



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 **31July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31July 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: 38.5/50.
A very strong exam. It's a pity there were so many mistakes in the Q&A section!

Commented [EV2]: Mark for this section: 4/10.

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]: The correct answer is (c).

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]: Correct.

Question 1.10

Select the **correct answer**:

Commented [EV12]: The correct answer is (a).

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.

[Answer:

In the Italian insolvency framework, the "Pari-passu" principle is termed as "Par Condicio Creditorum" which means that all creditors have an equal right to payment and that the proceeds of the debtor's estate shall be distributed in proportion to the size of creditor's claims. However, Par condicio creditorum in Italian insolvency framework only applies to those creditors who have an unsecured claim and are not preferred creditors. They share pro-rata in the amount available to them.

Under the Italian insolvency law creditors are classified differently according to their claims. So naturally, unless the debtor files for insolvency, it becomes difficult for the creditors to ascertain their category and thereby the order of their pay out status. Other factors which add to the unawareness of the creditors are the complexities involved in the system along with time period involved in enforcing the contracts which is relatively longer in Italy as compared to the time period involved in resolving insolvency proceedings.

The creditors have been classified differently because of the nature of transaction they have entered with the debtor. For instance, secured creditors themselves are divided by procedures, priorities and rights that it becomes difficult to apply principle of equality amongst the same class of creditors itself (Par Condicio Creditorum).

Under Italian Law, parties could grant securities over their assets subject to few exceptions.

- A) Italian laws are dynamic and offers many forms of securities like:
- i. Mortgage (Article 2808 et seq. Civil Code) – Over Real estate assets.
 - ii. Consensual Liens – Over movable properties.
 - iii. Consensual pledges – Over transferable financial instruments, receivables and bank accounts, intellectual property rights.

Commented [EV13]: Mark for this question: 8.5/10.
This is a reasoned and well-developed answer, with some comparative elements that have been properly added to the analysis. It could have been better if there had been less reliance on the wording of the report, and more analysis of the impact of the law on Italian creditors.
Overall, as the mark suggests, a very good answer. Well done!

B) Some other forms of securities recognised by Italian laws are:

- i. General Liens – Over movable goods.
- ii. Special Liens – Over both movable and immovable goods.
- iii. Special liens under Article 46 of the legislative decree 385/1993 – Over equipment, machinery, work-in-progress, stock and receivables and allowed only to banks and other financial institutions.

Different forms of guarantees like surety and first demand guarantees are also popular in supporting the credit market. It provides creditors right to take legal claim against a third party, the guarantor.

The creditors may exercise their rights before the debtor gets subjected to insolvency proceedings. For instance, Article 2748 et seq of the Civil Code provides for the general preferences in the event there are multiple rights created over the same asset. According to the Article, pledges prevail over special liens on movable properties and special liens prevail over mortgages on immovable properties. In addition to this when several securities are created over the same asset then the creditor who first obtains the possession of the asset legally prevails over conflicting claims.

To enforce securities, debt should be due, and creditor should have requested money and given a proper notice to the debtor. Upon expiry of notice, creditors can enforce their claim through courts. No court procedure is required for special liens on bank accounts (Legislative Decree 170/2004). For enforcement pledge, first existence and validity of pledge is required to be proved. In case of guarantee, both guarantor and co-debtor can claim what they paid for the debtor, but the only guarantor is allowed to claim expenses and interest.

There such many more list of preferences where creditors are paid in priority to the unsecured creditors. It is difficult to make a comprehensible list of the same. From multiple forms of securities and their preferences to different means of enforcing these rights make the process complex to understand.

Even at the outset of insolvency, the securities, pledges or mortgages created voluntarily within a year before the declaration of insolvency for pre-existing debts which were not payable are subject to successful avoidance action. When the debtor enters into a formal insolvency procedure there is no specific provision which automatically prevents secured creditor from enforcing his security interests.

Pari-passu in other jurisdictions are based on a waterfall mechanism that considers the rights and privileges of class of creditors. Leading countries like the US and the UK, having a well-developed insolvency law has clearly recognised the priorities for pay out to the creditors. For instance, in the US, first payment is made out to secured claimants, administrative expenses and priority claims, general unsecured claims, subordinated claims, equity interests. UK also has the same priority as listed for US, viz, settlement first is made to fixed charge holders, liquidators' fees and expenses, preferred creditors, floating charge holders, unsecured creditors, interest incurred on all unsecured debts post-liquidation, shareholders.]

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 [EV14]: Mark for this question: 14/15.
Excellent, well-developed and properly structured answer. You should have highlighted better your findings at the end of the first and final section of your essay. Other than that, this is a really good answer!

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.

[Answer:

Italy for a long time did not have in place a formal procedure for personal debtors' insolvency. However, with the introduction of the law 3/2012 and later amended by law 221/2012, the personal debtor insolvency procedure was introduced for all those debtors that could not file for any other corporate insolvency procedures. Italy has newly enacted 301 article, Codice della Crisi d'Impresa e dell'Insolvenza (CCEI) which has brought changes to consumer insolvency framework.

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The main changes to the treatment of personal debtors post the introduction of law 3/2012 are as follows:

The 3/2012 introduced two procedures namely:

- i. Consumer Agreement.
- ii. Consumer Liquidation

The 221/2012 law introduced Consumer Plan procedure as the third procedure which was originally absent from the 3/2012 law.

Eligibility criteria for these procedures

Article 1 Legge Fallimentare, defines who all are qualified as a debtor to file for a procedure. The 3/2012 law made the procedure available to:

Commented [EV15]: Not directly related to the topic.

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- i. Individuals and Corporate entities that do not carry out entrepreneurial activities
- ii. Commercial entrepreneurs who reach the threshold to initiate the insolvency
- iii. Entrepreneurs who have invested in innovative start-ups
- iv. Entrepreneurs that have debt size of not less than EUR 30,000
- v. Individuals that are in over indebtedness (both cash-flow and balance-sheet insolvency in accordance with Article 5(2) Legge Fallimentare)
- vi. Debtor must not have entered into any bankruptcy proceeding in the previous 5 years.

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However, Article 1, restricted certain categories of debtors such as farmers and unlimited liability shareholders to apply for personal insolvency in Italy. Therefore, to make the eligibility criteria more inclusive, amendments were proposed in 221/2012 law and farmers were given the right to apply for the procedure as a personal debtor. For unlimited liability shareholders Article 147 Legge Fallimentare allows them to open personal insolvency procedures.

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Additional eligibility criteria involved in a personal insolvency procedure; However, these conditions are not applicable to consumer liquidation:

- (a) over indebtedness has been caused because of gross misconduct (earlier reckless conduct prior to CCEI)
- (b) availed credit disproportionately to the income (removed by 176/2020 amendment)
- (c) personal debtor cannot be admitted to the procedure if obligations were assumed without a reasonable prospect of fulfilling them. (Removed by 176/2020 amendment)

Note:

Above Point (b) and (c) has been removed from the eligibility criteria because being a subjective qualification got exposed to interpretation by the courts which eventually created hurdles in terms of preventing the personal debtors to start a procedure. Gross misconduct amendment is believed that it removes the bottle neck for consumers to initiate the procedure and that the consumer would only be restricted to initiate the procedure in case the debtor contracted debt in good faith or without fraud i.e., no malice **conduct**.

Commented [EV16]: A summary paragraph here would have been useful.

Differences between consumer’s agreements and plans

Particulars	Consumer Agreement	Consumer Plans
Applicability	<i>Debtors who are not consumer but do not meet eligibility requirement for formal corporate insolvency procedures</i>	<i>Procedure available to consumers for debts entered by them outside their business activity/profession.</i>
Introduced	<i>In 3/2012 law and amended in 221/2012</i>	<i>Introduced in law 221/2012</i>
Approval Requirement	<i>Debtor need creditors’ approval and court’s approval</i>	<i>Only court’s approval required</i>
Role of Organismo	<i>Assists the debtor in drafting the plan</i>	<i>Along with assistance in drafting the plan, a detailed report has to also be drafted to be submitted before the Courts. The report should address the reasons of over-indebtedness, feasibility of the plan, effectiveness of the proposal against consumer agreement</i>
Court process	<i>The court has to ascertain that 60% creditors voted in favour of the plan and that the plan is feasible</i>	<i>The procedure is similar to the consumer agreement. However, in addition the court has to verify immediately the existence of fraudulent or negligent acts. The court in order to access the feasibility of the plan needs to ensure that the non-discharged debts are paid and that the debtor is worthy.</i>

The conditions to obtain a discharge of pre-bankruptcy debts:

As highlighted above that both the consumer agreement and the consumer plan to become effective, requires the approval of the Court. The court if grants the approval to the agreement or the plan it results in the discharge of all the debts of the debtor.

When debtor undergoes consumer liquidation process, the closure of the process determines the discharge for all unpaid debts. As per the Italian law, the liquidation process should run for 4 years before the court could pass an appropriate order, discharging the debtor for its dues. The court order could be challenged if it is shown that a creditor was preferred without having any such right of preference, or in cases of fraud or gross negligence. Under liquidation the debtor receives Esdebitazione (discharge) after the liquidator has executed the liquidation plan. The discharge is given only to worthy debtors who had actively looked for work or worked and also cooperated with the liquidator.

For consumer agreement and consumer plan, the discharge is operative when the agreement/plan gets executed. The court is not to be approached for passing the necessary order of discharge unlike under liquidation.]

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

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?

[Answer:

1. Whether the local court at Modena entitled to admit the petition of corporate liquidation?

Article 9(1) of the Legge fallimentare is based on the rebuttable presumption that the registered office is the main seat of the company. The same matter is also dealt in the cases C Class no 14676/2012 and C Cass no 16080/2009. All the Insolvency procedures petitions are to be commenced before the local insolvency where the debtor's registered office is based i.e., Centre of Main Interest (COMI).

Further, considering that in the present case the debtor changed its registered office from Milan to Modena would not oust the jurisdiction of the insolvency court based at

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Commented [EV18]: This answer is correct, but it is not properly phrased, and you don't make reference to key case law, which could have supported your conclusion.

Modena because Article 9(2) provides that any changes in the registered office that occur in the year before the filing does not affect the court's jurisdiction.

2. Would the situation of court jurisdiction remain the same by law no 155/2017?

Even after the introduction of the new framework i.e., law no 155/2017, the principal place of business of the company would continue to remain Modena only. Hence, the situation would continue to remain the same.

Commented [EV19]: What about the *tribunale delle imprese*?

3. Can the judgment (and the insolvency-related judgments arising from it) be enforced in the UK

Yes, since corporate liquidation forms part of the Annexure A of the EIR Recast, enforcement of the insolvency related judgements would be enforced in the UK through the Cross Border Insolvency Regulations, 2016 under Article 15(1), Schedule 1. However, the Italian practitioner would have to apply before the UK courts for recognition as the recognition of the judgement in the UK would not be automatic. There are many prerequisites that the UK court would satisfy itself before granting the recognition to the judgements delivered by the Italian Courts.]

Commented [EV20]: You should have made reference to the *Gibbs* rule. Apart from that, the answer is correct.

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?

Commented [EV21]: Mark for this section: 3.5/4
This answer is correct and well developed, even if partially out of context.

[Answer:

1. Debtor:

The debtor usually takes the initiative of opening the liquidation proceedings but there does not lie any obligation on the part of debtor to initiate the proceedings. However, as per the Article 217 of Legge Fallimentare, the debtor including the legal representatives who delays the filing of the Insolvency petition commits an offense of "Simple Bankruptcy" provided the delay worsens the corporate debtor's financial distress.

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Article 223-225 of the Legge Fallimentare provides for the criminal actions that could be undertaken for Simple Bankruptcy matters. It applies to the directors, managers, auditors and officeholders. If it is found that these people had unreasonably delayed the commencement of the insolvency procedure, then they can be punished with imprisonment of 6 months to 2 years.

2. Directors

Directors have the duty when the company is at the risk of being insolvent that they must file a petition for insolvency without undue delay, to avoid further worsening the company's financial position. In the present case the directors were aware about the insolvency position of the company since June 2020 and the debtor had filed for insolvency in December 2020. It became imperative on the directors to initiate the insolvency in June 2020 itself. Also, the directors had run the affairs of the company in an unfair manner also leading to criminal actions against them.

On failure to commence the insolvency proceedings, a director could be criminally liable because the director would be held responsible for increasing the company's liabilities by failing to file a petition for the commencement of the insolvency proceedings when the company was insolvent or over-indebted

3. Local Court

Local court is under no obligation to file for bankruptcy of the debtor. It is either debtor itself or the creditors. Courts have two significant roles to play, first to direct the insolvency procedure and second to check whether all parties involved are acting according to the rules.

However, the public prosecutor can file for corporate liquidation against the debtor's company under Article 6 the Legge Fallimentare, if a report of insolvency by a Civil Judge, who has discovered the existence of insolvency regarding the debtor's company during any judicial proceedings under his adjudication.]

Commented [EV22]: Not directly relevant.

Question 4.3 [maximum 5 marks]

Commented [EV23]: Mark for this section: 5/5.

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?

[Answer:

Yes, the corporate debtor can grant the collateral on the land as the Italian law restricts collateral creation under two scenarios which are primarily deals with state-owned assets:

- a) Assets that belong to the state (demanio necessario):
It includes infrastructure build by the state for its protection. Infrastructure including military airports, barracks. It also includes the territorial seas, harbours, water bodies etc.
- b) Assets that cannot be securitised as they belong to the state (demanio accidentale):
These include important assets of nation such as Roads, Railways, Airports, Museums, Libraries etc.
- c) Patrimonial funds
- d) Assets that cannot be subjected to foreclosure
- e) Assets listed under Code of Civil Procedure under Article 514

In the present situation a river crosses from the plot of land which does not mean that the land could not be given as collateral for the reason that the river belongs to the state and the land is the private property of the debtor. Secondly, the river has not been given as collateral. It is stretch of land with the plant is given as collateral to Tesco.]

End of Assessment