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RESTRUCTURING AND INSOLVENCY

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Restructuring and insolvency in Italy: overview

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FORMS OF SECURITY

1. What are the most common forms of security granted over immovable and movable property? What formalities must the security documents, the secured creditor or the debtor comply with? What is the effect of non-compliance with these formalities?

Immovable property

Common forms of security and formalities. The most common forms of security granted over immovable property are:

- **Mortgage (*ipoteca*).** A mortgage grants the creditor the right to expropriate a property to secure his claim. It is commonly used by creditors to secure rights over immovable property.
- **Special lien (*privilegio speciale*).** Liens arise automatically by operation of law over certain claims. Specifically, the claims over immovable property which benefit from special liens include:
  - claims for expenses related to judicial proceedings incurred in the common interest of the creditors;
  - claims for expenses arising to secure precautionary or expropriation measures;
  - tax claims on the immovable property income;
  - claims for non-performance of a preliminary sale contract related to immovable property.

Subject to compliance with the appropriate steps for creating and registering the security, in case of the debtor's default, the creditor can foreclose the assets and be paid with preference to the other creditors.

A mortgage must be filed with the local registry, where the assets are registered. The filing grants the creditor with a right of preference, rendering the mortgage enforceable against third parties, including future buyers of the asset involved. If more than one mortgage is registered over the same asset, the date of filing creates the ranking of the priority of the mortgage.

Liens cannot be contractually created and, since they arise automatically, no specific formalities are required.

Effects of non-compliance. Under general law principles, security is perfected once the relevant formalities are fulfilled. All the forms of security mentioned above are void if the required formalities are not complied with, in particular the security must be created in writing, whether or not before a public notary. Non-compliance with the registration requirements makes the security unenforceable against third parties.

Movable property

Common forms of security and formalities. The most common forms of security granted over movable property are:

- **Pledge (*pegno*).** The pledge is used to secure creditors' rights over movable property. The holder of a pledge, after having satisfied specific requirements to validate and make the pledge effective, can enforce the security by selling the pledged assets.
- **Mortgage over registered movable goods (*ipoteca su beni mobili registrati*).** A mortgage can be used to secure registered movable property, including ships, aircrafts and motor vehicles.
- **General lien (*privilegio generale*).** A general lien applies to all the debtor's assets and can only be created on movable property. A general lien protects the following claims:
  - remuneration due to employees;
  - social security claims;
  - tax liabilities.
- **Special lien (*privilegio speciale*).** A special lien covers specified movable assets to protect creditors' rights related to claims for:
  - expenses relating to judicial proceedings to secure an asset;
  - expenses related to the conservation or improvement of an asset;
  - rentals of immovable property (the lien applies to assets located at the leased property);
  - the sale price of a car.

A pledge is created by delivering the relevant asset to the creditor. Under the Civil Code, when the value of the pledged claim exceeds EUR2.58 the pledge must be in writing and have a certified date, usually obtained by executing the document before a public notary or by exchanging the document by registered mail.

For formalities relating to mortgages and liens, see above, *Immovable property: Common forms of security and formalities.*

Effects of non-compliance. See above, *Immovable property: Effects of non-compliance.*

CREDITOR AND CONTRIBUTORY RANKING

2. Where do creditors and contributories rank on a debtor's insolvency?

In bankruptcy proceedings (*see Question 7*) the following rankings apply (*Article 111, Royal Decree Number 267 of 16 March 1942*):

- **Preferential claims (*crediti in prededuzione*).** Costs and expenses incurred by the receiver and the Bankruptcy Court, during the course of bankruptcy proceedings are preferential

claims. For example, the appointment of a lawyer to defend the bankrupt in a trial, other professionals' fees and other debts incurred after the start of the bankruptcy are conceptually considered as preferential claims.

- Law 122 of 2010 extends the category of preferential claims to include (with the aim of protecting new finance,) loans granted by financial institutions to the debtor for a settlement with creditors (*concordato preventivo*) or a debt restructuring agreement (*accordo di ristrutturazione dei debiti*).
- The expert's costs and fees validating the plan underlying the settlement with creditors, or a debt restructuring agreement are also given status as preferential claims.
- **Secured claims (*crediti privilegiati*).** This category includes claims secured by mortgages, pledges or liens. If a creditor's claim is only partly satisfied through the proceeds from the sale of the asset secured by a mortgage, pledge or lien, the creditor is deemed to be an unsecured creditor for the remaining part of the claim.
- **Unsecured claims (*crediti chirografari*).** This category includes claims incurred before the bankruptcy petition was filed and the unsecured creditors usually receive a pro rata share of the distributed funds, ranking after the secured claims.
- **Shareholders.** In practice, shareholders do not usually receive a distribution from the bankruptcy. If funds are available, holders of preferred shares take priority over ordinary shareholders.

UNPAID DEBTS AND RECOVERY

3. Can trade creditors use any mechanisms to secure unpaid debts? Are there any legal or practical limits on the operation of these mechanisms?

Trade creditors can use the following other mechanisms to secure unpaid debts:

- **Claim assignment (*cessione dei crediti*).** The creditor can assign one or more of his claims, with or without consideration, even without the debtor's knowledge, provided that the claims do not have a strictly personal nature and they can be legally transferred. The assignment can take place instead of a payment due or as security for payment obligations and, as a result, the creditor owns the claim.
- Although the assignment is valid even if the debtor is not notified, such notification must take place for the assignment to be enforceable in relation to third parties and, if the same credit has been assigned to different persons, the first assignment notified prevails.
- The assignment of tax claims and of claims relating to public entities is governed by specific rules.
- **Credit risk insurance (*assicurazione rischio crediti*).** The creditor can protect his credit against the debtor's risk of insolvency by taking out credit risk insurance.
- **Guarantee (*fidejussione*).** A third party can guarantee the performance of the debtor's obligations by binding himself personally to the debtor, therefore becoming liable with him. The guarantee is valid if the primary obligation is also valid and it does not guarantee an amount higher than the creditor owes the debtor. It must be granted with conditions no more onerous than those of the primary obligation.
- **Retention of title sale (*contratto di vendita con riserva della proprietà*).** If a retention of title clause is contractually agreed by the parties, ownership is transferred to the buyer only after the purchase price has been entirely settled. The buyer runs the risks from the date of the delivery. A retention of title agreement is enforceable against third parties if it is contained in a document having a certified date. If the retention of title sale concerns machinery with a value higher than EUR15.49, it must be filed with the relevant local court.

4. Can creditors invoke any procedures (other than the formal rescue or insolvency procedures described in *Questions 6* and *7*) to recover their debt? Is there a mandatory set-off of mutual debts on insolvency?

The creditor can invoke the following actions against the debtor, if bankruptcy or other rescue proceedings have not already been initiated:

- **Debt collection proceedings (*procedimento d'ingiunzione*).** Creditors can access this kind of simplified proceedings, which normally takes a few months, if their claim is based on written evidence. The court, after having verified the requirements for such an action, issues a payment order against the debtor, allowing the creditor to foreclose his assets. If the debtor challenges the order, the proceedings are changed into ordinary proceedings and have a longer duration.
- **Ordinary proceedings (*procedimento di cognizione*).** Ordinary proceedings are used to obtain a judgment and, depending on the local court which is hearing the case, they have a duration of no less than two to three years. Because of this, creditors only use ordinary proceedings when other remedies are unavailable.
- **Special proceedings to execute unpaid pledges and mortgages (*procedura esecutiva su beni ipotecati o pignorati*).** Creditors can use special proceedings to enforce mortgages or pledges over assets, which are sold by public auction or a private sale process. The creditor cannot take possession of the assets directly, but can bid for them, provided that no other creditor took part in the foreclosure proceedings and no bids were submitted to the court during the sale process.
- **Special proceedings to enforce a financial guarantee (*procedura esecutiva su beni oggetto di garanzia finanziaria*).** These proceedings allow the creditors to enforce an unpaid claim secured by a financial guarantee by selling the secured asset directly, or being assigned by the debtor at a reasonable value.

STATE SUPPORT

5. Is state support for distressed businesses available?

Over the past few decades, Italy has been successful in containing debt from rising.

The existing state support programme aims to financially support business operations, through a fund that was set up specifically for this purpose (*Fondo Unico per gli incentivi alle imprese*).Among those specific tax incentives, the following are particularly relevant:

- The Destination Italy Decree (December 2013), which:
  - created a specific desk of the Revenue Agency to help and provide information to foreign investor; and
  - enhanced the tax ruling procedures by extending the validity period of the preventive rulings and including the existence of Italian permanent establishments of foreign companies.
- The Fiscal Compact Decree (January 2015), which:
  - extended the tax exemption on interest paid by Italian companies to funds based in white-listed jurisdictions; and

- enabled Italian companies to benefit from financial instruments currently available to their foreign competitors by aligning Italian legislation to other EU partners.

The Fiscal Compact Decree (Law Decree No. 3 of 24 January 2015) aims to re-launch the investment process in Italy and contains urgent measures for the banking system and investments. It promotes the creation of a "service" company and supports the capitalisation, corporate restructuring and industrial consolidation of Italian companies in temporary distress but otherwise characterised by adequate industrial and market prospects. Certain categories of investors will benefit from a fee based guarantee granted by the Italian Ministry of Economy and Finance. Investors who do not take advantage of the state guarantee will have specific governance rights and will play a key role in resolutions concerning investments.

RESCUE AND INSOLVENCY PROCEDURES

6. What are the main rescue/reorganisation procedures in your jurisdiction?

Settlement with creditors (*concordato preventivo*)

Objective. Settlement with creditors is a court procedure allowing a company in financial difficulty to propose a plan to restructure its debts. The debtor can ask the Bankruptcy Court to be admitted even when it is only in a crisis situation (*stato di crisi*) and not technically insolvent. The law does not define the concept of "crisis", but this situation will generally occur when there are financial difficulties (not necessarily reaching insolvency at this point).

Recent amendments to the existing provisions have been introduced regarding the settlement with creditors. Prior to those, creditors could only approve or reject but not amend the plan. However, creditors can now put forward an alternative restructuring plan, if the:

- Creditors represent at least 10% of the overall indebtedness of the debtor.
- Debtor's plan offering the payment of unsecured credits is lower than 40% of the respective claims.

The creditors can vote on all plans which must be filed in advance at the Bankruptcy Court. The plan approved with the highest majority, in terms of the amount of claims, prevails. In case of deadlock, the debtor's plan will take precedence. In case of a deadlock among alternative plans, the plan which was filed at court first will have precedence.

If none of the plans reach the required majorities, the Bankruptcy Court submits again to the creditors' vote the plan that reaches the highest number of votes.

Settlement with creditors refers to the traditional pre-bankruptcy arrangement with creditors. This is the only insolvency procedure allowing a cramdown without a public receiver overruling the board of directors. After the recent reform of insolvency procedures, this process has a high degree of flexibility and allows the creditors to be divided into classes according to the nature of the debts, with possible different treatment for each class.

Initiation. The debtor initiates the procedure by filing a petition with the Bankruptcy Court, with a proposed plan certified by an expert opinion confirming its feasibility and the truthfulness of the accounting data.

The petition must be supported by the following documents:

- Description of the business and an explanation of the reasons for the crisis situation.
- Statement of the debtor's assets and liabilities.
- Schedule of the amounts due and a list of the creditors with their names and addresses.
- Financial statements relating to the debtor's business for previous accounting periods.
- The proposed settlement plan.
- An expert opinion validating the feasibility of the plan and the truthfulness of the accounting data.

Substantive tests. In a settlement with creditors, the substantive test is that the company is in financial crisis, a term which only recently has been defined in the legislation.

Consent and approvals. If the debtor is a partnership, the petition must be authorised by an absolute majority of its equity. If the debtor is a corporation, the petition must be accepted by an absolute majority of the votes at an extraordinary shareholders' meeting.

Only unsecured creditors can vote on the plan, which proceeds only if 51% of the creditors, expressed in value, have approved it. If there are different classes of creditors, 51% of the classes must be in favour the plan, by a vote of majority of all the claims included in each class.

Under the proposed plan, the company can offer any type of settlement to its creditors, including payments in cash, bonds or debt-for-equity swaps.

The debtor must always file an expert opinion on the feasibility of the plan, the contents of which the Bankruptcy Court does not have the power to examine, limiting its activity to check if the procedure has been fulfilled and if the classes of creditors have been formed according to the law. Judgement on the proposal's merit is reserved to the unsecured creditors while the secured creditors do not vote. The proposed settlement plan must take into account the payment of at least 20% of unsecured creditors, unless a proposal for *concordato in continuità* is filed. If secured creditors are not repaid in full because their collateral value is insufficient, they are deemed to be unsecured creditors to the extent of their unpaid claim.

After the creditors' vote, the Bankruptcy Court must approve the agreement. The creditors and others who may be affected by the agreement can request the court to reject it. In this case, as well as if the proposal divides the creditors into classes, the Bankruptcy Court has the power to examine the plan.

If a minority of the classes voted against the plan, the Bankruptcy Court can use a cramdown (impose a reorganisation plan despite the objection of some classes of creditors) and approve the plan if the creditors who voted against it will receive not less than they could receive with other possible crisis solutions, in particular in a liquidation procedure.

Supervision and control. If the Bankruptcy Court allows the registration of a settlement with creditors, it will issue an order appointing a judge to supervise the proceeding, as well as a judicial commissioner (*commissario giudiziale*) (usually an accountant or a lawyer having the powers of a public officer). During the proceedings, the company is controlled by its management under the supervision of the judicial commissioner, while specific extraordinary transactions require court approval.

Protection from creditors. Starting this procedure stops the enforcement of claims, and the debtor's assets are managed by the judicial commissioner. Once the plan has been confirmed, an automatic stay on creditor actions prevents creditors from creating new security interests to secure their claims, or taking further action against the debtor or its assets to enforce their security or collect their debts.

Creditors' claims freeze at the filing date, but the claims for interest on secured claims continue to accrue during the proceedings.

Length of procedure. The proceedings must be concluded within six months from the date of filing the petition. This period can be extended by the Bankruptcy Court for an additional two months.

The reform provides that in specific circumstances a debtor can file a request for a composition with creditors without the need to provide the necessary filing documentation. Such documentation must be filed in court at a later date. The date will be determined by the court and will be between 60 and 180 days after the initial request. During this time, the debtor can decide to continue with the procedure for a composition with creditors or choose to proceed with a restructuring agreement (*Article 182, Bankruptcy Law*).

The protections provided to the debtor by the Bankruptcy Law, such as the stay of enforcement and conservative measures by creditors to recover their debts, will operate from the time of the filing.During the document preparation and creditor negotiation period, any enforcement actions by the creditors will be stayed. The protections will not applyif the debtor fails to submit the documentation within the deadline set by the court.

Conclusion. Once the plan has been approved by the creditors and the Bankruptcy Court, it is binding and must be fulfilled. If the company later becomes bankrupt, all the payments, actions and guarantees that the company makes according to the plan are exempt from clawback action and the directors, officers and statutory auditors are exempt from certain potential criminal charges linked to the bankruptcy.

Dissenting creditors and interested third parties can challenge the plan, for reasons which do not have to concern the mere inconvenience.

If the creditors reject the plan or, after its registration, the debtor fails to meet its conditions, the judicial commissioner will report such circumstances to the Bankruptcy Court which can then issue an order of bankruptcy or, if it does not uphold any challenge, issue an order confirming the plan.

Such an order can be challenged up to the Supreme Court of Cassation (*Corte di Cassazione*). Once the confirmation order is final, the case closes and the plan proceeds.

Debt restructuring agreement (*accordi di ristrutturazione dei crediti*)

Objective. A debt restructuring agreement under Article 182-bis of the Bankruptcy Law resembles a pre-packaged reorganisation plan under Chapter 11 of the US Bankruptcy Code.

The debtor must enclose an expert report on its ability to pay the remaining creditors in full, who otherwise can challenge the agreement before the Bankruptcy Court by requiring verification that their claims will be paid as normal. The Bankruptcy Court will only grant the exemption from the avoidable transfers discipline if this condition is satisfied.

Initiation. The debtor can request a moratorium during the negotiations of a debt restructuring agreement and must file the following documents with the competent court:

- Request for the moratorium.
- Updated economic and financial statements.
- Detailed list and estimate of the value of its assets and a list of its creditors and security interests.
- List of holders of *in rem* or personal rights over the debtor's assets.
- Proposal for a debt restructuring agreement.
- Debtor's statement confirming that negotiations with creditors representing at least 60% of its debts are continuing.
- Report by an expert, meeting the requirements for the certification of the debt restructuring agreement, ascertaining its feasibility and confirming that the restructuring proposal allows for the regular payment of creditors who are not participating in the negotiations or that have already confirmed that they are unwilling to enter into such negotiations.

The debt restructuring agreement can also include a tax settlement to restructure its tax claims (*Article 182 ter, Bankruptcy Law*) and is subject to approval by the Bankruptcy Court where the debtor has its registered office and where the agreement must be filed.

Substantive tests. The substantive test is simply that a financial crisis situation has arisen. A debtor filing an application that contains business continuity provisions may be authorised by the court to (*Articles 182 and 186, Bankruptcy Law*):

- Grant a pledge or a mortgage to secure such interim financing.
- Effect payments for supplies instrumental for the continuation of the business which would otherwise be subject to clawback, certified by the independent professional advisor as able to best satisfy the payment obligations owed to creditors.

The debtor will also be allowed to:

- Suspend any payment from being made in favour of the secured creditors for one year from the date of the approval of the composition.
- Bid in the public sector, provided that the debtor has been certified by the expert as reasonably capable of fulfilling the contract with the public administration.

Consent and approvals. The debt restructuring agreement is an out-of-court agreement by and between the company and its creditors representing at least 60% of all claims against the debtor, aiming to restructure the company's debts.

Supervision and control. The Bankruptcy Court can grant judicial approval of the debt restructuring agreement once it has ruled on any opposing actions. The Bankruptcy Court's decree of approval is then published in the Companies' Registry. All transactions, payments and security interests carried out or granted under a judicially-approved debt restructuring agreement are protected against bankruptcy clawback actions.

Protection from creditors. An automatic stay on creditor actions for 60 days from the date of filing the debt restructuring agreement prevents them from taking action against the debtor or its assets to enforce their security or collect their debts.

The company's directors, officers and statutory auditors, on the public officer's initiative, can be deemed liable for civil or criminal charges relating to the causes which have resulted in the insolvency of the company.

A debt restructuring agreement takes effect the day it is published in the Companies' Registry and the creditors whose claims arose before the date of publication cannot begin restraining actions or enforcement proceedings against the debtor's assets for 60 days following the publication. Any interested party can oppose the debt restructuring agreement within 30 days from the publication.

Length of procedure. There is no fixed time limit for this sort of proceeding, as the length depends on the duration of the negotiations with the creditors.

Conclusion. A debt restructuring agreement can be challenged by any interested party within 30 days from the publication. If no challenges are upheld, the court issues an order confirming the plan. This order can be challenged up to the Supreme Court of Cassation.

Certified rescue plans (*piani di risanamento attestati*)

Objective. This procedure can be applied to the companies in financial difficulties. The purpose of the procedure is to allow the restructuring of the company's debts to ensure rebalancing of its financial situation, without the intervention of the courts.

Initiation. Under the Bankruptcy Law, this type of agreement must be based on a plan prepared by the company, usually with the technical support of its financial adviser. This is done under Article 67(3)(d) of the Bankruptcy Law, aiming to ensure the repayment of the company's outstanding debts and the debtor's financial re-balancing.

Certified rescue plans generally include, among other things:

- An industrial and financial plan.
- A moratorium.
- A debt refinancing or rescheduling plan.
- An analytical description of all transactions, payments and security interests that, under the certified rescue plan, are to be made or granted with respect to the debtor's assets.

Finally, before entering into an out-of-court agreement based on a plan, creditors require that the certified rescue plans be reviewed by an expert who issues an opinion on the reasonableness of the assumptions and the debtor's ability to fulfil its payment obligations. The expert's opinion is intended to provide protection for the creditors against clawback actions based on the transactions, payments and security interests made or granted under the certified rescue plans and related agreements.

The Italian Insolvency Act exempts certain transactions from being subject to challenge by a liquidator seeking to revoke or "claw back" transactions entered into within a specified period prior to insolvency. The provisions state that "deeds, payments and security interests taken in the debtor's assets, if performed under a plan that appears both to be suited to the restructuring of the company's indebtedness and to ensure the rebalancing of its financial position (the reasonability of such plan having been certified by a qualified independent advisor)" may not be subject to challenge (section 67, paragraph 3(d)). Restructuring is established through the creation of a new plan for the company's business operations with the purpose of achieving the debt restructuring referred to above.

The plan requires expert, independent third-party certification. The working out of the plan requires a preliminary evaluation phase during which the company's management is required to uncover and examine the underlying reasons for the company's distressed state. For the purpose of ascertaining whether certain mandatory measures set out under Italian law need to be applied, management should carefully review:

- Debts that have fallen or are close to falling due.
- Contracts to which the company is a party, focusing in particular on termination clauses that are triggered by the company's insolvency, standstill agreements, or any other workout or moratorium agreed to with creditors.
- The occurrence of losses that have affected, or may affect, the integrity of the corporate capital.

During the review phase, it is quite common for the distressed company to negotiate and enter into a standstill agreement with its creditors in relation to existing indebtedness in order to allow the company's management time to complete their analysis. Once the analysis is completed, the management (usually in consultation with external advisors and with its main creditors) draft a new business and financial plan to be certified under section 67 of the Italian Insolvency Law. Based on the new business and financial plan, the company will negotiate and enter into out-of-court agreements with creditors that remain exempt from a liquidator's claw back. These agreements may provide for a variety of arrangements. Generally, they provide for write-offs and/or rescheduling of the indebtedness, debt-to-equity swaps, new equity injections or disposal of assets. Because the agreements are entered into among private parties, their provisions are not enforceable against third parties. Consequently, as distinct from other work-out instruments set out under the Italian Insolvency Law, the restructuring plans do not afford protection of the debtor's assets. In fact, creditors remain entitled to commence proceedings against the debtor or to move for its bankruptcy.

On the other hand, the absence of the court's involvement and the lack of reporting requirements with the Company Registry, combined with the flexibility and speed with which the restructuring plans can be put into place, allows for the restructuring to have as little impact as possible on the company's goodwill.

Finally, it is worth mentioning that while restructuring plans have recently been used to restructure large companies, they have been less frequently employed to restructure the indebtedness of small companies.

Substantive tests. There is no specific test other than the company being in financial crisis.

Consent and approvals. See below, *Supervision and control*.

Supervision and control. The debtor continues to remain in control of the business.

The Bankruptcy Law does not expressly require that the certified rescue plan and the expert's opinion bear a specific date. However, specifying a date supports the evidence that the certified rescue plan was approved by the competent company bodies and the expert's opinion was issued before any subsequent debtor's bankruptcy, and before entering into transactions.

If the debtor is listed on the stock exchange, the expert must be appointed by the court.

Protection from creditors. A certified rescue plan is not a judicial procedure. It is a creditors' agreement founded on the consensual restructuring of the company which may provide different scenarios for the company involved.

The law grants an exemption from the clawback of payments made and actions performed during the execution of the certified rescue plans if the company is declared bankrupt at a later stage.

Length of procedure. Since the certified recovery plan is an out-of-court procedure, there is no specific time period.

Conclusion. The proceedings end with the implementation of the contents of the expert's report and the fulfilment of the actions contained in the certified rescue plan.

Extraordinary administration for large insolvent companies (*amministrazione straordinaria delle grandi imprese in stato di insolvenza*)

Objective. Extraordinary administration has been designed with the goal of restructuring a large insolvent company.

The proceedings is managed by the Ministry of Economical Development (*Ministero dello Sviluppo Economico*) (Ministry) and controlled by the relevant Bankruptcy Court.

The Ministry appoints one or three commissioners (*commissari straordinari*) to control the company and to act as the representative of the insolvent estate.

More precisely, two types of proceedings are currently available:

- *Prodibis* proceedings, introduced in 1999 under Legislative Decree No. 270/99.
- *Marzano* proceedings, introduced in 2003 by Legislative Decree No. 347/2003.

Initiation. While *Prodibis* proceedings can be started by a creditor, the debtor, the public prosecutor or the court, only the debtor can initiate *Marzano* proceedings.

The debtor is subject to *Prodibis* proceedings if all of the following apply. The debtor:

- Is subject to bankruptcy proceedings.
- Has employed at least 200 employees for at least one calendar year before the extraordinary administration.
- Has liabilities that have been two-thirds greater than the value of its assets and revenues during the tax year before the extraordinary administration.
- Has the potential to recover its value, through asset sales or a restructuring.

The debtor is subject to *Marzano* proceedings if all of the following apply to it or its group, with all companies taken together.

The debtor:

- Is subject to bankruptcy proceedings.
- Has employed at least 500 employees for at least one calendar year before the extraordinary administration.
- Has liabilities including guarantees worth no less than EUR300 million.

Substantive tests. To be admitted to the extraordinary administration procedure, the debtor must be insolvent, which means that it is unable to pay its debts when they are due.

Consent and approvals. The liquidation or restructuring programme must be approved by the Ministry without any creditors' right to vote or to challenge the plan.

Creditors' committee opinions, issued on the creditors' behalf, are not binding on the commissioner, the court or the Ministry.

The only time that creditors' consent is required is during *Marzano* proceedings. If a settlement to creditors is submitted by the commissioner which, if accepted, would conclude the proceedings, it must be approved by a majority of the creditors.

Supervision and control. During extraordinary administration proceedings, the debtor usually continues to run the business.

Protection from creditors. The creditors are prevented by an automatic stay from taking additional action against the debtor and its assets to enforce security or collect their debts.

Length of procedure. The proceedings can be extended by the court to other insolvent companies in the debtor's group when there is potential for recovery and the restructuring of the group is facilitated by such an extension.

The commissioner draws up a plan to repay the debtor's creditors. This takes the form of a liquidation programme or a restructuring programme. The commissioner can modify the liquidation programme into a restructuring programme and vice versa, provided that the Ministry approves this change within one year of having approved the initial plan.

The company's directors, officers and statutory auditors are exposed to the risk of civil or criminal charges relating to the insolvency and the receiver is entitled to claw back certain transactions.

The proceedings have the following maximum duration:

- For a liquidation programme: one year.
- For a restructuring programme: two years.

If, due to the complexity of the proceedings, at the end of such periods the plan is only partly executed, a 12-month extension can be granted by the Ministry (which can be renewed for anadditional 12 months).

Conclusion. When the liquidation or the restructuring programme is completed, the proceedings end. The proceedings can have a shorter duration (only for *Marzano*), if the creditors accept a settlement proposed by the commissioner.

If the programme does not succeed, the proceedings can be converted into bankruptcy proceedings (*see Question 7*).

7. What are the main insolvency procedures in your jurisdiction?

Bankruptcy proceedings (*fallimento*)

Objective. Until the last decade, the bankruptcy system was focused on the idea that failed businesses should be liquidated and insolvent debtors expelled from the economic system. As a result, insolvency proceedings usually ended with the liquidation of the debtor's assets and both the debtor and the creditors ran the risk of clawback actions and potential criminal liability in the event of the debtor's subsequent bankruptcy.

However, after recent reforms, bankruptcy proceedings now aim to pay out the creditors by realising the debtor's assets and distributing the proceeds to them. The status of insolvency justifies the adjudication of bankruptcy by the court, even where the insolvency is not due to the debtor's misconduct.

Initiation. Bankruptcy proceedings are initiated when a company is deemed to be insolvent according to the provisions of the Bankruptcy Law, meaning it is no longer able to regularly meet its obligations and pay its debts.

To be subject to bankruptcy proceedings, the company must have its registered office in Italy and meet one of the following requirements:

- The total annual value of its assets in the three financial years before filing the petition or from its date of incorporation, if less, must be greater than EUR300,000.
- The total annual value of its gross revenues in the three financial years before filing the petition or from its date of incorporation, if less, must be greater than EUR200,000.
- The total value of its liabilities, including debts not yet due must be greater than EUR500,000.

The procedure is started by an order of the Bankruptcy Court having jurisdiction over the debtor's principal place of business, based on a petition filed on the initiative of:

- One or more creditors.
- The debtor.
- The public prosecutor, when he becomes aware of the debtor's insolvency status in other proceedings of a different nature.

The main consequence of the opening of bankruptcy proceedings for the bankrupt is so-called "dispossession", that is, the transfer to the receiver of the management of, and the right of disposal of, present and future assets.

Under the Civil Code, the directors must fulfil the duties imposed by law and by the company's articles of association. They are liable to the company for damages if they do not fulfil such duties, or if they failed to supervise the general conduct of the company's business. Further, if the directors were aware of prejudicial acts and they did not do what they could to prevent them or reduce their harmful consequences, directors can also be liable for damages.

Additionally, when a company becomes insolvent, the directors must promptly file for bankruptcy.

Bankruptcy proceedings do not apply to:

- Individuals.
- Public entities.

- Insurance companies.
- Fiduciary companies.
- Banking and financial institutions.

When bankruptcy proceedings start, an automatic stay prevents the creditors creating new security interests to secure their claims or taking additional actions against the debtor or its assets to enforce their security or collect their debt.

Only claims for interest on secured claims continue to accrue during the proceedings.

Substantive tests. To be classified as bankrupt, the debtor must be insolvent, a term which indicates that it is unable to pay its debts when they become due.

Consent and approvals. The Bankruptcy Court appoints a receiver, who is a public officer (*pubblico ufficiale*) to control the company and its assets. The receiver is personally liable if he does not fulfil the role of protecting the creditors' interests with due care.

The Bankruptcy Court schedules a date for hearing evidence of the creditors' claims and the creditors must file their claims at least 30 days before the date of the hearing. They can also file their claims at a later stage, though it must be within 12 months from the date the court approves the final schedule of liabilities (*stato passivo*).

The Bankruptcy Court appoints the creditors' committee, composed of three or five members selected from the creditors, to approve certain transactions and the liquidation plan. Once approved by a majority vote, the liquidation plan is submitted to the court.

After creating the creditors' committee, the receiver submits a proposed liquidation plan, which must be finalised within 60 days from the date of the inventory. The liquidation plan sets out the activities which the receiver deems necessary.

Those can include clawback actions and the sale of certain assets or the company as a going concern.

The creditors' committee's resolutions are passed by affirmative vote of the majority of its members.

The receiver runs insolvency proceedings under the Bankruptcy Court's supervision, and debtor-in-possession management is not allowed.

Supervision and control. The proceeding is carried out and supervised by a receiver (*curatore*), a deputy judge, and a creditors' committee representing all the creditors.

The receiver can generally run bankruptcy proceedings under judicial supervision. However, the consent of the creditors' committee (a body which may have three or five members) is required for certain activities, such as:

- Requesting the court to carry on running the business.
- Reductions of claims and settlements.
- Waivers of litigated claims and acknowledgments of third party rights.
- Cancellations of mortgages.
- Relinquishments of pledges.
- Donations.
- Extraordinary transactions (that is, transactions which can cause the decrease or dispersal of the estate's assets).

Protection from creditors. The creditors are prevented by an automatic stay from pursuing claims outside the Bankruptcy Court since the adjudication of bankruptcy (*dichiarazione di fallimento*) prevents any creditor from instituting or continuing individual proceedings against the bankrupt.

The secured creditors (that is, those whose claims are secured by a mortgage, pledge or supported by a lien) have priority in payment from the proceeds of the sale of the bankrupt's assets and their credits continue to accrue during the proceedings. To the extent they are not fully satisfied, they may participate with unsecured creditors in the distribution of the remaining assets.

Length of procedure. The duration of bankruptcy proceedings varies. While the receiver has 60 days from the inventory date to deliver the proposed liquidation plan, bankruptcy proceedings handled in the large courts have a longer duration than in smaller courts and can last several years.

Conclusion. The receiver must liquidate all the company's assets and distribute the proceeds to the creditors to have the proceedings formally concluded.

In some cases, a buyout of the bankruptcy estate may take place (*concordato fallimentare*) by a third party or by the debtor itself.

The debtor can only file for a buyout within one year after the opening of the bankruptcy proceedings and within two years from the date on which the status of liabilities has become final. Once the Bankruptcy Court has established the schedule for the distribution of the proceeds, the debtor can choose to offer the creditors a settlement giving them either a greater or a quicker recovery than that provided for under the bankruptcy distribution.

In this case, the debtor must submit his offer to the Bankruptcy Court. If the court decides that the settlement offer is in the best interests of the creditors, it issues an order directing that notice of the offer be given to all the creditors and then sets a date for a creditors' meeting where they will vote on the settlement offer.

Afterwards, they can submit their votes either in writing to the court within the term set by the judge, or by appearing in person or by power of attorney, at the creditors' meeting. Creditors who fail to cast their votes are deemed to have accepted the settlement offer.

STAKEHOLDERS' ROLES

8. Which stakeholders have the most significant role in the outcome of a restructuring or insolvency procedure? Can stakeholders or commercial/policy issues influence the outcome of the procedure?

Stakeholders

Italian law is very protective of employees' rights and, historically, certain interested parties, like *cassa integrazione guadagni* (a special public fund which protects employees' income) are involved when companies are in financial crisis. Trade unions are a key player in these situations. Recently, a labour market reform took place in Italy. The reform was aimed at making the Italian work environment more aligned with the flexibility needed in today's global economic landscape. The reform, which was enacted through different laws in 2014 and 2015 includes:

- Deregulation of the dismissal regime and of fixed-term contracts.
- Significant tax and social security contribution breaks for employers that offer permanent job contracts.
- Re-allocation of job seekers by improving private and public labour market institutions.

Banks also influence restructuring and insolvency situations and, after the recent reforms, they are more cautious than in the past about injecting money into companies in financial distress.

Influence on outcome of procedure

The stakeholders can have a practical influence on the type of insolvency proceedings used if they are also creditors.

In bankruptcy proceedings and certified rescue plans the choice of procedure rests with the company. Debt restructuring agreements must be approved by the creditors.

The main goal of the recently reformed insolvency law is to rescue the business and financially rehabilitate the debtor, whereby the main creditors are the employees and the state (for unpaid taxes).

LIABILITY

9. Can a director, partner, parent entity (domestic or foreign) or other party be held liable for an insolvent debtor's debts?

Director

A company's director, as well as its officers and statutory auditors, have specific duties and must act in the best interests of the company, with the due care required by their role and with the powers granted to them by law and the company's bye-laws. The directors must promptly file for insolvency when the company becomes insolvent. As a consequence, they can be held liable for damages deriving from the non-observance of such duties and in case the company is declared bankrupt.

The nature of such liability can be civil or criminal. Under civil law, the directors are jointly liable if they failed to supervise the general conduct of company affairs or if, being aware of the existence of prejudicial acts, they did not do what they could to prevent their performance or to eliminate or reduce their negative consequences.

The directors are also liable to the company's creditors for non-observance of their duties concerning preservation of the company's assets when these assets prove to be insufficient to satisfy the creditors' claims.

Under criminal law, directors and officers can also be personally prosecuted for bankruptcy crimes committed before or during the bankruptcy proceedings, as fraudulent bankruptcy acts, abusive recourse to credit, or denouncing non-existing credits.

Under Article 27 of the Constitution, criminal liability is generally individual. Exceptions apply under Decree 231/2001 concerning criminal liability of companies for crimes committed by its officers or employees, when such crimes are committed for the benefit of the company.

Company directors are also subject to criminal liability if they have:

- Removed, destroyed or falsified the company's books and other accounting records or kept them in a manner as to make it impossible to reconstruct the company's assets and business transactions, with the intent of obtaining an undue profit or of harming the company's creditors.
- Hidden, destroyed or dissipated all or part of the assets or, with the intent of damaging the creditors, alleged or acknowledged the existence of non-existing debts.
- Destroyed much of the company's assets by means of risky or manifestly imprudent transactions.
- Carried out seriously imprudent transactions to delay the adjudication of bankruptcy.
- Worsened the company's serious economic condition by failing to file a bankruptcy petition.

In addition, directors are forbidden from paying some of the creditors or creating fictitious titles of preference, for the purpose of favouring some creditors and of harming others.

Partner

If a sole contributory of a business does not incorporate his business entity (by filing a statement at the Registry of Companies indicating the contributory's name, domicile and date and place of birth), he will be fully liable for the business entity's debts.

If there is more than one contributory, all partners are liable for the entity's debts.

Parent entity (domestic or foreign)

For parent companies, Article 2497 of the Italian Civil Code sets out specific liabilities for legal entities exercising direction and co-ordination (*direzione e coordinamento*) towards other companies.

Therefore, the parent entity will be liable if it acts in its own interest or in the interest of other third parties breaching the principles of a fair management of the companies subject to their direction and co-ordination towards the:

- Shareholders of the controlled companies, for the damages caused to the value of their shares.
- Creditors, for the damages caused to the controlled companies' assets.

However, the parent entity will not be liable when:

- There is no damage, taking into account the overall outcome of the activity of direction and co-ordination.
- The damage has been completely eliminated through a specific action carried out for this purpose.

Other party

Not applicable.

SETTING ASIDE TRANSACTIONS

10. Can an insolvent debtor's pre-insolvency transactions be set aside? If so, who can challenge these transactions, when and in what circumstances? Are third parties' rights affected?

Bankruptcy

Once bankruptcy proceedings are started, some transactions executed by the debtor are invalid, including:

- Transactions executed without consideration during the two years before the adjudication of bankruptcy. Payments made by the debtor during the two years before the adjudication of bankruptcy to repay debts due after the start of the bankruptcy proceedings.
- Payments executed without consideration to the debtor's spouse (if the debtor is an individual entrepreneur) and executed while the debtor was running the business, unless the spouse was unaware of the debtor's insolvency status.
- Payments to the debtor's spouse, if the debtor is an individual entrepreneur, during the two years before the adjudication of bankruptcy, unless the spouse was unaware of the debtor's insolvency status.

Further, during bankruptcy proceedings, the receiver can clawback a transaction if all the following conditions are met:

- The third party was aware of the debtor's insolvency status.

- The transaction took place within the clawback period, which starts 12 months before the adjudication of bankruptcy for the following transactions:
  - transactions which require the debtor to perform or undertake obligations the value of which exceed, by more than 25%, the value of payments that the creditor has made or promised to the debtor;
  - any payment made by the debtor that was not in cash or another common payment method;
  - pledges or mortgages granted in connection with pre-existing debts not already due.

The clawback period begins six months before the adjudication of bankruptcy for the following transactions:

- Payment of outstanding debts.
- Conveyances other than those made without consideration.
- Guarantees which the debtor granted at the same time as incurring debt.
- Pledges or mortgages granted in connection with pre-existing due debts.

The following transactions are not subject to the clawback:

- Payments for goods and services made during the ordinary course of business.
- Payments made and guarantees granted by the debtor as part of a settlement with creditors, a debt restructuring agreement or certified rescue plan.
- Payments to employees.
- Payments of fees due in connection with filing a settlement with creditors.
- Overdraft repayments unless these repayments have materially reduced the debtor's exposure towards a bank.

Extraordinary administration

Some transactions occurring during extraordinary administration proceedings are not subject to clawback. The time periods are the same as in bankruptcy proceedings (*see above, Bankruptcy*).

In the *Marzano*, the commissioner's powers are the same as those of the receiver during bankruptcy proceedings. In *Prodibis* proceedings, the commissioner can only clawback transactions as part of a Ministry-approved liquidation programme, but not if there is a restructuring plan in place. An extended clawback period applies in relation to inter-company transactions, if the extraordinary administration involves a whole corporate group.

CARRYING ON BUSINESS DURING INSOLVENCY

11. In what circumstances can a debtor continue to carry on business during rescue or insolvency proceedings? In particular, who has the authority to supervise or carry on the debtor's business during the process and what restrictions apply?

In insolvency procedures, the debtor is usually dispossessed of its assets and is not entitled to run the business anymore. However, in some cases, the receiver may decide that it is more profitable for creditors for the business to continue, since its interruption would be detrimental.

In bankruptcy proceedings, the Bankruptcy Court can authorise the business to continue if the receiver's request has already been approved by the creditors' committee.

However, in practice, the continuation of the business rarely takes place and, when it is authorised, the receiver must keep the company's accounts and report to the creditors' committee periodically concerning his activity.

In a settlement with creditors, the continuation of the business by the debtor is quite common, under the supervision of the court-appointed commissioner.

In an extraordinary administration, continuation of business is different in the *Prodibis* and *Marzano* proceedings. In the *Prodibis*, the debtor continues to run the business until the commissioner, having become aware of the structure of the business and its assets, dispossesses the debtor. In the *Marzano*, the debtor is immediately dispossessed of its assets.

ADDITIONAL FINANCE

12. Can a debtor that is subject to insolvency proceedings obtain additional finance both as a legal and as a practical matter (for example, debtor-in-possession financing or equivalent)? Is special priority given to the repayment of this finance?

Claims relating to additional finance granted by banks and regulated financial institutions to a company in financial difficulty are deemed super priority claims (*Law 122 of 30 July 2010*). However, to be part of this category, the new finance must have been granted within one of the following categories:

- A settlement with creditors, when either the:
  - new finance was approved by the court at the beginning of the proceedings;
  - settlement with creditors has been ratified by the court.
- A debt restructuring agreement, if it was ratified by the court.

For bankruptcy or extraordinary administration proceedings, additional finance granted is deemed super priority under the Bankruptcy Law if approved by the Bankruptcy Court.

MULTINATIONAL CASES

13. What are the rules that govern a local court's recognition of concurrent foreign restructuring or insolvency procedures for a local debtor? Are there any international treaties or EU legislation governing this situation? What are the procedures for foreign creditors to submit claims in a local restructuring or insolvency process?

Recognition

Judgments obtained in other EU countries are automatically recognised by Italian courts. For judgments rendered abroad concerning insolvency proceedings, the locally competent court of Appeal must verify the contents and recognise the judgment with an exequatur (*delibazione*) after having verified that:

- The defendant knew the existence of such a proceeding.
- The defendant could defend himself in such a proceeding.
- The judgment was rendered according to the law of the foreign country.
- The judgment does not violate any Italian law concerning public order.
- No proceedings are pending before an Italian court for the same matter.

Concurrent proceedings

Italian courts recognise concurrent proceedings in other EU jurisdictions. The main proceedings must take place where the debtor has its centre of main interests, and one or more secondary proceedings can take place where the debtor's assets are located in a different jurisdiction from the main one.

Interim financing and contracts in the course of execution

The new rules also affect the issues of interim financing and contracts which are already in the course of execution.

In the past, debtors who underwent restructuring procedures often found that banks would deny them "bridge-financing" (essential for the survival of the debtors).

Under the new rules, even before the approval of the recovery plan or of the restructuring agreement, the debtor will be able to do the following:

- Obtain interim financing with repayments ranking preferentially to all other creditors in the event of insolvency, provided that such financing is considered, in a report of an independent expert, to be the best way of satisfying the payment obligations owed to the creditors.
- Ask the court to dissolve contracts in the course of execution or to suspend the contracts for a period not exceeding 60 days, with the debtor to provide an indemnity in favour of the party that would suffer in the event of termination of such contract.
- Carry out acts of ordinary administration and, with the consent of the court, carry out urgent extraordinary acts. Third party claims arising as a result of such acts lawfully done by a debtor will also rank preferentially to all other creditors.

Payments to creditors outside the agreement should take place within the following specified time limits (*Article 182, Bankruptcy Law*):

- 120 days from the date of the approval, for debts which were already due on the date on which the approval of the restructuring agreement was granted.
- 120 days from the relevant due date for debts which were not due at the date of the approval.

International treaties

Italy is a party to bilateral treaties with various EU member states concerning insolvency proceedings and is a signatory to:

- Regulation (EC) 1346/2000 on insolvency proceedings (Insolvency Regulation).
- Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation).
- The UNCITRAL Model Law on Cross-Border Insolvency 1997 (UNCITRAL Model Insolvency Law).

Procedures for foreign creditors

There are no specific procedures that foreign creditors must comply with when submitting claims in local insolvency proceedings.

REFORM

14. Are there any proposals for reform?

Changes to the rescue and reorganisation procedures were introduced through Law No 132 [XXX] of 6 August 2015. In introducing those measures the government aimed at addressing a risk that a company facing problems may drag others with it. For example suppliers of goods and services and financial institutions continue to assume obligations which cannot be satisfied. Addressing such issues promptly can limit the negative impact on the economy by restructuring companies in a way that not only protects entrepreneurial activities but also brings business, financial and employment benefits.

ONLINE RESOURCES

Italian Government (Governo Italiano)

W www.governo.it

Description. The official website of the Italian Government. This website provides official resources on Italian law and judgments.

Court of Cassation (Corte di Cassazione)

W www.cortedicassazione.it

Description. The official website of the Italian Court of Cassation. This website provides official resources on Italian law and judgments.

Global insolvency

W www.globalinsolvency.com

Description. This website provides unofficial information and resources on local and international laws.

Insol Europe

W www.insol-europe.org

Description. This website provides unofficial information and resources on local and international laws.

Practical Law **Contributor profiles**

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Areas of practice. Insolvency; cross-border restructuring; winding-up and formal liquidations of companies; debt restructuring agreements; rescue plans; company and commercial.

Non-professional qualifications. University of Rome "La Sapienza", Doctor in Jurisprudence; admitted to practice before the Supreme Court

Recent transactions

- Appointed receiver for corporate bankruptcies by appointment of the Bankruptcy Court of Rome.
- Assisted the administrators of MG ROVER ITALIA SPA in the implementation in Italy of the EU Regulation 1346/2000 concerning transnational insolvency.
- Appointed by the Ministry of Economical Development (*Ministero dello Sviluppo Economico*) as receiver for relevant insolvency procedures of large companies named forced administrative liquidations (*liquidazioni coatte amministrative*).
- Appointed by IVASS (*Istituto di vigilanza sulle assicurazioni private*) as receiver for relevant insolvency procedures of insurance companies in forced administrative liquidations (*liquidazioni coatte amministrative*).

Languages. English, Spanish

Professional associations/memberships

- President INSOL EUROPE 2001- 2002 and currently Honorary Member.
- Member of the Rome Bar Association.
- Member of the International Bar Association.
- Member of British Italian Law Association.
- Member of the Editorial Board of International Corporate Rescue, Kluwer.
- Member of the Editorial Board of Eurofenix, INSOL EUROPE newsletter.
- Leading practitioner for Italy in the "Who's Who of Insolvency Restructuring Lawyers", Law Business Research, 2003-2013.
- Rotarian.
- Vice President of *Istituto Italiano di Studi Internazionali di Insolvenza e di Risanamento* (ISIR).

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- La ristrutturazione dei debiti, *Maggioli Editore,* 2013.
- La nuova responsabilità delle persone giuridiche (author), *Giuffrè Editore,* 2012.
- Crisi d'impresa, strategie di risanamento (author), *Giuffrè Editore,* 2011.
- La nuova legge fallimentare *Giuffrè,* 2007.
- La crisi d'impresa nel nuovo diritto fallimentare (author), *Il Sole 24 Ore,* 2006.
- The EU Regulation on Insolvency proceedings, Restructuring and Insolvency, *Practical Law,* 2004.
- The European Restructuring and Insolvency Guide 2002/2003 – White Page in association with Deutsche Bank, Linklaters and PricewaterhouseCoopers, 2002.