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: 23.5 (6+6+5+6.5)/50.
This assessment includes some good anse=wers, such as those to the multiple-choice questions. However, the essay and problem answers are mainly descriptive and at times inaccurate or incorrect.

After discussing your assessment with the lecturer for this module, we agreed that you were close enough for us to exercise our discretion to pass you. Your mark will be recorded as 50% (25/50).

Commented [AA2]: TOTAL MARK: 6/10.

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

Commented [AA6]: The correct answer is d). Fiduciary duties cannot be owed to them 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]: Correct.

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

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: 6/10.
The answer makes reference to some changes introduced in the law, but the candidate does not address the core issue raised by the essay question – whether in their opinion enough has been done to address the shortcomings of the Italian system.

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).

The Italian insolvency law reform that was enacted in 2017 and was a huge step, since it was no longer viable to postpone significant changes that were deemed necessary in the system.

Italian insolvency law dates back to 1942 when insolvency was a synonym of fraud. Since then, a lot of fragmented texts have tried to change the existing law in specific points. Despite the good intention, these fragmented changes ended up on a system that lacked coherence and demanded change. The reform enacted in 2017, is based on a preparatory work of the Rodorf Commission and is proposed as a way of modernizing insolvency in Italy. The commission and the government aimed to promote a system that would comply with the best practices set out by the UNCITRAL and the EU.

The law does not materially change the current insolvency legislation.

This final reform was a result of multiple changes made in the legislation since 2005 when the provisions were altered to favor the rescue and restructurings of distressed yet viable debtors. This was a huge development, since insolvency in Italy, at the beginning was seen as a crime.

Also, the world bank report of 2019 appointed that Italy was in a bad category related to enforcing contracts, which means that the time and cost needed to resolve commercial disputes was not good in the general rank. To address these matters, despite the changes provided in the reform, the government attributed the competence to deal with corporate insolvency matters to a specialized section of the court.

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

Commented [AA14]: TOTAL MARK: 5/15.
The answer is incomplete and very broad. There is no reference to case law and statutes. The candidate's opinion is not disclosed.

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 problem regarding the par condicio creditorum is that in theory, most creditors have to be treated equally in an insolvency state regarding the distribution order. Therefore, the law brings a wide range of exceptions to this principle, such as security enforcements that are not subject to this equal treatment (real securities such as mortgages, liens over movable properties, and others).

This fact can mitigate the use of such principle, which is evoked only when needed and may not the eligible to address the financial crisis of the company since the debtor might be eligible to grant a lot of privilege to securities that do not subject to equal treatment. Therefore, with that many exceptions, you cannot assure the use of the institute in the way it was designed to be, as a form o provide the same treatment to a collective proceeding.

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

Commented [AA15]: TOTAL MARK: 6.5/15.

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: 2/6.
The answer is incomplete – you didn't address the second part of the question. As for the first half: The majority of the commentators and the Supreme Court argue that in case of real transfer of the headquarters of the debtor, the court responsible for opening and supervising the procedure would be the court of the new seat, even if the change occurred less than 1 year before the insolvency petition (C. Cass., no. 3081/2011; De Sanctis, 'Il nuovo diritto fallimentare' in Jorio, Fabiani (eds), *Commentario alla legge fallimentare* (Bologna: Zanichelli, 2010)).

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?

No, it was not. Italian law states that any changes in the registered office that occur in the year before the filling cannot affect the court's jurisdiction, therefore, the insolvency should have been opened before Milan. Despite that, the presumption is rebuttable, therefore it is a real case of headquarters' transfer the court of such place can have jurisdiction to proceed the bankruptcy, even if the change occurred less than a year before the filing.

Question 4.2 [maximum 4 marks]

Commented [AA17]: MARK: 2/4.
You didn't address the second half of the question. The answer to the first half is correct.

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?

The directors of the company have a duty to manage the company in a prudent a reasonable manner. Therefore, any compensatory remedy would be eligible if the directors failed to act with normal diligence in supervising the conduct of the company's affairs, which seems to be

the case of the director that was holding fraudulent transactions in prejudice of the company and its creditors.

Also, the article 217 states that a debtor or its legal representative who delays the filing of a bankruptcy petition might be subject to committing the crime of simple bankruptcy of the deal worsens the financial structure of the company.

Therefore, the court do not have the power to demand a company to file for an insolvency proceeding (art. 1, (2))

Question 4.3 [maximum 5 marks]

Commented [AA18]: MARK: 2.5/5.
You could have expanded the answer to the second half of the question. As for the first half, the law prohibits only the sale of rivers – nothing is said about land adjacent to rivers.

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?

No, the plot of land could not have been given as security since it is crossed by a river, which is an asset that can only be owed by the state. Therefore, they are called demanio necessario Civil code article 822 (1). Other assets cannot be secured if they do belong to the state (civil code, art. 822 (2)), but territorial waters cannot be given as collateral in any way.

*** End of Assessment ***