



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]: MARK: 40/50. Excellent paper, with very good answers to the essay and problem questions. In the third question, the candidate could have been more critical in their analysis of the changes between previous and existing laws affecting the bankruptcy of insolvent debtor. Unfortunately, the mark is affected by some mistakes in the MCQs.

Commented [VE2]: MARK: 5/10.

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.

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.

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]: 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: 10/10. Comprehensive answer, which addresses all the issues in the question and relies on a multiplicity of authoritative sources. Well done!

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.

A major principle with respect to insolvency proceedings lies in the *par condicio creditorum* concept which relates to the equal treatment of creditors within a certain class or rank. Article 57 of the *legge fallimentare* states, *inter alia*, that "[b]ankruptcy opens the competition of creditors over the bankrupt's assets" (see also art. 2741(1), Italian Civil Code). Indeed, Italian case law has emphasized the importance of such a principle especially in the case of refusing the return of already transferred to an insolvent buyer assets from an insolvent debtor as pursuing such an action would give preference to the insolvent debtor over the buyer's creditors and circumvent the *par*

condicio creditorum principle (C. Cass., SS UU no. 12476/2020; see also C. Cass., no. 30416/2018). Except for specific legal and contractual situations, the framework regarding priorities and preferences is applicable to the entirety of formal insolvency procedures thus making the aforementioned principle of similarly positioned creditors relevant only to classes of creditors. An example refers to the exceptions applicable to consumer's agreements in respect of the *par condicio creditorum* rule and in particular the contractual perspective of these agreements that may allow differentiations from the rule. Of course, there are cases in which the rule cannot be circumvented such as the consumer's liquidation procedure in the absence of an agreement. Interestingly, avoidance actions cannot be pursued in the context of a pre-insolvency composition process, unless the *actio Pauliana* procedure is selected (arts. 2901 *et seq.*, Civil Code).

It is important to note that the granting of a security and the contemporaneous creation of the debt during the six-month period prior to insolvency can be subject to an avoidance action if the trustee can demonstrate that the counterparty was informed of the insolvency of the debtor. In addition, subordination agreements and priority clauses comprised in that agreement in respect of secured parties may also be considered a deviation from the *par condicio creditorum* rule.

In the context of real securities (e.g. mortgages, pledges, liens), no provisions are comprised in the Italian *legge fallimentare* in terms of limiting enforcement actions in the case of an opening of an insolvency proceeding. Avoidance actions remain however available (see also art. 67, *legge fallimentare*, and *actio Pauliana* in the context of art. 2901 *et seq.*, Civil Code).

Regarding a bank account pledge, the pledgee is deemed a secured creditor from the moment insolvency proceedings commence, while monetary rights created after the opening of a proceeding become part of the insolvency estate of the debtor (pledgor). Enforcement on behalf of the pledgee is possible following recognition by the court of the claim and pledge, and authorization by the judge of the pledged asset's sale.

As per securities concerning financial collateral, article 1 parties (pledgee/secured creditor) of the decree 170/2004 claiming the security have the possibility to notify the debtor regarding the enforcement of the security and to refund the remaining proceeds from the sale to the debtor.

Concerning the spectrum of personal guarantees, the *surrogazione* refers to the situation of a "co-debtor" paying in lieu of another debtor (art. 1203(3), Civil Code), while the situation of a *regresso* refers to a third party paying in lieu of the debtor (art. 1950, Civil Code). The third party and the "co-debtor" can go against the debtor as regards the paid sum. Nevertheless, expenses and interests can be claimed only by the guarantor. It is interesting to note that the guarantor and the third party take the place of the initial creditor in the insolvency proceeding process (C. Cass. 17 January 2008, no. 903 in 8 (2008)).

An important framework is the one referring to "quasi securities". Sale and leaseback contracts refer to a situation in which, pursuant to law 124/2017, the assets can be returned to the lessor from the lesser (insolvent) and in which the lessor preserves the right for submission of a proof of claim regarding the losses deriving from the contract itself (assuming losses are not treated by way of the goods' sale or an additional contract). In fact, before the enactment of that law the lessor only had the opportunity to file a proof of claim and not the right to recover the asset in a subsequent insolvency proceeding of the lessee. This was true in the event the scope of the leasing contract centred on a transfer of property to the lessee (insolvent debtor). If the leasing contract did not centre on a transfer of property and its purpose focused simply on the use of the goods by the lessee, then the approach of the subsequently enacted law 124/2017 applied. At the time of the enactment of that law, an uncertainty arose with respect to whether this approach would apply also retrospectively. In a Supreme Court decision (C. Cass., SS UU 28 January 2021, no. 2061) the non-retrospective character of the law was emphasized, while lessors have still to demonstrate the objective purpose of the contract prior to being authorized to claim back the asset.

Some limitations present in art. 1260 et seq (Italian Civil Code) generated issues with the assignment of receivables to third parties. In any case, factoring, following law n. 52/1991, took the form of another quasi security where the eventuality of insolvency of the third party tasked with the payment of the debt may be borne by the assignee. A specificity of the factoring mechanism is that it is permitted in case the assignor concerns an individual, business or partnership operating for a commercial scope and in case the contracts regarding the receivables have been concluded by the assignor during the operation of its business. Furthermore, only a factoring company or bank allowed to conduct financial operations on Italian territory can be considered assignees (Italian Consolidated Banking Act, legislative decree 385/1993). Avoidance actions regarding insolvency cannot be pursued with respect to transactions linked to a factoring contract (see law 51/1992).

Another example is linked to retention of title clauses that can be effected against other creditors in the event that a written agreement exists with a certified date and if that agreement has been concluded before an enforcement proceeding commenced by said creditors. In general, a retention of title over assets gives the opportunity to creditors to get authorization from the court of the sale of the asset outside the framework of the insolvency process.

Moreover, creditors with post-commencement claims retain priority over other creditors. These are as follows: fees and expenses of the officeholder; expenses relating to the sale of assets; the debtor premises' rent after the opening of the procedure; employees wages and social security expenses for the period after the commencement; and, other advisors' costs. Additional creditors involve suppliers. It should be mentioned that preferred creditors and secured creditors are the ones ranking first in the list.

Following the previous analysis, if there is something that should be highlighted is the multiplicity of laws and particularities with respect to the exceptions to the equality of creditors rule. Particular focus is given to securities, privileges and guarantees in this regard. There is an apparent issue of predictability of creditors' position in terms of an insolvency proceeding in respect of these exceptions. Commentators have argued that the Italian system, as far as the principle is concerned, closely resembles the approaches of other civil law jurisdictions, such as Germany and Switzerland, in that these jurisdictions are not strictly following an 'equal treatment of creditors' approach and in that domestic laws differ with respect to the period under assessment for claw-back actions and the typology of preferences. Other jurisdictions present a rigorous framework with respect to the *par condicio creditorum* rule. We will attempt to provide some illustrative examples. In the United States, voidability of transactions for the ninety days prior to the petition date is recognized, but a transaction concluded during the business operation of a non-insolvent debtor or a non-insolvent one because of the transaction circumvents voidability. In the United Kingdom, voidability of a preference granted by an insolvent debtor or that provoked the insolvency of the debtor is recognized in the six months before the filing of the petition provided that the element of a desire to grant a preference to a particular creditor is present. Australian law fixes the relevant avoidance period at six months before the filing of the petition and refers to the voidability of a preference from the debtor to a creditor on the basis of the insolvency of the debtor. The voidability of the preference is unsuccessful if it is proven that the creditor had no reason to assume the insolvency of the debtor and that that transaction would make him a preferred creditor in the said proceedings. Canadian law acknowledges avoidance for transfers occurred in the three months before the order commencing the insolvency proceeding. Such transfers should be pursued by an insolvent debtor with a scope of preferring a particular creditor. The latter characteristic is presumed to exist in case the transfer resulted indeed in the creditor being favoured. In France voidability of payments of matured debts that occurred after the insolvency of the debtor can take place if the preferred creditor was aware of the insolvency of the debtor. Generally, payment of debts before their due date, payments not involving ordinary methods of payment and the granting of security rights concerning already existing debts are all capable of activating voidability dispositions under French law if occurred following the insolvency of the debtor. Voidability of a payment by ordinary methods of a debt already due is also recognized in certain Latin American jurisdictions when the preferred creditor was aware of the insolvency of the debtor. New Zealand law makes a distinction between preferences granted by an insolvency debtor with the purpose of preferring a creditor (in this case the period to be assessed is two years before the date of adjudication) and preferences granted not having such a scope (one month before said date).

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

Commented [VE14]: MARK: 12.5/15. This is a good answer, and the student shows very good knowledge of the topic. However, the student adopts a descriptive approach in the analysis of the procedure. The analysis and comparison are left to the reader. However, this was one of the tasks of this essay.

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.

By 2012, the Italian system was not providing an individual framework for formal consumer- and discharge-oriented procedures. If commercial entrepreneurs relied on pre-insolvency and in-liquidation composition, individual entrepreneurs could be supported by the discharge in accordance with art. 142 of the *legge fallimentare*. The non-allocation of the same mechanisms of discharge to individuals was supported by subsequent decisions by the Constitutional Court (C. Cost., no. 43/1970, in *Foro it*, 1970, I, 1017; C. Cost., no. 94/1970, in *Giur. Comm.*, 1970, III, 308). Law 3/2012 and its amendments introduced by law 221/2012 **broughbrought** forward the procedures of a consumer's agreement, consumer's plan and consumer's liquidation. (ft 84?) While, pursuant to law n. 3/2012, the aforementioned procedures are available to all debtors who are unable to apply for corporate insolvency procedures because of their nature, individuals applying for a corporate insolvency procedure and receiving a positive answer are not able to subsequently apply for a personal insolvency procedure. Generally speaking, these procedures may be opened by individuals not carrying out entrepreneurial operations, commercial entrepreneurs as well as professionals. Law n. 221/2012 extended eligibility to farmers, while for limited liability shareholders commentators argue that these entities are allowed to apply for personal insolvency procedures. Nevertheless, Italian jurisprudence has not supported a consumer's discharge when that individual was an unlimited liability shareholder applying for a consumer liquidation as that individual would benefit from the continuation of the trading of the company. That individual's situation should be addressed in the context of a corporate insolvency procedure. Pursuant to art. 6(2)(b) of law 3/2012, the consumer plan alternative can be pursued where debts are not linked to a professional activity of a business.

As per further eligibility criteria, these procedures can be initiated by showing an element of 'over-indebtedness'. It is useful to note that the objective criteria for considering the eligibility of entities are the same in both personal and corporate insolvency procedures. With respect to consumer's agreements and plans, there is an impossibility for the consumer to be eligible in the event (subjective criteria): there was reliance on their behalf on credit in a non-proportionate way to their income; their reckless behaviour resulted in the situation of over-indebtedness; and, they took up commitments without a reasonable prospect of fulfilling them. Because consumers would be excluded from filing such procedures due to the strict interpretation given by courts, law 176 of 2020 only retained the second element in the previous list. Some scholars argue, however, that Italian jurisprudence demonstrates that courts at times still interpret these provisions as if no revision to the provision took place (Court of Barcellona Pozzo di Gotto, 16 April 2021 (2021, Sez. Merito); Court of Ferrara, 7 April 2021; Court of Catania, 5 March 2021). It is also supported that the new amendment within the new Code (*Codice della Crisi dell'Impresa e dell'Insolvenza*), which entails a change from the reckless conduct criterion to a gross misconduct element, will

Commented [VE15]: ?? This sentence is not clear.

minimize the instances in which consumers are denied consumer plans and agreements. An additional requirement centres on the non-opening of a bankruptcy procedure during the five years preceding the current filing. Italian law includes provisions on criminal sanctions in case of fraudulent abuse of personal insolvency procedures and does not comprise any provisions on the mandatory opening of said procedures in the event of over-indebtedness. The following analysis outlines the legal circumstances that facilitate honest consumers in obtaining discharge of their debts. Both the previous framework and the CC//dimension are taken into account.

*In terms of consumer's agreements, initially the agreement could only bind its signatories, whereas after law 221/2022, the agreement was linked to the following requirements: a) pursuant to art. 11(2), individuals who became creditors in the previous year, the spouse, individuals related to the debtor (up to the 4th degree of kinship) and the entirety of the preferred creditors are not allowed to vote on the proposal; b) creditors not responding to the proposal made are deemed to have approved it; c) there needs to be approval by 60% of creditors that make up the consumer's debt; and, d) after the publication and approval requirements, the agreement becomes binding with respect to all creditors. The contents of the plan are not limited by the law in any way, but that does not mean that the insolvent should not pursue repayment of their debt towards creditors utilizing their future revenue. Interestingly, if creditors do not vote in the ten days preceding the hearing, they will be deemed to have voted positively the proposal. Of course, during that period the debtor has the opportunity to modify the plan for which the initial creditors who already voted for the plan should be re-contacted for voting again. If the 60% of voting creditors requirement is fulfilled, a feasibility assessment and a final report are prepared, the latter on the basis of the steps of the plan. If the requirement is not met, there is uncertainty as to whether the *organismo* should communicate these results at the moment it realizes a percentage of more than 40% (of those creditors who represent 40% of the insolvent's debt) against the plan. Commentators argue that the opportunity of preparing an alternative plan may be available until the day of the hearing. This solution according to others may result in further dissipation of the insolvent's estate to the detriment of dissenting creditors as the stay would continue to run. In any event, following ten days after approval of the plan, during which creditors may bring forward objections, the plan, these eventual objections and the final report are transmitted to the court by the *organismo*. Most important, revocation of the initial court decree regarding the admission to the procedure can be pursued only when the element of fraud is involved. Nevertheless, if it appears that the dissenting creditor would benefit more from a consumer's liquidation procedure, there is no approval of the plan by the court. The court decision can be appealed by a three-member court (same court in *composizione collegiale*). Amendments of the plan are possible in case of unfeasibility to execute the plan. Of course, this unfeasibility should not be related to any actions on behalf of the debtor and the processes indicated above, among others, should be followed. Moreover, the procedure imposes a full repayment of claims that cannot be foreclosed (e.g. amounts received by a former spouse for his or her maintenance and that of his or her children).*

*With respect to consumer's plans, these concern restructuring plans prepared by the debtor being assisted by the *organismo*. Approval by creditors and enforcement by the court are required. Being a procedure formulated in law 221/2012, insolvents not eligible to apply for a corporate insolvency procedure, and who are not consumers, can apply not for consumer's plans but for a consumer's agreement or a consumer's liquidation process (see art. 6(2)(b), law 3/2012). In this procedure, the proposal should be approved only by the court. Eligibility requirements resemble the procedure of consumer's agreements. The *organismo* drafts a report that includes a holistic assessment of the possibility of success of the plan and the reasons for the debtor's financial distress also considering in a comparative manner the alternative options of the debtor's rescue. Inter alia, the court will examine whether the debtor is able to secure the payment of non-dischargeable amounts and whether the debtor is in a situation of 'worthiness'. This criterion has not been explained in depth by the law. Pursuant to art. 12-bis(3) (law 3/2012), the element of 'worthiness' cannot be fulfilled in case of proof that the insolvent took up commitments that was unable to cover in a reasonable manner.*

*The consumer's liquidation procedure is a binding process for creditors where the *par condicio creditorum* rule cannot be circumvented. In this procedure the debtor should fulfill the element of 'worthiness', while he is the only one permitted to apply. The procedure may be also triggered by the conversion from a consumer agreement or plan. The non-negotiability element, the collective aspect and the purpose of the debtor's liquidation constitute important traits of the overall procedure. Eligibility requisites are identical to those applicable to a consumer agreement. The fact that for the previous five-year period the debtor should not have been involved in any bankruptcy procedure is linked to the assumption that the law wanted to favour sincere, but, in any case, unfortunate insolvent consumers. This is reinforced by a practical perspective in that the distressed situation of the consumer may be 're-activated' from circumstances falling outside the control of that insolvent consumer. In this regard, the 'worthiness' criterion is no longer relevant. Fraud or insufficient submission of documents can result in inadmissibility with reference to the procedure. When conversion from another procedure is involved, the entirety of acts pursued for the execution of the plan or proposal are enforceable and unavoidable. The *vis attractiva concursus* is not followed by this procedure. The closure of the liquidation procedure translates into the discharge of the entirety of the insolvent's unpaid debts.*

Important considerations are the following. On the one hand, there can be a termination of the plan in case of incompliance of the insolvent with the commitments linked to the plan and of impossibility of executing the plan for causes outside the debtor's control. On the other hand, a stay on executory actions can be halted following a petition by interested parties upon the impossibility of the debtor to pay specific taxes and amounts that cannot be foreclosed. In addition, in the event of impossibility of repaying amounts due to public bodies under a plan, the plan will not be applicable to them enabling these entities to pursue the debtor via alternative (normal) recourses. Furthermore, assets obtained after the four-year period indicated

above will not be available to creditors for satisfaction of their debts even if the insolvent is still considered to be part of the bankruptcy procedure.

Execution of the agreement or the plan results in the discharge of the debtor's debts treated during the process. Nevertheless, an application to court for an order should be pursued for the discharge in the case of consumer's liquidation (art. 14-terdecies, Law 3/2012). Individuals who were under a liquidation procedure are the only persons to whom a discharge is available. In this context, the liquidator should execute the liquidation plan and distribute the proceeds to creditors, while the court should terminate the procedure. Discharge in general does not refer to the entirety of debts (e.g. amounts due to a former spouse for its and its children maintenance). However, it does refer to pre-bankruptcy creditors who did not participate in the process except if they were not aware of the existence of the procedure. The criterion of worthiness comprises considerations of cooperative behaviour of the debtor toward the liquidator, a willingness to be employed during the four-year period, partial repayment of unsecured creditors' debt and unhindered continuation of the procedure. The time limit to apply for discharge amounts to one year from the time the liquidation process closed. Objections may be raised by creditors who have not been satisfied against the insolvent's discharge. Avoidance of the discharge can be also pursued if it is demonstrated that certain creditors were preferred unrightly and/or where the element of fraud or gross negligence is present at the moment of asset declaration by the debtor.

Following the enactment of the new Code, *Codice della crisi dell'impresa e dell'insolvenza*, on 15 July 2022, consumers have the possibility to apply for three formal insolvency procedures, the *piano di ristrutturazione* (arts. 67-73, CCII), the *concordato minore* (arts. 74-83, CCII) and the *liquidazione controllata del debitore* (arts. 268-277, CCII).

The *piano di ristrutturazione* is available to over-indebted consumers. Through this procedure a restructuring agreement is suggested to the insolvent's creditors. Pursuant to article 69(1) CCII, the consumer who already went through the process of discharge in the previous five-year period or who generally benefited from discharge twice, is not allowed to suggest a proposal to creditors. The same result is reached when the consumer pursued a determination of its over-indebtedness individually or due to bad faith or gross negligence. Interestingly, the creditor whose determination of the debtor's over-indebtedness was made on a negligent basis or whose actions deteriorated the financial situation of the insolvent is not permitted to vote against the plan in the context of the sanctioning hearing (art. 69(2), CCII). Upon full execution of the plan, the remaining claims existing prior to that plan undergo the discharge process after which the *organismo* is permitted to be paid by the debtor. In case of incomplete execution of the plan, either additional time is allocated to the debtor by the court or the plan sanctioning process is revoked by the court. Regardless of the reason for revocation of the plan's sanctioning, conversion to personal controlled liquidation follows.

*The concordato minore is available to joint debtors every time one of these debtors is not a consumer. The scope of the procedure is to pursue the activity of the entrepreneur while a restructuring plan is being prepared. In this procedure, if debtors went through a discharge during the five-year period or if generally they were subject to a discharge twice, they are not allowed to apply for the procedure. The same result is achieved if the insolvent carried out the petition process in a fraudulent manner (art. 77, CCII). The court order opening the procedure cannot be appealed when it determines compliance of the petition with the law. In the voting process, creditors who do not communicate their vote to the *organismo* are presumed to be favouring the plan (art. 79(3), CCII). If the majority in the claims' value of creditors positively votes the plan, then the plan is considered approved (art. 79(1), CCII). If there is one creditor covering the majority of the claims' value, a requirement exists for an additional numerical majority for the plan's approval (ibid). In case of creditor classes, the majority of these classes is required for the approval (ibid). Where creditor(s) oppose the plan, it should be demonstrated for the approval that these creditors will acquire an equal value of the claims as in a liquidation. Opposition by revenue bodies will in any case be irrelevant for the sanctioning of the plan, but they should acquire an equal value of their claims as in a liquidation (art. 80(3), CCII). Revocation of the sanctioning can be pursued where the debtor does not execute its commitments under a specified deadline (see art. 82 (CCII) for the cases where sanctioning is revoked and there is a conversion of the procedure to personal controlled liquidation).*

The liquidazione controllata del debitore can be opened, among others, for an over-indebted consumer. Over-indebtedness may mean insolvency or situation of crisis. In accordance with art. 271 (CCII), in the event of an application either by the public prosecutor or the creditors the court may permit the debtor to provide supplemental documents in view of converting this procedure to the other rescue-centred procedures available to consumers.

*An order terminating the procedure is issued by the delegated judge. Previously, debtor discharge in an automatic manner was not envisaged. Currently, articles 278 to 283 of the CCII identify automatic discharge for consumers under indebtedness. Upon termination of the procedure, discharge is effected. Alternatively, discharge is effected after three years following the opening of the procedure (whatever circumstance is earlier) (arts. 279 and 282, CCII). The *organismo* is tasked with the submission of the application. The *organismo* also submits a statement indicating compliance by the insolvent with statutory obligations (art. 283(3), CCII). Discharge does not apply to debtors convicted for a bankruptcy crime pursuant to a final decision, to debtors who concealed assets or wrongfully increased their liabilities, to debtors delaying or obstructing the procedure, and to debtors being favoured already twice from a discharge or having benefited once in the five-year period (art. 280, CCII). One of the most important provisions with respect to the discharge relates to article 283 of the CCII. In this regard, in case the debtor is not holding any assets and if there is no possibility for the repayment of its creditors in the future and even if the insolvent did not initiate any controlled liquidation procedure, there is a possibility for the operation of a discharge. In this scenario, the insolvent will have to demonstrate their worthiness*

(art. 282(2), CCII). Such discharge is available on a one-time basis only. In addition, obligations of third parties (e.g. guarantors) due to creditors are not extinguished by the discharge. Certain claims cannot be discharged. Such claims are, for instance, fines on behalf of public entities and courts, compensation orders and allowances to a spouse (art. 278(6), CCII).

The preceding analysis attempted to set forth some characteristics in the context of personal restructuring and personal liquidation procedures under Italian law taking also into account discharge considerations. It follows that indeed the new Code, "Codice della Crisi dell'Impresa and dell'Insolvenza", enhances the position of consumers who are honest but unfortunate in their financial situation compared to the framework prior to the reform that was in place before July 2022.

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 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?**

*Pursuant to paragraph 1 of article 9 of the *legge fallimentare*, bankruptcy is declared by the court of the place where the entrepreneur has his or her principal place of business. The following paragraph states that "the transfer of the registered office that occurred in the year prior to the exercise of the initiative for the declaration of bankruptcy does not affect the jurisdiction" (art. 9(2), *Legge Fallimentare*). Therefore, any transfer during the previous year before the filing remains irrelevant for the determination of the jurisdiction.*

*According to the facts of the case, Buonapizza Srl moved its registered office from Milan to Modena on 15 April 2020. The principal factory of the company is based in Modena. Involving assets in other countries, the debtor's activity relates to the production of pizzas and their sale to foreign shops. The debtor experienced an industrial action in late 2020 halting its operations and by the end of December 2020 the debtor had already filed for corporate liquidation. On 12 January 2021 a *fallimento* proceeding (corporate liquidation proceeding) was opened by the local court of Modena.*

*The court in Modena, linked to the location where the debtor, Buonapizza Srl, was located, was entitled to open *fallimento* proceedings (corporate liquidation) against the company even if the transfer of the company's registered office to Modena was effectuated on 15 April 2020, less than a year from the petition for the procedure. This is due to the explicit provision in article 9 (*Legge fallimentare*) pursuant to which the transfer of the registered office of the debtor is irrelevant for the determination of the competent court.*

Commented [VE16]: MARK: 5/6. Very good answer, but there is a mistake as to the rules on the competence of the *tribunale delle imprese*.

Commented [VE17]: Ok.

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

Law 155/2017 sought to identify the competent court in relation to the size and type of bankruptcy proceedings and ensure the specialization of judges dealing with bankruptcy matters. In fact, it is envisaged that at the specialized sections of the business courts at the district level (and with appropriate reinforcement of staffing) larger proceedings will be concentrated. Pursuant to article 27 of the *Codice della Crisi dell'Impresa e dell'Insolvenza*, "[f]or proceedings for access to a crisis and insolvency regulation instrument or insolvency proceedings and disputes arising therefrom relating to enterprises under extraordinary administration and groups of enterprises of significant size, the court of jurisdiction shall be the court seat of the specialized sections on enterprises referred to in Article 1 of Legislative Decree No. 168 of June 27, 2003. The court that is the seat of the specialized business section shall be identified in accordance with Article 4 of Legislative Decree No. 168 of June 27, 2003, having regard to the place where the debtor has the center of main interests" (art. 27, CCII). In addition, paragraph 3(c) of the same article makes reference to the debtor's center of main interests in more detail. In particular, a debtor company's COMI is presumed to be the location of the registered office resulting from the business register or the location of the actual place of habitual activity or, if unknown, the location linked to the legal representative. The next article makes clear that a transfer of the debtor's center of main interests is not relevant for jurisdiction purposes "when it occurred in the year prior to the filing of the application for access to a crisis and insolvency regulation instrument or the opening of judicial liquidation" (Article 28, CCII).

Buonapizza Srl transferred its registered office from Milan to Modena on April 15, 2020. The bankruptcy proceedings, if opened after 15 July 2022, would most probably be opened again at the location of the debtor's main interests, which is again Modena, in accordance with paragraph 1 of article 27. Indeed, the determination of the competent court is based upon the location of the debtor's main interests. We don't think that this time the proceeding will be initiated by another court, the specialized sections of the *tribunale delle imprese*, as no reference is made in the facts of the case to any extraordinary administration being opened or the existence of a group of companies (para. 1, Art. 27, CCII; Law 155/2017).

Commented [VE18]: No. The case should have probably been heard in front of a *tribunale delle imprese*

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

The topic of the recognition of Italian insolvency judgments in the United Kingdom is an intricate issue considering the exit of the UK from the European Union. The fact that corporate liquidation proceedings are enlisted in Annex A of the EU Regulation (EIR Recast) 2015/848 is irrelevant as regards the proceedings to be recognized in the UK. The 2006 CBIR should be examined in this regard (Cross-Border Insolvency Regulations) and particularly articles 15 to 17 (Schedule 1). The Italian insolvency representative should apply for the recognition of the Italian insolvency proceeding in

the UK court. He should take into account the requirements of a certified copy demonstrating the initiation of the insolvency proceeding in Italy and the designation of the Italian insolvency representative and of a certificate stating the existence of the Italian insolvency proceeding as well as the insolvency representative's appointment (Art. 15(2), Schedule 1, CBIR of 2006). In case of already opened insolvency proceedings in the United Kingdom, the automatic stay of article 20(1) is activated with regard to these proceedings. At the same time, any Italian insolvency judgment and insolvency-related judgment linked to that proceeding would not be effected in the United Kingdom in case of a contrast with the *Gibbs Rule*. The latter rule can be identified in a seminal court decision, *Rubin v. Eurofinance* ([2012] UKSC 46). More specifically, in the event of an English law-debt the latter cannot be subject to discharge or alteration by a foreign law, in the context of a foreign insolvency proceeding. If the party was subjected to the foreign proceeding and the order was effected against that party, the previous rule does not have any effect.

According to the facts of the case, *Buonapizza Srl* by the end of December 2020 had already filed for corporate liquidation. On 12 January 2021 a *fallimento* proceeding (corporate liquidation proceeding) was opened by the local court of Modena. That decision can be effected in the UK after considering the procedure of the CBIR 2006 with the Italian insolvency representative following the procedure of Articles 15 to 17. However, under the *Gibbs Rule* the Italian insolvency judgment (and any insolvency-related judgments resulting therefrom) cannot be enforced in the UK as the contract between the UK company *Tesco* and *Buonapizza Srl* is governed by English law. More specifically, the party, *Tesco*, against which the order is made, is not subjected to the Italian foreign proceeding and, therefore, any discharge or alteration of the debt cannot be effected by Italian law in the context of the Italian insolvency proceeding. The Italian judgment will be effected in the UK only if the creditor *Tesco* subjects its claim to the Italian proceeding.

Commented [VE19]: Excellent answer.

Question 4.2 [maximum 4 marks]

Commented [VE20]: MARK: 3/4. Good answer, but no reference to compensatory approaches.

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?

Pursuant to article 6 of the *legge fallimentare*, "bankruptcy is declared upon petition of the debtor, one or more creditors or upon the request of the prosecutor". Specifically, the *pubblico ministero* can submit a petition to the court where one of the following situations arises: a) when during criminal proceedings there is insolvency of the debtor; b) in the context of escape, untraceability or absconding of the debtor, the closure of the business premises, the misappropriation, substitution or fraudulent diminution of assets by the entrepreneur; and c) when the insolvency results from the report coming from the court that detected insolvency in the course of civil

proceedings (article 7, *Legge Fallimentare*). Concerning the element of the existence of an obligation to file for insolvency, there is no mandatory action to be taken on behalf of the debtor with respect to corporate liquidation. Nevertheless, Article 217 *Legge Fallimentare* provides that the fact that the debtor as well as its legal representative are hindering the process of submitting the insolvency petition activates subparagraph 1(4) of Article 217 *Legge Fallimentare*. This article refers to the *bancarotta semplice* crime ('simple bankruptcy') where the aforementioned delay in filing the insolvency petition aggravates the financial situation of the debtor.

According to the facts of the case, a Buonapizza Srl's director had concealed important information regarding the debtor company's financial status since January 2019. This concealment involved irregular accounting activities and diversion of funds to offshore jurisdictions. In addition, a creditor of the company had filed an executory action in the context of which by June 2020 the Modena court had identified the eventuality of Buonapizza Srl's insolvency. Under these circumstances, neither Buonapizza Srl nor its directors are obliged to file for corporate liquidation in the context of insolvency unless the delay in filing deteriorates its financial distress. Furthermore, it results from the aforementioned article 6 that the right to petition rests with the debtor, one or several creditors or with the *Pubblico Ministero*. There is no mandatory filing on behalf of the Modena court even if the court was "aware of the insolvency of the company". A possibility to request the commencement of an insolvency procedure concerns the *Pubblico Ministero*, as envisaged in the circumstances above. In the present case, we think that the latter scenario would have been more feasible, as there is an irregular activity in relation to the accounting of the company on behalf of a director.

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 Srl granted collateral over the plot of land crossed by a river. Pursuant to Italian law, the debtor company is permitted by law to grant such a collateral to the benefit of Tesco. This is in accordance with the Civil Code that refers to the possibility of a mortgage to be effected upon any immovable property belonging to the debtor (see also Article 2808 *et seq*, *Codice Civile*). However, a clarification should be made here that the river crossing the plot of land cannot be included in the mortgage deed as rivers are part of the *demanio necessario*, i.e. assets owned only by the Italian State.

Under Italian law, specific assets cannot be obtained as collateral. These mainly involve state-owned assets. Firstly, there is the *demanio necessario* category which concerns assets that only the state can own, in accordance with Article 822 of the Italian Civil Code. In this category, one can identify, for instance, rivers, streams, ports, lakes, lagoons, coastlines and facilities intended to protect the country such as military airports and military roads.

Commented [VE21]: MARK: 4.5/5. Very good answer, but it was clear that the river was not part of the plot.

*Secondly, there is the **demanio accidentale** category. In this category the following assets are intended to be captured "roads, highways and railroads; airfields; aqueducts; buildings recognized as being of historical, archaeological and artistic interest in accordance with the relevant laws; collections of museums, picture galleries, archives, libraries; and finally, other property which is by law subject to the regime proper to the public domain" (Article 822, **Codice Civile**).*

*Additional assets that cannot be subject to a security interest are the **patrimonial fund** (article 167, **Codice Civile**), assets enlisted in article 545 of the Italian Civil Code of Procedure that cannot be foreclosed as well as assets included in article 514 of the Italian Civil Code of Procedure.*

*** End of Assessment ***