



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: 25 (4+5+7+8.5)/50.

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 Iustinianus*, 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*.

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.

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).

Commented [AA10]: The correct answer is c). See page 38 of the guidance text: “Automatic set-off requires the claim to be quantified and certain, but not necessarily due.”.

Commented [AA11]: Correct.

Commented [AA12]: The correct answer is b). 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*”.

Commented [AA13]: **TOTAL MARK: 5.5/10.** There is little attempt to make reference to the laws outlined in the guidance text. The text is often taken verbatim from the guidance. The candidate does not answer the essay question.

[Legislative decree 35/2005 marked the commencement of a period in which the legislator favoured rescue-oriented solutions such as pre-insolvency compositions to deal with corporate distress. However, it is also possible to observe a legislative trend towards a more creditor-oriented approach in corporate insolvency law.

The reforms enacted between 2005 and 2012 had the common purpose of promoting the early use of rescue and restructuring measures. However, recent reforms (law 132/2015 and The Rordorf reform - law 155/2017) have been characterised by a marked scepticism on the use of restructuring and particularly pre-insolvency agreements. In particular, it reasserts the more stringent approach towards the opening and use of pre-insolvency compositions aimed at liquidating the assets and not continuing the business of the distressed debtor. It seems that now the need to promote the creditors' protection and the maximisation of their returns prevails over the equally legitimate debtor's expectation to try to rescue a distressed yet viable business.

Italy does not have a system of separate insolvency courts as in, so all formal insolvency procedures are commenced in the court where the debtors have their main place of business (usually, the company's registered office). Then, any changes in the registered office that occur in the year before the filing cannot affect the court's jurisdiction.

These courts are the same courts that are entitled to enforce any claims against the debtor when solvent. According to the World Bank 2019 Doing Business Report, Italy performs particularly badly among developed economies under the "enforcing contracts" indicator. This indicator measures the time and cost needed to resolve a commercial dispute through a local first-instance court and the time needed to enforce that judgment.

In the most recent 2020 Doing Business Report, Italy is in a much better position than before in the indicator on the ease of resolving insolvency. To improve these outcomes, the government has recently attributed the competence to deal with corporate insolvency matters to specialised sections of the *tribunale delle imprese*. This decision does not affect personal bankruptcies, whose filings will continue to be referred to local courts.]

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.

[The principle of equality amongst creditors (*par condicio creditorum*) is a fundamental principle of the Italian Bankruptcy Law. According to which, absent statutory priorities, no creditor may be paid a higher percentage of his claim than other creditors. A consequence of this principle is not only that the payment of debts by the bankruptcy receiver is strictly regulated, but also that all transactions effected by the debtor over the previous year are scrutinised and possibly unwound as preferential.

However, there are two groups of creditors that enjoy preferential treatment (*creditori privilegiati*): creditors who hold a security interest (*creditori ipotecari o pignoratizi*); and creditors who have a preference under law (*creditori privilegiati in senso stretto*). Therefore, the equality principle only applies to those creditors who have an unsecured and non-preferred claim (*creditori chirografari*). They share pro rata after satisfaction of secured and preferred

Commented [AA14]: Why is this relevant?

Commented [AA15]: TOTAL MARK: 7/15.

The answer shows a general, superficial understanding of the law. There is no reference to case law, and no attempt to discuss whether and to what extent the system is byzantine and cumbersome.

creditors. Pledges and preferred creditors holding a lien over movable assets also have a "right of retention" (*diritto di ritenzione*). This right allows those creditors (but only after their priorities have been finally ascertained) to seek authorisation 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 authorisation from the delegate judge to redeem such assets.]

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

Commented [AA16]: TOTAL MARK: 8.5/15.

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 [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?

The answer to the first part of the question is correct. The answer to the second part is incomplete and/or incorrect.

[Italy does not have a system of separate insolvency courts as in, so all formal insolvency procedures are commenced in the court where the debtors have their main place of business (usually, the company's registered office)." Any changes in the registered office that occur in the year before the filing cannot affect the court's jurisdiction. It has been asked whether this presumption is rebuttable or not. 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. So, in this case, the local court in Modena remains entitled to open a corporate liquidation proceeding against *Buonapizza Srl*.

The Rordorf Reform have been characterised by a marked scepticism on the use of restructuring and particularly pre-insolvency agreements. Unlike corporate liquidation, a pre-

insolvency composition has to be filed in the court where the debtor has its main place of business, that is usually the company's registered office.]

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 insolvent debtor is under no obligation to file for corporate liquidation but if the debtor and its directors delay the filing of a petition for bankruptcy, they commit the crime of "simple bankruptcy" if the delay worsens the debtor's financial distress (according to article 217 of the *legge fallimentare*).

The public prosecutor can also file a corporate liquidation petition in the circumstances outlined in article 6 of the *legge fallimentare*. These circumstances are: evidence of a situation of insolvency during a criminal case; a decision by the debtor to flee, escape arrest or shut down its business premises, as well as by the discovery of serious irregularities in the business accounts; a report of a situation of insolvency by a civil judge, who discovers the existence of insolvency regarding one of the parties to a judicial proceeding under his supervision.]

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?

[Under Italian law, parties have a general freedom to grant securities over their assets. However, there are some assets that cannot be obtained as collateral. These are state-owned assets, which can be divided in two classes: (i) Assets that can only belong to the state. These include seashores, harbours, rivers, streams, lakes and territorial waters, as well as any infrastructure that is essential to protect the state as barracks, military airports, etcetera; (ii) Assets that cannot be securitised if they belong to the state. These include roads, railways, highways, airports, aqueducts, buildings with historical, artistic or archaeological interests and the pieces of art owned by museums, archives and libraries. Other assets that cannot be securitised are the assets constituting a patrimonial fund, those that cannot be subject to foreclosure and those listed in article 514 of the Civil Procedure Code.

So, Could *Buonapizza Srl* could grant collateral over the plot of land crossed by a river, but not over the river itself.]

*** End of Assessment ***

Commented [AA18]: This is not relevant for answering the problem question. You should have made reference to the newly-created *tribunale delle imprese* (law 155/2017).

Commented [AA19]: MARK: 1.5/4.
The answer simply copies-and-pastes text from the guidance. There is little attempt to apply the rules to the scenario.

Commented [AA20]: What about the court? What does this mean for the instant case? What about remedies?

Commented [AA21]: MARK: 4/5.
The answer is correct, but the candidate should have used their own words to answer the question rather than taking material verbatim from the guidance text.