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.

Commented [AA1]: TOTAL MARK: 36.5 (7+7.5+11.5+10.5)/50.

Commented [AA2]: TOTAL MARK: 7/10.

Commented [AA3]: Correct.

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.

(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.

(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

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.

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

Commented [AA7]: Correct.

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

Commented [AA8]: Correct.

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

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

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.

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

Question 1.8

Commented [AA10]: Correct.

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*.

Question 1.9

Commented [AA11]: Correct.

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.

Question 1.10

Commented [AA12]: Correct.

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.

QUESTION 2 (direct questions) [10 marks]

Commented [AA13]: TOTAL MARK: 7.5/10.
The answer is descriptive and largely taken from the guidance text. There is little attempt to address the second part of the answer, i.e. whether the new rules are likely to address the shortcomings evidenced by the *Doing Business Report*.

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).

Legge fallimentare 267/1942 used unified approach to codifying insolvency rules. As the economical situation changed over times, need for changes became apparent. Although the proposals for general reform of insolvency regulation were discussed, changes instituted were segmental and mostly addressed particular situation/business crisis which occurred over time.

Law 80/2005 attempted to introduce rescue culture which resulted in pre-insolvency procedures becoming preferred way for companies in crisis, which still didn't necessarily progress to insolvency stage. Together with reduced majorities for approval of the plan which eliminated requirement for "trustworthiness" this led to numbers of pre insolvency procedures from 100/150 (before introduction of these changes to 1400 by the end of third quarter of 2013.

Two Legislative decrees in 2006 reduced the powers of judges and courts in relation to automatically opening the liquidation procedures, while 2007 reform abolished mandatory 40% unsecured creditors satisfaction rule.

Law 134/2012 further introduced possibility for debtors to file to the pre-insolvency petition without contextual restructuring plan (concordato in bianco), tacit approval of the plan and new rules on post-commencement financing.

These reforms while increased number of pre-insolvency procedures aimed at rescue/restructuring led to final plans being approved even with unsecured creditors receiving negligent amounts of their claims.

These issues were addressed in Law 132/2015 which re-introduced minimum percentage of satisfaction of unsecured creditors claims (20%) It could be said that this law ended the period of "pro debtor" phase in legislative and brought restrictions to usage of stated pre-insolvency procedures, which further led to significant decline in their numbers with continuing trend that extended in 2018.

As the need for change was visible, Government appointed group of experts "Rordorf Commission" was entrusted with task to propose changes that would among other things transpose best practices set by the UNCITRAL and EU. EIR Recast was considered together with Model Law on Cross Border Insolvency, with purpose to simplify recognition of qualified foreign insolvency proceedings. Proposed changes were base to Law 155/2017 gave authority to government to introduce changes. This was done by legislative decree 14/2019 which at the moment is still not in force (postponed to 2021) due to COVID-19 pandemic which introduces a world wide health and economic crisis.

Although there is much room for improvement in overall legal regulation as documented in international publications (World Bank 2019 Doing Business Report) in matters of enforcing contracts (111/190 countries) and ease of doing business (58th place), legal reforms obviously addressed situation and over time evidenced shortcomings and to

a large extend managed to resolve them compared to other jurisdictions which led to Italy being ranked 21/190 in terms of resolving insolvency (indicators included are time, cost and outcome for domestic companies) in the stated world Bank 2019 Doing Business Report.

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 *par condicio creditorum* principle is a basic principle of insolvency procedures which "insists" on equal treatment of creditors, especially in terms of satisfaction/percentage of satisfaction of their claims and/or seniority when it comes to insolvency situation/proceedings. Basis for this is in fundamental origins of insolvency procedures that are considered as general forced collection over all of debtors' assets which usually, especially in past led to liquidation of company. Italian legal system in basis follows that principle, but with rather large number of privileged creditors and different provisions on securities that can change the order/expected seniority and eventual satisfaction of creditors' claims.

Usually, it's the security given in order to enhance the position of creditor that changes the "ranking order" of creditors claim. Excluding assets that can only belong to state and assets that cannot be securitized if they belong to state, parties have general freedom to grant securities over their assets. In respect to cross-border insolvency, securities over assets according to Italian International Private Law (Law 218/1995) are governed by the law of the jurisdiction where the assets are located.

Most common security over real-estate is mortgage, while for movable assets, pledges and liens are possible. Usually, form of notarised agreement registered with competent office is necessary and for money in the bank there are special provisions on establishing security over it.

Law recognizes some separate type of securities some of whom can prevail over general liens. Such are (i) Privilegi generali – over movable goods, (ii) Privilegi speciali – over movable and immovable goods and (iii) Privilegi speciali under article 46 of legislative decree 385/1993 (only available to banks, similar to floating charge, but restricted in regards to time frame).

Pledges prevail over special liens on movable goods unless pledgee knew the existence of special lien and acted in bad faith. Special liens are on the other side preferred to mortgages. This is per Article 2748 (er seq.) of Civil Code.

When it comes to determining seniority of security in case of multiple creditors, rule od "who is earlier in time he is stronger in law".

There are also preferences available to some creditors which are not securities in themselves, but provide respected creditors priority over unsecured creditors.

Commented [AA14]: TOTAL MARK: 11.5/15.
Your analysis of the law is compelling and accurate. However, you should have more clearly stated your views on whether the system is cumbersome and byzantine.

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Commented [AA15]: Good introduction.

Commented [AA16]: Good – you're referring to the law and the guidance text, without copying -and-pasting from it. Well done!

Securities usually asked/granted to make creditors position "stronger" don't guarantee that position to creditor if they were given in "insolvency suspectant" time, for they can be avoided, Time frame is different for payable (due) and not-payable claims at the moment of establishing security relevant to declaration of insolvency, one year before for the first, and six months for the latter. If the security was granted at that time, insolvency practitioner/trustee can file a petition on behalf of creditors.

Sale and lease back, factoring and retention of title contracts create what is called "quasi" securities. They are not named securities, but they provide for "effect" like securities. Factoring is reserved for banks as per Civil code, and Consolidated Banking Act, while contracts wit ROT clauses must be in written form with certified date and in some cases registered in order to have effect on other creditors.

There are also preferred creditors which are paid first and their status is regulated/given only by Law and cannot be established contractually. These are for example money owned for funerals, personal maintenance, money owned to government for VAT, money owned to employees for wages and judicial expanses.

Before all of these aforementioned, special priority have post-adjudication creditors whose claims have arisen after formal commencement of insolvency proceedings. These claims include: (i) office holders fees and expanses, (ii)costs of sale of assets, (iii) rent for debtors premises after opening of the proceedings, (iv) employees salaries and social security payments for work provided after opening of the proceedings, (v) legal and other advisor's fees.

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

Commented [AA17]: TOTAL MARK: 10.5/15.

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]

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?

Since there is no mention that other court has challenged venue of local court in Modena, or some of creditors, combined with fact that at the time of filing the petition Buonapizza Srl had registered place of business of is in Modena court was entitled to open a corporate liquidation.

Commented [AA18]: MARK: 2/6.
This answer is incomplete. You should have made reference to the law to determine the competence of a court in case of insolvency proceedings; the exception to the general rule, especially for companies which moved their registered office in the year before the filing; the new rules introduced in 2017 on the *tribunale delle imprese*.

Question 4.2 [maximum 4 marks]

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?

Directors of company have primarily fiduciary duty to shareholders of the company and of course obey the law.

As facts of the case state, company's directors acted fraudulently in altering the accounting records and diverting funds to offshore company. They can be held criminally liable under legge fallimentare articles 223-235 for that behaviour. Additionally, company directors can be held criminally liable if they prolonged the filing of petition in light of imminent insolvency which was possibly also the case here.

Commented [AA19]: MARK: 3.5/4.
You address all the points raised by the problem (with the exception of compensatory claims), and your answer is correct.

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Facts of the case state that information that company was potentially insolvent was discovered during in a court case of executory action commenced by one of company creditors. Since that was 7 months prior to filing for company liquidation it confirms that company directors delayed the filing of the petition. Besides failing in their obligation to manage the company's business diligently (normal diligence) they also made direct damage to the company and its shareholders and can be held liable for that. The conflict of interest was also present, but it can be said that that "oversight" was consumed with intentional transferring of the funds to offshore company.

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Since judge in executory proceedings case was made aware of potential insolvency of company, in case he had sent the report to Public prosecutor, the latter would be entitled to submit petition for insolvency

Question 4.3 [maximum 5 marks]

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?

Commented [AA20]: MARK: 5/5.
Correct, exhaustive answer.

Buonapizza Srl could not give collateral over the plot of land described (or at least not all of it) because it is considered as goods that can only belong to the state (demanio necessario) in respect to Italian law (Civil code article 882(1)). These also include seashore, harbours, streams, territorial waters as well as other assets needed to protect the state.

Other assets that cannot be obtained as collateral under Italian law are some assets that cannot be given as security if they belong to the state. Those include assets of historical value, archaeological artefacts, pieces of art that are owned by museums, libraries and

archives, also roads, highways, airports and aqueducts. This is stated in Civil code article 882(2).

*** End of Assessment ***