

I. COMMENCEMENT OF AN INSOLVENCY PROCEEDING IN ITALY

A. Bankruptcy (“*Fallimento*”) Proceeding

The principal bankruptcy proceeding in Italy is the “*fallimento*”, which is a liquidation procedure. The purpose of this bankruptcy procedure is to satisfy the creditors’ rights and to remove the insolvent enterprise from the market. The proceeding is initiated when a company or sole trader is deemed to be insolvent. The company must be a trading company, to be subject to these proceedings, as defined in the Italian Civil Code, that is: any company or individual whose main activity consists of the production or trade of goods and services. Small traders, as defined in the Italian Civil Code, are exempt. Non-residents, (companies and individuals) may also be subjected to bankruptcy proceedings.

When the bankruptcy procedure is established, the assets of the debtor are not only intended for the realization of the creditors’ rights existing at the moment of the adjudication of bankruptcy but they also become unavailable for the obligations under subsequent contracts.

A receiver is appointed by the Court to manage the liquidation. The receiver must collect and sell the debtor’s goods under the judge’s direction. The Court also appoints a judge who directs the proceeding and must determine creditor’s claims.

The requirements necessary for the declaration of bankruptcy are: (1) the debtor’s ability as a commercial entrepreneur (subjective assumption); and (2) the state of insolvency of the debtor (objective assumption).

A petition of the debtor or of the creditors may open the procedure. The public attorney may also file a petition to the Court, generally when there are bankruptcy crimes, but he may also file the petition in any case of insolvency. The Court itself can open the procedure, without a petition, when another Court managing a civil proceeding notices that there is an insolvency situation or when in the course of a bankruptcy conservation proceeding it’s clear that there isn’t any possibility to save the enterprise or, in the “*concordato preventivo*” proceeding, the agreement between the debtor and the creditors fails.

Most bankruptcy proceedings are initiated by the filing of a petition by creditors or by the debtor. Many times the creditors file the petition to force the debtor to reach an agreement to avoid bankruptcy. Debtors may open the bankruptcy proceeding when it’s not possible to reach any other solution. In such a case, the enterprise has generally been insolvent for many months, sometimes for years. After the entry of an order of Court, which declares the proceeding open, the receiver must act to avoid the fraudulent transfers made by the debtor.

After the filing of the petition, the Court must assure the debtor's right to defend against the entry of the order opening the proceeding. That means that the debtor has the right to be heard by the Court before the entry of the order declaring the debtor a bankrupt. After the entry of the bankruptcy order, the debtor has the right to challenge the order in the Court which issued the order. If the debtor does so, there is a formal proceeding in the form of a civil suit. If the order opening the bankruptcy proceeding is affirmed, the debtor may present an appeal to the Court of Appeals.

If the creditors' petition for the opening of the bankruptcy proceeding is rejected, the creditor may appeal to the Court of Appeals.

B. Other Proceedings

The so-called minor bankruptcy procedures, such as the Controlled Administration and Preventive Creditors' Settlement Procedure (*concordato preventivo*), are designed to avoid a debtor's bankruptcy. Only a filing of a petition by a debtor may commence both these procedures.

1. Controlled Administration

Controlled Administration is a judicial procedure of a protective nature. It is premised on the specific supposition that the debtor's difficulty in fulfilling its obligations is temporary. It is an instrument the law grants to the debtor in temporary difficulty, in order to prevent insolvency and, in a declaration of bankruptcy, when there is evidence that the undertaking can be saved. The purpose of Controlled Administration is to re-establish the financial health of the enterprise and place it in general suspension for a circumscribed period of time. During that period of time, the undertaking continues to do business under the debtor's management, controlled by a commissioner and directed by the judge. During this period, the entrepreneur's assets are not subject to claims made by the creditors.

2. Preventive Creditors' Settlement Procedure

Preventive Creditors' Settlement Procedure is another procedure for the satisfaction of the rights of creditors, which allows the debtor to avoid a declaration of bankruptcy and all the resulting consequences of a patrimonial and personal character. When the requirements provided by the law are met, the insolvent debtor can put forward a composition procedure and avoid bankruptcy, paying a percentage of the assets in respect of the *par condicio creditorum* [creditor's equal treatment]. Creditors have the right to participate in the creditors' meeting, and for the composition to be approved, it must receive a majority vote of at least two-thirds of the voting creditors. If that doesn't happen, the court will have to reject the proposal. Only a filing of a petition by a debtor may commence both these procedures.

C. Large Enterprises in Crisis

Particular attention must be given to the procedure of extraordinary administration of large enterprises in crisis. This procedure is aimed at saving those undertakings belonging to the industrial sector, which fall into financial and operational difficulties considered as temporary and surmountable. On the organizational level, these proceedings provide levels of rearrangement and re-conversion suitable for proving the real and concrete possibility of recovery of the enterprise, through restructuring, separation and merger. On the procedural level, this proceeding is administrative in nature and, in particular, is aimed at removing a declaration of bankruptcy by enterprises in an evident or ascertained state of insolvency, which operate in strategic sectors of the economy. In this proceeding, the protection of the *par condicio creditorum*, which is the reason of every kind of bankruptcy procedure, is extended to the public interest to prevent a crisis which could create distrust in the market and, therefore in the entire economy.

The extraordinary administration law has been modified after the *Parmalat* case, giving more powers of intervention to the Minister of Industry. This procedure may be opened on a debtor's petition or on a creditor's petition to the Court.

II. STAY OF COLLECTION ACTIONS

The purpose of the stay in Italian law, like American law, is to give the debtor some "breathing time," to focus on the enterprise's reorganization, to give to the receiver in the bankruptcy proceeding the exclusive right to collect the debtor's goods, and to relieve the debtor from the pressure of creditor collection efforts.

In the procedures of Controlled Administration and of Composition Preventive Creditor's Procedure with creditors, the filing of the petition by the debtor stops all creditors' actions and the enforcement of court orders regarding creditors' claims. The debtor cannot pay the creditors for debts which were incurred prior to the opening of the proceeding. Payment of such debts violates the pre-proceeding rules and oblige the Court to enter an order declaring the debtor a bankrupt. Any such payments will also be avoidable by the receiver in the subsequent bankruptcy proceeding.

In the bankruptcy procedure, following articles 51 and 52 of the Italian law, creditors cannot execute on the debtor's goods, which are in the receiver's control. Creditors must file their claims against the debtor with the bankruptcy judge and cannot exercise their collection actions in the courts of ordinary jurisdiction. The bankruptcy order gives the receiver the administration power over the debtor's estate. All the actions referring to the debtor's "patrimony" must be filed against the receiver and the receiver has the legitimate standing to act for all credits and to enforce rights of the debtor. This rule applies to both the debtor's personal and patrimonial rights (the right to act on behalf of the debtor for all the debtor's rights with respect to property or to claims).

In this way, the creditors' rights to enforce their claims against the debtor and to enforce ordinary jurisdiction Court's decisions are substituted by the right to file claims in the bankruptcy proceeding and to be paid from the bankruptcy liquidation of the debtor's assets.

If a creditor decides to act against the debtor without filing his claim in the bankruptcy proceeding, any decision of the courts of ordinary jurisdiction will be unenforceable against the receiver. If the creditor tries to enforce the decision against the debtor, the receiver will ask the judge, in the non-bankruptcy court enforcement proceeding, to reject the creditor's petition.

There are no exceptions to the rule which requires creditors to file claims with the bankruptcy court. But, there are exceptions to the stay of the enforcement when the object of the enforcement is a pledge or is a bank's loan secured by real estate. However, there are no exceptions to stay of enforcements in Extraordinary Administration Procedures. Also, in Extraordinary Administration Procedures, the creditors' claims must be filed with the Bankruptcy Court.

III. PLAN PROCEDURES

A. Bankruptcy and Minor Proceedings

In Italian bankruptcy procedure, there is no procedure for proposing a plan to the creditors in the ways that are provided under Chapter 11 in the U.S. Bankruptcy Code. Under Italian law, the bankruptcy proceeding only provides for liquidation of the enterprise to pay the creditors. In the so-called minor bankruptcy procedures, such as the Controlled Administration and Preventive Creditors' Settlement Procedure (*concordato preventivo*), a plan process exists only in the Controlled Administration Proceeding.

Under Italian law, the main scope of the various insolvency procedures is focused on the protection of the interests of the creditors of the insolvent entrepreneur, pursuant to the principle of economic liability, according to which, the insolvent debtor's assets are liable for the fulfillment of the obligations. Consequently, all the above-mentioned procedures, with some specific exceptions that will be addressed hereinafter, are mainly aimed at the liquidation of the insolvent enterprise and to its elimination from the market. The Italian legislature has chosen to exclude the entrepreneur from the productive system when he has demonstrated that he is incapable of adequately managing his activity.

The possibility of re-organizing the enterprise in crisis has been considered by the legislature, which has provided besides the bankruptcy procedure, the Controlled Administration Procedure (articles 187 – 193 R. D. 267/1942).

In the Controlled Administration Procedure, the debtor must demonstrate to the Court that there is a serious possibility that the enterprise will recover. To reach this goal, the debtor must prepare a plan. Both the Court and the majority of the creditors must agree with the plan. A limitation of this procedure is the fact that the debtor is only allowed to suspend payments to creditors for up to two years. There isn't any other provision to recover the enterprise. Generally, at the end of the proceeding, the debtor, even if the debtor has recovered his economic balance, is not able to pay the previous credits.

In practice, many times at the end of a Controlled Administration Procedure proceeding, the debtor tries to reach an agreement with the creditors to pay them only a percentage of their debt. To reach this goal, the debtor may use the other minor proceeding, the Preventive Creditors' Settlement Procedure (*Concordato Preventivo*). Use of the Preventive Creditors' Settlement Procedure results in a reduction of the total amount of creditors' claims and in the postponement of the payment of the reduced claims. This isn't, however, a direct re-organization of the enterprise. The Preventive Creditors' Settlement Procedure is intended to limit the time and cost inconveniences for the creditors with respect to a bankruptcy procedure and to support the insolvent entrepreneur, who can demonstrate his trustworthiness and diligence, freeing him of a part of his liabilities and leaving him with the use of his assets. However, it should be noted that the Preventive Creditors' Settlement Procedure may be considered to indirectly permit reorganization of an enterprise because it can result in maintaining, even if partially, an enterprise in the market.

In the practice, however, both the Controlled Administration and the Preventive Creditors' Settlement Procedure are generally not able to help the debtor in the enterprise's recovery. In fact the suppliers and the banks don't like to support the debtor. The aim of the Preventive Creditors' Settlement Procedure is to help the debtor, if honest and worthy, to pay the creditors and settle the insolvency, not to reorganize the enterprise.

B. Extraordinary Administration of Large Enterprises in Crisis

The situation is, however, completely different in the Extraordinary Administration of Large Enterprises in Crisis. That law provides the possibility to companies employing a minimum number of employees, (at present at least 200 persons), whose debts indicate the possibility of a possible insolvency, to be managed by an Extraordinary Commissioner under the supervision of the Ministry of Industry. The activity of the Extraordinary Commissioner is directed to the re-organization of the enterprise through a re-organization plan. In the event that the re-organization plan cannot be completed, the entity must be wound-up.

A company seeking relief under a Large Enterprise in Crisis must file a petition to be admitted to the proceeding choosing between two different types of plans. The first type of plan contemplates the sale of the assets on the market and the creditors payment from the proceeds of sale. To accomplish this result, the company is allowed to operate for not more than a year. The second type of plan is a veritable reorganization plan that must be

accomplished in not more than two years. This type of reorganization plan also permits a sale of part of the debtor's assets.

A court must approve the filing of the petition. If the company is admitted to the proceeding, the Minister of Industry appoints an Extraordinary Commissioner. The plan is presented to the Minister by the Commissioner and must be approved by the Minister.

After the Parmalat case, the law has been changed. The insolvent companies that have debts of more than 1 billion euro and almost 1,000 employees for more than one year, can ask the Minister of Industry to be admitted to the Extraordinary Administration. The Minister may directly enter the decree, but the Court must confirm the entry of the decree. The judge must declare the company's insolvency. If the judge rejects the petition, the Minister's decree is avoided. Under this procedure, the time of intervention is faster than in an ordinary proceeding, but the only plan permitted is a reorganization plan.

The Extraordinary Commissioner must manage the company. He has all the powers of the receiver in a bankruptcy proceeding. The Examiner may file petitions and represent the company before the Courts of ordinary jurisdiction. He can also file a petition with the Minister of Industry requesting the Extraordinary Administration of other insolvent companies within the same group.

In the *Parmalat* case there are many creditors. A great number of these creditors are bond holders. The banks, which gave important loans to Parmalat, recommended that their clients subscribe to the Parmalat bonds. The banks, therefore, had a conflict of interests because their clients' capital was necessary to sustain the company and in this way to permitted to Parmalat to reimburse the banks' loans.

It is generally recognized that Parmalat, if well administered, is a profitable enterprise. There isn't anything wrong from the industrial point of view, but it is not anticipated that the profits from Parmalat's operations will be sufficient to pay its creditors in full.

For this reason, the law permits the Extraordinary Commissioner to propose directly to the Minister a Creditor' Settlement Agreement. The law states that such an agreement's proposal must include:

- (1) the division of the creditors into classes. This is the first time that Italian law contemplates the creation of creditors classes.
- (2) different treatments for the different classes of creditors.

(3) the settlement of the credits through the distribution to the creditors of stock or other forms of participation of risk capital in Parmalat.

The majority of the creditors must accept the Creditors' Agreement Proposal. If the Agreement provides for creditors' classes, each class must accept the proposal, but the Court may approve the agreement even if one or more classes don't accept, if the conditions of the proposal are not worse for the objecting creditors classes than any of the other possible alternatives.

IV. UPCOMING CHANGES IN ITALIAN LAW

In Italy, people now agree that it is necessary to reform the bankruptcy law. A Committee appointed by the Minister of Justice has prepared a draft law that should be discussed by the Government in the near future. The draft provides for two different procedures - a proposed crisis procedure and a liquidation procedure.

A. Proposed Crisis Procedure

Upon filing a petition to be admitted to the crisis procedure, the debtor must present a plan. The plan must indicate the treatment reserved to the creditors, the guarantees, the assets that assure the plan's execution, the ways according to which the creditors will be paid, such as the distribution of stocks or other forms of participation in the risk capital of the enterprise. Creditors may be divided into classes, assuring the creditors in each class the same treatment, but providing different treatments for different classes. The debtor's proposal and the plan must be approved by the majority of the creditors and by the Bankruptcy Court.

B. Proposed Liquidation Procedure

In the liquidation proceeding, the Reform Committee's proposal provides the possibility that the creditors, the receiver or a third party may present a plan focused on settlement of the insolvency. The requirements for a plan are similar to those provided for in the proposed crisis procedure and permit the debtor, as well as creditors, to present a plan.

October 2004

Luciano Panzani

Presentation for the 78th Annual Meeting of the National
Conference of Bankruptcy Judges

October 10-13, 2004

Nashville, Tennessee

(Hon.) Luciano Panzani
Judge, Italian Supreme Court of Cassation
Rome, Italy

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11/17/04 8:07 PM (99955.0203)