



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: 42/50, OR 84%. 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: 5/10 marks]

Question 2.1 [maximum 4 marks] [Reviewer: 0/4 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.)

No, since these provisions, referred to as *ipso facto* clauses, are effectively rendered inoperative as the termination can only be invoked with the bankruptcy trustee's permission.

When Dutch person is a contracting party it is customary that these provision remain although it is questionable whether or not they will be enforceable. **[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: 2/3 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). **[Reviewer: your answer follows the guidance text closely, but fails to point out the specific reasons (this is the introduction): ability to monetize collateral in bankruptcy as if there was none, trustee acting on behalf of the creditors, ability for any two creditors regardless of size to apply for bankruptcy, extended set-off rights etc.]**

Main reasons for considering Netherlands a creditor-friendly jurisdiction are:

- (a) Creditors can enforce their rights outside and also in case of insolvency (restructuring and bankruptcy), and DBA in its roots is considered traditional and creditor “inclined”, even now with the introduction of CERP
- (b) Dutch court system is efficient and predictable allowing creditors to enforce their rights in relatively short time, which is further emphasized by legal services market that is mature and accustomed to dealing with international matters due to long tradition of foreign trade relations
- (c) There is possibility for summary proceedings and expedited ruling, and timelines for bankruptcy and other insolvency proceedings are relatively short

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 the purposes of answering this question, judgement from Croatia will be considered. Since Croatia is member of the EU, routes for recognition of this judgement would be via provisions of Brussels I Recast and Lugano Convention.

Brussels I Recast (Regulation 1215/2012 provides for recognition of judgements (excluding insolvency matters) for all procedures started on or after 10 January 2015, it applies on civil and commercial matters. The judgement may be enforced as if rendered by Dutch court.

Lugano Convention has similar scope, judgement will be recognized as by Brussels I recast, but when it comes to enforcement, additional process of exequatur is needed in which the enforcement will be granted unless (a) enforcement flagrantly conflicts with Dutch public policy, (b) debtor has not been able to defend due to untimely and undue presentation of the document by which proceedings were started and (c) the judgement is irreconcilable with other judgement between same parties delivered by court of another member state.

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.)

The fundamental problem with providers of “new money” in Dutch insolvency proceedings is that there is no provisions that would allow establishing new security over the already pledged/mortgaged assets in the estate. There is no immediate “super seniority” that can be found in US chapter 11 proceedings, and as such. That is even increased by risk that establishing of security in “late” phase before insolvency can be avoidable.

As a matter of “preparations” for such possible scenario, the “regular” course of actions is that when borrowing money and establishing security, contract’s provisions provide for “super senior basket” which is effectively capped contractual subordination which would if circumstances should require enable to provide new borrower with a senior security as a par of previous financial arrangement.

When financial difficulties are already present, there are several options that debtor can utilise in order to secure new financing in distressed situations assuming that none of the options are ones that are avoidable by law in the first place.

- (i) After incorporation of CERP, DBA provides for possibility for court authorization of the transactions and financial arrangements deemed necessary for debtor to continue it’s business.
- (ii) “Positive pledge obligation”, a provision that obliges debtor to provide additional security on creditor’s request if such agreement was made in regular course of action (wasn’t included “recently”) is not avoidable – court authorization is useful
- (iii) Changes in mortgage seniority
- (iv) Changes in pledge seniority are possible, but is relatively complicated since by law it requires them all to be temporarily waived for a short period of time in order to establish new order of them/ranking which has inherit risk that new pledges will be avoidable.

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.)

Creditor that has the guarantee from another company (in this case, cross-guarantee from Dutch affiliate) is able to collect his claim from principal debtor and also from the guarantor.

In relation to possible insolvency situation of main debtor, creditor’s claim (in lack of other security provided for that loan) will be considered as unsecured claim.

Under Dutch law, collecting claims from both main debtor and guarantor, called “double-dipping” is allowed with the limitation that it does not provide for satisfaction over the amount of the initial debt. Further more, the amount paid by the guarantor will be deducted from the final distribution by the debtor’s insolvent estate and vice versa. Additionally under provisions of DBA, restructuring of claim towards debtor and guarantor can be done through one restructuring plan, thus not requiring the guarantor to go through restructuring himself.

QUESTION 4 (fact-based application-type question) [15 marks in total] [Reviewer: Strong answer, 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."

Bankruptcy proceedings were not considered since the instructions by general counsel were that it is restructuring of debt (procedure) is aimed for and there is no info on possible stopping of payments by either of company.

The possible course of actions (considering inputs from general counsel about not wanting to pay for full legal proceedings) would be to open the proceedings in Netherlands (with the Dutch subsidiary who has issued bonds) or in France (which they are used to). Possible risks in going with only one proceedings would be that creditors could enforce the debt in either country since holding company which guarantees for the debt is in France.

To mitigate that risk (having in mind additional expenses), I would advise to start reorganization proceedings in France (sauvegarde) for the holding company (or all companies), and suspension of payments procedure in Netherlands and ask court to allow for cool down period. Then first vote on the reorganization plan / composition plan in France (which is their primary jurisdiction and they are in favour of). The scope of the plan in France would obviously be to restructure the company debt, with elements described in question.

During that time arrange schedules with Dutch court, and if/after the plan is confirmed in France, put the same plan to vote in Netherlands. The majority for acceptance of the plan is more than half of the admitted claims and a simple majority of the admitted creditors present at the meeting and eligible to vote.

There is possibility of out of court restructuring (extrajudicial), in which case two third's of total value of claim in class majority is needed in at least one class of creditors. In case of this procedure, cross-class-cram-down is an option. Also, the cool -off period can be imposed by court for maximum duration of eight months.

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 my opinion restructuring of the bond debt could not be done only in French proceedings since the company issuing bonds is Dutch company. There is possibility that in case

of such attempt, creditors of Dutch company could start enforcement proceedings which could spiral out of hand with holding company in France being the guarantor.

Restructuring debt only in Netherlands can be considered although it is not general counsel's preference. If the plan is confirmed in Netherlands it would need to take into account the guarantee issued by French holding company and creditors would have to accept the restructuring of the conditions also in regards to guarantor. If they would not accept that it would leave the holding company exposed to their enforcement even in case plan is accepted in Netherlands (by voting of possibly "friendly" creditors).

Creditors that oppose the restructuring could initiate the bankruptcy proceedings in France and argue in Dutch court that Dutch company has in fact its COMI in France and that proceedings in Netherlands can only be considered as secondary (territorial) proceedings, but if majority of debt is governed by Dutch law, that would pose a sufficient connection and the proceedings can be opened as main proceedings.

[Reviewer: Not sure I follow you on the weight attributed to the governing law of the debt, but you are right, it is a COMI question. Most students elaborate quite a bit more on the COMI question, which is indeed vital here: does the decision to have the group's bond debt be issued by a foreign (from French perspective) SPV impact the ability to restructure the entire group in France?]

*** End of Assessment ***