INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6D

ITALY

This is the **summative (formal) assessment** for **Module 6D** 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 6D. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

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.assessment6D]**. An example would be something along the following lines: 202021IFU-314.assessment6D. **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 **7 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

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.

Select the CORRECT answer under each of the following questions (1.1 to 1.10).

Question 1.1

The motto *"si fallitus, ergo fraudator"* was coined by Baldo degli Ubaldi to describe the state of those debtors that were:

(a) insolvent and trying to escape from punishment.

(b) insolvent and responsible for despicable acts, such as defrauding people.

(c) simply insolvent.

(d) simply fraudulent.

Question 1.2

When an insolvency petition is filed:

(a) all connected actions are dealt with by the insolvency court where the proceedings were commenced, irrespective of their value.

(b) there is no *vis attractiva* for connected actions.

(c) the *vis attractiva* is limited to those actions that deal with the status of the creditors, but not those that deal with the legal position of the debtor and its legal representatives.

(d) all connected actions are dealt with by the insolvency court where the proceedings were commenced, unless they exceed the threshold of EUR 1,000,000, in which case the local Court of Appeal will deal with the action.

Question 1.3

The submission of a petition for *concordato in bianco*:

(a) was introduced in the law to offer a Chapter 11-style procedure to Italian distressed yet viable businesses.

(b) gave unrestricted freedom to insolvent debtors, which prompted the legislator to ban the use of this procedure in 2015.

(c) determines the same effect on creditors as the submission of a traditional pre-insolvency composition petition with reference to actions against the assets of the debtor.

Commented [AA1]: TOTAL MARK: 38.5 (4+6+14+14.5)/50.
This is a very strong assessment. It's a pity that the mark is affected by the answers to the multiple-choice questions, as well as the first answer to the essay question. The answers to the second essay question and the problem question are among the best one I've seen in this year's submissions.

Commented [AA2]: TOTAL MARK: 4/10.

Commented [AA3]: The correct answer is b).
See page 5 of the guidance text: "Insolvency was considered as a shameful situation and insolvent debtors as fraudulent people".

Commented [AA4]: Correct.

Commented [AA5]: The correct answer is c).
Ftn 176 states that the *concordato in bianco* was the MOST RECENT attempt to introduce a Chapter 11-type procedure under Italian law. The general *concordato preventivo* was also introduced for the same purpose and it was already in force before the introduction of the *concordato in bianco*. As a result, this answer is wrong.

(d) allows the creditors to continue only existing enforcement actions and, in any case, only up to the point in time when the debtor submits a restructuring plan.

Question 1.4

The director's duty to manage the company in a prudent and reasonable manner is owed to:

(a) the company's shareholders.

(b) the company's creditors.

(c) the company's shareholders and to its creditors on the eve of insolvency.

(d) the company, irrespective of whether their actions can affect either shareholders or creditors.

Question 1.5

The evolution towards a system where insolvency is not punished as a crime was primarily due to:

(a) the rediscovery of Latin legal texts, particularly of the *Codex Iustinianeus*, in the late middle ages.

(b) the invasion by Napoleon's troops in the early 19th century and the resultant enactment in Italy of French-inspired laws.

(c) the development of mercantile-oriented societies, where both the local nobility and the growing middle class were involved in trade activities.

(d) the social doctrine of the Roman Catholic Church.

Question 1.6

In order to be executed, a deed of mortgage over real estate needs to be:

(a) drafted in writing and signed by at least one of the parties;

(b) drafted in writing and signed by both parties;

(c) drafted in writing, signed by both parties and registered with the competent land registry;

(d) drafted in writing in a notarised form, signed and registered.

Question 1.7

Recent reforms (2015 and onwards) on pre-insolvency compositions had the objective of:

(a) reducing the use of these procedures, thus marking the end of the legislative *favour* towards their use.

(b) reducing the improper use of these procedures.

(c) ensuring higher returns to all creditors and particularly to unsecured ones.

Commented [AA6]: The correct answer is d).
Fiduciary duties cannot be owed to shareholders in insolvency. As the question was open/general, the answer needed to match the question.

Commented [AA7]: Correct.

Commented [AA8]: Correct.

Commented [AA9]: The correct answer is b).

(d) harmonising the Italian system with European rules and best practices.

Question 1.8

Rules on netting and set-off:

(a) apply only to liquidation procedures.

(b) restrict the validity of contractually negotiated clauses.

(c) require claims to be quantified, certain and preferably due.

(d) are not codified in the *legge fallimentare*.

Commented [AA10]: Correct.

Question 1.9

To determine jurisdiction in cross-border corporate insolvency cases, Italian courts adopt:

(a) a territorialist approach, as evidenced by the rules set out in article 9 of the *legge fallimentare*.

(b) a modified territorialist approach, where the jurisdiction of the Italian courts is alternatively expanded or restricted depending on the behaviour of the parties and for the purpose of restricting the strategic use of insolvency provisions and loopholes.

(c) a modified universalist approach, as suggested by the jurisprudence of the Court of Justice of the European Union and relevant European laws.

(d) a purely universalist approach.

Commented [AA11]: The correct answer is b).
See the Supreme Court decision 15880/2011 and the second paragraph of page 60, commencing with: "While these examples…".

Question 1.10

Recent reforms based on the preparatory work of the "Rordorf Commission" and enacted by legislative decree 14/2019:

(a) benchmark international best practices and European recommendations.

(b) do not introduce significant changes to the current law.

(c) discourage the strategic use of statutory provisions by both creditors and debtors.

(d) have not yet been enacted by Parliament.

Commented [AA12]: The correct answer is a).
See page 59 of the guidance text: "While these examples show the Italian legislator's preference for a territorialist approach, this *favor* is somehow mitigated by the need to respect European laws and international conventions, as established by article 9(4) of the *legge fallimentare*".

QUESTION 2 (direct questions) [10 marks]

Outline the main changes introduced by the post-2005 reforms under Italian insolvency law and reflect on the extent to which these reforms have been successful in addressing the shortcomings evidenced in authoritative international publications, such as the World Bank's *Doing Business* Report.

Please include reference to the changes recently approved by Parliament after the work of the "Rordorf Commission" (law 155/2017 and legislative decree 14/2019).

Law 80/2005 reformed the law regarding contracts with creditors. It significantly reduced the period during which a transaction can be avoided or clawed-back.

Legislative degree 5/2006 reformed corporate liquidations. It also did away with the amministrazione controlla as procedure that gave companies in distress the option to continue trading for up to two years under the supervision of a receiver and the insolvency court.

Legislative decree 169/2007 reformed the procedure of liquidazione coatta amministrative, which is the forced administrative liquidation.

Law 134/2012 introduced innovations for pre-insolvency compositions, turnaround plans under article 67 and debt restructuring agreements under article 182-bis of the legge fallimentare.

Law decree 69/2013 and law 132/2015 introduced more changes to pre-insolvency compositions and debt restructuring arrangements.

Law 155/2017 and legislative degree 14/2019

Commented [AA13]: TOTAL MARK: 6/10.
The answer is incomplete and descriptive. There is no reference to the candidate's opinion as to the effectiveness of the recent reforms.

QUESTION 3 (essay-type questions) [15 marks in total]

The principle of equality amongst creditors (*par condicio creditorum*) applies only with reference to classes of creditors. However, the current system of securities, privileges and guarantees under Italian law recognises a wide array of exceptions to the *par condictio creditorum* rule. As a result, the system is rather byzantine and cumbersome, to the extent that many creditors are unlikely to be aware of their privileged status until or unless their debtor files for insolvency.

Discuss this statement with reference to relevant case law and statutes.

The first way in which insolvency law creates an exception to the ranking of creditors is with the preference given to post-adjudication creditors. This refers to claims that arose after the formal insolvency procedure was commenced. They are not secured creditors but enjoy a preference over secured (and all other) creditors. They include officeholders' fees and costs; the costs of selling the assets; the rent payable for the debtor's premises after the procedure has commenced; employees' salaries and social security payments regarding work done after commencement of the procedure; and legal and other advisors' fees.

The second way in which insolvency creates an exception is by affording a preferent position to certain preferred creditors. They are not secured creditors because they have no security rights, but under insolvency law, they will be paid after the secured creditors but before the normal unsecured creditors. These preferred creditors include money owed for funerals, infirmity or personal maintenance (article 2751 of the Civil Code); money owed to the state for

Commented [AA14]: TOTAL MARK: 14/15.
Well-argued answer, with a clear and well-supported opinion. The candidate could have expanded their answer with reference to case law, as asked in the essay question.

certain taxes, such as VAT (article 2752 of the Civil Code); money owed by an employer on behalf of its employees (articles 2753-54 of the Civil Code); and judicial expenses (article 2777 of the Civil Code).

Although this system might be regarded as byzantine and cumbersome, I do not really think that it is. The reason for this is that many (if not most) insolvency systems across the world follow a very similar approach. Nevertheless, it is problematic that the list of preferred creditors is so long, because it significantly disrupts the equality that is supposed to exist amongst unsecured creditors. Therefore, as many countries have done, it is advisable to significantly restrict or even do away with the list of preferred creditors.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Commented [AA15]: TOTAL MARK: 14.5/15.

Buonapizza Srl (the debtor) is a company registered in Milan, Italy. Its only factory is in Modena, Italy, which is also the place where the board of directors transferred the registered office to on 15 June 2017. Its main line of business consists of producing locally-sourced pizzas and selling them to large foreign grocery shops, such as *Tesco* in the UK. In July 2017, *Buonapizza Srl* ceased its operations due to industrial action and later that month filed for corporate liquidation (*fallimento*). In a judgment dated 12 August 2017, the local court in Modena opened a corporate liquidation proceeding against *Buonapizza Srl*.

During the proceeding, it emerged that since January 2016 one of the three executive directors withheld relevant information about the company's state of affairs. This director devised a complex scheme with the company's accountant to divert funds to offshore accounts and to alter the company's balance sheet. It was also established that the local court of Modena was aware of the potential insolvency of the company since January 2017, when this emerged during an executory action by one of the company's creditors.

Finally, as part of the liquidation procedure the receiver organised an auction for the sale of the company's assets, including a plot of land crossed by a river that was given as collateral to Tesco.

The legal representative from Tesco, one of *Buonapizza Srl*'s creditors, comes to your offices and raises the issues below with you.

Using the facts above, answer the questions that follow. (When answering the questions, please refer to the relevant provisions under national law as well as to relevant case law.)

Question 4.1 [maximum 6 marks]

Commented [AA16]: MARK: 6/6.

Was the local court in Modena entitled to open a corporate liquidation proceeding against *Buonapizza Srl*, considering that the company's registered office only moved to Modena shortly before the filing? Would the situation be different under the new framework introduced by law no 155/2017?

According to article 9(1) of the Legge fallimentare, formal insolvency proceedings must be commenced in the court where the debtor (Buonapizza Srl in this case) has its main place of business, which is usually where the company is registered. The reason for this is the presumption that the registered office is the main seat of the company (see C Cass no 14676/2012; C Cass no 16080/2009; Court of Appeal of Turin 4 Aug 2009). Therefore, it would seem that the proceeding must be commenced in Milan, since that is where the company is registered.

However, the registered office was moved to Modena and the question is whether the insolvency proceeding can therefore be commenced in the Modena court. According to article 9(2) of the Legge fallimentare, if the registered office was changed in the year before the filing, the court's jurisdiction does not change. In other words, because the registered office was moved to Modena only a couple of months before filing, it appears that the court in Milan still has jurisdiction over the matter.

However, the majority of commentators as well as the Supreme Court is of the view that the above is a rebuttable presumption, meaning that if there was a real transfer of the headquarters to Modena, the latter court would be responsible for opening and supervising the procedure, even if the change took place less than one year before the insolvency (see C Cass no 3081/2011; De Sanctis (2010)). Therefore, if it can be proven in this case that the transfer to Modena was real, it would be legitimate for the court in Modena to have opened the corporate liquidation procedure.

Regarding the new framework under law 155/2017, specialised sections of the enterprise court (tribunale delle imprese) will have the competence to deal with corporate insolvency matters.

Question 4.2 [maximum 4 marks]

Commented [AA17]: MARK: 3.5/4.
You could have made more reference to statutes.

Were the debtor, its directors or the local court under any obligation to file for insolvency at an earlier stage? Are there any compensatory or punitive remedies for the parties' failure to act promptly?

In terms of article 224 of the legge fallimentare, managers, auditors and officeholders must not unreasonably delay the commencement of a corporate insolvency procedure. If they do, they will have criminal liability and can be imprisoned for between six months to two years. Since the directors in this case have known about the potential insolvency for a significant period, they could be liable for delaying the commencement of the procedure. This delay does not seem reasonable in light of the complex scheme to divert funds and amendments to the balance sheet.

In fact, the possible criminal liability also applies if they have concurred in altering the company's accounting entries. Therefore, since the directors altered the balance sheet of Buonapizza Srl, they will be liability under this provision.

Question 4.3 [maximum 5 marks]

Commented [AA18]: Mark: 5/5.

Could *Buonapizza Srl* grant collateral over the plot of land described in the example? Are there any assets that, under Italian law, cannot be obtained as collateral?

Land can be given as collateral by the registration of a mortgage in the land registry. In this case it would have been possible to register a mortgage over the land. However, because the river belongs to the state, that portion of the land does not belong to Buonapizza Srl and therefore, under article 822(1) of the Civil Code, cannot be used as collateral. If, under Italian law, it means that the entire piece of land (on which there is a river) can be used as collateral, then it would not have been possible to register a mortgage over that land.

Other assets that cannot be used as collateral are harbours, seashores, lakes, territorial waters and any infrastructure essential to the state, such as airports.

Furthermore, under article 822(2) of the Civil Code, other assets (when belonging to the state) also cannot be used as collateral, such as roads, railways, highways, aqueducts, historical sights and art owned by museums.

Finally, assets constituting a patrimonial fund (see article 167 of the Civil Code), assets that cannot be subject to foreclosure (article 545 of the Civil Procedure Code) and other assets listed in article 514 of the Civil Procedure Code cannot be used as collateral.

Assets that cannot be subject to foreclosure (and thus not available as collateral) include wedding bands, a set of table and chairs, basic pieces of furniture and so forth.

*** End of Assessment ***