Chambers
Global Practice
Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Insolvency 2021

Italy: Law & Practice
and
Italy: Law & Practice

Matteo Bascelli, Elena Grigò,
Riccardo Di Carlo and Andrea Di Gregorio
LMS Studio Legale

practiceguides.chambers.com

ITALY

Law and Practice

Contributed by:
Matteo Bascelli, Elena Grigò, Riccardo Di Carlo and Andrea Di Gregorio
LMS Studio Legale see p.34

CONTENTS

1. State of the Restructuring Market p.4
1.1 Market Trends and Changes p.4

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations p.5
2.1 Overview of Laws and Statutory Regimes p.5
2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership p.6
2.3 Obligation to Commence Formal Insolvency Proceedings p.6
2.4 Commencing Involuntary Proceedings p.7
2.5 Requirement for Insolvency p.7
2.6 Specific Statutory Restructuring and Insolvency Regimes p.7

3. Out-of-Court Restructurings and Consensual Workouts p.8
3.1 Consensual and Other Out-of-Court Workouts and Restructurings p.8
3.2 Consensual Restructuring and Workout Processes p.9
3.3 New Money p.10
3.4 Duties on Creditors p.10
3.5 Out-of-Court Financial Restructuring or Workout p.10

4. Secured Creditor Rights, Remedies and Priorities p.11
4.1 Liens/Security p.11
4.2 Rights and Remedies p.12
4.3 Special Procedural Protections and Rights p.13

5. Unsecured Creditor Rights, Remedies and Priorities p.13
5.1 Differing Rights and Priorities p.13
5.2 Unsecured Trade Creditors p.13
5.3 Rights and Remedies for Unsecured Creditors p.14
5.4 Pre-judgment Attachments p.14
5.5 Priority Claims in Restructuring and Insolvency Proceedings p.14

6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings p.15
6.1 Statutory Process for a Financial Restructuring/Reorganisation p.15
6.2 Position of the Company p.17
6.3 Roles of Creditors p.18
6.4 Claims of Dissenting Creditors p.18
6.5 Trading of Claims against a Company p.19
6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group p.19
6.7 Restrictions on a Company's Use of Its Assets p.20
6.8 Asset Disposition and Related Procedures p.20
6.9 Secured Creditor Liens and Security Arrangements p.21
6.10 Priority New Money p.21
6.11 Determining the Value of Claims and Creditors p.21
6.12 Restructuring or Reorganisation Agreement p.21
6.13 Non-debtor Parties p.22
6.14 Rights of Set-Off p.22
6.15 Failure to Observe the Terms of Agreements p.22
6.16 Existing Equity Owners p.23

7. Statutory Insolvency and Liquidation Proceedings p.23
7.1 Types of Voluntary/Involuntary Proceedings p.23
7.2 Distressed Disposals p.26
7.3 Organisation of Creditors or Committees p.26

8. International/Cross-Border Issues and Processes p.27
8.1 Recognition or Relief in Connection with Overseas Proceedings p.27
8.2 Co-ordination in Cross-Border Cases p.27
8.3 Rules, Standards and Guidelines p.27
8.4 Foreign Creditors p.28
8.5 Recognition and Enforcement of Foreign Judgments p.28

9. Trustees/Receivers/Statutory Officers p.28
9.1 Types of Statutory Officers p.28
9.2 Statutory Roles, Rights and Responsibilities of Officers p.29
9.3 Selection of Officers p.29

10. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies p.30
10.1 Duties of Directors p.30
10.2 Direct Fiduciary Breach Claims p.32

11. Transfers/Transactions that May Be Set Aside p.32
11.1 Historical Transactions p.32
11.2 Look-Back Period p.33
11.3 Claims to Set Aside or Annul Transactions p.33

1. STATE OF THE RESTRUCTURING MARKET

1.1 Market Trends and Changes

Statistical and Empirical Data

From a glance at the data and information made available by CERVED (*Osservatorio fallimenti, procedure e chiusura d'impresa – 1q 2021*) company closures have returned to growth, although still far below pre-COVID-19 levels.

In the first quarter of 2021, 2,539 bankruptcy procedures (*fallimenti*) were opened, with a year-on-year increase of 11.9%. Compared to data recorded in first quarter of 2019 (pre-COVID-19), the number of open proceedings is 10.9% lower, although that number may increase in the coming months.

From January to March 2021, there were significant increases in bankruptcy procedures in the services sector (1,515 proceedings opened, an increase of 15.4%) and the construction sector (455 proceedings opened, an increase of 11%), while they have decreased in the industrial sector. Moreover, sole proprietorships are the most affected.

In the same period, the number of other insolvency proceedings with creditors (ie, judicial compositions with creditors (*concordati preventivi*) and compulsory administrative liquidations (*liquidazioni coatte amministrative*)) also increased (0.6%), with 355 proceedings opened. Among such procedures opened between January and March 2021, judicial compositions with creditors are the most numerous (148), followed by compulsory administrative liquidations (105).

In this case, the industrial sector seems to be the most affected and, in particular, energy and utility, manufacturing and real estate ones.

Restructuring Trends

The crisis triggered by the COVID-19 pandemic appears to be one of the main causes of many companies' default, despite legal instruments such as moratoria, stay of action, or the postponement of renegotiation terms under certain procedures provided by the Italian government.

The trend of restructurings and insolvencies procedures in Italy will likely be influenced by the recent legal and regulatory interventions aimed at supporting businesses to face with the economic and financial crisis caused by the COVID-19 pandemic.

Law Decree No 118 of 24 August 2021 - converted into Law No 147 of 21 October 2021 - ("Law Decree No 118/2021"), together with Law No 159 of 27 November 2020 and Law No 69 of 21 May 2021, has provided for urgent measures concerning company crises and business reorganisation anticipating specific parts of Legislative Decree No 14 of 12 January 2019 (the "Crisis and Insolvency Code"), whose entry into force has been postponed to 16 May 2022 (and to 31 December 2023 as regard to the so called "Early Warning System").

Incoming Developments

The Italian Recovery and Resilience Plan (PNRR) provides for an ambitious reform agenda and investment programme. The most important reforms concern public administration and justice systems.

In particular, the reform of civil justice provides, among other things, for:

- a simplification of both first and second instance trial procedures;
- an increase in Alternative Dispute Resolution; and
- a strengthening of enforcement and executive actions.

These reforms will presumably influence the non-performing exposure (NPE) market in Italy, mainly because of a creditor oriented approach.

2. STATUTORY REGIMES GOVERNING RESTRUCTURINGS, REORGANISATIONS, INSOLVENCIES AND LIQUIDATIONS

2.1 Overview of Laws and Statutory Regimes

Royal Decree No 267 of 16 March 1942 (the "Bankruptcy Law") still remains the regulatory framework of reference for financial restructurings, reorganisations, liquidations and insolvencies of business entities and partnerships. Its provisions apply to any type of business enterprise that exceeds one or more of the legal thresholds (assets, revenues, outstanding debt), ie, individual enterprises, partnerships, limited liability companies and joint-stock companies (including listed companies).

The Bankruptcy Law provides for two different in-court procedures for ordinary business companies:

- bankruptcy procedure, entirely liquidatory; and
- judicial composition with creditors, mainly aimed at preserving the going concern.

Amending the Bankruptcy Law

From 2005 onwards, the Bankruptcy Law has been thoroughly amended following a debtor-oriented approach, mainly providing for consensual/out-of-court procedures, such as:

- restructuring agreements (*accordi di ristrutturazione dei debiti*), merely subject to judicial approval; and
- certified recovery plan (*piano di risanamento attestato*), which is not supervised by either the court or a court-appointed receiver.

In addition to the above, Law Decree No 118/2021 has introduced a new procedure, *Composizione negoziata per la soluzione della crisi d'impresa*, aimed at solving business crises in pre-insolvency situations.

Such new provisions allow any individual and collective companies to ask for an appointment of an independent expert (*esperto indipendente*) whose aim is to facilitate negotiations between the debtor and the relevant creditors, in order to reach an agreement on the terms of the restructuring in a tight time frame and, consequently, lead the company to its recovery.

The Crisis and Insolvency Code

An overview of Italian laws and statutory regimes regarding restructuring, reorganisations, liquidations and insolvencies procedures could not be deemed exhaustive without mentioning that, from 16 May 2022, the Bankruptcy Law will be replaced by the Crisis and Insolvency Code, except for:

- rules that have already amended certain provisions of the Italian Civil Code; and
- rules concerning the Early Warning System, which will enter into force on 31 December 2023.

The most innovative provisions set forth by Crisis and Insolvency Code are:

- the Early Warning System aimed at facilitating an earlier emersion of the distress situation through certain preventive restructuring remedies;
- rules concerning the insolvency and restructuring of groups of companies;

- a wide set of rules emphasising the going concern; and
- replacing the name "bankruptcy procedure" with "judicial liquidation procedure" (*liquidazione giudiziale*).

The following procedures should also be mentioned:

- Legislative Decree No 270 of 8 July 1999 (the "Prodi Act"), which provides for extraordinary administration for large insolvent enterprises (*amministrazione straordinaria delle grandi imprese in crisi*), as subsequently amended and implemented by Law No 39 of 18 February 2004 (the "Marzano Act"), Law No 166 of 27 October 2008 (the "Alitalia Act") and Law No 13 of 1 February 2016 (the "ILVA Act"); and
- Law No 3 of 27 January 2012, which provides for a debt discharge in the event of over-indebtedness of private individuals and entities that cannot avail of procedures set forth in the Bankruptcy Law.

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

In Italy, all restructuring, reorganisation, insolvency, receivership and similar proceedings are commenced on a "voluntary" basis, since they can only be activated by the debtor.

Only the bankruptcy procedure may be filed by interested third parties, ie, one or more unsatisfied creditors or the public prosecutor.

In order to avoid negative effects of creditors' passivity in negotiations, reforms enacted in recent years have introduced "involuntary" (meaning "compulsory") restructuring, reorganisation, insolvency, receivership and similar proceedings, providing forms of intra- and/or cross-class cram-down.

All such procedures are ruled by the aforementioned laws. Outside such procedures, mere private agreements between debtors and relevant creditors may be negotiated and perfected, but with no effect vis-à-vis third parties and no protection granted by the above-mentioned procedures.

2.3 Obligation to Commence Formal Insolvency Proceedings

The Bankruptcy Law and the Crisis and Insolvency Code set out specific obligations of activation by the debtor if certain circumstances occur, in order to address a crisis in a timely manner.

In particular, the Crisis and Insolvency Code imposes a proactive attitude on debtor, such as:

- the obligation of the debtor to take appropriate company measures to promptly detect the crisis in order to take the necessary initiatives to resolve it without delay (Article 3); and
- the obligation of the debtor, during the negotiation and execution of the agreements and procedures for the regulation of the crisis and insolvency, to take in time appropriate measures for the prompt resolution of the procedure, also in order not to affect creditors' rights (Article 4, paragraph 2).

In accordance with the Early Warning System, an alert duty is imposed on specific company offices/entities (such as corporate control bodies, auditor or auditing company) and on specific categories of creditors (such as the Tax Authority and National Social Insurance Agency), which must immediately report to the supervisory body of the company any sign of the crisis (Articles 14 and 15 of the Crisis and Insolvency Code).

If it is proved that shareholders have intentionally decided or authorised the accomplishment of detrimental acts to the company, they

are deemed jointly and severally liable with the directors (Article 2476, paragraph 8 of the Italian Civil Code).

Italian case law has recently ruled on the specific topic concerning abusive use of credit (*abusivo ricorso al credito*) and related directors' liability (Supreme Court, judgments No 18610 dated 30 June 2021 and No 24725 dated 14 September 2021). The Supreme Court stated, among other things, that, in the event of abusive lending (*abusiva concessione di credito*), the bank's liability may be joint and several with corporate bodies' one (Article 146 of the Bankruptcy Law).

2.4 Commencing Involuntary Proceedings

Creditors or other parties may only initiate a bankruptcy procedure.

However, creditors representing at least 10% of the claims resulting from the balance sheet may formulate their own plan, place a competing proposal and vote under a judicial composition with creditors (Article 163, paragraph 4 bis of the Bankruptcy Law).

2.5 Requirement for Insolvency

Article 2, paragraph 1, letters a) and b) of the Crisis and Insolvency Code has introduced the following definitions:

- crisis - "a state of financial difficulty which is likely to result in the company's insolvency and which is manifested as the inadequacy of prospective cash flows to fulfil planes obligations on a regular basis"; and
- insolvency - "the state of the debtor manifested by defaults or other external facts showing that the debtor is no longer able to meet its obligations regularly".

In addition, Article 2, paragraph 1, of Law Decree No 118/2021, refers to "a state of financial or economic imbalance that is likely to result in a crisis or insolvency" (the "twilight zone"), which allows the debtor to have access to the *Composizione negoziata per la soluzione della crisi d'impresa*.

2.6 Specific Statutory Restructuring and Insolvency Regimes

Procedures Applicable to Financial Companies

Within the Italian legal system, financial companies, and so companies that can be qualified as credit institutions, financial institutions, investment companies or fund management companies, under either Legislative Decree No 385 of 1 September 1993 (the "Consolidated Banking Law") or Legislative Decree No 58 of 24 February 1998 (the "Italian Securities and Exchange Act") are subject to:

- an administrative compulsory liquidation with mainly liquidation purposes; and
- a special management procedure, which is mainly aimed at restructuring.

All these special procedures are initiated, supervised (and, to some extent, managed) by the relevant supervisory authorities.

Procedures Applicable to Assurance, Insurance and Reinsurance Companies

Assurance, insurance and reinsurance companies, as defined by Legislative Decree No 209 of 7 September 2005 (the "Italian Private Insurance Code"), are subject to the same procedures as mentioned above.

Other

Large insolvent enterprises meeting certain requirements in terms of number of employees and size of debts are subject to extraordinary administration for large insolvent enterprises, in lieu of ordinary liquidation under the bankruptcy procedure.

Pursuant to the Prodi Bis Act, companies with more than 200 employees and an outstanding amount of debt greater than two thirds of both the company's total assets and the last fiscal year's total revenues are subject to a special administration procedure, aimed at reorganisation and managed by a special commissioner (*commissario straordinario*) appointed by the Ministry of Economic Development.

Pursuant to the Marzano Act, an amended procedure is applicable to companies with more than 500 employees and an outstanding amount of debt greater than EUR300 million.

Such special procedures have been further implemented and modified by the Alitalia Decree.

3. OUT-OF-COURT RESTRUCTURINGS AND CONSENSUAL WORKOUTS

3.1 Consensual and Other Out-of-Court Workouts and Restructurings

General Perceptions

In Italy, consensual, non-judicial and other informal restructuring processes are positively viewed by creditors and professionals assisting the parties, and therefore preferred over the statutory processes. From 2005, the Italian legislator has provided sufficient tools and reliefs to allow for the restructuring of viable businesses; as a consequence, a generally restructuring-friendly legal environment has been created in the last 15 years.

Support from Banks

Usually financial entities like banks – and, increasingly, funds specialised in distressed situations – are supportive of borrower companies which are in a state of financial and economic difficulties, but still worthwhile of restructuring attempts; this is mainly because of sensible privileges such as priorities for interim and new financing.

Legal Instruments that Influence the Choice of Restructuring Procedures

Starting from 2005, certain legal instruments have been introduced in the Italian legal system encouraging the choice of restructurings procedures. In particular:

- actions, payments and guarantees provided in a plan, approved by the company and aimed at reinstating a balanced financial situation of its account and at restructuring its indebtedness, as well as acts, payments or guarantees made in execution of a judicial composition with creditors or of a restructuring agreement approved by the court and those legally created after the filing of an appeal for the opening of a judicial composition with creditors, are exempted from claw-back actions in case of subsequent bankruptcy (Article 67, paragraph 3, letters d) and e), of the Bankruptcy Law);
- crimes of "preferential bankruptcy" (*bancarotta preferenziale*) and "simple bankruptcy" (*bancarotta semplice*) are not committed in case of payments and transactions made pursuant to judicial compositions with creditors, restructuring agreements and certified recovery plans (Article 217 bis of the Bankruptcy Law); and
- receivables arising from loans in all forms in the framework of a restructuring agreement or a judicial composition with creditors are pre-deductibles (Articles 182 quater and quinquies of the Bankruptcy Law).

Mandatory Consensual Restructuring Negotiations

Italian laws do not require mandatory consensual restructuring negotiations before the commencement of a statutory process.

However, the *Procedura di composizione assistita della crisi*, aimed at achieving an agreed out-of-Court solution to a company's crisis, is noteworthy; in this case, the *Organismo di composizione della crisi d'impresa* or "OCRI" facilitates negotiations between the debtor and his creditors.

3.2 Consensual Restructuring and Workout Processes

Consensual "Standstills" as Part of an Initial Informal and Consensual Process

In principle, consensual "standstills" and waivers may be used at the very first step of informal and consensual restructuring process and they are highly recommended by best practice mainly because a negotiation phase is necessary for the debtor to choose the right tools to restructure its indebtedness.

However, the use of these tools is made difficult due to the fact that banks and financial creditors require a thorough knowledge of the financial measures underlying the restructuring processes.

Undertakings and Obligations of a Debtor Company

A standstill agreement is usually proposed by the debtor company to its creditors while drafting its comprehensive business and financial restructuring plan.

In return, typical interim obligations on the same company may include:

- to elaborate the restructuring plan with the assistance of financial and legal professionals;
- to project cash flows showing in detail what the inflows and outflows will be during the period creditors are stayed;
- to provide comfort letters issued by an independent expert (*attestatore*) as to company's financial situation;
- to use the facilities granted by the banks in accordance with terms of the standstill agreement;
- to act in order to preserve the business value; and
- to prevent default events from occurring.

Steering Committees

Bankruptcy Law does not provide for any creditors' committee (*comitato dei creditori*) under consensual restructuring processes; nonetheless, it is customary to have professionals performing as co-ordinators and representatives of creditors, such as loan agents and financial/legal advisers creditors' side, if and when appointed at this early stage of the procedures.

Information Provided by the Company

As an immediate consequence of the fact that no sensible creditor would accept a restructuring plan without being properly informed, the debtor company must constantly provide creditors with adequate asset, economic, financial and legal information, giving evidence of the going concern.

Specifically, information regarding the business and the relevant plan should be:

- reliable, updated and complete;
- presented clearly; and
- covering all aspects relevant for creditors and other third parties.

Legal Situations

Coherently with the above, legal situations such as contractual priority, security/lien priority, equity-holder and intercompany priority rights, and the relative positions of competing creditor classes (and equity owners) should be duly represented in the restructuring plan, in the relevant

report by the independent expert appointed by the debtor, as well as in the agreements with creditors.

3.3 New Money

Money is not commonly injected, particularly by banks, into a distressed company before and outside of a statutory or other formal process, except for specific situations, due to super-priority liens or rights established under intercreditor agreements being limited to the parties and not enforceable against third parties when a bankruptcy procedure is commenced.

New money is usually injected by:

- equity owners who may take advantage of the provision set forth in Article 182 quater of the Bankruptcy Law, which establishes a super priority rank granted to 80% of shareholders' loans, if these loans are provided in execution of a restructuring agreement;
- banks and financial institutions, pursuant to Articles 182 quarter and quinquies of Bankruptcy Law.

3.4 Duties on Creditors

An issue commonly raised outside formal proceedings is the difficulty for debtor companies to receive comprehensive and final responses in a reasonable time, especially from banks, other financial creditors and public creditors. The Crisis and Insolvency Code explicitly imposes certain duties and obligations of conduct on creditors.

Creditors are now expressly required to co-operate with the debtor, with the authorities during Early Warning System and *Procedura di composizione assistita della crisi*, as well as with bodies appointed by the Judicial Authority during the proceedings. Creditors are also required to respect obligation of confidentiality regarding the debtor's situation, the measures taken by the latter and the information acquired (Article 4, paragraph 3, of the Crisis and Insolvency Code).

The "Guidelines for financing companies in financial distress" (*Linee-guida per il finanziamento alle imprese in crisi* – Second Edition, 2015) set out certain "virtuous patterns of behaviour", such as providing to the debtor co-ordinated responses, compatible with its crisis situation and within a reasonable timeframe; particularly in case of numerous creditors with small claims, in order not to cause delays in the restructuring of the company.

The *Codice di comportamento tra banche per affrontare i processi di ristrutturazione atti a superare le crisi di impresa* provides common procedural protocols to foster co-ordination among creditors (eg, by appointing a steering committee), basing discussions on reliable information and ascribing a duty of fairness to the other banks involved in negotiations.

3.5 Out-of-Court Financial Restructuring or Workout

Restructuring over the Dissent of Creditors

In order to facilitate composition with creditors, the Bankruptcy Law and Crisis and Insolvency Code provide for certain legal instruments whereby consensual out-of-court restructuring or workout may be accomplished and effectuated over the dissent of minority creditors.

Recently, Law Decree No 118/2021 has broadened debtors' option for use (or simply threaten to use) procedures and measures envisaging cram-down mechanisms, with the aim to pose a limit on creditors' "free riding" (ie. when a creditors' decision not to participate in the restructuring negotiations is motivated by opportunistic yet informed considerations) or to remove creditors' "rational apathy" (ie, when creditors' do not have an incentive to engage in negotiations because of the size of the claim).

Legal Instruments

Judicial composition with creditors

If a creditor belonging to a dissenting class or – in the event of failure to form a class – dissenting creditors representing 20% of the claims allowed to vote, contest the convenience of the proposal filed by the debtor, the court may nonetheless approve the judicial composition with creditors if it verifies that creditors may be satisfied to the same extent as they would have been following a viable alternative procedure (Article 180, paragraph 4 of the Bankruptcy Law).

Restructuring agreement

The competent court is allowed to approve a restructuring agreement also without the adherence of the financial administration or of the social security entities (Article 182 bis, paragraph 4 of the Bankruptcy Law).

A restructuring agreement may also contain a proposed tax settlement for the partial or deferred payment of certain overdue taxes (Article 182 ter of Bankruptcy Law).

A cram-down of dissenting minority creditors under a restructuring agreement is possible by creating one or more categories among them having similar legal status and economic interests, provided that the following conditions are met:

- all creditors belonging to the relevant category have been informed of the negotiations, have been allowed to participate in such negotiations in good faith and have acquired complete and up-to-date information about debtor's asset, economic and financial situation;
- the agreement provides for the continuation of the business activity, directly or indirectly;
- the claims of the creditors belonging to one category which have agreed to a restructuring agreement represent at least 75% of the debtor's overall indebtedness vis-à-vis the creditors belonging to the same category;
- the creditors of the same non-member category to whom the effects of the agreement are extended are satisfied to an extent not less than the winding-up alternatives;
- the debtor has notified to the creditors the agreement, the application for approval by the court and the attached documents.

Some of said conditions are not required (for example even when no continuity of business is provided) when at least 50% of the overall indebtedness of the debtor is represented by debts vis-à-vis banks and financial intermediaries (Article 182 septies, paragraph 5, of the Bankruptcy Law, as amended by Law Decree No 118/2021).

Similar provisions are also contained in the Crisis and Insolvency Code (Articles 61 and 63).

4. SECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

4.1 Liens/Security

The Italian legal system provides for various forms of guarantees over specific assets and/or over the whole debtor's property. Collateral includes the following.

- Mortgages (*ipoteca immobiliare*) – creditors often use a mortgage to secure rights over immovable property. A mortgage is by far the most common form of security taken over immovable property (please note that in Italy *mutui fondiari* pursuant to Articles 38 et seq of the Consolidated Banking Law – mortgage or land loans - are by far the most common financing instrument to finalise the purchase of a new property by using a residential property as a collateral).

- Mortgages over registered movable goods (*ipoteca su beni mobile registrati*) – creditors can use a mortgage to secure registered movable property, such as ships and motor vehicles).
- Pledges (*pegno*) – creditors often use a pledge to secure their rights over movable property.
- Special liens (*privilegio speciale*) – special liens arise automatically by operation of law over certain claims. Claims over immovable property which benefit from special liens include:
  (a) claims for expenses incurred in foreclosing an asset;
  (b) claims for expenses incurred in conserving an asset;
  (c) tax claims on the asset; and
  (d) claims for non-performance of a property sale agreement.
- General lien (*privilegio generale*) – a general lien differs from a special lien because it must apply to all the debtor's assets and can only apply to movable property. Claims which are automatically protected by a general lien include employee salary claims, social security claims and certain tax claims.

Pursuant to Italian law, before starting a proceeding of enforcement, creditors must request for payment; once a certain time has elapsed, depending on the type of security interest, they can start the enforcement proceeding. With reference to pledges, mortgages and special liens, creditors start the enforcement through a court proceeding.

Law Decree No 59/2016 of 3 May 2016 introduced a new form of credit guarantee, the so called "non-possessory pledge" (*pegno non possessorio*), in order to secure receivables in connection with the ordinary conduct of business.

The effective use of such new security has been recently made possible by Law Decree No 114 of 10 August 2021 through a web portal for the registration of non-possessory pledges, in which the formalities submitted must be entered daily.

Moreover, such decree also introduced a new form of corporate financing secured by the transfer to the lending party of a real estate asset and conditioned to the possible breach by the borrower to certain obligations under the relevant facility agreement.

Conversely, a personal guarantee (*fideiussione*) is a strictly regulated form of guarantee, which remains valid only if the underlying guaranteed obligation is valid. In this case, the guarantor is released if the guaranteed creditor has further financed the relevant debtor although it was aware of its difficult financial conditions.

Moreover, an autonomous first demand guarantee is intended as a tool ensuring payment to the relevant creditor independently of the circumstances affecting the relevant debtor or the underlying guaranteed obligation if the contractual conditions/steps and procedures provided by the relevant agreement are fulfilled.

4.2 Rights and Remedies

Once the insolvency procedure is opened, secured creditors are satisfied according to the order laid down by specific rules provided by the law, regardless of any contractual intercreditor covenants.

Under a judicial composition with creditors, the proposal made by the debtor may envisage secured creditors not being satisfied in full, provided that it allows that their claims be met to an extent that is not lower than the proceeds in the event of liquidation.

A stay of action on creditor is available under reorganisation and insolvency procedures.

Article 182 bis of the Bankruptcy Law provides for certain limits to enforce secured creditors' rights and remedies.

Specifically, from the date of publication and for sixty days thereafter, creditors with a title prior to that date cannot begin or continue precautionary or executive actions against the debtor's assets or acquire pre-emptive rights if not already agreed. Moreover, a stay of action may also be required by the debtor during the negotiations and before the formalisation of a restructuring agreement by filing a request to the competent court.

4.3 Special Procedural Protections and Rights

Secured creditors must follow certain rules in order to enforce their rights under a bankruptcy procedure. Every claim, even if secured, must be determined according to the strict provisions set forth in the Bankruptcy Law.

Under a judicial composition with creditors:

- secured creditors whose claims are proposed to be reimbursed in full, are not entitled to vote if they do not waive in whole or in part their pre-emptive right; the portion of the claim not secured shall be treated as an unsecured credit and the waive shall take effect for the sole purpose of the agreement (Article 177, paragraph 2 of the Bankruptcy Law; and Article 102 of the Crisis and Insolvency Code); and
- the plan may provide a moratorium of up to two years from the approval for the payment of creditors with privilege, pledge or mortgage, unless provision is made for the winding-up of the assets in respect of which the pre-emption exists (Article 186 bis of the Bankruptcy Law and Article 86 of the Crisis and Insolvency Code).

5. UNSECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

5.1 Differing Rights and Priorities

The Bankruptcy Law provides for a division of creditors into classes (*classi*) under a judicial composition with creditors (Article 160), or categories (*categorie*) under a restructuring agreement (Article 182 septies); in both cases such division depends on legal position and economic interests.

In a bankruptcy procedure, once the company's assets have been sold, the distribution of the relevant value among creditors follows a specific order:

- super priority pre-deductible credits;
- secured credits subject to pre-emption; and
- other unsecured credits.

This waterfall applies in all insolvency proceedings aimed at winding-up the company.

A plan should propose how shareholders are to be classified for voting purposes, but it is not customary that they receive any distribution.

5.2 Unsecured Trade Creditors

Unsecured trade creditors are not generally kept as a whole in a single class or category during a restructuring process; conversely, it is possible to place specific unsecured creditors (eg, all the company's suppliers) in the same class or category to make it possible for them to build consensus among creditors, abiding by the principle of *par condicio creditorum*.

5.3 Rights and Remedies for Unsecured Creditors

The Bankruptcy Law provides certain rights and remedies for unsecured creditors in an insolvency context.

The proposal for a judicial composition with creditors must ensure the payment of at least 20% of the amount of the unsecured receivables (Article 160, paragraph 4 of the Bankruptcy Law).

Should a judicial composition with creditors have a liquidation purpose, new money must increase the satisfaction of unsecured creditors by at least 10% compared with a judicial liquidation (Article 84, paragraph 4 of the Crisis and Insolvency Code).

Should stay of action measures be provided, they also apply to unsecured creditors.

5.4 Pre-judgment Attachments

The Bankruptcy Law does not provide for any pre-judgment attachments.

However, the Crisis and Insolvency Code has now provided for certain precautionary measures, defined as "precautionary measures issued by the competent Court for the protection of the debtor's assets or business, which appear, according to the circumstances, to be most appropriate for temporarily ensuring the effects of the procedures for the regulation of the crisis or insolvency" (Article 2, paragraph 1, letter q). Such measures are also mentioned in Article 7 of Law Decree No 118/2021.

The Italian Civil Code provides for certain legal instruments aimed at preserving debtors' patrimonial guarantee and, particularly, the *sequestro conservativo* (Article 2905 of the Italian Civil Code), pursuant to which creditors may apply for the attachment of the debtor's assets when they have a well-founded concern of losing the security of their claims.

5.5 Priority Claims in Restructuring and Insolvency Proceedings

Proceeds from the sale of the assets in Bankruptcy Procedure are meant to be used to satisfy priority claims specifically described (Article 111 of the Bankruptcy Law), such as costs and expenses that the receiver (*curatore*) and the Court incur during insolvency proceedings as well as professional fees and other debts incurred after the debtor files its bankruptcy petition. Moreover:

- receivables arising from loans in all forms provided in performance of a judicial composition with creditors or a restructuring agreement are pre-deductibles for the purposes of the aforementioned Article 111 (pursuant to Article 182 quater of the Bankruptcy Law);
- a debtor who has an application for admission to a judicial composition with creditors or an application for the approval of a restructuring agreement, can request the court for the authorisation to obtain financing, which is pre-deductible, if an independent expert certifies that these loans are functional to the best satisfaction of creditors (pursuant to Article 182 quinquies of the Bankruptcy Law).

Such claims are satisfied with super priority ranking, prior to all debtor company's existing debts, except from secured creditors who have priority over cash realised through the sale of the company's secured assets.

In addition, the Crisis and Insolvency Code specifies which claims (Article 6) and which loans (Articles 99-102) are pre-deductible.

6. STATUTORY RESTRUCTURING, REHABILITATION AND REORGANISATION PROCEEDINGS

6.1 Statutory Process for a Financial Restructuring/Reorganisation

The following are the main provisions concerning statutory processes, procedures and mechanisms for reaching and effectuating a financial restructuring/reorganisation.

Creditor Consents

A judicial composition with creditors must be approved by creditors holding a majority of the claims. Should different classes of creditors be provided, the composition is approved only if the majority of classes also approve it. Once a judicial composition with creditors is confirmed by the court, it is binding on all creditors prior to its publication in the Register of Companies.

A restructuring agreement is approved when the agreement is concluded with creditors representing at least 60% of claims. The debtor can ask that the effects of the restructuring agreement be extended to creditors which have not agreed the contents of the agreement, under certain conditions (Article 182 septies of the Bankruptcy Law).

A new rule introduced by the Article 7 of the Crisis and Insolvency Code concerns unified procedures for the regulation of crisis and insolvency, providing for a consolidated procedure of judicial ascertainment of the crisis or insolvency before the court and an examination of all the requests and petitions at the same time. While examining requests and petitions, the court shall give priority to those aimed at resolving the crisis by means of procedures other than judicial liquidation, if they are accompanied by a plan that recognises the convenience for creditors.

Limitations on the Types of Agreements

In a judicial composition with creditors, there are no limitations on the types of agreements between the affected parties, provided that the *par condicio creditorum* rule is respected; moreover, Article 160, paragraph 1, letter a) of the Bankruptcy Law provides for the restructuring of debts and satisfaction of claims by any means, depending on the strategies adopted by the debtor.

Under a restructuring agreement, there are fewer limitations on the types of agreements which can be reached between debtor and creditors since no *par condicio creditorum* rule applies.

Under the proposed plan of a judicial composition with creditors and/or a restructuring agreement, the company can offer any kind of settlement to its creditors, including postponement of debt, debt write-downs and exchange of debt for equity.

Objectives and Purposes

A judicial composition with creditors is generally aimed at safeguarding the company and protecting the assets in the creditors' interest. The Crisis and Insolvency Code provides that, under a judicial composition with creditors, debtors may achieve the satisfaction of creditors by continuing their business or by liquidating their assets (Article 84).

The purpose of a restructuring agreement is to resolve a company's state of crisis.

Role of the Court

A judicial composition with creditors is an in-court procedure. During which the company is under the supervision of the judicial commissioner(s) (*commissario giudiziale*). Certain extraordinary transactions require court approval.

A restructuring agreement is negotiated between the parties out-of-court, even if court confirmation is required in order to provide legal certainty through assessing the viability of the plan.

Timelines and Milestones

A judicial composition with creditors proceeding cannot last for more than nine months from the date of filing the petition. The competent court can extend this period for an additional period of two months, but only once. These time periods do not bind the courts.

Conversely, there is no time limit for restructuring agreements since their length depends on the negotiations with creditors. The in-court phase usually lasts for two or three months.

Calculation of Claims

The application for admission to a judicial composition with creditors must be submitted together with a list of names of creditors, with an indication of their claims and causes of pre-emption. The judicial commissioner shall then proceed to the verification of the list of creditors and debtors based on accounting entries submitted, making any necessary adjustments (Article 161 of the Bankruptcy Law).

The application for the approval of a restructuring agreement must be submitted together with the same documentation, including a list of creditors (Article 182 bis of the Bankruptcy Law).

Binding of Creditors

Upon confirmation, a judicial composition with creditors is binding on all creditors prior to its publication in the Register of Companies.

Even though Article 182 bis, paragraph 1, of the Bankruptcy Law provides for the payment-in-full of non-adhering creditors, its paragraph 4 allows the court to approve a restructuring agreement also without the adherence of the financial administration or of the bodies managing social security forms, under certain conditions.

Challenging Mechanism

Dissenting creditors and interest third parties may challenge a judicial composition with creditors in court on the grounds of its validity.

Moreover, one or more creditors representing at least 10% of the claims resulting from the balance sheet deposited pursuant to Article 161 of the Bankruptcy Law, may submit a competing (and different) proposal.

Within 30 days after publication of a restructuring agreement in the Register of Companies, creditors and any other interest party may file an opposition. The court, in deciding on the opposition, may approve the restructuring agreement.

Final Steps and Conclusion

A judicial composition with creditors must be approved by creditors holding a majority of the value of the debt, and, if the restructuring proposal divides them into different classes, also by a majority of these classes. Secured creditors are not entitled to vote, if paid in full. When secured creditors' claims are treated as unsecured claims as to the portion of their claims that exceeds the market value of their collateral, they are entitled to vote with respect to such a portion.

In case of dissenting creditors, the court may rule against creditors in a dissenting class only if it determines that such creditors' claims will be satisfied to at least the same extent as under the winding-up alternative ("no creditor worse off"). Following creditors' approval and court confirmation, a judicial composition with creditors becomes binding on all creditors, including those that cast a dissenting vote.

If a judicial composition with creditors is not approved by creditors, the debtor, if found insolvent, is declared bankrupt and becomes subject to a bankruptcy procedure.

The debtor is allowed to reach out-of-court restructuring agreements, to be approved by not less than 60% of creditors by value of claims (Article 182 bis of the Bankruptcy Law), or by not less than 30% of creditors by value of claims, if certain conditions are met (Article 182 novies). Such agreements, which are only binding for the consenting creditors, are subject to judicial confirmation.

Certified Recovery Plans

Though certified recovery plans are not to be included in insolvency procedures, according to the Crisis and Insolvency Code, a company may prepare a plan, to be presented to creditors, which is deemed appropriate to allow the recovery of the company's debt exposure and to ensure the rebalancing of its economic and financial situation.

Such plan, together with a relevant report by an independent expert, must indicate:

- the economic and financial situation of the company;
- the main causes of the state of crisis;
- strategies to be put in place;
- a list of creditors and the amount of their claims, as well as a list of non-adhering creditors;
- injection of new money;
- the timing of the actions to be taken; and
- the business plan.

6.2 Position of the Company

Automatic Stay

Once a plan under a judicial composition with creditors has been confirmed by the competent court, an automatic stay prevents creditors from creating new security interests or taking further actions against the debtor or its assets to enforce their security or collect their credits. Creditors' claims freeze on the filing date, other than claims for interest on secured claims, which continue to accrue during the proceeding.

Starting from the filing date of a restructuring agreement, an automatic 60-day stay prevents creditors from taking further actions against the debtor or its assets to enforce security or collect their debts. Under certain circumstances, this 60-day stay can begin from the opening of negotiations with creditors.

Management and Continuation of Business Activities

During a judicial composition with creditors, the debtor can continue to run its business (*spossessamento attenuato*) under the supervision of a court-appointed commissioner. The court must approve extraordinary transactions, such as the company incurring new debt.

A plan under a judicial composition with creditors may provide for the continuation of the business activities, if conditions set forth in Article 186 bis of the Bankruptcy Law are met:

- the plan sets out an analysis of the expected costs and revenues arising from the continuation of the business activities, with express indication of the necessary financial resources; and
- the opinion of an expert is submitted along with the plan, certifying that the continuation of said activities is in the creditors' best interest.

For restructuring agreements, there is no dispossession and therefore the directors of the company are entitled to manage the business.

New Money

Under the Bankruptcy Law, financing is generally allowed in the forms provided by Articles 182 quater and quinquies, including:

- financing provided to the debtor according to and in compliance with a judicial composition with creditors or a restructuring agreement already approved by the court;
- financing provided to the debtor for the purpose of submitting an application for the admission to a judicial composition with creditors of the approval of a restructuring agreement;
- financing provided to the debtor after (or immediately before) the submission of an application to a judicial composition with creditors or the submission of the approval of a restructuring agreement, when an independent expert certifies that it determines a better return for creditors; and
- financing provided to the debtor after (or immediately before) the submission of an application to a judicial composition with creditors or the submission of the approval of a restructuring agreement, when it is aimed at fulfilling the urgent needs of the company, provided that the latter will suffer permanent damages without obtaining the financing and the debtors cannot find another financial support.

6.3 Roles of Creditors

Classes of Creditors

In a judicial composition with creditors, creditors are divided by law into secured creditors and unsecured creditors. In addition to those created by law, the plan on which the judicial composition with creditors is based may split creditors into different classes with a similar legal position and economic interests. These classes may be treated differently within the plan, which may provide different terms and conditions to settle their credits.

In a restructuring agreement, the debtor may create different classes of creditors with similar legal positions and economic interests (Article 182 septies of the Bankruptcy Law).

Organisation and Representation

The creditors' committee represents creditors and looks after their interests.

In a judicial composition with transfer of assets, the court shall appoint a creditors' committee consisting of three or five members to which, to the extent compatible, the provisions on the composition and functioning of the creditors' committee contained in Articles 40 and 41 of the Bankruptcy Law shall apply.

Information Made Available to Creditors

The Crisis and Insolvency Code provides that creditors must be fully and clearly informed about the crisis or insolvency management tool chosen by the debtor (Article 3).

6.4 Claims of Dissenting Creditors

Even though smaller creditors must also be informed about any restructuring agreement, they do not tend to take an active – or at least participatory – role in the negotiation given their limited exposure.

Cram-down mechanisms have also been introduced into the informal consensual processes under the Bankruptcy Law to avoid a restructuring agreements failure or delay, therefore claims of dissenting creditors may be modified without their consent. In relation to this and, particularly, to requirements and limits of such procedures, please bear in mind that:

- it is possible to file a tax arrangement not only together with a judicial composition with creditors, but also with a restructuring agreement, when a winding-up is less convenient; the tax arrangement enables debtors to pay

their tax debts partially and periodically (Article 182 ter of the Bankruptcy Law);
- a debtor can also ask to extend the effects of the restructuring agreement to creditors which have not agreed to the contents, divided in one or more categories having similar legal status and economic interests, when certain conditions are met, such as:
  (a) all creditors belonging to the relevant category have been informed of the negotiations, have been allowed to participate in such negotiations in good faith and have acquired complete and up-to-date information about debtor's asset, economic and financial situation;
  (b) the agreement provides for the continuation of the business activity, directly or indirectly (except where half of the indebtedness is owed to banks and financial intermediaries);
  (c) claims of the creditors belonging to one category which have agreed to the Restructuring Agreement represent at least 75% of the debtor's overall indebtedness vis-à-vis the creditors belonging to the same category;
  (d) creditors of the same non-member category to whom the effects of the agreement are extended are satisfied to an extent not less than the winding-up alternatives; and
  (e) debtor has notified to the creditors the agreement, the application for approval by the court and the attached documents.

6.5 Trading of Claims against a Company

Claims against a company undergoing a restructuring procedure may be traded.

In a bankruptcy procedure, should claims be transferred before the distribution, the receiver attributes the quota of the credits to the transferee. That communication includes the documentation demonstrating the transfer and a motion signed by the transferor and the transferee. In this case, the receiver provides for the correction of the list of creditors. The same provisions also apply in case of subrogation of the creditor.

Draft Law No 788, presented on 12 September 2018, is aimed "at allowing debtors who are non-performing, but who still have the possibility of getting back into the game, to be able to extinguish their debt at a reasonable price, while still allowing the assignee creditor to earn a fair profit".

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group

The Crisis and Insolvency Code introduces a brand-new set of provisions governing the crisis and the insolvency of corporate groups (Articles 284-292), firstly providing for the definition of "corporate group", based on the notion of direction and co-ordination (Article 2497 of the Italian Civil Code).

Companies in a state of crisis or insolvency belonging to the same group, all having the centre of their main interests (COMI) in Italy, can present a single petition for access to a judicial composition with creditors or for the approval of a restructuring agreement. Companies may submit a single plan of all of them or different plans mutually linked.

The Crisis and Insolvency Code sets out a number of rules intended to simplify the procedures relating to companies belonging to the same group, such as the appointment of a single judge (*giudice delegato*) and a single judicial commissioner, as well as the inability to terminate or invalidate a judicial composition with creditors for reasons affecting one or multiple group companies, unless the circumstances on which the termination is based would significantly affect

the judicial composition with creditors of other companies.

6.7 Restrictions on a Company's Use of Its Assets

Italian law provides for certain conditions applied to the company's use of its assets during a restructuring process.

Generally, during a judicial composition with creditors, the existing management can continue to run the company under the supervision of a court-appointed commissioner. The court must approve extraordinary transactions, such as the company incurring new debt. Moreover, a plan under a judicial composition with creditors may provide for the continuation of the business activities, under certain conditions (Article 186 bis of the Bankruptcy Law).

For restructuring agreements and certified recovery plans, there is no dispossession and therefore the directors of the company are entitled to manage the business.

The Crisis and Insolvency Code sets out certain rules relating to extraordinary transactions of the debtor company in the context of a judicial composition with creditors (Article 116). Specifically, if a plan under a judicial composition with creditors provides for extraordinary transactions (such as mergers, demergers or transformations), the validity of such transactions may be contested by creditors only by challenging the court approval.

6.8 Asset Disposition and Related Procedures

Execution of the Sale of Assets

An entity in a state of crisis may propose a judicial composition with creditors based on a plan that may include the restructuring of debts and satisfaction of claims by any means including disposal of assets, assumption or other extraordinary transactions (Article 160 of the Bankruptcy Law).

A noteworthy aspect is the introduction of a competitive procedure if the plan submitted by the debtor contains an offer aimed at transferring to a person, even before court approval, the company or one or more branches of the company or specific assets. The same provisions shall also apply when the debtor has entered into an agreement which has as its purpose the non-immediate transfer of a company, a branch of a company or specific assets.

The competitive procedure is intended to search for parties interested in the purchase of the assets.

If a judicial composition is based on the transfer of assets, and does not otherwise provide, the court appoints one or more judicial liquidators (*liquidatore giudiziale*) in the approval decision and a committee of three or five creditors to assist in the liquidation and determine the methods of the liquidation.

Sales of companies and branches of companies, immovable property and other goods registered in public registers, as well as, among others, sales of assets must be authorised by the creditors' committee (Article 182 of the Bankruptcy Law).

Moreover, through the sale of non-strategic assets, the company may secure liquidity, which may be essential to the survival of its core business as a going concern.

Cancellation of Registrations and Transcriptions

The cancellation of the registrations relating to rights of pre-emption, as well as the cancellation of the transcriptions of attachments and seizures and of any constraint, shall be carried out by

order of the court, unless otherwise provided for in the approval decree.

Credit Bidding

Regarding credit bidding, although there are no provisions on this point, on the basis of general principles offsetting does not seem to be allowed.

In a bankruptcy procedure and judicial composition with creditors, creditors are prohibited from making deals with the debtor to "sell" their votes (*mercato di voto*) (Article 233 of the Bankruptcy Law).

Pre-negotiated Transactions

Though during restructuring proceedings it is deemed possible to effectuate sales and similar transactions that have been pre-negotiated prior such proceedings, only acts carried out in execution of a plan certified by an independent expert are exempt from claw-back actions.

6.9 Secured Creditor Liens and Security Arrangements

Secured creditors may freely dispose of their claims without any limits.

Conversely, judicial mortgages recorded in the 90 days preceding the date of publication of the application in the Register of Companies are ineffective with respect to claims existing before the judicial composition with creditors (Article 168 of the Bankruptcy Law and Article 46, paragraph 5 of the Crisis and Insolvency Code).

6.10 Priority New Money

Priority new money can be obtained by the company under the rules set forth in Articles 182 quater and quinquies of the Bankruptcy Law and Articles 99-102 of the Crisis and Insolvency Code.

New loans may also be secured by assets of the company.

6.11 Determining the Value of Claims and Creditors

It is not possible to use a statutory process as a forum for determining the value of claims.

Every claim, even if provided with the right of pre-emption, as well as every personal right or right in real property or movables, must be determined according to the provisions set forth in Title I, Chapter Five of the Bankruptcy Law.

6.12 Restructuring or Reorganisation Agreement

Within a judicial composition with creditors, the plan and the documents submitted by the debtors shall be accompanied by the report of an independent expert, designated by the debtor, attesting the veracity of the business data and feasibility of the plan itself. Restructuring agreements and certified recovery plans are also based on a debtor's plan, the assumptions and conclusions thereof being certified by the said independent expert. Moreover, both judicial composition with creditors and restructuring agreement require a court approval.

The debtor may request the court to authorise the terminating of pending contracts or suspend them for 60 days, which may only be extended once. Such request must be made by submitting a petition for a judicial composition with creditors, or afterwards once the same has been approved by court.

The counterparty is entitled to a compensation equal to the damages resulting from the contract's non-fulfilment.

Such rules do not apply certain contracts such as employment contracts and property lease contracts.

6.13 Non-debtor Parties

Even if approved, a judicial composition with creditors is binding on all creditors, co-debtors, guarantors of the debtor and other jointly and severally liable debtors remains responsible towards creditors. Further, unless otherwise agreed, it is also effective for unlimited liability partners. Conversely, some specific rules provide for release of non-debtor parties from liabilities.

In particular, Article 182 decies of the Bankruptcy Law states that Article 1239 of the Italian Civil Code applies to creditors who have concluded a restructuring agreement with the debtor.

In the event that the effectiveness of a restructuring agreement is extended to non-adhering creditors, the latter shall not lose their rights against co-obligors, guarantors of the debtor and recourse holders.

Unless otherwise agreed, restructuring agreement of the company shall be effective vis-à-vis members with unlimited liability, who, if they have provided securities, shall continue to be liable on that other basis.

6.14 Rights of Set-Off

Creditors have the right to offset the debts they owe the bankrupt company with claims owed them by the same, even in case where they have not come due before the bankruptcy decree (Article 56 of the Bankruptcy Law).

For credits not yet come due, no set off will take place if the creditor acquired the credit by an inter vivos transfer after the bankruptcy decree or the year before.

A condition for the right of set-off is that debts and claims to be set off against each other must be liquid (and so determined in their amount) and be of the same nature.

The same provision is contained by Article 155 of the Crisis and Insolvency Code.

6.15 Failure to Observe the Terms of Agreements

The Bankruptcy Law provides for certain implications of the company failing to observe the terms of a restructuring agreement.

The non-performance of a restructuring agreement resulting in a significant deviation from assumptions (*scostamento significativo*) may lead to different consequences, depending on creditors' position. Please note that a deviation should be considered significant when the hypothesis included in the agreement as a milestone can no longer be implemented or can be implemented only under conditions that are different from those assumed in the plan.

As for adhering creditors such non-performance will give rise to the consequences set forth in the agreement entered into with the debtor (eg, the possibility of activating an express termination clause) and will entitle creditors, if the conditions are met, to invoke the ordinary remedies provided for by the Italian Civil Code, such as the acceleration and termination of the contract. In such event, creditors' original claims are reinstated, usually forcing the debtor into insolvency.

For non-adhering creditors, as no agreement has been perfected with them, they usually file for a bankruptcy procedure.

In order to avoid termination of a restructuring agreement, it is now provided that whenever substantial amendments to the restructuring plan become necessary after the approval by the court, the debtor shall make such amendments as may be appropriate to ensure the execution of the restructuring agreement (Article 182 bis, paragraph 8 of the Bankruptcy Law).

In this case, the independent expert appointed by the debtor must renew the relevant report.

In judicial composition with creditors, each of creditors may only request the termination of the judicial composition for non-performance in case of serious non-fulfilment, or the annulment when it is discovered that the debtor has exaggerated its liabilities or subtracted a significant part of its assets.

6.16 Existing Equity Owners

Equity owners are residual claimants who are not entitled to any particular return and not entitled to be paid at all unless creditors receive their entitlement, or else agree otherwise by consenting to a restructuring plan.

At the same time there are no provisions which impose on equity owners any squeeze-out mechanism from the debtor company. For micro-, small- and medium-sized enterprises the viability of a restructuring plan may depend on the same persons combining the role of manager and of equity holder.

Moreover, judicial compositions with creditors (unless the plan provides for a capital increase or an extraordinary transaction), restructuring agreements and certified recovery plans have no impact on limited liability partners, as well as a bankruptcy procedure of a company doesn't entail the bankruptcy of its limited liability partners.

The delegated judge (*giudice delegato*) may, on the proposal of the receiver, issue a decree ordering the limited liability partners and previous owners of shares to make any required payments, as long as the deadline for payment has not expired (Article 150 of the Bankruptcy Law).

7. STATUTORY INSOLVENCY AND LIQUIDATION PROCEEDINGS

7.1 Types of Voluntary/Involuntary Proceedings

General Overview

The bankruptcy procedure has liquidation purposes. Upon declaration of bankruptcy, the court delegates a judge to supervise the procedure and appoints a committee representing the debtor's creditors. Upon insolvency declaration, the court also appoints a receiver who oversees the liquidation of the bankrupt's estate and distribution of the proceeds to creditors according to the priority of their respective claims. The liquidation is usually carried out piecemeal, but the receiver may sell the whole business (or portions thereof) as a going concern when in the best interest of creditors.

Moreover, in place of the liquidation of the bankrupt's estate and distribution of the proceeds, the law provides for the possibility of reaching a Court-supervised Composition with Creditors (*concordato fallimentare*) during the proceeding, thereby enabling a faster and generally more profitable closure of the liquidation.

The bankruptcy procedure will be replaced by a judicial liquidation after the entry into force of the Crisis and Insolvency Code. A new important provision introduced by the latter concerns unified procedures for the regulation of crisis and insolvency, providing for a consolidated procedure of judicial ascertainment of the crisis or insolvency before the court and all the requests and petitions are collected and examined at the same time. Moreover, while examining requests and petitions, the court will give priority to those aimed at resolving the crisis by means of procedures other than a judicial liquidation, if they

are accompanied by a plan that recognises the convenience for creditors.

A compulsory administrative liquidation is a special liquidation procedure that may apply to companies operating in certain supervised markets of public interest, such as banks, financial intermediaries and insurers. This procedure is activated in the event of insolvency or material irregularities in the management of the relevant company. Article 198 of the Bankruptcy Law provides for the appointment of a liquidator (*commissario liquidatore*), whose role is similar to that of the receiver in a bankruptcy procedure.

Commencement

Bankruptcy may be filed either by the debtor, by its creditors or, rarely, by a public prosecutor.

A compulsory administrative liquidation may be requested by the company, the authority supervising the company or by one or more creditors.

Statutory Requirements

Recourse to the procedures regulated by the Bankruptcy Law is restricted to companies that carry on "commercial business" and that exceed certain size requirements. The company must also be in a state of insolvency.

The subjective condition of a compulsory administrative liquidation is identified from time to time by special laws that provide for it in specific categories of companies, all of which have in common a public connotation, while the objective condition is the state of insolvency of the company.

Calculation of Claims

The company filing for Bankruptcy must do so by depositing, among other things, a list of its creditors and the amount of their claims (Article 14 of the Bankruptcy Law). However, the bankrupt company is ordered by the court to deposit a list of creditors within three days if it has not already done.

Moreover, creditors must file a motion to be placed on the list of creditors at least 30 days before the hearing for the verification of the claims (Article 93 of the Bankruptcy Law).

Within a compulsory administrative liquidation, the recognition of a creditor's claim is based on the records and documents of the company. Creditors may submit to the liquidator their observations or motions. The liquidator then compiles a list of claims allowed or rejected.

Timelines and Milestones

The bankruptcy judgment has immediate effect from the day of its docketing.

A relevant deadline is the one related to the liquidation program: within 60 days from the compiling of the inventory plan, and no later than 180 days from the bankruptcy judgment, the receiver issues a liquidation program to submit to the creditors' committee for its approval. That plan must indicate the deadline to complete the liquidation of the company's assets, which cannot go beyond two years from the filing of the bankruptcy judgment, unless the receiver considers that a longer term is necessary.

There is no set time limit for the closure of a bankruptcy procedure or compulsory administrative liquidation, even though the European Court of Human Rights envisaged as a reasonable duration of bankruptcy proceedings a period of seven years.

Stay of Actions

Except as otherwise provided by law, from the day the bankruptcy judgment is issued, no individual enforcement or protective action, even for claims matured during the bankruptcy pro-

cedure, may be started or pursued on the assets of the company.

Appointment of Office Holders

The management and directors of the company are not allowed to continue its business. A bankruptcy procedure implies that the company is deprived of the administration and availability of assets existing at the date of the starting of the procedure.

The receiver is responsible for managing the procedure and for administering the assets of the bankrupt company in order to liquidate them and satisfy the claims of creditors.

A liquidator is appointed in a compulsory administrative liquidation.

Disclaim of Contracts

If a contract has not yet been carried out or not been completed by both parties when one of them is declared bankrupt, its execution generally remains suspended until the receiver, with authorisation from the creditors' committee, decides to take the place of the bankrupt, assuming all the obligations arising therefrom, or to terminate the contract (Article 72 of the Bankruptcy Law).

Conversely, in a judicial composition with creditors, the debtors may request to be authorised to dissolve the contracts in progress at the time of submission of the application or to suspend them for not more than 60 days, renewable once. In such cases, the contractor is entitled to a compensation equal to the damages resulting from the contract's non-fulfilment.

However, in case of consensual contract performed by one party, the receiver could not release the contract. In particular, the receiver is not entitled to terminate contracts such as:

- contracts with real effects;
- service contracts when the service has already been provided; and
- contracts already solved by the company prior to a bankruptcy procedure.

Rights of Set-Off

The Bankruptcy Law establishes a right of set-off, provided that the claims are due, quantified and certain (Article 56).

Information Made Available to Creditors

In a judicial composition with creditors, the Bankruptcy Law provides for a debtor's obligation to regularly provide information (Article 161, paragraph 8).

Moreover, Crisis and Insolvency Code provides that creditors must be fully and clearly informed about the crisis or insolvency management tool chosen by the debtor (Article 3).

Final Steps and Conclusion

The receiver provides for payment of sums assigned to creditors in the distribution plan following the methods set by the delegated judge to preserve evidence that payments were made.

Having approved the accounting and paid the receiver's fee, the delegated judge orders the final distribution according to the rules established above.

Bankruptcy Procedure is closed occurring the following events (Article 118 of the Bankruptcy Law):

- if within the timeframe set in the bankruptcy decree no one request to be placed on the list of creditors;
- when, even before the final distribution of assets, the distribution to creditors satisfies the whole sum of credits contained on the list of creditors or when they have otherwise

expired or all the debts and costs to be satisfied in pre-deduction have been paid;
- when the final distribution of assets is complete;
- when during the proceedings it becomes clear that the proceedings will not allow the satisfaction even in part of creditors or of pre-deductible claims and costs of the procedure.

Concerning a compulsory administrative liquidation, the amounts derived from the liquidation of the assets are distributed between creditors.

Before the last distribution to creditors, the final budget settlement regarding the management and distribution plan among creditors, accompanied by a report of the monitoring committee (*comitato di sorveglianza*), must be submitted to the authority which oversees the liquidation, which then authorises the filing with the clerk of the court and the compensation to the liquidator.

Once the deadline for objections has passed without objection, the budget, the revenue and expenditure account and the distribution plan are approved, and the liquidator shall distribute the final allocations among creditors.

7.2 Distressed Disposals

Execution of the Sale of Assets

The receiver may sell the business in one block to a third party, or sell single assets. A sale in block is the preferred solution under the Bankruptcy Law because it is assumed that the sale of an ongoing business may better satisfy creditors and be a more efficient method of liquidating the assets.

Sales and other liquidation acts are carried out by the receiver through a competitive procedure.

Cancellation of Pre-emptive Rights

Unless otherwise provided, the purchaser shall not be liable for debts of the transferred businesses arising before the transfer of such businesses.

For immovable assets and other assets contained in public registries, once the sale is concluded and the full price has been paid, the delegated judge orders the cancellation of the any entry regarding pre-emptive rights, including liens and attachments and any other kind of interest.

Credit Bidding

Regarding credit bidding, although there are no provisions on this point, on the basis of general principles such offsetting does not seem to be allowed. In fact, while creditors' claims are against the bankrupt company, the debts incurred with the purchase of the assets would be against the mass of creditors. Thus, since the bankrupt and the mass of creditors are different entities, offsetting in a similar situation would violate the *par condicio creditorum* principle.

Pre-negotiated Transactions

On the basis of general principles, it is not possible to effectuate pre-negotiated sales transactions following the commencement of a bankruptcy procedure as no protection from claw-back actions is provided.

7.3 Organisation of Creditors or Committees

In a bankruptcy procedure, the court appoints a committee representing the debtor's creditors. Its members are chosen from creditors who have either:

- filed a request to be put on the list of creditors;
- previously communicated their availability; or
- communicated other persons satisfying the requirements.

The creditors' committee monitors the activities carried out by the receiver, authorises their actions, and expresses its view in those cases established by law and on request of the delegated judge, by a succinct and reasoned opinion (Article 41 of the Bankruptcy Law).

In a judicial composition agreement with transfer of assets, the court shall appoint a creditors' committee consisting of three or five members to which, to the extent compatible, provisions on the composition and functioning of the creditors' committee contained in Articles 40 and 41 of the Bankruptcy Law shall apply (Article 182 of the Bankruptcy Law).

Members of the creditors' committee are entitled to repayment of costs, in addition to any additional payment awarded.

There is no appointment of steering committees or co-ordinators or informal ad hoc committees of a small group of creditors in certified recovery plans or restructuring agreements.

8. INTERNATIONAL/ CROSS-BORDER ISSUES AND PROCESSES

8.1 Recognition or Relief in Connection with Overseas Proceedings

For procedures opened in an EU member state, Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("Regulation No 2015/848") applies, stating that the opening of insolvency proceedings in that member state shall be recognised in all other member states.

Regulation No 2015/848 also enables the main insolvency proceedings to be opened in the member state where the debtor has its COMI. Those proceedings have universal scope and are aimed at encompassing all the debtor's assets. To protect the diverse interests, Regulation No 2015/848 permits secondary insolvency proceedings to be opened to run in parallel with the main insolvency proceedings. Such secondary proceedings may be opened in the member state where the debtor has an establishment and their effects are limited to the assets located there.

8.2 Co-ordination in Cross-Border Cases

Italian courts have not entered into any protocols or other arrangements with courts in other countries to co-ordinate proceedings.

Insolvency protocols are expressly mentioned in Regulation No 2015/848 and contemplated as a possible means of co-operation.

8.3 Rules, Standards and Guidelines

The Crisis and Insolvency Code has now introduced rules determining which jurisdiction is paramount.

A company having its COMI abroad may be subject to proceedings for the regulation of crisis and insolvency in Italy even if similar proceedings have been opened abroad, when it has an establishment in Italy (Article 26 of the Crisis and Insolvency Code).

The transfer of the COMI abroad shall not exclude the existence of the Italian jurisdiction if it has taken place in the year preceding the filing of the application for an agreed resolution of the crisis or insolvency or the opening of a judicial liquidation or after the beginning of the *Procedura di composizione assistita della crisi*, if earlier.

It is also clarified that, when opening cross-border insolvency proceedings with the Regulation

No 2015/848, the court shall declare whether the proceedings are main, secondary or territorial.

Finally, this provision shall apply without prejudice to international conventions and European legislation.

Therefore, according to the Italian provisions on international law, as well as the UNCITRAL Model Law on Cross-Border Insolvency, if there is no specific bilateral treaty, Italian courts have jurisdiction to start proceedings whenever such courts verify that the company's COMI is located in Italy.

8.4 Foreign Creditors

Foreign creditors are not treated differently under Italian law.

8.5 Recognition and Enforcement of Foreign Judgments

Insolvency proceedings opened in another EU member state are automatically recognised in Italy. However, the automatic recognition does not apply to out-of-court procedures, since are not included within the context of Regulation No 848/2015.

In the event that a company is declared bankrupt in a state that is not member of the European Union nor party to a bilateral treaty, the foreign judgment shall be recognised and enforced in Italy only if it is not opposed by an interested party. In this case, the Italian court must examine the legality of the foreign decision in order to decide if it may be recognised, based on whether:

- the foreign proceeding provided for a fair hearing;
- the opposed decision is made final; and
- the opposed judgment is not contrary to public order.

This recognition procedure applies only to insolvency decisions and does not concern restructuring procedures.

9. TRUSTEES/RECEIVERS/ STATUTORY OFFICERS

9.1 Types of Statutory Officers

Italian law provides for various types of statutory officers who may be appointed in the proceedings at issue.

In a bankruptcy procedure, the receiver (*curatore*) administers the assets of the bankruptcy estate and takes all procedural actions under the supervision of the delegated judge and the creditors' committee.

In a judicial composition with creditors, the court appoint a judicial commissioner (*commissario giudiziale*), with supervision and control functions. In particular, they oversee the management of the company. Moreover, if the plan provides for the liquidation of debtor's assets, a judicial liquidator (*liquidatore giudiziale*) is appointed.

In a compulsory administrative liquidation, a liquidator (*commissario liquidatore*) is appointed, as well as a monitoring committee (*comitato di sorveglianza*) of three or five members skilled in the type of activity exercised by the company.

In an extraordinary administration for large insolvent enterprises, the company is managed by a special commissioner (*commissario straordinario*) appointed by Ministry of Economic Development.

The Crisis and Insolvency Code introduced new entities. Primarily the OCRI (*Organismo di composizione della crisi d'impresa*), which is set up at the Chambers of Commerce. This body is asked

to impose the restructuring of the unbalanced company in peremptory terms.

Finally, Law Decree No 118/2021 introduced the *Composizione negoziata per la soluzione della crisi d'impresa*, in which an independent expert (*esperto indipendente*) aimed at assisting the company in crisis shall be appointed. This is closer to a "mediator" or "conciliator" (pursuant to European Commission Recommendation 2014/135/EU and Restructuring Directive 2019/1023/EU) than to the independent professional entrusted with the task of examining the restructuring plan.

9.2 Statutory Roles, Rights and Responsibilities of Officers

The receiver is required to manage a bankruptcy procedure and, while exercising his functions, is supervised by the delegated judge and the creditors' committee. The receiver personally holds their tasks, but may delegate specific activities to other bodies, with an authorisation from the creditors' committee.

The receiver, within 60 days of the bankruptcy decree, must present the delegated judge with a particularised report of all the causes and elements of the bankruptcy, containing the bankrupt's explanation on how they were diligent in running their affairs, the responsibility of the bankrupt and of other persons and to what extent these facts may be of interest in a criminal investigation. The receiver, with the approval of the delegated judge and after consulting the creditors' committee, may file actions for damages against directors and members of the supervisory bodies, CEO's and liquidators as well as liability actions against members of a limited liability company.

The judicial commissioner, in the same way as the receiver, is a public official while performing their tasks. During a judicial composition with creditors, they supervise the administration of the company by the debtor and shall establish an inventory of the debtor's assets and a detailed report on the causes of the collapse, on the conduct of the debtor, on the proposed composition and on the guarantees offered to creditors. The judicial commissioner, if finds that the debtor has concealed or hidden assets, intentionally failed to report one or more claims, asserted the existence of non-existent assets or committed other acts of fraud, must so report immediately to the court.

In compulsory administrative liquidation, the liquidator carries out the liquidation of the assets under direction of the supervising authority and the supervision of the monitoring committee. Moreover, they shall exercise the liability actions against directors and members of boards of control of the company in liquidation, with the approval of the supervising authority.

The special commissioner is required to manage the business and to deliver a report on the causes of the insolvency as well as a prospect for the economic recovery, also describing the value of the enterprise.

The OCRI is responsible for receiving report and managing the *Procedura di allerta*. It also facilitates negotiations between the debtor and their creditors in the *Procedura di composizione assistita della crisi*.

The independent expert facilitates negotiations between the debtor, creditors and any other interested parties in order to find a solution for overcoming the financial or economic imbalance.

9.3 Selection of Officers

The receiver is nominated in the bankruptcy decree or, in case of substitution or removal, by order of the court.

Lawyers, accountants, book-keepers, professional partnerships, groups of professionals whose members satisfy certain requirements or anyone who has been an administrator, director or controller of a corporation may be nominated as receiver.

The court may at any time, on the proposal of the delegated judge or that of the creditors' committee or sua sponte, remove the receiver by reasoned order, hearing the receiver and the creditors' committee.

The spouse, family member (within four grades of relation) of the bankrupt, creditors of the same and those who contributed to the collapse of the company within the last two years prior to the bankruptcy decree or anyone else with a conflict of interest with the bankruptcy cannot serve as receiver.

Regarding appointment and removal, the same provisions apply to the judicial commissioner within a judicial composition with creditors as for the receiver in a bankruptcy procedure.

In compulsory administrative liquidation, the liquidator is appointed by the court and, with regard to their removal, the same provisions as for the receiver apply.

A special commissioner is appointed by Ministry of Economic Development to control the company and to act as the representative of the insolvent estate.

Strict rules are prescribed with regard to the eligibility requirements for the special commissioner and their removal, as well as for the members of the OCRI and for the independent expert.

10. DUTIES AND PERSONAL LIABILITY OF DIRECTORS AND OFFICERS OF FINANCIALLY TROUBLED COMPANIES

10.1 Duties of Directors

Obligations

The Crisis and Insolvency Code amended Article 2086 of the Italian Civil Code by introducing a new paragraph. From 16 March 2019, directors of all types of business acting as corporations or in a collective form must establish an organisational, administrative and accounting structure appropriate to the nature and size of the company, and react in a timely manner to a business crisis and/or loss of going concern.

Directors must also activate themselves without delay to adopt and implement those instruments provided by the regulations to overcome the state of crisis and restore the going concern, such as the *Procedura di composizione assistita della crisi* or other insolvency instruments.

The obligations provided in new Article 2086 also affect the "business judgment rule" principle, since the breach of such obligations is no longer related to the general principle of the "required diligence" (*diligenza esigibile*) but is a breach of a specific obligation determined by law.

Responsibility to All Creditors

Directors owe their responsibility to all creditors.

Directors of a joint stock company are liable towards creditors of the company "for non-fulfilment of their duties concerning the preservation of the integrity of corporate assets".

Creditors can also bring a liability action when the corporate assets prove insufficient to satisfy their credit (Article 2394 of the Italian Civil Code).

A similar provision is set out in Article 2476, paragraph 6, of the Italian Civil Code, which extends the liability to directors of a limited liability company.

Measure to Determine Insolvency

Under Italian law, there is no objective and predetermined term within which a filing for a bankruptcy procedure must be made and prior to which such filing is not needed, nor a standard practice recognised by case law.

To this extent:

- a bankruptcy procedure can be started if a company is cash-flow insolvent, and so if it is "no longer able to regularly perform its obligations" (Article 5 of the Bankruptcy Law); and
- a company may file for a judicial composition with creditors whenever a "state of crisis" materialises (Article 160 of the Bankruptcy Law).

Practices to Limit Risks of Criminal Offences

There are some steps which are usually taken by directors in the context of Italian turnarounds in order to limit the risk that certain criminal offences may arise, such as:

- convening regular board meetings and taking all actions deemed appropriate in order to clearly analyse the company's financial and economic situation;
- avoiding preferential payments, carrying out transactions that may damage the company and/or third parties (including creditors and subsidiaries) or trading in a way that may worsen the financial situation of the company;
- not making payments to shareholders and related parties and applying cash only towards payment of such expenses of the company that are necessary to keep it as a going concern (for example payroll, suppliers or fundamental investments); and
- continuously controlling the status of the turnaround.

Although it is not usual, the restructuring plan may envisage the debtor waiving potential claims against directors, whether departing or remaining; in such case, the plan should provide adequate disclosure of the actual or likely evidence of such claims and the rationale for the proposed waiver.

Duties Owed to Owners and Shareholders

Directors must fulfil their duties as set out in law and the corporate charter with the diligence required by the nature of their position and their specific role (Article 2392 of the Italian Civil Code). Their duties include, among others:

- drawing up financial statements;
- convening a shareholders' meeting when it is necessary to reduce share capital due to loss or when the share capital is eroded under the legal minimum; and
- comply with decisions taken by shareholders.

Regarding limits established by law, directors are prohibited to act in a conflict of interest, to exceed their authority and to compete with the company. Moreover, directors may also be liable if they are aware of prejudicial facts and they do not take actions to prevent, eliminate or mitigate damages.

Following the declaration of bankruptcy, directors lose all powers of administration, except for the power:

- to appeal against the declaration of insolvency (according to Italian case law);
- to bring actions against the receiver or the creditors' committee, under certain conditions; and
- to request court suspension of the sale of a company's asset.

Criminal Offences and Liability

In the context of the insolvency or financial distress, certain acts performed by the directors may give rise to specific criminal offences such as:

- simple bankruptcy (in the case of negligent delay in filing for the opening of insolvency proceedings);
- preferential bankruptcy (in the event of payments to or creation of security interest in favour of some creditors in order to benefit them over other creditors);
- "fraudulent bankruptcy" (in the case of failure to properly keep the required accounting books or diverting, wasting or concealing funds or assets or making transactions at an undervalue); and
- "illegal recourse to credit" (which occurs when financings are sought from third parties while hiding the company's insolvency or financial difficulties).

10.2 Direct Fiduciary Breach Claims

Directors of a joint stock company are liable to:

- the company itself (according to Article 2392 of the Italian Civil Code the directors are liable to the company for damages arising from the failure to perform their duties, and Article 2393 provides for a liability action initiated by the company against the directors themselves);
- company's creditors (pursuant to Article 2394 directors shall be liable to the company's creditors for any failure to comply with their obligations to preserve the integrity of the company's assets);
- shareholders or third parties (who may exercise the action provided for in Article 2395 for "damages suffered as a direct result of intentional or negligent acts committed by the directors").

During a bankruptcy procedure, compulsory administrative liquidation or extraordinary administration for large insolvent enterprises, actions for liability provided by the Italian Civil Code shall be brought by the receiver, the liquidator and the special commissioner.

Specifically, the Bankruptcy Law (Article 146) establishes that the receiver, with the approval of the delegated judge and after consulting the creditors' committee, may file:

- actions for damages against directors and members of the supervisory bodies, CEO's and liquidators; and
- liability actions against members of a limited liability company.

Article 378 of the Crisis and Insolvency Code amended Article 2476 of the Italian Civil Code, providing that directors of a limited liability company shall be liable to the company's creditors for any failure to comply with obligations relating to the preservation of the integrity of the company's assets.

11. TRANSFERS/ TRANSACTIONS THAT MAY BE SET ASIDE

11.1 Historical Transactions

Historical transactions that preceded an insolvency process may be annulled under certain conditions.

A claw-back action can be exercised when it is proven that:

- a third party was aware of the debtor's state of insolvency;
- any transaction for consideration occurred within one year prior to the date of declaration of bankruptcy, when the services provided or

the obligations assumed by the company are disproportionate, exceeding 25% of the value of the counterpart obligation;
- the transaction was used to extinguish due debts that have not been paid through ordinary methods of payment and made in the year prior to the declaration of bankruptcy;
- pledges or mortgages were created within six months prior to the declaration of bankruptcy as collaterals for those debts comes due; and/or
- transactions were performed for free by the company within the two years prior the declaration of bankruptcy.

Further, according to the Crisis and Insolvency Code, certain transactions can be revoked if performed by a company in financial difficulties after the filing of the application for the opening of a judicial liquidation or within six months or one to two years prior such filing.

11.2 Look-Back Period

Look-back periods established by the Bankruptcy Law are six months, one year or two years prior the insolvency proceedings, depending on the type of transaction carried out by the company.

Similar terms are provided by the Crisis and Insolvency Code (Article 166).

11.3 Claims to Set Aside or Annul Transactions

Claw-back actions may be exercised by the receiver within three years from the opening of a bankruptcy procedure and within five years from the execution of the transaction.

Acts, payments and guarantees given on the assets of the debtor as part of a certified recovery plan as well as acts, payments or guarantees made in execution of a judicial composition with creditors or of a restructuring agreement approved by the court and those legally created after the filing of an appeal for the opening of a judicial composition with creditors, are not subject to claw-back actions.

LMS Studio Legale is an Italian independent law firm recognised on the market for its ability to handle extraordinary transactions and sophisticated legal issues. With more than 50 lawyers across its four offices in Milan, Rome, Turin and London, LMS combines a multidisciplinary approach with great attention to quality and promptness of the legal service offered. LMS's restructuring and insolvency department has played a key role in some of the best-known debt restructuring transactions in Italy, both in and out of court, assisting with very high-profile distressed companies and their stakeholders, as well as entities responsible for managing situations. Thanks to its in-depth expertise in EU and international law and its solid training, the department also advises on cross-border procedures and reorganisations. LMS also relies on established relationships with leading international firms in Europe, North America, Asia and South America.

AUTHORS

Matteo Bascelli is a partner in the restructuring and insolvency department of LMS Studio Legale, having gained previous professional experience at some of the most prestigious law firms. With 20 years of training in the field of banking law and in-depth knowledge of the law of the corporate crisis, Matteo regularly provides professional assistance to banks and financial intermediaries in debt restructuring operations hosted in the context of the instruments for the composition of the corporate crisis, as well as in insolvency procedures, with particular regard to those that provide financial assistance to support business continuity for the purpose of turnarounds.

Elena Grigò is a counsel in the restructuring and insolvency department of LMS Studio Legale, and has a PhD in bankruptcy law with specific focus on debt restructuring agreements. She focuses her professional experience on bankruptcy law, assisting major banks and other financial institutions in reorganisation plans, restructuring arrangements and composition with creditors as well as on NPE transactions. Elena is regularly involved in transactions on distressed assets as well as in financing transactions. Elena is author of a large number of articles on bankruptcy, banking and civil procedure law, and a regular speaker at seminars.

Riccardo Di Carlo is an associate in the restructuring and insolvency department of LMS Studio Legale, providing assistance in the areas of banking and finance, with a particular focus on restructuring and insolvency. Riccardo has gained experience, in particular, in out-of-court debt restructuring transactions, assisting banks and financial intermediaries in negotiating and implementing the different instruments of negotiated settlement of corporate crises provided by the Italian Bankruptcy Law, as well as in NPE transfer transactions.

Andrea Di Gregorio is a junior associate in the restructuring and insolvency department of LMS Studio Legale. Andrea has gained experience especially in out-of-court debt restructuring transactions as well as in NPE transfer transactions. Before graduating in Law, Andrea completed two internships in a Milanese law firm and in the legal department of an Italian joint stock company. He also contributes to an online legal journal.

LMS Studio Legale

Corso Magenta n. 84 - 20123
Milan
Italy

Tel: +39 02 881861
Fax: +39 02 57760400
Email: mail@lmslex.com
Web: www.lmslex.com

Trends and Developments

Contributed by:
Matteo Bascelli, Elena Grigò, Riccardo Di Carlo and Andrea Di Gregorio
LMS Studio Legale see p.40

The Evolution of Italian Insolvency

The status quo

Italian insolvency law has undergone a fast evolution in recent years, essentially due to radical changes in the cultural, social and economic environment, within an increasingly globalised context.

Royal Decree No 267 of 16 March 1942 (the "Bankruptcy Law"), focused on bankruptcy procedures (*fallimento*) as an insolvency procedure aimed at the mere winding-up of the business and liquidation of the assets of the bankrupt entrepreneur-debtor, has been gradually modernised by providing for procedures which, on the contrary, tend to prevent such outcomes in order to favour the overcoming of the economic crisis and the recovery of the company. At an international level, the debt restructuring procedure which embodied the wind of change can certainly be identified in Chapter 11 of the US Bankruptcy Code.

In addition to the protection of creditors, recent European legislation has also been concerned about providing incentives to pursue restructuring with the aim to preserve business continuity, given the business's viability; in doing that, modern legislators are caring about safeguarding creditors' and stakeholders' interests seen as a *comunità di pericolo* ("community of danger" or "community of losses") in relation to the insolvency of the debtor. In particular, European Commission Recommendation No 2014/135/EU, whose aim is to harmonise national insolvency laws, has as its primary purposes those of enabling companies in financial difficulty to restructure effectively and granting a second chance to "honest entrepreneurs" declared bankrupt.

The same purposes are then pursued by Directive No 2019/1023/EU on preventive restructuring frameworks and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

Modernising the bankruptcy procedure

Though the central role of a bankruptcy procedure was originally seen by the Italian legislator as the natural solution to the insolvency of the debtor, focusing on liquidation and sanctions, with a key role assumed by the delegated judge, there has been a slow but inexorable progressive modernisation, through the following main steps:

- the introduction of ad hoc disciplines regulating the insolvency of large enterprises with Law No 95 of 3 April 1979 instituting extraordinary administration for large insolvent enterprises (*amministrazione straordinaria delle grandi imprese in crisi*) (replaced by Legislative Decree No 270 of 8 July 1999) and then, for very large insolvent enterprises, with Law No 39 of 18 February 2004, with the common objective to preserve production assets and maintain employment levels to the detriment of the protection of creditors;
- the reform of judicial composition with creditors (*concordato preventivo*) with the aim of simplifying its use by rehabilitating the figure of debtor who no longer has to prove its worthiness (*meritevolezza*), therefore able to enjoy an unprecedented autonomy in managing the crisis;

- the 2005 introduction of new legal instruments for the private-sector, such as the certified recovery plan (*piano attestato di risanamento*) and restructuring agreement (*accordo di ristrutturazione*), and a regression of claw-back actions;
- the 2006 approval of the comprehensive bankruptcy reform, which shifted the Italian legislator's focus from the entrepreneur to the company;
- from 2005-06 onwards, the almost annual succession of numerous amendments to the Bankruptcy Law, thus officially opening the so called "building site" of insolvency reform;
- the 2015 "mini-reform" concerning judicial composition with creditors (introducing competing proposals and competing offers, whose aim is to enhance the principle of competitiveness with a focus on the best satisfaction of creditors) and restructuring agreements; and
- also in 2015, the Minister of Justice appointed a commission (the "Rordorf Commission") tasked with elaborating the principles of the delegated law for the reform of crisis and insolvency law, the work of which resulted in Law No 155 of 19 October 2017 (the "Delegated Law") containing the guidelines of such reform.

The Delegated Law and the Crisis and Insolvency Law

Due to the paramount importance of the Delegated Law in the modernisation of the Italian insolvency system, it is worthwhile highlighting some of the relevant principles, among which are the following:

- replacing the term "bankruptcy" with "judicial liquidation" (*liquidazione giudiziale*), due to the stigma associated with judicial insolvency procedures;
- introducting the *procedura di allerta* and *procedura di composizione assistita della crisi*, aimed at encouraging early detection of a state of crisis and facilitating negotiations between a debtor and its creditors;
- introducing of a definition of "crisis", considered the likelihood of future insolvency;
- establishing a single procedural model for the assessment of the debtor's state of crisis or insolvency;
- prioritising the handling of proposals aimed at overcoming the crisis by ensuring business continuity, even indirectly (through a different entrepreneur), reserving judicial liquidation to cases where no other solutions are feasible;
- reducing the time and costs of proceedings;
- introducing a set of provisions governing the crisis and the insolvency of corporate groups;
- comprehensively reorganising the rules governing negotiated solutions of a business crisis (judicial composition with creditors, restructuring agreement, certified recovery plan), or composition of indebtedness crisis (*procedura di sovraindebitamento*); and
- the possibility for the debtor, at the end of a judicial liquidation, to apply for immediate discharge of debt; and
- the provision of speciality judges.

The principles contained in Delegated Law have found their full expression in Legislative Decree No 14 of 12 January 2019 ("Crisis and Insolvency Code"), whose entry into force was originally set for August 2020, subject to the issuance medio tempore of one or more corrective decrees (the first correction of the Crisis and Insolvency Code is Legislative Decree No 147 of 26 October 2020).

Requests to postpone the Crisis and Insolvency Code's entry into force, particularly with regard to the rules on the *procedura di allerta*, were backed at the beginning of 2020 by the outbreak of COVID-19, with the postponement of the original deadline to September 2021 motivated by the circumstance that the *proce-*

dura di allerta was intended to operate within a stable economic framework characterised by physiological fluctuations, where the majority of companies are not affected by the crisis and in which, therefore, the indicators can actually play a selective role.

The most recent legislative measures

Going back over the evolutionary stages of insolvency regulation, the following measures should be mentioned:

- emergency legislation was implemented in early 2020, intended to counteract the national economic crisis through the introduction of certain measures aimed at providing financial support to companies (through the suspension of executive and precautionary actions, moratoria ex lege, subsidised loans guaranteed by the State, non-repayable grants, etc); important changes have been made, also with regard to judicial composition with creditors and restructuring agreements, especially with reference to the possible cram-down of tax and social security debts (introduced by Law No 159 of 27 November 2020);
- the Decree of Minister of Justice dated 22 April 2021 has established a new commission at the Legislative Office of the Ministry of Justice to develop proposals for amendments to Crisis and Insolvency Code (the "Pagni Commission"); and
- for the time being, Law Decree No 118 of 24 August 2021 - converted into Law No 147 of 21 October 2021 - ("Law Decree No 118/2021") has introduced the following measures:
  (a) the postponement of the entry into force of the Crisis and Insolvency Code to 16 May 2022, except for the "Early Warning System" which will instead enter into force on 31 December 2023;
  (b) the introduction of a new negotiated settlement tool for resolving business crises called *composizione negoziata per la soluzione della crisi d'impresa*, open to entrepreneurs (commercial and agricultural and without size preclusions) who find themselves "in a state of financial or economic imbalance that is likely to result in a crisis or insolvency", with which the legislator has replaced signs, indicators and indices of the crisis (whose effectiveness has been postponed by the same Law Decree No 118/2021); and
  (c) some urgent amendments to the Bankruptcy Law, anticipating certain innovations contained in the Crisis and Insolvency Code, essentially aimed at further incentivising restructuring agreements.

It is likely that activities carried out by the Pagni Commission will lead to further significant innovations that will further change the framework of the Italian insolvency legislation, since its tasks include, among others, the formulation of "corrective proposals" (and even temporary amendments due to the ongoing health emergency) to the Crisis and Insolvency Code, taking into consideration the provisions of the above-mentioned Directive 2019/1023/EU, to be implemented by July 2022.

Creditor- or debtor-orientated approaches

An observer of the current regulatory framework may note a clear oscillation of the Italian legislator between a creditor-oriented approach typical of the Crisis and Insolvency Code, in the footsteps of the 2015 "counter-reform", and a more debtor-oriented trend inspired by the purpose of supporting companies in the short and medium term by protecting their business continuity, due to the ongoing pandemic crisis.

Such fluctuating behaviour closely recalls the natural field of action – and, therefore, of collision – in which the insolvent entrepreneur on the one hand and the unsatisfied creditors on

the other, who are mutually bound by promises made and expectations disappointed, face each other; in this context, the legislator is called upon to remedy the disorder that the insolvent debtor produces and spreads in the market, inevitably using the legal paradigm of the "relationships of obligation" (*rapporto obbligatorio*), as the cornerstone of property law.

Changing established solutions

In Italy, the traditional solution offered by insolvency regulation has been to ensure the most effective protection of creditors' interests through a bankruptcy procedure; the modern question is whether such protection can be pushed to the point of sacrificing the company in the name of that interest.

The criticism of the solution is particularly significant in situations of general crisis when it becomes more difficult to assess whether it is more efficient to pursue creditors' interests and the related public interest in the orderly conduct of economic relations, or to reasonably safeguard the company and, along with it, the wider *comunità di pericolo* represented by all the stakeholders.

The PNRR

The evolution at hand cannot ignore the imposing reform plan represented by the Italian Recovery and Resilience Plan (PNRR), which accepts the appeal formulated by the EU in the "Country Specific Recommendations"; among these, the invitation to speed up the procedures of forced execution and enforcement of guarantees, in the awareness that the efficiency of the justice sector is an indispensable condition for the economic development and for a correct functioning of the market.

Particular attention is paid to this aspect because of the centrality of the compulsory enforcement of claims deriving from non performing exposures (NPEs), which clearly emerge in a context of a global business crisis; the interventions are specifically aimed at facilitating the commencement of enforcement, reducing time limits for filing the hypocatastal certification, strengthening the instrument of delegation in real estate enforcement, introducing the *vente privée* (sale of the attached property by the debtor) and the *astreinte* (or indirect coercion).

Contributed by: *Matteo Bascelli, Elena Grigò, Riccardo Di Carlo and Andrea Di Gregorio,* ***LMS Studio Legale***

LMS Studio Legale is an Italian independent law firm recognised on the market for its ability to handle extraordinary transactions and sophisticated legal issues. With more than 50 lawyers across its four offices in Milan, Rome, Turin and London, LMS combines a multidisciplinary approach with great attention to quality and promptness of the legal service offered. LMS's restructuring and insolvency department has played a key role in some of the best-known debt restructuring transactions in Italy, both in and out of court, assisting with very high-profile distressed companies and their stakeholders, as well as entities responsible for managing situations. Thanks to its in-depth expertise in EU and international law and its solid training, the department also advises on cross-border procedures and reorganisations. LMS also relies on established relationships with leading international firms in Europe, North America, Asia and South America.

AUTHORS

Matteo Bascelli is a partner in the restructuring and insolvency department of LMS Studio Legale, having gained previous professional experience at some of the most prestigious law firms. With 20 years of training in the field of banking law and in-depth knowledge of the law of the corporate crisis, Matteo regularly provides professional assistance to banks and financial intermediaries in debt restructuring operations hosted in the context of the instruments for the composition of the corporate crisis, as well as in insolvency procedures, with particular regard to those that provide financial assistance to support business continuity for the purpose of turnarounds.

Elena Grigò is a counsel in the restructuring and insolvency department of LMS Studio Legale, and has a PhD in bankruptcy law with specific focus on debt restructuring agreements. She focuses her professional experience on bankruptcy law, assisting major banks and other financial institutions in reorganisation plans, restructuring arrangements and composition with creditors as well as on NPE transactions. Elena is regularly involved in transactions on distressed assets as well as in financing transactions. Elena is author of a large number of articles on bankruptcy, banking and civil procedure law, and a regular speaker at seminars.

Contributed by: *Matteo Bascelli, Elena Grigò, Riccardo Di Carlo and Andrea Di Gregorio,* ***LMS Studio Legale***

Riccardo Di Carlo is an associate in the restructuring and insolvency department of LMS Studio Legale, providing assistance in the areas of banking and finance, with a particular focus on restructuring and insolvency. Riccardo has gained experience, in particular, in out-of-court debt restructuring transactions, assisting banks and financial intermediaries in negotiating and implementing the different instruments of negotiated settlement of corporate crises provided by the Italian Bankruptcy Law, as well as in NPE transfer transactions.

Andrea Di Gregorio is a junior associate in the restructuring and insolvency department of LMS Studio Legale. Andrea has gained experience especially in out-of-court debt restructuring transactions as well as in NPE transfer transactions. Before graduating in Law, Andrea completed two internships in a Milanese law firm and in the legal department of an Italian joint stock company. He also contributes to an online legal journal.

LMS Studio Legale

Corso Magenta n. 84 - 20123
Milan
Italy

Tel: +39 02 881861
Fax: +39 02 57760400
Email: mail@lmslex.com
Web: www.lmslex.com