



**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**

Commented [AA1]: TOTAL MARK: 36.5 (6+7.5+11+12)/50.

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

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

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**

Commented [AA3]: Correct.

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**

Commented [AA4]: Correct.

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**

Commented [AA5]: Correct.

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.

(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 Iustinianus*, in the late middle ages.

(b) the invasion by Napoleon's troops in the early 19<sup>th</sup> 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.

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

**Commented [AA7]:** Correct.

**Commented [AA8]:** Correct.

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

- (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**

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**

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**

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 [AA10]:** Wrong. The correct answer is c)

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

**Commented [AA12]:** Correct.

**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).

Among main reforms approved by Italian parliament were:

1. **Law 80/2005:** It regulated agreements with creditors and reduced the "suspect period" varied from one year to six months prior to insolvency declaration in which transactions are subject to claw-back actions. In addition, it tried to encourage a rescue culture regarding Pre-insolvency compositions.
2. **Legislative decree 5/2006:** It change regulations about corporate liquidations and created the *amministrazione controllata*, a proceeding which gave to enterprises in distress the possibility of continuing trading for up to two years under the supervision of a receiver and the insolvency court.
3. **Legislative decree 169/2007:** It reformed the procedure of forced administrative liquidation (*liquidazione coatta amministrativa*). Furthermore, this decree removed the possibility of the court declaring the commencing of a corporate liquidation proceeding if it should not meet the eligibility criteria.
4. **Law 134/2012:** This regulation introduced material innovations regarding pre-insolvency compositions, using the *concordato in bianco*, introducing new rules for post-commencement financing, and, imposing the principle of tacit consent for the determination of the creditors' quorum needed to approve the plan.
5. **Law decree 69/2013 and law 132/2015:** Both impulse changes to pre-insolvency compositions and debt restructuring arrangements. For example, it re-introduced the obligation to pay a fixed percentage (20%) of unsecured creditors' claims. The latter law marked the end of the use of Pre-insolvency compositions.

However, according to the World Bank 2019 *Doing Business* Report, an Italian first-instance court takes an average of 1,120 days (almost three years) to enforce a contract, of which 840 days (two years and three months) are for trial to reach a judgment and 270 days (nine months) for enforcing that judgment. Same results appeared in the World Bank 2020 *Doing Business* Report.

For this reason, the Italian government has enacted two main regulations to improve this data.

6. **Law 155/2017 (Rodorf reform):** It gave the Italian government the authority to complement the law by means of one or more law decrees. It kept a strict approach towards the opening and use of pre-insolvency compositions aimed at liquidating the assets and not continuing the business of the debtor.
7. **Legislative decree 14/2021:** It introduced the Italian insolvency code, *Codice della Crisi d'Impresa e dell'Insolvenza* (CCII), which Will be implemented in full in September 2021.

Commented [AA13]: \*TOTAL MARK: 7.5/10.  
Reference to the law is complete, analysis is mainly missing.

CCII encourages rescue over liquidation reducing the time and cost of judicial insolvency proceedings. The fundamental goal of this code is identified the factors of a business crisis through provision of warning systems, accompanied by the introduction of a body for the composition of corporate crisis being a partially non-judicial and confidential procedure carried out under the supervision of the Chamber of Commerce.

Additionally, the provisions of the CCII regulate the state of crisis and insolvency of any debtor, including consumers, professionals and entrepreneurs of any size and nature

Definitely, the Italian reforms have not been enough to revert the data show by the World Bank reports due to the fact that duration and cost of the judicial insolvency proceedings. However, I strongly believe that some changes incorporated in the CCII will allow reducing the time of solving insolvency matters.

### 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 condicio 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.

In Italian insolvency law, a fundamental principle is the *par condicio creditorum*, which means that all creditors have an equal right to payment to their claims. Nonetheless, there are two groups of creditors that enjoy preferential treatment creditors who (i) hold a security interest, and (ii) have a preference under law.

Under Italian law, there are some securities such as mortgages, consensual liens over registered movable properties, for example, vehicles, aircrafts, and ships; consensual pledges, usually over equity stock, debt instruments, and government bonds, as well as on receivables and bank accounts; and securitization transactions.

On the other hand, liens can be classified as a) general liens over movable goods belonging to the debtor; b) special liens over both movable and immovable goods belonging to the debtor; and c) special liens under article 46 of legislative decree 385/1993.

In addition, the equality principle only applies to those creditors who have an unsecured and non-preferred claim. They share pro-rata after satisfaction of secured and preferred creditors. Pledgees and preferred creditors holding a lien over movable assets also have a right of retention. This right allows those creditors (but only after their priorities have been finally ascertained) to seek authorization to sell the relevant assets outside the procedure but in accordance with rules set forth by the judge. Also, in these cases, the bankruptcy receiver may seek authorization from the delegate judge to redeem such assets.

However, I strongly believe that preferred creditors do not want to use the enforcement of their guarantees or preferences before the commencement of insolvency proceeding because these actions could be subject to clawbacks.

**Commented [AA14]:** Why? You should have expanded your view here. The answer is incomplete. Your expert views and analysis are missing.

**Commented [AA15]:** TOTAL MARK: 11/15.  
In your answer, you make reference to the law, but not to cases. Additionally, you don't explain the extent to which you agree with the statement that the system is rather byzantine and cumbersome. In other words, the analysis in your answer is only superficial.

Article 67 of the Italian insolvency law states transactions carried out by a debtor within six months or one year prior to the date of the insolvency declaration may be revoked by the insolvency practitioner, trustee, on behalf of the debtor and for the benefit of the creditors, among others, in the following cases:

- Pledges securities and mortgages voluntarily created within one year preceding a declaration of insolvency in respect of pre-existing debts which were not payable;
- Pledges, securities, and mortgages judicially imposed, or voluntarily constituted, within six months preceding the declaration of insolvency in respect of payable debts.

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

Commented [AA16]: TOTAL MARK: 12/15.

*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 [AA17]: MARK: 3/6.

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 the article 9 (1) of Italian insolvency law, procedures are commenced in the court where the debtors have their main place of business, commonly the company's registered office. In addition, any changes in the registered office that occur in the year before the filing cannot affect the court's jurisdiction (article 9 (2)). However, the majority of commentators and the Supreme Court argue that in the case of a 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 one year before the insolvency petition<sup>1</sup>.

In the particular case, the court of Modena should commence and continue with the Buonapizza's insolvency proceeding.

Furthermore, with law N° 155/2017, the court of Modena will keep with the case due to the fact that one of the incorporations with this regulation is that a single court will have a supervisory role over the procedure and a sole officeholder will be entitled to run the companies for the duration of the procedure.

#### 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?

The directors of a company must act with a duty of care, avoid conflicts of interest and comply with the law and the company's by-laws in the day-to-day management of the company. So, the directors are jointly liable if they fail to adequately supervise the general conduct of the company's affairs or if, being aware of prejudicial acts, they do not act to prevent any harmful activities, or to eliminate or reduce the harmful consequences of such activities.

In insolvency procedures, liability is proven against directors if:

- They failed to act with normal diligence in supervising the conduct of the company's affairs, to do their best to prevent the occurrence of prejudicial acts or reduce their harmful effect or have acted in conflict of interest.
- Their actions caused immediate and direct damage to the company.

According to article 224 of Italian insolvency law, criminal liability for simple bankruptcy to directors, managers, auditors, and officeholders. These persons can be punished with imprisonment of between six months to two years if they unreasonably delayed the commencement of a corporate insolvency procedure, or they have concurred in altering the company's accounting entries.

In the particular case, a director of Buonapizza is responsible for these acts who withheld relevant information about the company's state of affairs and devised a complex scheme, divert funds to offshore accounts and alter the company's balance sheet) because this director did not act with normal diligence and did detrimental acts against the debtor's assets.

Moreover, Buonapizza's auditor or accountant will be responsible for altering the company's balance sheet. In contrast, in the provided example, it is not clear that managers or officeholders knew of these misconducts.

Finally, the court of Modena cannot have any liability because it only ordered the execution of an action from a debtor's creditor, it is impossible to know that from this action, debtor would be insolvent.

<sup>1</sup> C Cass, no 3081/2011; De Sanctis, "Il nuovo diritto fallimentare" in Jorio, Fabiani (eds), *Commentario alla legge fallimentare* (Bologna: Zanichelli, 2010).

Commented [AA18]: Why? You should have expanded this point, even if the answer is correct.

Commented [AA19]: No – the creation of the *tribunale delle imprese* will move the competence from the court in Modena to that court in Bologna.

Commented [AA20]: MARK: 4/4.  
Correct, well-argued answer.

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**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?

According to Italian law, debtors have the freedom to grant securities over their assets or properties. *Buonapizza* granted Tesco as collateral a plot of land, not the river or part of it, in this case, this collateral was obtained correctly for this creditor.

Additionally, article 822 of the Italian Civil Procedure Code states some debtor's assets cannot be obtained as collateral such as:

- Assets that can only belong to the state include seashores, harbours, rivers, streams, lakes, and territorial waters.
- Assets that cannot be securitised if they belong to the state include roads, railways, highways, airports, aqueducts, buildings with historical, artistic or archaeological interests and the pieces of art owned by museums, archives and libraries.

**\* End of Assessment \***

Commented [AA21]: MARK: 5/5.  
Correct, well-argued answer.