



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: **[studentID.assessment6D]**. An example would be something along the following lines: 202122-336.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 "studentID" 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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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

Select the **correct answer**:

Under the current law, a consumer cannot be admitted to a consumer's agreement or plan if:

- (a) he assumed obligations without a reasonable prospect of meeting them and he relied on credit in a manner that was not proportionate to their income.
- (b) he is responsible for causing the over-indebtedness with a reckless conduct.

(c) both (a) and (b).

(d) only (b).

Question 1.2

Select the **correct answer**:

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

Select the **correct answer**:

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.**

Commented [EV1]: Final Mark: 29.5/50.
This exam paper could have been better, if all answers matched the quality and analysis shown in your final answer.

Commented [EV2]: Mark for this section: 5/10.

Commented [EV3]: The correct answer is (d).

Commented [EV4]: Correct.

Commented [EV5]: The correct answer is (c).

- (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

Commented [EV6]: The correct answer is (d).

Select the **correct answer**:

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 [EV7]: Correct.

Select the **correct answer**:

In order to be eligible for pre-insolvency compositions, companies need to be:

- (a) in a state of crisis rather than in a state of insolvency upon admission to the procedure.
- (b) cash-flow or balance-sheet insolvent.
- (c) in a state of crisis or insolvency upon submission of the petition and at the moment in which the court is asked to approve the agreement.
- (d) in a state of over-indebtedness.

Question 1.6

Commented [EV8]: Correct.

Select the **correct answer**:

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

Select the **correct answer**:

In personal bankruptcy procedures:

- (a) creditors do have to prove their claims in these procedures, with the exception of a consumer's liquidation.
- (b) there is no mechanism to challenge an erroneous proof of debt submitted by the debtor or his representative.
- (c) it is not possible to file a late claim in consumer's liquidations.
- (d) there is no provision, under the law, to authorise the late filing of proofs of claims.

Commented [EV9]: The correct answer is (d).

Question 1.8

Select the **correct answer**:

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 [EV10]: Correct.

Question 1.9

Select the **correct answer**:

Following the United Kingdom's (UK) withdrawal from the EU:

- (a) Italian restructuring procedures are no longer enforceable in the UK.
- (b) it may be possible to rely on a simplified recognition procedure under the Cross-Border Insolvency Regulations 2006 if the Italian restructuring procedure is a pre-insolvency composition collective in nature and notified to all potential creditors.
- (c) recognition of such proceedings would produce effect even for contracts subject to English law (rule in *Gibbs*).
- (d) while in the past it was possible to rely on the Brussels Recast Regulation, it is now possible to rely on the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments.

Commented [EV11]: The correct answer is (b).

Question 1.10

Select the **correct answer**:

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]

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, as well as international recommendations and approaches adopted in other jurisdictions such as the United Kingdom or the United States.

While it is possible to create unequal classes, classes of creditors being treated equally is a necessary principle of insolvency frameworks because not everyone can come out of an insolvency proceeding whole and as such, it makes sense that all creditors, subject to their priority rights, bear the burden of the insolvency equally. Secured creditors must have more rights to their security than an unsecured creditor because the secured creditor has gone through the time and cost to obtain security. By doing so, they have given themselves a priority over an unsecured creditor, but this is not unjust.

While cumbersome, creditors should work to understand their rights as well as their priority levels in the cases of insolvency. Creditors must also do their due diligence to protect themselves and put themselves in the best position possible.

Other jurisdictions such as the US and UK have similar provisions and work to treat all creditors (within a class) equally. Hence, they have provisions to deal with fraudulent transactions including preferences because it is unfair for one creditor to have received a significant benefit prior to the insolvency over other creditors. These jurisdictions also have preferred creditors who receive additional benefits over unsecured creditors, such as child or spousal support arrears. Many of these preferences only exist under insolvency law, and as such, the creditor need not be aware of them prior to insolvency proceedings.

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

Outline the main changes to the treatment of personal debtors that has occurred since the introduction of law 3/2012.

Commented [EV12]: Correct.

Commented [EV13]: Mark: 5/10.

While I appreciate the comparative aspect of your answer, there is too little reference to the provisions under the Italian law. The first two paragraphs of your answer could apply to almost all jurisdictions in the world.

Commented [EV14]: Mark: 7/15.

The answer is not detailed. The final part of the question on discharge is only marginally covered in your answer. The answer suggests that some of the concepts relating to consumer procedures are not clear. There is no comparison between consumer's agreements and plans.

In particular, include references to: the eligibility criteria for these procedures; the differences between consumer's agreements and plans; the conditions to obtain a discharge of pre-bankruptcy debts.

The consumer's agreement and consumer's liquidation were introduced **by law... in...**. If someone can file for corporate insolvency, they are not allowed to avail themselves of consumer procedures. Consumer proceedings are available to individuals and some corporate entities if they are not entrepreneurial or if they don't meet eligibility thresholds. Consumer proceedings are not available to someone who filed a bankruptcy proceeding within the last five years. While these proceedings are available for **entities** experiencing both balance sheet and cash flow insolvency, it cannot be used for someone who had no reasonable chance of meeting obligations they assumed, was responsible of reckless conduct that brought about the over indebtedness, or relied on credit that was not proportionate to their income. **Note: due to the restrictiveness of the above criteria, there have been changes in new legislation which only keeps the reckless conduct as something that will prevent someone from being able to file a plan or arrangement.**

Commented [EV15]: ???

Commented [EV16]: Language could be improved and polished.

A consumer's agreement under law 3/2012 is a personal bankruptcy proceeding which requires the consumer to come to an agreement with its creditors. The agreement does not involve any cramdowns and is only applicable to the agreed parties governed by a new contract. Currently, a consumer agreement involves a proposal being made by the consumer, with the help of an organismo to its creditors for approval. The proposal requires approval from 60% in value of the creditors and does involve a cramdown.

A consumer's agreement involves the creditors and a consumer makes a proposal for them to vote on and approve followed by court approval. An organismo is involved to monitor the process and ensure the proposal is being followed. A consumer's plan does not involve the creditors as much but obtains court approval. Creditors can raise objections to the court if they believe a plan is not in their best interest, but the court makes the final decision regarding the plan. Fraudulent transactions are verified by the court immediately in a consumer plan.

An automatic stay exists for a consumer agreement, but not for a plan. The court does have the discretion to issue a stay against actions that could negatively impact the outcome of the plan.

All debts involved in an agreement or a plan are discharged upon completion of the agreement or plan.

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

Commented [EV17]: Mark for this question: 12.5/15.

Buonapizza Srl (the debtor) is a company registered in Milan, Italy. Its main factory is in Modena, Italy, which is also the place where the board of directors transferred the registered office to on 15 April 2020. The company has assets in other jurisdictions, including the United Kingdom. The debtor's main line of business consists of producing locally-sourced pizzas and selling them to large foreign grocery shops, such as Tesco in the UK. The contract with *Tesco* is subject to English law, but there is no choice of forum for any dispute arising from it.

In December 2020, *Buonapizza Srl* ceased its operations due to industrial action and later that month filed for corporate liquidation (*fallimento*). In a judgment dated 12 January 2021, the local court in Modena opened a corporate liquidation proceeding against *Buonapizza Srl*.

During the proceeding, it emerged that since January 2019 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 June 2020, 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? Can the judgment (and the insolvency-related judgments arising from it) be enforced in the UK?

The proceedings should be opened where the company has its main place of business. While the location of the registered office is often used, given they moved the office to Modena shortly before filing, one could argue that the move may have been strategic if that was their only connection to Modena. But in this case, the company's main factory was also in Modena and therefore, it can be argued that is their main place of business. Therefore, yes the court in Modena was entitled to open the proceedings as Modena can be argued as the company's main place of business.

Yes, under the new framework of law 155/2017, specialized sections of the enterprise court will now hear corporate insolvency proceedings.

Due to Brexit, the UK is no longer a party to many of the treaties that bind the EU. In order for the judgement to be enforced in the UK, the Italian liquidator/receiver would have to apply to the UK court for recognition under the Cross Border Insolvency Regulations 2006. Following recognition, the judgement can be enforced subject to conditions. The judgement that is being enforced in the UK is only enforceable if it complies with the Gibbs rule, which in this case requires Tesco to have been a part of the proceedings which altered or discharged their debt.

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?

No, the debtor is not under an obligation to file. However, by delaying and worsening the financial situation of the company, the debtor (and its representatives) may have committed simple bankruptcy under legge fallimentare. If convicted, prison time is possible under article 224. In this case, the director and accountant also altered the company's balance sheet after moving funds offshore. They too could be held criminally liable. Therefore, yes there can be compensatory and punitive remedies for failing to act promptly.

Commented [EV18]: Mark for this part of the question: 5/6.

Commented [EV19]: Good, well-argued answer – but what about references to the law?

Commented [EV20]: Ok.

Commented [EV21]: Perfect.

Commented [EV22]: Mark for this part of the question: 4/4. Perfect answer, well done!

Directors can be liable for breach of duty if they are not acting in the company's best interest and in a reasonable manner. If directors do not act with diligence, do not prevent prejudicial acts, or have a conflicted interest and they cause damage to the company, they can be found liable and be committed of a crime under legge fallimentare. In this case, one director has also committed fraud, as he withheld information, moved funds offshore, and falsely altered the company's financial documents, which is a crime in itself.

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?

If the plot of land does not include the river and is not a state asset, then yes, they could grant their property as collateral. If the river is included in the plot of land and/or the surrounding land is considered a state asset, then no, it cannot be used as collateral. Therefore, security can only be granted on the land that does not include the river, because a river is a state asset.

Yes, some assets under Italian law cannot be used as collateral. For example, assets owned by the state, such as rivers, lakes, airports, and roads, cannot be used as collateral under the Civil Code.

*** End of Assessment ***

Commented [EV23]: Mark for this part of the question: 3.5/5
I see your point in the first part of your answer. But rivers cannot be included in the land registry, and the surrounding land is not considered a state asset (except for the bank of the river). The second part of the answer should have been developed more.