



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.

FINAL SCORE: 41/50, OR 82%. 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: 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: Incorrect. Correct answer is (b), as the EIR provides for automatic recognition. See guidance text.]**
- (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.)

An *ipso facto* clause may be invoked with the trustee's permission. A confirmation on the performance of the contract could be sought from the trustee. If performance is confirmed security must be provided for the same and if not then the bankruptcy trustee cannot claim performance by the counterparty. **[Reviewer: What you state is correct, but applies in bankruptcy. I would have expected some indication that in extrajudicial restructuring, ie. Under CERP, ipso facto clauses cannot be exercised.]**

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).

Netherlands is considered a creditor friendly jurisdiction because under the bankruptcy framework and in the general enforcement of security framework as well, the creditors have a strong hold on the assets provided as security. The enforcement of securities is also a faster and transparent process where creditors at all times have predictability as to the outcome. The secured creditors can get their claims settled by way of a summary proceeding wherein if successful the creditor shall have executory title and can call for executory attachments. Until recently, the bankruptcy framework did not provide for standstill measures without creditor assent. Even now under the DBA the secured creditors are free to proceed against the debtor irrespective of acceptance of the bankruptcy application. Further, restructuring plans under CREP also require active consent from the creditors.

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 and Lugano Convention are two routes for automatic recognition and apply to civil and commercial matters excluding insolvency matters. The third route of recognition without a treaty would require appointment of an exequatur and if the court finds that: (i) the principal court's jurisdiction is based on internationally acceptable principles; (ii) the judgment is in line with the Dutch public policy; (iii) the proceedings followed proper procedures; (iv) the judgement is not irreconcilable with any Dutch precedent or any recognised foreign judgment; it is recognised under Dutch law.

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 that the new money financier or a financier that is seeking provide funding to a company undergoing a distress situation is that the basic principle of priority among secured creditors is prior tempore. Therefore, such financing cannot be given any preferential treatment under or first ranking security unless the other creditors positively affirm and cede charge and priority in favour of the new lender. A Dutch debtor does not have any right under law to give such preferential treatment and such treatment if at all given is given through contractual arrangement between the existing lenders.

In case of mortgage the new money lender may be able to gain a preferential right over the other existing lenders if this understanding is recorded in writing by way of a notary deed that states the change in priority and consent for the same from all mortgagees. However, similar provision is not available for Pledge. For any change in priority amongst pledgees, a pledge may have to be temporarily waived by the existing lender and allow for the new pledge to be created and then again renew the registration for the earlier pledge. This is often considered to be risky especially in a situation where the company is undergoing distress. The new

lender may also consider taking out some of the existing pledgees or opt for restructuring before undertaking any liability.

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.)

Dutch law does not differentiate between a Dutch and non-Dutch creditor and all creditors under Dutch law have the benefit of double dipping. Therefore, the creditor has the right to simultaneously proceed against the assets of both the principal debtor and guarantor. Dutch law allows double dipping so long as it does not result in the creditor recovering from the debtors and co-debtors more than the debt that is due from them. Therefore, the creditor can file a claim in the insolvency proceedings of the principal debtor and at the same time file a claim against the guarantor however the amount of claim from the guarantor shall be reduced by the amount already recovered from the principal debtor.

Under the DBA, restructuring of both the claims is also allowed through one restructuring plan without the guarantor necessarily having to undergo insolvency. Dutch courts may assume jurisdiction in group insolvencies where the debtor does not have its COMI in Netherlands but the restructuring is sufficiently linked to the Netherlands. As in the present case where the guarantor is a Dutch entity and the principal debtor may be undergoing insolvency proceedings in another country the restructuring plan of the principal debtor where the creditor has filed a claim can subsume the pool of assets of the guarantor and collectively address the claim filed by the creditor. In such cases where a group company without a COMI in Netherlands offers a restructuring plan addressing the claim of the creditor and taking into account the pool of assets of the debtor and personal guarantor which may be accepted by Dutch Courts.

QUESTION 4 (fact-based application-type question) [15 marks in total] [Reviewer: 9/15 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.)

In the present case the parent company and the holding company is based in France while only the special purpose vehicle is based in the Netherlands. As both the countries are part of the EU the EIR shall apply in this case. The first test of jurisdiction is the COMI test. If the French court is approached for restructuring of debt France would have a strong as the COMI as both the main entities and material operations are situated in France. The issuer entity being the Dutch entity has only limited operations in Netherlands. ***[Reviewer: Please note though, that under EIR the COMI is determined for each entity independently! So for Dutch SPV, not so important where the most material operations of the group are.]***

Broadly, the case presented in this question is quite similar in facts and substance to the Grupo Isolux Corsan case. Wherein the a Spanish headquartered conglomerate that issued corporate bonds via a special purpose vehicle incorporated in Netherlands. Amidst financial difficulties the company decided to restructure the debt availed through the bond issuance with its principal bondholders via an informal out of court restructuring which would then be approved by the Spanish court. However as these proceedings would not be recognised outside of Spain and would not in turn be binding on the Dutch financing company, Isolux applied for a suspension of payments under the Dutch law. A suspension of payments implies an automatic stay over all claims and proceedings against the debtor. This time was used by Isolux to arrive at a restructuring plan with the bondholders under the Spanish law and the same was submitted in the Dutch court as a composition agreement. The composition agreement was then approved by the Dutch court which not only saved Isoluc from any proceedings against the Dutch entity but also approval of the Dutch court meant automatic approval under the EIR in all EU jurisdictions.

Therefore in the case at hand it would be relevant to know whether the majority of the bondholder are based out of France and whether an out of court restructuring plan in France would be approved by a majority of creditors. ***[Reviewer: I am not sure whether the location of the bondholders matters so much. If COMI of the parent is France, for whatever reason, and the plan is adopted with a majority, then your route works.]*** If so it would be best to open suspension of payments in Netherlands and request to align the timelines with the restructuring process in France with the former. The resultant restructuring plan could then be presented as a composition plan and thereafter gain approval throughout EU after the Dutch approval. ***[Reviewer: And accordingly, we need to ask the French counsel whether there are any French proceedings that would also extend over the Dutch SPV (and recognized in the Netherlands, I think? Or maybe look at CERP in the Netherlands? And what are we going to tell the GC to take away his concerns?)***

*** End of Assessment ***