



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: 32/50, OR 64%. 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: 7/10 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. *[Reviewer: Although the statement is correct, so are statements (a) and (c), so the correct option here is option (d).]*
- (c) A date established in hindsight by the Court.
- (d) All of the above.

Question 1.6

Select the correct answer:

Does the trustee in a Dutch bankruptcy represent the creditors?

- (a) Yes, he is independent with a principal duty of care is towards the creditors.
- (b) Yes, he is appointed to the board with a special mandate to look after the interests of the creditors.
- (c) No, he is independent from the debtor and creditors, but acts for the benefit of the joint creditors.
- (d) No, he takes the role and position of the board and manages the estate.

Question 1.7

Which of the following statements is **incorrect** (“the Netherlands” in each case being interpreted to mean only the European part of the Kingdom)?

- (a) The European Insolvency Regulation has force of law in the Netherlands.
- (b) The European Insolvency Regulation has a different scope than the Dutch Bankruptcy Act.
- (c) The European Insolvency Regulation replaces Dutch international private law where it relates to insolvency.
- (d) The use of “COMI” in the European Insolvency Regulation means that the Dutch courts no longer have to decide about jurisdiction on European companies.

Question 1.8

Which of the following security rights **does not exist** under Dutch law:

- (a) Undisclosed pledge on receivables.
- (b) Floating charge on receivables.
- (c) Mortgage on aircraft.

(d) Pledge on bank accounts.

Question 1.9

Which of the following statements is **incorrect**?

- (a) Dutch composition agreements have been recognised under the UNCITRAL Model Law on Cross-Border Insolvency. *[Reviewer: Correct answer is (d), as this statement (a) is actually correct. See the case of Grupo Isolux Corsán for instance, covered in the Guidance Text.]*
- (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. *[Reviewer: The correct answer was (b). Option (d) is not correct, as CERP only adds a fourth limb to the DBA, but does not materially change what was already there.]*

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.)

It is questionable whether the relevant provision is enforceable. To obtain certainty about whether or not a contract will be honoured, a counterparty may ask the bankruptcy trustee to confirm the debtor's obligations will be met. **[Reviewer: I would have expected you to indicate that in principle, these stand and are enforceable, but not in respect of utilities, employment and lease, and not in CEPR (part of debtor protection)]**

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 Netherlands is referred to as a creditor-friendly jurisdiction because the word creditor refers to both Dutch and non-Dutch creditors. Dutch law does not differentiate between the two, nor does it contain any provision that have the effect of disadvantaging foreign creditors beyond the fact that they have to familiarise themselves with Dutch proceeding and come to file their claims. Three reasons why the Netherlands is known as a creditor-friendly jurisdiction:

- 1) The extension of the right of set-off applies in insolvency proceedings;
- 2) Real security rights can be obtained easily and provide for an almost inviolable hold on the secured assets; and
- 3) The insolvency system main goal is to maximise the insolvency estate in order to settle as much debt as possible.

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.)

1. The Recast Brussels Regulation applies to civil and commercial matters but explicitly excluded insolvency proceedings. A judgement handed down by a court of an EU member state is fully recognised within the EU, if the supporting legal proceedings are within the scope of the regulation which means the judgement may be executed in the Netherlands as if it were rendered by a Dutch court.
2. Lugano Convention parties are the EU, Iceland, Norway and Switzerland. A judgement rendered by a court of a member state within the scope of the convention is automatically recognised.

QUESTION 3 (essay-type questions) [15 marks in total] [Reviewer: 11/15 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.)

The transaction of a new money financier can be avoided under fraudulent preference laws by the creditors or by the bankruptcy trustee if the debtor subsequently goes bankrupt. also referred to as claw-back. In cross-border transactions in distressed environment, especially where out of court corporate rescue and recovery strategies are developed, it is quite common that the Dutch law preference risks play a key role in deliberations. Avoidance of a voluntary legal act for which there was no financial consideration requires that the debtor had knowledge of the ensuing prejudice at the time of the act. However, if there was consideration but creditors or the trustee believe that the consideration as insufficient and therefore prejudicial to the interest of creditors, knowledge of the prejudice is required not only on the part of the debtor, but also on the part of its counterparty.

If the legal act is not voluntary but satisfies an obligation, which was due at the time, even if this results in prejudice of the creditor, avoidance is possible only on very limited grounds and only in the case of the bankruptcy of the debtor.

Most corporate financing documentation in the Netherlands contain an obligation for the debtor to create security rights over additional assets at the financiers first demand which is know as a positive pledge obligation. This pledge is invoked only when the financial position of the debtor deteriorates and it becomes clear that there may not be enough assets for all creditors to be paid.

The financier can consider the creation of security rights in relation to emergency funding

[Reviewer: all correct, but I would have expected to see what I consider (also in the guidance text) the most important hurdle, which is the prior tempore role in vesting security: it means that already pledged assets are no longer available as recourse for new money lenders.]

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.)

Outside of insolvency proceedings and the cooling-off period ordered during a restructuring, a creditor can enforce its creditor rights and take recourse against the assets of both the original debtor and the guarantor. In the bankruptcy, the creditor only has an ordinary, unsecured claim to file with the administrator or bankruptcy trustee, bar any preference or real security applicable to the claim. The personal security of which the creditor has the benefit does, however allow it to circumvent the debtor’s insolvency proceedings by taking recourse against the co-debtor/ guarantor. In the Netherlands personally security typically includes a contractual prohibition on the co-debtors to make competing claims of recourse until the creditor has been paid in full.

Double dipping is allowed in the Netherlands to the extent that it does not result in payment of more than the total sum of the claim. Which means that the creditor can file its full claim in the insolvency proceedings of the debtor and at the same time demand payment by the co-debtor or guarantor. However, the amount paid by the co-debtor or guarantor will be deducted from the final distribution by the debtor’s insolvent estate.

The DBA offers a solution to double dipping by way of allowing the restructuring of both the claim on the debtor and co-debtor through one restructuring plan and without requiring the co-

debtor to go through a restructuring itself. If a group company without a COMI in the Netherlands, may offer a restructuring plan or even if all but one group companies are located outside of the Netherlands, the entire group debt may be restricted through the Dutch plan. This prevents bondholders from double dipping and allows for the restructuring of related obligations through one restructuring plan.

QUESTION 4 (fact-based application-type question) [15 marks in total] [Reviewer: 7/15 points]

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.)

In relation to the instruments issued by the Dutch entity, has made them party to the group’s financing arrangements, which may be exposed to acceleration by the creditors and through intercompany financing lines, create exposure to the rest of the group. At the same time the group may have an interest in the Dutch debtor filing for suspension of payments in protection against activist creditors. However the wider group interest is not served well with the entry of an external administrator.

In regards to the concerns of the general counsel regarding the payment for full legal proceedings in more than one jurisdiction, the Dutch courts in recent years have proved to be considerate of the potential destructive effect that a local proceeding may have on an otherwise realistic global restructuring effort. The interpretations of the DBA, allows them to hold off meetings in the Netherlands and align the timetable of the Dutch proceedings with the group-wide restructuring efforts in France which allows multinational groups of companies (like above) to negotiate a restructuring agreement in their parent’s main

jurisdiction (France), have it voted on there and then file the same agreement (which does not need to be in the Dutch language) as a composition agreement in the Dutch proceedings. It can then be voted on again with typically lower majority requirements than that of the main jurisdiction (France) and approved by the Dutch court. Under this situation this will lower the cost by not having to open a full legal proceeding in the Netherlands and also with the use of the same restructuring agreement there will only be a cost of preparation for one document. Also the Dutch court's approval of the composition plan has recognition throughout Europe under the European Insolvency Regulation (recast) and / or recognition in the US under Chapter 15 / UNCITRAL Model Law when the identical original restructuring agreement has not been recognised in situations where it lacked or was still awaiting court approval in the parent's home jurisdiction.

[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. I also miss some questions to be asked to French counsel, such as whether France has a scheme that would be recognized also in relation to the Dutch vehicle]

*** End of Assessment ***