



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: 202223-336.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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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 8 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.

Question 1.1

Under the law applicable to personal / bankruptcy procedures opened before 15 July 2022, a consumer cannot be admitted to a consumer's agreement or plan if -

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

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.

Commented [VE1]: TOTAL: 25/50. This is a promising paper. Two of the long answers are very good. however, you made a lot of mistakes in the Q&As, and you didn't answer properly the question on personal bankruptcy procedures.

Commented [VE2]: MARK: 3/10 in this section.

Commented [VE3]: Correct answer is (d).

Commented [VE4]: Correct.

Question 1.3

Which of the following procedures introduced by the new *Codice della Crisi dell'Impresa e dell'Insolvenza* is not binding on dissenting creditors?

- (a) *Concordato preventivo* (pre-insolvency composition).
- (b) *Accordi di ristrutturazione dei debiti* (debt restructuring agreements).**
- (c) *Piani attestati di risanamento* (turnaround plans).
- (d) *Composizione negoziata della crisi* (negotiated agreements).

Commented [VE5]: Correct answer is (c).

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.

Commented [VE6]: Correct answer is (d).

Question 1.5

In order to be eligible for pre-insolvency compositions regulated by the *Codice della Crisi dell'Impresa e dell'Insolvenza*, 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 when the court is asked to approve the agreement.
- (d) in a state of over-indebtedness.

Commented [VE7]: Correct answer is (c).

Question 1.6

Commented [VE8]: Correct.

A "situation of crisis" is -

- (a) the same as insolvency.
- (b) the same as over-indebtedness.
- (c) uncertain, as the concept is not defined by the law.
- (d) a situation of economic and financial distress that can lead to cash-flow insolvency in the ensuing 12 months.**

Question 1.7

Commented [VE9]: The correct answer is (d).

In the personal bankruptcy procedures regulated by the *Codice della Crisi dell'Impresa e dell'Insolvenza* -

- (a) liquidation is not an option.
- (b) innovative start-ups can file for a consumer's debt restructuring agreement.**
- (c) the *organismo di composizione della crisi* does not play any role in minor compositions.
- (d) debtors are allowed to keep their own homes if they successfully complete a consumer's debt restructuring agreement.

Question 1.8

Commented [VE10]: Correct answer is (c).

Rules on netting and set-off -

- (a) apply only to liquidation procedures.
- (b) restrict the validity of contractually negotiated clauses.**
- (c) require claims to be quantified, certain and preferably due.
- (d) are not codified in the *legge fallimentare*.

Question 1.9

Commented [VE11]: Correct answer is (b).

Following the United Kingdom's (UK) withdrawal from the European Union -

- (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 that is collective in nature, and if notification has been provided to all potential creditors.

(c) recognition of Italian restructuring proceedings would even have consequences for contracts subject to English law (rule in *Gibbs*).

(d) it is now possible to rely on the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments, while in the past it was possible to rely on the Brussels Recast Regulation.

Question 1.10

Commented [VE12]: Correct.

Recent reforms based on the preparatory work of the Rordorf Commission and enacted by the *Codice della Crisi dell'Impresa e dell'Insolvenza* -

(a) benchmark international best practices and European recommendations.

(b) do not introduce significant changes to the current law.

(c) discourage the strategic use of statutory provisions by both creditors and debtors.

(d) have not yet been enacted by Parliament.

QUESTION 2 (direct questions) [10 marks]

Commented [VE13]: MARK: 7.5/10. Good answer, which shows a good understanding of Italian law. I appreciate the attempt to compare Italian laws with those from other jurisdictions. There are no mistakes as to the understanding of the law, but some examples are questionable.

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 UK or the United States.

*The principle of equality amongst creditors (*par condicio creditorum*) is a fundamental principle in several insolvency systems --- including the Italian system ---, which provides that creditors must be treated equally in the distribution of the debtor's assets within an insolvency proceeding. This principle is outlined by article 52 of the Italian *Legge Fallimentare*.*

Notwithstanding the fact that it is a fundamental principle, the Italian insolvency law provides some exceptions, that not rarely create complex discussions around the definition of creditor's rights, remedies, and privileges. As a result and as indicated in

the statement above, creditors might not be aware of their privileged status until, or unless, their debtor files for insolvency.

An example of this exception is provided in article 2751 of the Italian Civil Code, that, in short, grants mortgage creditors the preference to receive the values raised by the sale of the asset that constitutes its mortgage. Another example is the fact that the Italian Bankruptcy Law authorizes the constitution of pledges and mortgages, which, on its turn, creates a privilege for the creditors that will benefit from these guarantees / securities over the unsecured creditors. Finally, in the debt restructuring arrangements parties can freely propose different treatments between different classes of creditors.

It is important to note, however, that the Italian insolvency system is not the only that provides exceptions for the *par condicio creditorum* system. The UK system, for example, provides privileges for employee debts and secured creditors. The USA system also provides this kind of preference.

In order to guide and address issues related to this important principle, the UNCITRAL pursues through its activities, guides and soft legislation (e.g., the Legislative Guide on Insolvency Law) to emphasize the importance of the equitable treatment of creditors and equal the minimization of exceptions.

QUESTION 3 (essay-type question) [15 marks]

Personal restructuring and personal liquidation procedures have been significantly overhauled by the *Codice della Crisi dell'Impresa e dell'Insolvenza* (the Code). The new system represents a significant improvement over the previous law, particularly with reference to the more widespread and facilitated use of discharge for honest but unfortunate consumers. Discuss this statement with reference to the new provisions and procedures under the Code.

The first Italian rules on insolvency were mainly characterised by punitive approaches, in which, for example, insolvent merchants were subject to reclusion, loss of all their properties and political rights and, sometimes, even torture and/or death penalty. By the developments

The new system, however, provides more friendly approaches to debtor, especially because it provides rules that enhances (i) the availability of discharge for individual suffering with financial distress; (ii) the costs (which were reduced) for debtors to benefit from the insolvency regimes; (iii) the supportive rules, rights and remedies of the debtors facing financial difficulties; (iv) the correct environments for debtors and creditors negotiate and discuss the best ways to achieve the payment of the respective claims and also guarantees the activities of the debtor as a going concern; (v) the protection of the debtors against abusive collections and enforcements promoted by their creditors.

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

Commented [VE14]: This is quite a common exception. It is not peculiar of Italian law.

Commented [VE15]: Ditto.

Commented [VE16]: This is a good point but a bit off topic. Technically, the rules on distribution of assets do not apply where companies are being rescued.

Commented [VE17]: MARK: 3.5/15. The answer is really too short and does not show sufficiently detailed understanding of the topic.

Buonapizza Srl (the debtor) is a company registered in Milan, Italy. Its main factory is in Modena, Italy, which is also the place to where the board of directors transferred the registered office on 15 April 2020. The company has assets in other jurisdictions, including the UK. 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 liquidation proceeding it emerged that one of the three executive directors withheld relevant information about the company's state of affairs since January 2019. This director devised a complex scheme along with Buonapizza Srl's accountant to divert funds to offshore accounts and to alter the company's balance sheet. It was also established that since June 2020 the local court of Modena was aware of the potential insolvency of the company, 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 Buonapizza Srl'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]

- (a) 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?**

The liquidation petition must be filed in the court where the debtor has its main place of business, that is usually the place of the company's registered office. In this case, the

Commented [VE18]: MARK: 5/6. Good answers, the latter could have been more detailed and comprehensive.

registered office is in Modena, which is the Court entitled to open the corporate liquidation of Buonapizza. The fact that the registered office was moved to Modena shortly before the filing does not affect its jurisdiction to open the corporate liquidation, because the rule regarding the one (1) year period applies only when the registered office is moved to another **county**.

Commented [VE19]: Ok.

(b) Would the situation be different under the new framework introduced by law no 155/2017?

It might be different, because, as indicated in the guide text, the Italian government has recently attributed the competence to deal with corporate insolvency matters to specialized section of the tribunale delle imprese for large enterprises or group of enterprises. Therefore, in case Buonapizza SRL is considered a large enterprise the jurisdiction might be changed to a specialized section of the tribunale delle **imprese**

Commented [VE20]: Ok.

(c) Can the judgment (and the insolvency-related judgments arising therefrom) be effected in the UK?

As a rule, insolvency judgments and any related decisions cannot be enforced in the UK if they are contrary to the Gibbs rule, that provides that a debt governed by English law cannot be discharged or altered by a foreign law unless the party against whom the order was made was subject to the relevant proceedings. Since the contract with Tesco is subject to English law the insolvency judgment might not be effected in the **UK**.

Commented [VE21]: Ok. I would have liked some thoughts on whether the recognition could be effected under either the EIRR 2015 or the CBIR 2006.

Question 4.2 **[maximum 4 marks]**

Commented [VE22]: MARK: 3/4. Good answer, but the candidate omitted any reference to compensatory remedies.

Was 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?

As detailed in the Guide text, directors have a general duty to manage the company in a prudent and reasonable manner. These fiduciary duties are owed to the company's shareholders. In case they fail to meet these obligations results in liabilities for breach of duty.

Article 224 of the legge fallimentare provides criminal liability for managers, auditors and officeholders that unreasonably delayed the commencement of a corporate insolvency procedure or that have concurred in altering the company's accounting entries.

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?**

Buonapizza migrant collateral over the plot of land, however, since it is encumbered on behalf of Tesco, this new collateral must respect the principle of "pior in tempore", which secures Tesco priority over this asset. As described in the Guide Text, there are some assets that cannot be obtained as collateral, according to the Italian insolvency rules. These assets are: (i) assets that can only belong to the state (e.g., seashores, harbours, rivers, streams, lakes and territorial waters, as well as any infrastructure that is essential to protect the state); (ii) assets that cannot be securitised if they belong to the state (e.g., roads, railways, highways, airports, aqueducts, buildings with historical, artistic or archaeological interests and the pieces of art owned by museums, archives and libraries); and (iii) assets constituting a patrimonial fund, those that cannot be subject to foreclosure and those listed in article 514 of the Civil Procedure Code.

* End of Assessment *

Commented [VE23]: MARK: 3/5. The candidate gave the correct answer to the first question, but it is not clear why. This is because the sale is about a plot of land adjacent to a river, not to the river itself (which is an asset that cannot be granted as collateral). The answer to the second question is comprehensive and correct.