotiated in France will be pursuant to an insolvency proceeding according to Annex A of the EIR Recast; (2) if that proceeding could be recognized in the Netherlands as the main insolvency proceeding; or (3) whether is necessary to open an insolvency proceeding and request for measures in the Netherlands.

For answering those questions, first, pursuant to Annex A of the EIR Recast following procedures are deemed as insolvency proceedings for purposes of cross-border insolvency: “Sauvegarde, Sauvegarde accélérée, Sauvegarde financière accélérée, Redressement judiciaire, Liquidation judiciaire”. French attorneys have to answer if the reorganization plan may be achieved pursuant to any of those proceedings. If the answer to that question is affirmative, the insolvency practitioner appointed in the proceeding may request for recognition of that insolvency proceeding in the Netherlands as the main insolvency proceeding (Article 3, EIR Recast).

In that case, and to answer the second question, the insolvency practitioner appointed in the French insolvency proceeding may argue that the parent company is located in France, it “conducts the administration of its interests on a regular basis and which is ascertainable by third parties” (Article 3, EIR Recast). If the insolvency proceeding is recognized as the main insolvency proceeding, the insolvency practitioner may request some reliefs for suspending debt collections against the subordinated company, and that request will be governed by the Netherland law. Thus, there is not necessary to open two proceedings.

Nonetheless, if the French insolvency proceeding is not recognized as a main insolvency proceeding, and to answer the third question, the parent company could negotiate a restructuring plan and request before the Netherland Court for provisional measures for suspending debt collection actions, as did occur in the case of Isolux Corsán Group. In that case, the approval of the reorganization plan was deemed as a judgment pursuant to EIR Recast and automatically recognized in the Netherlands.

[Reviewer: I miss elaboration on the fact that the COMI question is vital here: that COMI of the Dutch issuer drives the decision to restructure in the Netherlands or in France, how COMI is determined and that it likely means (see Isolux Corsan) that you end up in the Netherlands.]

References

Gruijter, G., & Dunki Jacobs, D. (January de 2021). WHOA - the Dutch scheme of arrangement.

Hengst, F. (2020). The Netherlands. London, United Kingdom.

*** End of Assessment ***