INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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. This is an excellent paper. Had the answer to the first essay question been more focused, the mark would have been even higher. Overall, well done!

Commented [VE2]: MARK: 7/10.

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.

***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.

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: 5/10. While the answer is generally correct, it is off-topic. The question was about the preferences in the distribution of assets, not about claw-back actions.

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 condictio 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.

In the Italian Legal System, it is possible to identify that real guarantee (over movable and immovable property) and personal guarantees (when an individual guarantees the payment of the debt) can be constituted.

Regarding real guarantees, there are mortgages, consensual liens on registered movable properties (such as vehicles, aircrafts and ships), consensual pledges, usually over equity stock, debt instruments, government bonds, as well as on receivables and bank accounts. Finally, there is also the securitization of transactions.

A lien, in turn, can be classified as: (1) general liens (privilegi generali), which are placed over movable goods belonging to the debtor; (2) special liens (privilegi speciali) over movable and immovable goods belonging to the debtor; and (3) special liens (privilegi speciali) under article 46 of legislative decree 835/1993.

When a debtor is solvent, guarantees can be enforced only if the debt is due and if the creditor has requested payment and given proper notice to the debtor. Upon expiry of this notice to pay given to the debtor, the creditor can enforce his claim by means of court proceedings. The only difference is when special liens are obtained on bank accounts of the debtor, which will not require a court proceeding.

If the debtor is under insolvency proceeding, enforcement of pledges is possible upon authorization of the court and if the claim is existing and valid and the pledge has been recognized by the court. In addition, creditors may still freeze assets that were subject to consensual liens, but the trustee has the power to commence claw-back actions, under the Civil Code and under article 67 of the legge fallimentare (in general when the securities were created in the year preceding the declaration of insolvency of the debtor in respect of pre-existing debts which were not payable and when there were securities judicially imposed, or voluntarily constituted, within the 6 months preceding the declaration of insolvency in respect of payable debts).

These actions will have the purpose of avoiding a pecuniary loss to the debtor's creditors. However, there is a problematic that arises when a Revocatory Action is filed against a purchaser of the debtor's asset which is also under insolvency proceedings. That is, the hypothesis is when the trustee of the bankruptcy of a company in liquidation claims through a claw-back action (revocatory action) that certain disposition of assets put in place by the debtor company when it was in good standing against another company, whose bankruptcy after the disputed legal transaction has equally occurred.

The Corte di Cassazione in case number 12476/2020 reaffirmed its position that had already been issued in case 30416/2018, through which it understands the following for the above hypothesis:
The Revocatory Action benefits the creditor or the estate, but does not adversely affect the existence or validity of the instrument sought to be made ineffective through the Revocatory Action, given the provisions of the Civil Code and of the legge fallimentare.

The third-party purchaser of the property subject to the deed challenged in the revocatory action therefore remains the owner of the property right, but nevertheless remains exposed to an eventual judgement declaring the transaction ineffective against the applicant's bankrupt estate.

However, the supervening bankruptcy of the purchaser of the asset subject to the claw-back action is relevant moment to crystallize the liabilities as much as it is to crystallize the bankruptcy estate as of the date of the commencement of the bankruptcy (art. 52 of the legge fallimentare).

In other words, the successful of the revocatory action filed by the seller's trustee would thus remove the asset from the security of the purchaser's bankruptcy creditors based on an act, i.e., the claw-back judgment, subsequent to the bankruptcy decree of the purchaser.

In conclusion, the revocatory action would therefore remove the asset from the collective guarantee of the purchaser's creditors based on a judicial title formed after the bankruptcy decree of the purchaser. This is a situation, according to what has been stated by the Corte di Cassazione in case law no 12476/2020, that conflicts with the provisions of Article 42, Article 44, Article 45, Article 51 and Article 52, all articles of the of the legge fallimentare, in special with the article 52 that set forth the principle of equality amongst creditors (par condicio creditorum).

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

Commented [VE14]: MARK: 14/15. Excellent answer. The candidate compares the old with the new law, and provides an assessment of the efficacy of the changes introduced in recent times. The analysis includes reference to authoritative cases and materials.

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.

First of all, with the Codice della Crisi dell'Impresa e dell'Insolvenza ("the Code") it is important to be aware of the concepts it defines of crisis, insolvency, over-indebtedness and small enterprise. In particular for consumers and individuals in general, over-indebtedness means a situation of financial crisis or insolvency experienced by the person, meaning that he is not able to pay his debts as they fall due.

Secondly, although the personal bankruptcy legislation was recent, dating back to 2012, it was very complex and extensive and therefore not widely used. The legislation brought in by the Code seeks to simplify the procedures, which should encourage consumers, small business owners and other eligible persons to seek personal bankruptcy procedures. Since July 15, 2022, there are (1) consumer's debt restructuring agreement (articles 67 to 73 of the Code), (2) minor composition (Articles 74 to 83 of the Code) and (3) personal controlled liquidation (article 268 to 277 of the Code).

Regarding consumer rescue proceedings, what denotes that the Code has made them much more accessible is the fact that extremely subjective criteria have been removed, which sometimes in the past barred applicants from accessing personal restructuring proceedings. In particular, two subjective criteria provided for in Article 12-bis of Law 3/2012 have been removed, namely (1) that the applicant has not assumed obligations

without a reasonable prospect of meeting them; and (2) that the applicant has not accessed the credit in a manner disproportionate to his/her income. As a result, the Code has retained only the requirement that the applicant has not caused its over-indebtedness with a reckless conduct. Thus, the new Code diminishes the ability of the courts to bar the access of the "worthy" (meritevole) applicant to the rescue proceedings, by criteria that were absolutely counterproductive.

For instance, under the old law, the court of Barcellona Pozzo di Gotto held that the abuse of access to credit by the consumer - taking credit in excess of his income - would be reckless conduct, which caused his over-indebtedness. This decision of the court contradicts the will of the legislator, to allow the population to reduce its level of indebtedness and recover its purchasing power.

Therefore, with the new Code - in force since July 15, 2022 - consumer access to personal restructuring proceedings is treated in a more objective manner and consumers (and other eligible persons) are only barred from access to this procedure in the event of gross misconduct, such as in the case of credit contracted in the context of a fraudulent deal.

Regarding pesonal controlled liquidation, in contrast to the Law of 3/2012, the procedure is now similar to corporate liquidation. However, personal controlled liquidation is available to consumers, professionals, farmers, small entrepreneurs, innovative start-ups and other debtors who do not fall under the concept of corporate liquidation.

To be eligible for a personal controlled liquidation, the applicant needs to be in a situation of over-indebtedness (crisis or insolvency situation). In addition, the Codice della Crisi dell'Impresa e dell'Insolvenza innovates in relation to the old fallimentare law, as it authorizes the shareholders of some types of companies, such as società in nome coletivo, società in accomandita simplice, società in accomandita simplice per azioni a to file for personal controlled liquidation, on the condition that they prove that the debt was not caused by the entrepreneurial activity and that the personal controlled liquidation will not harm the company's creditors.

The venue of the petition is before the court of residence of the consumer or where the debtor has his center of main interest and the petition must be submitted by the local organismo, which has the duty to intervene in all controlled liquidation procedures (it is important to note that according to article 16 (2) of the Code: L'esperto è terzo rispetto a tutte le parti e opera in modo professionale, riservato, imparziale e indipendente. In addition, debtors need to be assisted by lawyers.

In the old legislation, consumer's liquidation could be requested only by the debtor, or a rescue proceeding could be converted by the court into liquidation. In the new legislation, the Code allows the Public Prosecutor to request the debtor's liquidation (subject to some particularities) and also allows a creditor who has an ongoing unsuccessful execution against the debtor exceeding EUR 50,000 to request the

debtor's liquidation. Both can also request that a rescue-oriented procedure be converted into liquidation. Before deciding on a debtor's request for liquidation, the court may grant the debtor time to reply or to offer documents so that a rescue-oriented procedure may be initiated instead of liquidation (art. 271 of the Code).

Furthermore, according to article 268 (4) of the Code, the following assets of the debtor cannot be included in the liquidation proceedings: (a) assets not subject to liquidation as provided for in art. 545 of the Procedural Civil Code ((Crediti impignorabili), (b) amounts intended for the maintenance of the debtor and his family and aliment payments; (c) any incoming arising from the use of assets belonging to the petitioner's offspring, (d) things that cannot be foreclosed under the Italian law.

Within seven days of the submission of the petition, the body serves the petition on the fiscal agencies and other interested entities for them to submit any claim. All executory contracts are suspended (and the liquidator may terminate them or take over their execution). This is relevant, because in the old legislation there was a gap, so that all non-executed and pending contracts remained unsettled, even with the opening of the procedure. Nor could the liquidator or organismo discard or disregard these contracts, which created an excessive burden on consumers and small business owners, who were unable to renegotiate these debts without the consent of their creditors.

Thus, at the first hearing, if the application fulfills all these requirements, the court makes an order for the commencement of proceedings and appoints a delegated judge and a liquidator (usually the same body as before). The order results in the debtor losing management over its assets and the commencement of an automatic stay of all executory actions against the debtor. Creditors then have 60 days to present their claims to the liquidator. The creditors can file objections and after a hearing before the delegated judge, with everything settled regarding disputed claims, the debtor's creditors' list becomes binding. In addition, within 90 days of the order to commence the procedure, the liquidator will prepare a plan for liquidation and distribution of assets. And, once the plan is executed, the liquidator prepares a final statement, which may be approved or rejected by the delegated judge.

Moreover, Law 3/2012 did not contain many rules on the distribution of proceeds and clousure procedure. And the few that existed were not very detailed. Regarding the discharge provisions, an order in this sense was only granted to a "worthy" individual, who had cooperated throughout the 4 years of the procedure with the liquidator.On the other hand, the new Code now offers an automatic discharge at the end of the personal controlled liquidation for consumers who have completed the procedure or if three years have passed since the beginning of the liquidation, whichever occurs earlier, according to the rules set out in articles 282 (1) of the Code. (282(1): Per le procedure di liquidazione controllata, l'esdebitazione opera di diritto a seguito del provvedimento di chiusura o anteriormente, decorsi tre anni dalla sua apertura, ed è dichiarata con decreto motivato del tribunale, iscritto al registro delle imprese su richiesta del cancelliere. Il decreto che dichiara l'esdebitazione del consumatore o del

professionista è pubblicato in apposita area del sito web del tribunale o del Ministero della giustizia).

However, it is important to note that in order for a termination order to be made, the conditions set out in art. 280 of the Code must be met, such as not having been convicted of a bankruptcy crime, not having hidden assets from the procedure, not having acted to delay the procedure or not having benefited from the discharge in the last 5 years or more than twice in his lifetime.

In addition, there is a general rule set out in Article 283(1) of the Code which provides that if the debtor, within 4 years of the bankruptcy procedure, receives assets capable of paying at least 10% of its creditors, these assets must be used to pay the creditors. Financing is an exception to this general rule and this provision of Article 283(1) of the Code does not apply to it.

Therefore, the new Code, in particular the personal bankruptcy procedures set out therein, demonstrate the will and concern of the Italian State to reduce the degree of indebtedness of its population, assisting the "debitore persona fisica meritevole" to settle their debts, allowing citizens to regain their purchasing power and thus return to consume the products produced by industry/sold by commerce. More than a law, it is a public policy aimed at reheating the Italian economy.

Therefore, the law seeks to reduce the level of indebtedness of Italian society as a whole.

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]

Commented [VE15]: MARK: 5/6.

(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?

According to Article 9 of the Legge Fallimentare (Regio Decreto 16 marzo 1942, n. 267), the application for corporate liquidation must be filed in the place where the debtor has its principal place of business, which the law presumes to be the company's registered office. Furthermore, Article 9 provides that the transfer of the registered office made in the year preceding the application for corporate liquidation does not have the effect of changing the court jurisdiction to examine the application.

Therefore, the Court of Modena would not be entitled to open the corporate liquidation of Buonapizza Srl considering that the debtor filed the petition in January 2021 and changed its registered office on April 15, 2020 from Milan to Modena. Unless the debtor demonstrates that although it was registered in Milan before April 15, 2020, its main factory has always been in Modena, which is the debtor's main place of business. In that case, the Court of Modena could open the corporate liquidation of Buonapizza Srl.

Commented [VE16]: Partially correct answer. For the reasons stated in the answer and in the scenario, it is likely that the competence is in Modena.

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

Pursuant to article 27 of the Codice della Crisi dell'Impresa e dell'Insolvenza, which enacted the Law no 155/2017, the request for corporate liquidation should be examined by a specialized section of the tribunale delle imprese (enterprise court), as long as Buonapizza Srl fits the criteria to be characterized as a large enterprise or group of enterprises.

Commented [VE17]: Ok.

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

Yes, the judgment and the insolvency-related decisions arising from it can be effected in the UK by means of the procedure set out in the Cross-Border Insolvency Regulations 2006 (CBIR 2006), Article 15(1), Schedule 1, which provides that "A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.".

Furthermore, the application for recognition shall be accompanied by: (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (c) in the absence of evidence referred to in sub-paragraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. (15 (2) of CBIR).

Furthermore, considering that Buonapizza Srl has assets in the UK, the debtor could benefit from an automatic stay against enforcements being conducted against its assets, under article 20(1) of the CBIR, provided that it was not enforcing proceedings of securities' interest, as this would be an exception (article 20(3)(a)).

Finally, considering the Gibbs rule (Supreme's Court case of Rubin v Eurofinance), by which a debt constituted under English Law cannot be discharged or altered by a foreign law, it would be difficult for foreign decisions to alter Tesco's claim, as the contract between Buonapizza Srl and Tesco is governed by English Law, unless it is demonstrated that Tesco is subject to the main foreign proceeding.

Commented [VE18]: Very good and comprehensive answer. Well done!

Question 4.2 [maximum 4 marks]

Commented [VE19]: MARK: 4/4. Excellent and comprehensive answer. No mistakes.

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?

According to Article 6 of the Legge Fallimentare, bankruptcy proceedings are initiated by the debtor, at the initiative of one or more creditors or by the public prosecutor (the last according to the conditions set out in Article 7 of the Legge Fallimentare). However, there was no duty that obliged the debtor, its directors or the court to request corporate liiquidation.

The Court of Modena could have, however, in January 2020 communicated to the Public Prosecutor's Office the insolvency condition of Buonapizza Srl, when it became aware of the matter in an enforcment proceeding against the debtor, pursuant to art. 7(2) of the Legge fallimentare. With that, the public prosecutor could have requested the corporate liquidation of Buonapizza Srl.

Regarding punitive remedies, under article 217 of the Legge Fallimentare, a debtor, in the person of his/her legal representatives (a function usually exercised by its director) commits the crime of simple bankruptcy if he/she delays to file for corporate liquidation and this delay worsens the debtor's financial crisis.
In addition, according to Art. 224, criminal liability for simple bankruptcy is extended to managers, auditors and directors, who are subject to imprisonment from 6 months to 2 years. In the present case, one of the three managing directors concealed relevant information about the company's situation since January 2019. This director devised a complex scheme, together with Buonapizza Srl's accountant, to divert funds to offshore accounts and alter the company's balance sheet. Therefore, this director and accountant can be criminally liable.

Regarding compensatory remedies, the liquidator has locus standi to initiate claw-back actions for the benefit of the bankrupt estate under the Legge Fallimentare. In the case, one of Buonapizza's directors, in January 2019, diverted funds to offshore accounts, to the detriment of Buonapizza's creditors. However, considering that the request for corporate liquidation was only filed in January 2021, the two-year limit for bringing the revocatory action would very likely be exceeded. Moreover, if this were the case, the liquidator would have to bring this action against the administrator within 3 years from the opening of the company's liquidation proceedings or 5 years from the annulment of the business, whichever occurred first.

Hence, it would remain for a creditor, group of creditors or even the liquidator to try to attack this money diverted to offshore companies by means of an actio Pauliana, under articles 2901 et seq of the Civil Code. This action can be brought within 5 years of the occurrence of the act that is sought to be declared void. However, it will be necessary to prove (i) eventus damni, that is, that the legal transaction carried out by the debtor harmed the creditors' chance of being paid, (ii) scientia fraudis aut damni, that is, that the debtor knew that this transaction would cause harm to the creditors, and (iii) partecipatio fraudis aut damni tertium, that is, that a third party knew of the potential harm caused by the transaction in cases of transactions carried out for consideration. In the case of Buonapizza, it would be necessary to seek more evidence about the members of the offshores that received the diverted money, for the filing of the actio

Pauliana, but it is a viable alternative for creditors to recover assets misappropriated from the debtor's assets.

In addition, the acts conducted by the director do not fit into the concept of a transaction that has occurred because of the ordinary course of the business, which would put the liquidator and the creditors in a bad situation, as the transactions would not be deemed void. This is not the case, at least from what can be extracted from the facts, as the director acted in bad faith by altering the company's balance sheet and sending company money to offshores.

Question 4.3 [maximum 5 marks]

Commented [VE20]: MARK: 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?

Under Italian Law, there are some assets that cannot be obtained as collateral. In general, these assets are state-owned assets, which can be classify in two different types:

1. *Assets that can only belong to the Italian State (demanio necessario). Pursuant to article 822 (1) of the Civil Code, the seashore, beach, roadsteads and harbors; rivers, streams, lakes and other waters defined as public by the relevant Italian laws, as well as any infrastructure relevant for national defense belong only to the State and are part of the public domain. Hence, these assets cannot be obtained as collateral.*

2. *Assets that cannot be securitised if they belong to the state (demanio accidentale). Pursuant to article 822 (2) of the Civil Code, these assets are: roads, highways and railroads; airfields; aqueducts; buildings recognized as being of historical, archaeological and artistic interest under the relevant laws; collections of museums, picture galleries of archives, libraries; and finally, other property that is by law subject to the regime proper to the public domain.*

In addition, further assets that cannot be obtained as collateral are (1) "un fondo patrimoniale", that is, a patrimonial fund, constituted under article 167 of the Civil Code, because it cannot be securitised; (2) assets that are not subject to foreclosure set forth in art. 514 of the Procedural Civil Code ((Cose mobili assolutamente impignorabili - Movable things that cannot be foreclosed); (3) and assets set forth for in art. 545 of the Procedural Civil Code ((Crediti impignorabili), because these assets are not subject to foreclosure as well.

Finally, it is worth noting that article 51 of Italian Private International Law (law no 218/1995) establishes that security interest are governed by the law of the jurisdiction of the location of the asset over which the security was created.

In this particular case, a plot of land crossed by a river that was given as collateral by Buonapizza Srl to Tesco. It would be necessary to collect more data on the Land Registry of the property, but it appears that at least the area of the land that is crossed by the river is owned by the Italian State and could not have been collateralized to Tesco.

Commented [VE21]: Good, well-reasoned answer!

*** End of Assessment ***