

## Global Restructuring & Insolvency Guide

### Italy

#### Overview and Introduction

Insolvency proceedings typically aim to liquidate an insolvent entrepreneur's assets with full discharge *vis-à-vis* all creditors.

Traditional Italian insolvency proceedings are extremely formal and require the involvement of courts and/or other public authorities, regardless of the size of the bankruptcy estate; consequently, they are usually lengthy and costly, the average duration being seven years.

In recent years alternative in-court and out-of-court arrangements have been introduced, which aim to facilitate the discharge of insolvent companies through compositions with creditors.

Currently, under Italian law, the insolvency procedures ("*procedure concorsuali*") for rehabilitation or liquidation of a company include:

- Bankruptcy ("*fallimento*");
- Pre-bankruptcy composition ("*concordato preventivo*");
- In-bankruptcy composition ("*concordato fallimentare*");
- Debt restructuring arrangements and certified turnaround plans ("*accordi di ristrutturazione dei debiti e piani attestati di risanamento*");
- Extraordinary administration of large enterprises in a state of crisis ("*amministrazione straordinaria delle grandi imprese in stato di crisi*"); and
- Forced administrative liquidation ("*liquidazione coatta amministrativa*").

Bankruptcy is the primary procedure and aims to assess the debtor's liabilities, sell its assets and distribute the proceeds among the creditors. During the proceedings, the debtor is deprived of the authority to manage and dispose of its assets, and these powers are delegated to a bankruptcy administrator under the direction and supervision of the delegated judge. Where the debtor is a company, upon completion of the bankruptcy procedure it will cease to exist. If the debtor is a sole proprietorship, he will cease to be an entrepreneur (and will generally be prohibited from starting a new business for a number of years). In general, bankruptcy can be defined as a liquidation (and not a work-out) procedure.

Work-out procedures, such as pre-bankruptcy composition, debt restructuring arrangements, turnaround plans and even extraordinary administration, are aimed at enabling a debtor in financial difficulty to restructure its operations (and particularly its debt) itself in order to continue its activities and pay back its creditors. Unlike bankruptcy, the aim is not the liquidation of the company, but its survival. It is worth noting, however, that the extraordinary administration and pre-bankruptcy composition may develop into bankruptcy if the recovery proves impossible (and in other cases), provided that the relevant conditions are met.

Voluntary liquidation is a corporate unwinding process governed by compulsory provisions of law and aimed at satisfying the company's creditors by liquidating the company's assets and paying any remaining assets or proceeds over to the shareholders. Therefore, during this process, the company still exists and operates (though no new business can be carried out) and can also be declared bankrupt; the management body is replaced by one or more liquidators which are vested with limited management powers aimed at carrying out and completing the liquidation process.

## Applicable Legislation

The statutory framework for insolvency-related procedures is primarily set out in Royal Decree no. 267 of 16 March 1942 (the “**Italian Bankruptcy Law**”). The Italian Bankruptcy Law has undergone extensive revisions in the last decade, which have shifted the focus from the protection of creditors through the liquidation of assets and distribution of proceeds to a wider range of opportunities for discharging debts via composition. The clawback regime previously in place has also been relaxed. Further important changes that have been introduced in recent years include:

- Increasing the number of entities excluded from bankruptcy proceedings;
- Changing and widening the powers of the bankruptcy receiver; and
- Increasing the powers of the creditors’ committee.

In addition, the position of the debtor has been improved, through:

- The abolition of the public register of bankrupt debtors; and
- The introduction of a debt discharge process for individual entrepreneurs.<sup>1</sup>

Material innovations regarding the pre-bankruptcy composition and debt restructuring arrangements under Article 182-*bis* of the Italian Bankruptcy Law and turnaround plans under Article 67, paragraph 3(d), of the Italian Bankruptcy Law have been introduced by Law Decree no. 83 of 22 June 2012, as converted by Law no. 134 of 3 August 2012 (the “**Development Decree**”). The purpose of this reform was to boost the restructuring and reorganisation of distressed enterprises in order to better cope with the current financial crisis. To achieve this purpose, the Development Decree has focused mainly on three factors: flexibility of the process, reliability of the restructuring plan and tax appeal.

Amendments to the Italian Bankruptcy Law have also been introduced with regard to the Pre-Bankruptcy Composition by Decree no. 69 of 21 June 2013, which sets out urgent measures aimed at boosting the country’s economy (the “**Decreto del Fare**”) and includes some important changes to the rules regarding the application introduced by the Development Decree.

Further amendments to the Italian Bankruptcy Law have been enacted by Law Decree no. 83 of 27 June 2015 (“Urgent reforms concerning Bankruptcy Law, Civil Law, Civil Procedure Law and Court administration”), as converted by Law no. 132 of 6 August 2015. They mainly regard the Pre-Bankruptcy Composition and Debt restructuring arrangements and aim at facilitating debt restructuring of the distressed enterprises.

Finally, a new electronic insolvency register has been established in the Ministry of Justice by Law Decree no. 59 of 3 May 2016 (which still awaits ratification by the Parliament). The aim of this register is to publish all the information and documents regarding bankruptcy procedures, pre-bankruptcy composition procedures, forced administrative liquidation procedures, extraordinary administration procedures and procedures for the approval of debt restructuring arrangements.

The Italian Council of Ministers has recently approved a delegated law bill (prepared by the “Rordorf Committee”) which aims to thoroughly reform the Italian Bankruptcy Law. It would introduce an

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<sup>1</sup> A debtor who is an individual can obtain discharge of some debts in the case of good conduct if he has:

- Cooperated with the administrative bodies in the proceedings;
- Not caused delay in the proceedings;
- Complied with the order to provide the bankruptcy receiver with the correspondence concerning the relationships involved in the bankruptcy;
- Benefited from the same procedure in the last 10 years;
- Not committed criminal offences such as the misappropriation of assets or the reporting of non-existent liabilities; causing or worsening the insolvency in order to make difficult the reconstruction of the assets and business; unlawfully obtaining financing;
- Not been convicted of fraudulent bankruptcy or offences against the economy, industry or commerce (unless rehabilitated).

effective alert mechanism at the first signs of bankruptcy, limit access to the pre-bankruptcy composition to companies capable of being revived and specifically regulate corporate groups. Furthermore a specialised judge is contemplated for minor bankruptcy cases.

All references in this chapter are to the law as applicable to new insolvencies. Old procedures may, however, still be governed by old rules.

## **Personal Bankruptcy**

With the exception of state entities and small undertakings, the Italian Bankruptcy Law applies to all entrepreneurs and only to them. As a result, non-entrepreneur individuals cannot be declared bankrupt.

## **Winding-Up Procedures: Liquidation – Voluntary and Involuntary**

Although liquidation is a winding-up procedure for partnerships and companies, it does not imply a situation of insolvency; in fact, liquidation can only be successfully completed if the company is not insolvent.

Voluntary liquidation is commenced by resolution of the shareholders, who appoint one or more liquidators. The liquidators replace the management body and are required to:

- Manage the company's assets and perform any acts required by the winding-up process;
- Draw up the company's annual and final liquidation balance sheets and relevant reports; and
- Pay off creditors.

Unless the shareholders challenge the balance sheet presented by the liquidators within 90 days, it becomes final and the liquidator can distribute the proceeds to the shareholders. Ultimately, the company is cancelled from the companies' register.

Involuntary liquidation occurs: (i) when the term of existence of the company expires; (ii) upon achievement of the corporate purpose, or when achievement becomes impossible; (iii) if shareholders' decisions cannot be taken because of deadlock; (iv) when the company's capital is reduced below the statutory minimum and not increased back; (v) in case of redemption of all shares; and (vi) for any other reasons set out in the by-laws.

## **Bankruptcy**

The key insolvency procedure is bankruptcy ("*fallimento*"). Bankruptcy is a court-supervised procedure for the liquidation of an insolvent company's assets and distribution of the proceeds. It results in the company's dissolution.

### **Eligibility for Bankruptcy**

As noted above, bankruptcy applies to business undertakings, with the exception of state entities and small businesses.

Small businesses are those which:

- Have had, in each of the three fiscal years before the date of filing of the petition for bankruptcy or, if less, from the beginning of the business's activity, net equity not exceeding EUR 300,000;
- Have realised, in each of the three fiscal years before the date of the filing of the petition for bankruptcy or from the beginning of the activity (if less), gross revenues not exceeding EUR 200,000;
- Owe debts, even if not yet due upon adjudication, not exceeding EUR 500,000.

The limits provided for under the above-mentioned letters can be updated every three years by means of a decree of the Minister of Justice, on the basis of the average of the variations in the ISTAT (“*Istituto Nazionale di Statistica*”) index of the consumption prices for families and blue- and white-collar workers for the period of reference.

The pre-requisite for a declaration of bankruptcy is a non-reversible state of insolvency. This exists where:

- The company is in default on its payment obligations; or
- Other evident indicia exist that the company is unable to meet its current liabilities on a regular basis.

According to certain court precedents, “indicia of insolvency” can be found even prior to, and regardless of, payment defaults, if it is foreseeable that the debtor will no longer be in a position to regularly pay its debts. Insolvency may also be found to exist upon even only one event of default, if the event demonstrates that the debtor is in distress. Even non-payment of a negligible debt, if related to essential services (such as public utilities) and if accompanied by scarce liquidity and an imbalance between assets and liabilities, can be considered a symptom of insolvency. Article 7 of the Italian Bankruptcy Law also provides that insolvency may be considered proved where the debtor flees or escapes arrest or shuts down his business premises. In such cases, the public prosecutor dealing with any such crimes must file a request with the competent Bankruptcy Court to declare the debtor’s bankruptcy.

Finally, pursuant to Article 15 of the Italian Bankruptcy Law, bankruptcy cannot be declared if the company’s overdue debt amounts to less than EUR 30,000.

### **Bankruptcy Petition**

Pursuant to Article 6 of the Italian Bankruptcy Law, bankruptcy proceedings are commenced by a petition filed by any of the creditors of the “insolvent” debtor, the public prosecutor or the insolvent debtor itself.

The insolvent debtor is under no obligation to file for bankruptcy, but Article 217 of the Italian Bankruptcy Law states that a debtor (including the debtor’s legal representative) who delays the filing of a petition for bankruptcy commits the crime of simple bankruptcy (“*bancarotta semplice*”), where such delay has worsened the debtor’s distress; this may also be true where the filing of the petition has been put off because of the implementation of an out-of-court voluntary composition plan, in case bankruptcy should follow. It must also be noted that the liability may be imposed upon advisors who have assisted the debtor company.

Under the same provision, any delay by the directors of a debtor to request to the debtor’s admission to bankruptcy may also be construed as mismanagement (“*mala gestio*”), i.e. violation by the directors of their duties. They would therefore be liable for damages suffered by the company’s creditors and shareholders.

Additionally, pursuant to the same Article 217, delaying the admission of the debtor to bankruptcy protection can be relevant in terms of criminal liability if the debtor undertakes “*seriously incautious transactions*” with the purpose of delaying the declaration of bankruptcy. “*Seriously incautious transactions*” include transactions that are not per se imprudent or hazardous, but which acquire such character if effected when the company is in state of insolvency. Examples include: the lease of the business to a third party in financial distress, at a low rent and without security; the sale of inventory at a lower-than-market-price; and the disposal of material assets.

Such crimes are punished with imprisonment of between six months to two years. The persons who can be punished for these crimes are: the entrepreneur who conducts the individual business; the directors of the debtor with management and representative powers; the debtor’s general manager; and the debtor’s liquidator and statutory auditors (plus aiders and abettors, including advisors).

## Persons Entitled to File for Bankruptcy

### **Management Body**

Where the debtor is a company, no previous shareholders' resolution is required. The management body takes the decision to file for bankruptcy and can give a proxy to one of the directors or a third party to effect the actual filing.

### **Third Parties**

A petition can also be filed by the company's creditors, provided that the debts of the company which become overdue during the pre-bankruptcy evidential phase of the procedure amount to no less than EUR 30,000.

### **Public Prosecutor**

The public prosecutor can file a petition for bankruptcy in two specific cases:

- When the state of insolvency arises in the course of criminal proceedings, or when the debtor has fled or cannot be traced, or when he has shut down the premises or disposed of, replaced or fraudulently diminished the business assets; and
- When the insolvency is brought to the attention of the public prosecutor by a judge who has ascertained such insolvency during the course of civil proceedings.

The option for the competent court to declare the bankruptcy of the debtor *ex officio* has recently been abrogated.

## Formalities of Filing for Bankruptcy

The petition for bankruptcy must be filed with the Bankruptcy Court of the district where the debtor has its "*main place of business*" in Italy.

Article 14 of the Italian Bankruptcy Law provides a list of items to be included in or attached to the debtor's petition:

- The mandatory accounting and fiscal books (including, therefore, the balance sheet of the company) concerning the three fiscal years prior to the filing of the relevant petition or the entire existence of the company, if this is of a shorter duration;
- A description and evaluation of its assets;
- A list of the creditors and their relevant claims;
- An indication of the gross revenues for each of the last three fiscal years;
- A list of secured creditors, an indication of the relevant assets and the title upon which the relevant security interest is based.

## Adjudication in Bankruptcy; Appointment of a Receiver and Creditors' committee

### **Bankruptcy Judgment**

The Bankruptcy Court will verify whether the petition for bankruptcy is formally valid and whether the conditions for bankruptcy are met. If both are confirmed, the Bankruptcy Court will declare the company bankrupt. The bankruptcy judgment has immediate effect starting from the day of its docketing.

The bankruptcy judgment can be appealed by the debtor as well as by any interested party (except the applicant who can, nonetheless, appeal rejection of a petition within 30 days after service of the notice of rejection). The Court of Appeal has jurisdiction to decide the appeal. An appeal does not suspend the effects of the adjudication, but the Court of Appeal may, upon request of the appellant or

of the bankruptcy receiver, suspend totally, partially or temporarily the liquidation of the assets where serious reasons subsist.

The delegated judge is appointed by the Bankruptcy Court at the time of adjudication.

### ***The Bankruptcy Receiver***

In the adjudication judgment the Bankruptcy Court also appoints a bankruptcy receiver ("*curator*"), an accountant or lawyer experienced in insolvency matters and enrolled on a special register maintained by the Bankruptcy Court.

The bankruptcy receiver acts as a public officer and is required to perform his duties in person. However, if necessary, he may be allowed by the delegated judge ("*giudice delegato*") to obtain expert or professional assistance. The bankruptcy receiver is paid out of the debtor's assets and his remuneration takes precedence over creditors' claims ("*predeuzione*"). The bankruptcy receiver acts in conjunction with a creditors' committee ("*comitato dei creditori*"), consisting of three to five creditors appointed by the delegated judge, which has an advisory as well as a supervisory role in the bankruptcy procedure.

Prior to recent changes the only restriction regarding the appointment of the bankruptcy receiver was that a person having a conflict of interest with the bankrupted company or the bankruptcy procedure could not be appointed; now it is expressly provided that a bankruptcy receiver must be a lawyer, an accountant, a person who has acted as financial officer or controller, or a law or accountancy firm. A receiver can be replaced by vote of a majority (in terms of value of claims) of the creditors.

The bankruptcy receiver's duties are to:

- Locate and dispose of the debtor's assets;
- Review the creditors' claims, both secured and unsecured;
- Prepare a list of the debtor's liabilities and submit it to the court;
- Report to the creditors' meeting on the status of the debtor's assets and liabilities; and
- Use the funds available to pay off creditors' claims *pari passu*, subject to priorities certified by the Bankruptcy Court.

The bankruptcy receiver's actions are subject to review of the delegated judge at the petition of the debtor or any other interested party.

The bankruptcy receiver fixes his seal on the assets of the bankrupt entity shortly after his appointment. Formerly, the liquidation of the assets was made on a piecemeal basis to be authorised. Current law requires the bankruptcy receiver to prepare a liquidation plan within 60 days from the fixing of his seal and in any case not later than 180 days from the bankruptcy judgment (104-ter of the Italian Bankruptcy Law) for the approval of creditors' committee members.

The aforesaid plan must indicate the deadline to complete the liquidation of the assets, which cannot anyway go beyond two years from the filing of the judgment declaring bankruptcy, unless the receiver deems it necessary to ask for a longer term and therefore specifically justifies this request. Should the deadlines indicated in the liquidation plan not be met without reasonable grounds, the receiver's appointment shall be annulled. The delegated judge receives a communication relevant to the approved plan and authorises the execution of the acts as provided by the plan itself. The plan can mention the existence of an in-bankruptcy composition (described below) with creditors.

In order to distribute proceeds, the bankruptcy receiver shall present, every four months following the date of the decree issuing the statement of liabilities and based on the liquidation plan, a schedule of the amounts available and a draft breakdown of those amounts by which creditors are then paid off. In case of failure to meet such obligations, the receiver is revoked.

## **Creditors and the Creditors' committee**

Creditors (and alleged owners of property existing on the debtor's premises that the bankruptcy receiver rules to be the debtor's property) must file a proof of claim with the bankruptcy receiver. Any disputes regarding these claims are settled by the Bankruptcy Court.

The Creditors' committee is composed of representatives of the creditors. These representatives must reflect the type (preferred, secured and unsecured) and size of the claims. The creditors' committee is appointed by the delegated judge handling the liquidation within 30 days from the judgment declaring bankruptcy, following consultation with the bankruptcy receiver and creditors. A majority (in terms of value of the claims) of the creditors may appoint new members at the hearing for the admission of the claims. The recent Law Decree no. 59 of 3 May 2016 considers a Creditor's committee to be established in the moment of acceptance, including by electronic means, of the appointment by the nominees.

The involvement of the creditors in the administration of the bankruptcy estate is limited.

## **Consequences of Bankruptcy**

### **Effects on the Debtor**

From the time of the adjudication, the debtor is dispossessed. The bankruptcy receiver manages and disposes of the assets under the direction of the delegated judge. The debtor may no longer validly act in court as plaintiff or defendant in relation to the assets (Article 43 of the Italian Bankruptcy Law). The bankruptcy receiver is vested with such powers upon the authorisation of the delegated judge. However, all pending proceedings in which the debtor is involved are automatically stayed from the date the adjudication is issued and need to be re-initiated by or against the bankruptcy receiver.

In order to speed up the legal disputes involving a bankrupt entity, the Conversion Law no. 132/15 provides that all these disputes shall be handled with priority over all other proceedings.

### **Effect on Creditors**

From the date of the adjudication, no attachment, garnishment or other enforcement action may be initiated or continued against assets of the bankrupt estate (Article 51 of the Italian Bankruptcy Law). Where such actions have been commenced prior to adjudication, they will be automatically stayed and absorbed in the bankruptcy procedure.

Creditors are required to submit their proofs of claim at least 30 days before the hearing for the verification of the claims. The bankruptcy receiver should prepare and send a preliminary list of liabilities to the creditors 15 days before the hearing. Creditors must provide comments no later than five days before the hearing. At the hearing, which can be held also in absence of creditors or by electronic means (as stated by recent Law Decree no. 59 of 3 May 2016), the delegated judge either admits or rejects the claims. Once a review of all claims is completed, the delegated judge issues a statement of liabilities by decree. Creditors may challenge the decree both in connection with their own and other creditors' claims.

If proofs of claim are submitted later than 30 days before the hearing, they are considered "late claims" ("*domande tardive*"); however, no late claims are entertained that are submitted later than one year after the judge's decree issuing the statement of liabilities (or 18 months if the procedure is particularly complex). Late admitted creditors share only in distributions made after the time of admission (Article 101 of the Italian Bankruptcy Law).

### **Effect on Operations**

By default, adjudication involves the cessation of all the activities of the company with a view to a sale of all assets. However, the Bankruptcy Court may order that business operations be continued whenever cessation could cause "*serious harm*", provided that the continuation does not adversely affect the creditors of the bankrupt debtor. If the Bankruptcy Court authorises the continued operation of the business, the management of the business is entrusted to the bankruptcy receiver (who may in turn avail himself of qualified third parties for this purpose).

As an alternative to the continued operation of the business by the bankruptcy receiver, the delegated judge may, with the consent of the representatives of the creditors, authorise the lease of the business as a going concern to a third party. This can be authorised whenever useful for the purpose of eventually selling the business under more favourable terms (this would be the case, for example, whenever the interruption of operations would significantly damage the debtor's goodwill, thus causing a loss of value).

Finally, the business of the bankrupt company could be sold to a third party *en bloc* as a going concern, rather than through a sale of the individual assets that comprise it. The sale of the business *en bloc* is the preferred solution under the Italian Bankruptcy Law, for two reasons: firstly, it is assumed that the sale of an ongoing business may realise a higher price than the sale of the individual assets comprising the business; secondly, it is a more efficient way of liquidating the assets. It should be noted that if the business was previously leased to a third party by the bankruptcy receiver, the third party has a right of first refusal in case of sale *en bloc* of the business.

### **Effect on Contracts**

Articles 72 to 83 of the Italian Bankruptcy Law govern the effects of the bankruptcy on contracts to which the debtor is a party. The rules vary depending on the nature of the contract, but, generally, a bankruptcy affects contracts in three different ways:

- By causing the automatic termination of the contract, in all cases where performance by the bankruptcy receiver would be impossible due to the immediate cessation of the debtor's activities;
- By granting the bankruptcy receiver a right of election between termination of the contract and its continuation; and
- If the receiver elects to continue the contract, by providing for the automatic replacement of the debtor with the bankruptcy receiver in such contracts.

The second option above is deemed to be the default rule. In such cases, if the bankruptcy receiver does not respond in a timely manner, the other party can request the Bankruptcy Court to set a deadline not exceeding 60 days for the bankruptcy receiver to notify his decision. If the bankruptcy receiver does not reply within the deadline set by the Bankruptcy Court, the contract is deemed to be terminated.

It is worth noting that contractual clauses providing for termination in case of bankruptcy of either party are ineffective *vis-à-vis* creditors (Article 72, paragraph 6 of the Italian Bankruptcy Law). While there are not yet any precedents, the prevailing view still seems to be that such a rule only applies from adjudication, so that the parties would remain free to provide for termination at an earlier stage of financial distress. Certain scholars, however, challenge this interpretation in that it would allow the parties to circumvent Article 72, paragraph 6.

### **Set-Off**

Pursuant to Article 56 of the Italian Bankruptcy Law, "*the creditors can offset their claims against their debts to the debtor, even if such claims are not yet due upon adjudication; however, claims that are not yet due at adjudication cannot be offset if the creditors purchased them in the year before adjudication or after adjudication*".

While this provision primarily addresses automatic set-off (which requires that the claims be due, quantified and certain), according to some case law precedents the judicial set-off (which is not subject to the above limits and must be declared by a court) is considered admissible in bankruptcy.

A first limit to set-off is that both claims must exist at the time of adjudication. Therefore no set-off can exist between a claim against the bankrupt company and a clawback claim of the bankruptcy receiver, as the latter arises after adjudication.

A second limit to set-off in bankruptcy concerns claims that were not yet due at adjudication and that are purchased by a bankrupt's debtor after adjudication (or in the previous year).

Finally, it is worth noting that contractual set-off effected prior to bankruptcy is recognised; however, if executed during the relevant suspect period, it can be subject to clawback as a preferential discharge. While the prevailing opinion is that the longer (one-year) suspect period applies, certain scholars challenge this position and submit that contractual set-off should be viewed as an ordinary disposition against consideration and therefore subject to a six-month suspect period. Besides the difference in length of time, in the latter case the burden would be on the bankruptcy receiver to prove that the defendant was aware of the state of insolvency of the bankrupt debtor at the time the set-off was effected, and not on the defendant to prove that he was not aware, as in the former case.

### **Clawback Actions**

#### *Rationale*

A fundamental principle of the Italian Bankruptcy Law is the equal treatment of all creditors (“*par condicio creditorum*”), according to which, absent statutory priorities, no creditor may be paid a higher percentage of his claim than other creditors. A consequence of this principle is not only that the payment of debts by the bankruptcy receiver is strictly regulated, but also that all transactions effected by the debtor over the previous year (or, in certain cases, over the previous six months) are scrutinised and possibly unwound as preferential.

The preferential nature of a transaction effected in the six months/one year prior to bankruptcy is always *de facto* assumed. Even arm’s length transactions (e.g. ordinary sales, payment of debts, etc.) are usually considered to be preferential, and the only way to prevent avoidance is to prove that the estate would not obtain any benefit from voiding such transactions. Unfortunately, the unwinding is almost always beneficial to the estate, as the other party is left with an unsecured claim against the estate, which is automatically less valuable than what is returned.

In order to void preferential transactions effected over the previous six months, the bankruptcy receiver also needs to prove that the other party was aware that the debtor was insolvent. However, such knowledge is assumed in certain instances, such as following the insertion of the debtor’s name in the bulletin of unpaid negotiable instruments (e.g. notes, drafts, checks) or in case of foreclosures or collection procedures against the debtor. It goes without saying that if the creditor sued in a clawback action is able to prove that the debtor was not insolvent at the time of the claimed payments, this will represent a valid defence.

#### *Elements of Clawback Actions*

Any transaction or payment which has the effect of putting a creditor into a better position than it would otherwise have been *vis-à-vis* other creditors constitutes a violation of the *par condicio* principle (equal treatment of all creditors) and therefore potentially subject to clawback. Recent changes have shortened the suspect period, defined the meaning of a “*transaction not a fair value*” (a transaction in which the disproportion of the consideration to the detriment on the insolvent debtor is greater than 25%) and provided for some exemptions (as described below).

- Transactions. Article 67 of the Italian Bankruptcy Law, first paragraph, provides that:

*“Unless the other party proves that it was not aware of the state of insolvency of the debtor, the following shall be set aside:*

1. *transactions for consideration occurring within the one year prior to the date of declaration of bankruptcy, where the services performed or the obligations undertaken by the bankrupt exceed of at least 25% of what has been given or promised to him;*
2. *the extinguishing of financial debts which have fallen due and are outstanding, not effected in cash or through other normal forms of payment, if made within the one year prior to the declaration of bankruptcy;*
3. *pledges, antichresis rights and voluntary mortgages granted or set up within one year prior to the declaration of bankruptcy for pre-existing debts which had not yet fallen due;*

4. *pledges, antichresis rights and judicial or voluntary mortgages created within six months prior to the declaration of bankruptcy as collateral for debts which had fallen due.*”

- Payments. Article 67 of the Italian Bankruptcy Law, second paragraph, provides that:
  - *“If the bankruptcy receiver proves that the other party was aware of the state of insolvency of the debtor, the payment of due and outstanding debts, transactions for consideration and those granting a preferential right for debts simultaneously created shall also be set aside if made within six months prior to the declaration of bankruptcy [...]”*
  - It is also important to note that: *“Deeds executed by the debtor on a gratuitous basis [i.e., without any valuable consideration] within the two years prior to the date of declaration of bankruptcy shall be without any effects vis-à-vis all creditors”* (Article 64 of the Italian Bankruptcy Law). In such cases the repossession of the assets by the bankruptcy receiver is automatic. In other words, it is not necessary to prove that the other party was aware of the state of insolvency of the debtor.
  - It is finally worth noting that under Article 65 of the Italian Bankruptcy Law, payments of debts not yet due at the time of adjudication in bankruptcy which are made by the debtor in the two years preceding bankruptcy are not considered valid and must be returned to the bankruptcy estate.
- Exemptions from clawback action. Article 67(3) of the Italian Bankruptcy Law provides, inter alia, that:

*“The following are not subject to clawback actions:*

1. *The payments of assets and services effected in the interest of the entrepreneurial activities in accordance with commercial terms and practices; [...]*
2. *Transactions, payments and security granted on the debtor’s assets provided that they have been made in furtherance of a restructuring plan under the terms and conditions provided for by Article 2501-bis, fourth paragraph of the Italian Civil Code [...].* The reference means that an expert must certify that the plan is reasonably capable, if implemented, of resolving the financial distress and furthermore (in accordance with the new provisions introduced by the Development Decree) must assess the truthfulness of the accounting data and the feasibility of the plan itself, in line with the provisions governing the pre-bankruptcy composition plan;<sup>2</sup>
3. *Transactions, payments and guarantees made in execution of a pre-bankruptcy composition plan or debt restructuring arrangement approved pursuant to Article 182-bis and furthermore transactions, payments and guarantees made after the filing of the petition pursuant to Article 161 [of the Italian Bankruptcy Law (i.e. those effected after the filing of the request for admission to the pre-bankruptcy composition plan in accordance with the relevant provisions)];*
4. *Payments made when due in order to obtain the performance of services aimed at allowing the debtor to access other minor insolvency procedures.”*

If the bankruptcy receiver is satisfied that a violation of the *par condicio creditorum* rule has occurred, it would certainly initiate a clawback action against the creditor in order to recover the lost value by means of an ordinary writ of summons before the Bankruptcy Court. Ordinary proceedings are thereby initiated.

The statute of limitations for initiating clawback action proceedings is three years from the declaration of bankruptcy or, if earlier, five years from the act or transaction to be clawed back.

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<sup>2</sup> The Development Decree has modified article 67 paragraph 3(d), clarifying that the expert is chosen by the debtor and must meet the following independence requirements: (i) he cannot be linked to the debtor through private or professional relationships which may jeopardise his independence; (ii) he has to meet the requirements set forth in article 2399 of the Italian Civil Code for internal auditors (*sindaci*) of a joint stock company; and (iii) he must not have been employed by the company in distress or have taken part in its management and supervisory bodies within the last five years.

It is to be noted that special statutes have introduced clawback exemptions or departures from the general rules. As an example, payments from account debtors of securitised receivables cannot be clawed back under Section 67 of the Italian Bankruptcy Law, while the sale of the receivables itself is subject to clawback by the seller's trustee but the relevant terms are halved (three and six months). The decree "Destination Italy" (*Decreto "Destinazione Italia"* no. 145 of 23 December 2013, confirmed by the Parliament in February 2014) has further exempted payments from account debtors of securitised receivables from the special clawback under Section 65 of the Italian Bankruptcy Law. Similarly, payments from account debtors of factored receivables under Law no. 51 of 1992 (factoring law) are exempt from clawback; however the assignor can be forced to repay the relevant amounts if he was aware of the state of insolvency at the time of the payment of the price of the assignment, and the assignee could be liable to the assignor if the sale was without recourse.

### *Criminal Provisions*

As mentioned above, when bankruptcy is declared, criminal liabilities may be imposed.

The Italian Bankruptcy Law provides for a certain number of bankruptcy crimes. They are divided into two main groups: crimes committed by the insolvent debtor (including unlimited liability shareholders); and crimes committed by persons other than the bankruptcy entrepreneur (i.e. directors, general managers, liquidators and statutory auditors, creditors and the bankruptcy receiver).

In particular, an insolvent debtor can be punished for, inter alia, distracting, concealing or destroying assets of the estate or for showing non-existent liabilities in order to prejudice creditors' rights (Article 216 of the Italian Bankruptcy Law) ("*bancarotta fraudolenta*"). The same provision punishes debtors who manipulate mandatory accounting or corporate records to their own benefit ("*bancarotta fraudolenta documentale*") or who, prior to or during the bankruptcy procedure, paid debts in order to give preference to a certain creditor to the detriment of the other creditors ("*bancarotta fraudolenta preferenziale*").

Article 217 of the Italian Bankruptcy Law contemplates less serious bankruptcy crimes committed by the insolvent debtor, e.g. the crime mentioned in "Bankruptcy Petition" above, in relation to delays in filing a petition for bankruptcy or the non-fulfilment of obligations undertaken in connection with a request for pre-bankruptcy composition or in-bankruptcy composition.

Other bankruptcy crimes for which the insolvent debtor can be punished include the abusive obtaining of credit (Article 218 of the Italian Bankruptcy Law) and the indication of non-existing creditors (Article 220 of the Italian Bankruptcy Law).

The second group of bankruptcy crimes includes those which can be committed by persons other than the insolvent debtor.

Pursuant to Articles 223–226 of the Italian Bankruptcy Law, criminal liability and similar sanctions for the bankruptcy crimes indicated above are extended to directors, general managers, liquidators and statutory auditors (if appointed) of a bankrupt company. This group of crimes further includes certain crimes that can be committed by persons who are not part of the company's charter. Creditors can be punished for trading votes in connection with the debtor's request for pre-bankruptcy composition or in-bankruptcy composition (Article 223 of the Italian Bankruptcy Law). Under Articles 228–230 of the Italian Bankruptcy Law, the bankruptcy receiver can be punished for specific criminal offences such as having a private interest in the bankruptcy procedure.

Of the specific criminal offences in the aforementioned provisions, third parties ("*extranei*") may only be criminally liable in respect to bankruptcy crimes for complicity with those who committed the crime ("*intranei*") under the general provisions of the Italian Criminal Code.

### **Priority of Claims**

#### ***Rights of Creditors during a Judicial or Regulatory Insolvency Resolution Process***

As noted above, the fundamental principle of Italian Bankruptcy Law is the *par condicio creditorum*, which means that all creditors have an equal right to payment pro-rated to their claims. However, there are two groups of creditors that enjoy preferential treatment ("*creditori privilegiati*"): creditors

who hold a security interest ("*creditori ipotecari o pignoratizi*"); and creditors who have a preference under law ("*creditori privilegiati in senso stretto*"). Therefore, the equality principle only applies to those creditors who have an unsecured and non-preferred claim ("*creditori chirografari*"). They share pro rata after satisfaction of secured and preferred creditors.

Pledgees and preferred creditors holding a lien over movable assets also have a "*right of retention*" ("*diritto di ritenzione*"). This right allows those creditors (but only after their priorities have been finally ascertained) to seek authorisation to sell the relevant assets outside the procedure, but in accordance with rules set forth by the judge. Also, in these cases, the bankruptcy receiver may seek authorisation from the delegate judge to redeem such assets.

### **Secured Creditors**

As a general principle, creditors holding a security interest are satisfied from the relevant assets to the exclusion of all other creditors, including secured creditors having a lower rank (e.g. first mortgage over second mortgage). However, the Italian Civil Code contains very detailed rules (Articles 2745) regulating priority conflicts between secured and preferred creditors.

The main categories of secured creditors are:

- Creditors who hold a mortgage on real property;
- Creditors who hold a pledge on movable assets (including claims of the debtor against third parties); and
- Creditors who hold a contractual lien on an entrepreneur's assets under section 45 of the Italian Banking Law.

A mortgagee and a pledgee are entitled to satisfy their claims from the proceeds of the sale of the encumbered assets. Any excess is available for distribution to other creditors (i.e. second mortgagees, preferred creditors and unsecured creditors). Where the relevant asset is insufficient to satisfy its claim against the debtor, a creditor will rank as an unsecured creditor for the remainder. Third parties claiming title to assets included in the estate (including on the basis of title retention clauses) are technically not considered secured creditors, because they are entitled to restitution and not to the proceeds of the sale of their assets.

### **Preferred Creditors**

A preferred creditor is a creditor whose claim is given statutory priority (by a statutory lien) over other creditors. No priority may be created contractually. Such liens may apply to all of the debtor's property or to specific property only.

### **Post-Adjudication Creditors**

Certain claims are regarded as "*claims against the administration of the estate*" ("*creditori della procedura, prededuzione*"). In general, claims that arise as a result of, or following, adjudication in bankruptcy, are considered claims against the estate administration and have priority over secured and unsecured claims. Examples of these claims are:

- All the bankruptcy receiver's fees and costs;
- The costs of the sale of the assets;
- The rent for the debtor's offices after adjudication;
- Employees' salaries and social security payments relating to the period after adjudication; and
- Attorney's and other advisors' fees.

## **Unsecured Creditors**

Unsecured creditors have no preference or security and will therefore be paid only if and to the extent any proceeds of the estate remain after all other claims have been satisfied. Unsecured creditors rank *pari passu* among themselves in the estate, in proportion to the size of their claims.

## **Order of Distribution**

The order of the distribution of proceeds from the sale of assets that are not reserved for creditors holding security interests or specific statutory liens is as follows:

- Post-adjudication claims, i.e. claims created after the adjudication, which have precedence over all other claims ("*crediti prededucibili*") (such as costs and permitted indebtedness incurred during the bankruptcy procedure), including secured claims;
- Taxes on real property (limited to the real property being sold);
- Employees' entitlements, including, without limitation, termination benefits;
- Claims of independent professional contractors who performed services for the bankrupt company during the 12-month period prior to bankruptcy; commissions due within the previous 12 months pursuant to agency agreements; and compensation for the termination of agency;
- Farmers' claims;
- Claims of suppliers of production plants and equipment, and the claims of banks which financed the purchase thereof;
- Income taxes;
- Local taxes, social security payments and insurance premiums;
- Other unsecured creditors' claims;
- Subordinated claims; and
- Equity holders' right of distribution of any excess.

Secured claims rank always ahead of claims in the last three categories and sometimes ahead of other claims, depending on the type of security.

## **Exit**

If there are insufficient assets in the estate to cover the costs of the bankruptcy procedure (i.e. bankruptcy receiver's fees), the bankruptcy receiver will notify the Bankruptcy Court and the Bankruptcy Court will summarily liquidate the company, terminating the bankruptcy.

Once all the assets have been liquidated and the relevant payments made to creditors, upon request of the bankruptcy receiver or of the debtor, the Bankruptcy Court declares the bankruptcy closed and the company ceases to exist. Termination of liquidation is mentioned in the companies' register maintained by the Chamber of Commerce.

## **Pre-Bankruptcy Composition**

### **Conditions for Access to Pre-Bankruptcy Composition**

Pre-bankruptcy composition is a court-supervised procedure, the purpose of which is to discharge the debtor's debts and avoid bankruptcy. The debtor must submit a plan, which can provide for:

- The restructuring or discharge of debts in whatever form, including transfer of assets, assumption of debts or any other transaction, including the sale of assets to creditors in satisfaction of their

claims, the issuance of shares, quotas or bonds (including convertibles) or other financial instruments;

- The transfer of the assets to a third party (“*assuntore*”) who also assumes the debt; creditors of the debtor (or subsidiaries of such creditors) or new companies to be established during the course of the procedure, the shares of which are allocated to the creditors, can act as *assuntore*;
- The division of creditors into classes based on criteria (legal position, economic interests, etc.);
- Different treatment among creditors belonging to different classes.

A pre-bankruptcy composition plan is available to debtors who are in a “*state of crisis*” (which can be, but is not necessarily, insolvency).

In order to strengthen the position of the unsecured creditors Article 160 of the Italian Bankruptcy Law provides that the *concordato* proposal shall have to grant the payment of at least 20% of the unsecured creditors’ claims. This provision does not apply to *concordato* proposals that contemplate business continuation pursuant to Article 186-*bis* of the Italian Bankruptcy Law.

### **Persons Entitled to Submit a Pre-Bankruptcy Composition Plan**

Only the debtor is entitled to submit a pre-bankruptcy composition plan and the relevant decision must be taken by the management body (usually the board of directors) of the company, which will then delegate one of its members to submit the plan.

### **Formalities of Filing for Pre-Bankruptcy Composition**

The pre-bankruptcy composition plan must be submitted to the Bankruptcy Court of the district where the debtor has its main place of business in Italy.

Article 161 of the Italian Bankruptcy Law provides a list of items to be attached to the petition. In particular:

- An updated report of the assets and liabilities, and of the economic and financial situation, of the company;
- A list and assessment of value of the assets and a list of the creditors with an indication of their relevant claims and security interests;
- A list of creditors holding claims or rights, whether against the debtor or in rem (e.g. interests on assets owned or in possession of the debtor);
- A statement of the creditors and the value of the assets of any shareholders who have unlimited liability for the debtor’s debts;
- A plan containing an analytic description of the means and timing necessary for the implementation of the proposal (provision introduced by the Development Decree).

The restructuring plan and the documents indicated above must be accompanied by a report of a qualified professional (enrolled in the register of auditors and satisfying certain requisites) who is appointed by the debtor and who certifies the truthfulness of the company’s data and the feasibility of the restructuring plan.

The Bankruptcy Court ensures that the application for the composition with creditors is filed with the companies’ registry within the following day of the filing.

Moreover, in order to give the company in distress more time to prepare a viable *concordato* proposal, the Development Decree has also provided that the debtor may file an application for the composition with creditors simply attaching the latest three financial statements, postponing to a later time the filing of the proposal, the plan and the documents to be annexed thereto (“*concordato in bianco*”). These other documents must be filed within a term fixed by the delegated judge (from 60 to 120 days), which

term can be extended by an additional 60 days maximum. During such period, creditors are prohibited to start or continue enforcement and foreclosure proceedings over the debtor's assets (the "**Automatic Stay**"). The Automatic Stay will be extended for the whole period of the procedure if the debtor is admitted to the *concordato*. Therefore, from the date of filing of the petition until the moment at which the decree of homologation (described below) becomes final, no pre-procedure creditors may initiate or continue enforcement procedures against the assets of the debtor. If such an initiative is taken (or the procedure is continued), the action is null and void.

During the Automatic Stay period, the debtor has the option to switch from the pre-bankruptcy composition to a debt restructuring arrangement pursuant to Article 182-*bis* of the Italian Bankruptcy Law (discussed below), and it is empowered to carry out urgent acts for the company's ordinary and extraordinary management subject to authorisation of the Bankruptcy Court. As indicated above, liabilities arising from the performance of such acts enjoy the highest priority ("*prededucibilità*").

As a way to strengthen the effects of the Automatic Stay, the Development Decree has provided that any judicial (i.e. based on a judgment) mortgage registered in the companies' register during the 90 days prior to the publication of the request for pre-bankruptcy composition is ineffective *vis-à-vis* the creditors at the time of filing of such an application.

In order to curb abuse of the pre-application and therefore too easy an access to the *concordato*, the *Decreto del Fare* has introduced some restrictions, namely higher information requirements and stricter control by the bodies of the procedure.

In particular, the debtor must now enclose a list of all creditors and relevant amounts owed. Moreover, the court may now appoint a judicial commissioner for the interim period (before the filing of the complete proposal) which will exercise control over the debtor in an effort to prevent the debtor from undertaking actions that might jeopardise the interests of the creditors.

A debtor applying for *concordato* is also required to periodically inform – at least on a monthly basis – the bodies of the procedure about the affairs of the company and the activities carried out for the implementation of the proposal. Non-fulfilment of such obligations may result in rejection of the application and declaration of bankruptcy, if the relevant requirements are met.

If the actions taken by the debtor are deemed inadequate, the court may shorten the deadline for filing the plan (or a debt restructuring arrangement pursuant to Article 182-*bis*).

## **Approval of Pre-Bankruptcy Composition Plan; Appointment of a Judicial Commissioner**

### ***Decrees of Admission and Homologation***

If the Bankruptcy Court determines that the conditions are met, it will start the procedure, appoint a delegated judge and judicial commissioner ("*commissario giudiziale*") and schedule a creditors' meeting within 120 days. The meeting can also be held by electronic means as set out in the recent Law Decree no. 59 of 3 May 2016.

At the creditors' meeting the judicial commissioner illustrates the proposal made by the debtor in order to discharge his debts and those eventually made by the creditors. The unsecured creditors are then called to vote on the proposal. (Secured creditors do not vote, as they have priority over the proceeds of the sale of their security.) If the meeting is held by electronic means the discussion on the proposals made by the debtor and eventually by the creditors is regulated by a provision of the delegated judge issued at least 10 days before the meeting.

The pre-bankruptcy composition plan is approved if the proposal obtains the favourable vote of the majority of the unsecured creditors. Where creditors have been divided into classes, the favourable vote of a majority of the voting creditors of each class is required. Votes are counted according to the amount of the claims, not *per capita*. The Conversion Law no. 132/2015 abrogated the "implied consent rule", according to which failure to vote was equal to approval, so that now all votes required for the approval of the proposal shall have to be explicitly cast (Article 178 of the Italian Bankruptcy Law).

After the approval of the proposal, dissenting creditors (or creditors belonging to a dissenting class) representing 20% or more of the liabilities may file an opposition, but the Bankruptcy Court can homologate (confirm) the plan nonetheless, if it is satisfied that dissenting creditors would not receive better treatment under the available alternatives (e.g. straight bankruptcy).

Before Decree no. 83/2015, creditors could only approve or reject the proposal but could not amend it. The aforesaid Decree now provides that creditors representing at least 10% of the claims against the debtor can file an **alternative proposal**, unless the independent expert attests that the debtor proposal grants the payment of at least 40% of unsecured creditors (or 30% in case of a business continuity composition). The creditors' plan must be filed at least 30 days before the date set for the creditors' meeting. This measure has been introduced in order to increase the competitiveness of pre-bankruptcy proceedings and therefore to maximise recovery for creditors.

Creditors will then vote on all plans and the plan approved with the highest majority shall prevail. In case of an equal number of votes, the debtor's proposal shall prevail; otherwise, should the equal number of votes concern the alternative proposals, the plan which was filed earlier shall prevail.

After the creditors' approval, the Bankruptcy Court homologates the pre-bankruptcy composition plan and appoints one or more liquidators in order to fulfil the approved plan, if it has to be realised by means of a transfer of assets. The decree of homologation must be issued within nine months of filing, subject to a 60-day extension. However, such terms are not mandatory.

In cases of breach of the pre-bankruptcy composition plan or fraud, bankruptcy may follow, at the behest of the Bankruptcy Court.

If the pre-bankruptcy composition plan is implemented, the debts are discharged and the debtor may return to ordinary operations (if the assets of the company are still in his possession).

Claims (including claims for repayment of loans, including up to 80% of the amount of shareholder loans) arising in the course of the implementation of the plan – not just after homologation but also before homologation (conditional upon the Bankruptcy Court confirming such priority in the decree of admission) – are granted highest priority and must be paid in full.

The aforementioned Conversion Law also states that, should the proposal include the sale of the going concern or of one or more assets of the company to an identified third party, the Court shall have to open a competitive auction procedure and boost the search of offerers in order to maximise the value of the concerned assets.

Following the Development Decree, a debtor may also, subject to Bankruptcy Court approval:

- Enter into first priority financing agreements to support the plan, even before having produced all the documentation to be filed together with the request of *concordato* pursuant to Article 161 of the Italian Bankruptcy Law. The Court's authorisation is subject to a certification to be issued by an independent expert attesting that the new financing is instrumental to the satisfaction of the creditors. Such facilities may be secured by pledge, mortgage or by an assignment of receivables by way of security.
- According to Decree no. 83/2015, debtors are also entitled to obtain urgent interim finance which is necessary for their business needs without having to file a certification issued by an independent expert. The relevant claims shall take precedence over the other creditors' claims in case of bankruptcy ("*prededucibili*"). The debtor must specify the purpose of the requested finance and declare that there are no alternative sources to obtain such financing and that failure to receive it will cause imminent and irreparable harm to its business. The Court shall decide on this request no later than 10 days from its filing after having heard the opinion of the judicial commissioner and, if necessary, also of the main creditors.
- Pay pre-existing claims relating to the purchase of goods and services, to the extent that the expert confirms that the purchase is essential for the continuation of the business activity and to ensure the best satisfaction of creditors.

## Consequences of a Pre-Bankruptcy Composition

### **Effect of Commencement**

Throughout the procedure, the debtor remains in possession and retains management powers under the supervision of the judicial commissioner and the delegated judge.

Bankruptcy rules on monetary claims generally apply to the pre-bankruptcy composition plan.

The Development Decree has also clarified that any act, payment or security executed or created after the filing of the application for a pre-bankruptcy composition and in accordance with its rules and procedures is not subject to clawback action.

### **Effect on Creditors**

The creditors must file a proof of claim with the judicial commissioner. Any disputes regarding these claims will be settled by the Bankruptcy Court.

The creditors' participation in the proceedings is crucial, since they have to vote for or against the debtor's proposal at the creditors' meeting. In principle, only unsecured creditors are allowed to vote.

### **Effects on Contracts**

According to case law, the provisions of Articles 72–83 of the Italian Bankruptcy Law on pending contracts do not apply. This conclusion has been drawn because these provisions are not quoted in the chapter of the Italian Bankruptcy Law regulating pre-bankruptcy composition plans, and the debtor still continues to run the business, under the supervision of the court and a judicial commissioner. As a consequence, any pending contract is governed by the ordinary rules, i.e. in case of breach by the debtor admitted in the pre-bankruptcy composition plan, the other party is entitled to terminate the contract.

However, the debtor may now seek Bankruptcy Court authorisation to terminate pending contracts which have not yet been performed at all or have been only partially performed; should the Bankruptcy Court grant the request, the debtor will have to pay in full an indemnification to the counterparty. The debtor may also ask the Bankruptcy Court to authorise a suspension of a contract for a term of 60 days that can be extended once by 60 more days.

### **Business Continuation Composition (“Concordato con Continuità Aziendale”)**

The Development Decree has introduced a new definition and regulation for all cases of pre-bankruptcy composition (most of which pre-existed and were widely used in the past) in which the proposal aims to ensure continuity of the business enterprise, whether by the same debtor or by a third party purchaser: the “business continuation composition” (“**BCC**”) (“*concordato con continuità aziendale*”). A *concordato preventivo* is a BCC if the proposal provides for: the continuation of the business by the debtor; the sale of the business as a going concern; or the contribution-in-kind of the business as a going concern to one or more companies (even if newly incorporated).

In these cases, the application must include a certification from an independent expert that the continuation of the business would maximise creditors' satisfaction. Under this special *concordato*, payment to secured creditors can be postponed up to one year after homologation and executory contracts cannot be terminated by the other party by reason of the debtor being under a *concordato* (despite any provisions to the contrary in the relevant contract). Pursuant to the provisions enacted with the Decreto Destinazione Italia, debtors who filed a petition to be admitted to a BCC may participate in public bids provided that the Bankruptcy Court grants its authorisation after having heard the opinion of the judicial commissioner (Article 186-bis, fourth paragraph, of the Italian Bankruptcy Law).

## **In-Bankruptcy Composition**

The in-bankruptcy composition procedure (“*concordato fallimentare*”) is aimed at speeding up bankruptcy proceedings. During the course of a bankruptcy, the debtor, any creditor or a third party may propose an in-bankruptcy composition. The procedure is similar to a pre-bankruptcy composition

plan; however, the debtor is entitled to propose a plan within one year after the adjudication of bankruptcy, provided that less than two years have lapsed from the date of issuance of the decree which approved the final creditors' list ("*stato passivo*").

A third party or one or more creditors proposing the in-bankruptcy composition (including an SPV formed for that purpose) acquires all assets included in the bankruptcy estate and assumes the relevant liabilities, thereby taking on the role of *assuntore*; the assumption is limited to the liabilities officially disclosed at the time when the proposal of in-bankruptcy composition is filed with the Bankruptcy Court.

Under Article 124 of the Italian Bankruptcy Law, the proposal for in-bankruptcy composition with creditors can include:

- The division of creditors into different classes and different treatments of different classes of creditors; and
- The restructuring of debts and the satisfaction of claims in any way, including by the sale of assets, assumption of debts or other extraordinary transactions.

The proposal may provide that the secured and preferred creditors will not be satisfied in full, on the condition that satisfaction is fixed at an amount not lower than the best possible price which may be obtained for the security on the market. The treatment provided for each class of creditors may not change the ranking of the preferred claims, as laid down by the law. No bonds or guarantees are required to back the commitments in the proposal; however, it is common practice to offer a bank guarantee to ensure that the contemplated payments are made.

As soon as the proposal for in-bankruptcy composition is filed with the Bankruptcy Court, the delegated judge seeks the bankruptcy receiver's opinion (which is, however, not binding) and the approval of the creditors' committee (which is for the homologation of the in-bankruptcy composition proposal). Secured creditors (unless they waive their priority) and creditors having a conflict of interest cannot vote. For example the proponent who is also a member of the creditors' committee is not allowed to vote on his proposal. Failure to vote equals approval.

For the proposal to be approved, it must obtain the favourable vote (counted according to the amount of the claims, not *per capita*) of a majority of the creditors admitted to the vote (i.e. all unsecured creditors and secured creditors who waived their security interest or lien). In that respect, secured and preferred creditors who cast their votes are deemed to have waived their security interest or lien.

After the vote, the bankruptcy receiver presents a report to the delegated judge informing him of the outcome of the vote.

If the proposal is approved, the delegated judge orders the bankruptcy receiver to immediately notify the proponent of the approval in order to allow him to seek homologation of the plan and furthermore to notify the debtor and any dissenting creditors, and sets a term of between 15 and 30 days for the filing of possible oppositions (which can be filed by any interested party). Within the same term, the bankruptcy receiver must file a report detailing its final opinion on the proposal.

In case no opposition is filed within the terms fixed by the delegated judge, the Bankruptcy Court, after having verified the regularity of the procedure and the outcome of the vote, homologates the in-bankruptcy composition proposal by means of a decree which is final and not subject to appeal.

If oppositions are filed, the Bankruptcy Court sets a hearing in order to examine evidence requested by the parties (or *ex officio*). The decision is taken by the Bankruptcy Court by means of a motivated decree. The Bankruptcy Court's decision on the opposition may be appealed before the Court of Appeal within 30 days of the date of service of the motivated decree on the relevant parties. However, the original decree is immediately enforceable even if subsequently appealed.

The in-bankruptcy composition can be terminated if the proponent does not post the (first demand bank) guarantee (customarily) contemplated in the proposal or breaches other obligations. The in-bankruptcy composition may also be declared void if liabilities have been wilfully inflated or a part of the assets has been diverted or hidden.

## Debt Restructuring Arrangements pursuant to Article 182-*bis*

The Italian Bankruptcy Law allows for debt restructuring arrangements (“*accordi per la ristrutturazione di debiti*”), whereby a debtor “*in a state of crisis*” enters into a composition with creditors which is binding on all the debtor’s creditors, provided that:

- The debt restructuring arrangement is agreed by creditors representing at least 60% of the value of the debts; and
- The reasonableness and feasibility of the debt restructuring arrangements, the truthfulness of the company’s accounting data and the suitability of such arrangements to ensure repayment of those creditors which did not agree with such arrangements are certified by an independent expert, who fulfils the requirements established in Article 67 of the Italian Bankruptcy Law.

In any case, the debtor must guarantee the full satisfaction of creditors who have not approved the arrangements.

The Italian Bankruptcy Law does not mandate a specific format for the debt restructuring arrangement. The parties can freely determine the specific obligations and how these are to be performed. For example, they may include the waiver of interest, guarantees, total or partial transfer of assets, different treatments between different classes of creditors or simple rescheduling.

The debt restructuring arrangement is subject to homologation (confirmation). To that end, it is recorded in the companies’ register; within 30 days of registration, creditors and any interested party may file an opposition. If the Bankruptcy Court considers that the aforementioned conditions are met and that oppositions, if any, are ill-founded, it issues a decree of homologation. If the Bankruptcy Court does not homologate the debt restructuring arrangement, it does not automatically declare the bankruptcy of the debtor (“*state of crisis*” does not necessarily coincide with insolvency).

According to the provisions introduced by the Development Decree, the payment of claims of creditors not adhering to the debt restructuring arrangement must occur: within 120 days of homologation if such claims are overdue; or within 120 days of their respective maturities if they are not yet due upon homologation.

The arrangement has to be published in the companies’ register and becomes legally binding on the day of publication.

During the phase of the filing with the court of the request for the formal confirmation of the debt restructuring arrangement, the company may request court permission to obtain new credit, which would be granted first priority and which may also be secured through pledge, mortgage or by an assignment of receivables by way of security. An opinion of an expert, certifying that the credit is “*functional to the best satisfaction of creditors*”, is required.

According to Decree no. 83/2015 the debtor is also entitled to obtain urgent interim finance which is necessary for its business needs without having to file a certification issued by an independent expert. The relevant claims shall take precedence over the other creditors’ claims in case of bankruptcy (“*prededucibili*”). The debtor must specify the purpose of the requested finance and declare that there are no alternative sources to obtain such financing and that failure to receive it will cause imminent and irreparable harm to its business. The court shall decide on this request no later than 10 days from its filing after having heard the opinion of the judicial commissioner and, if necessary, also of the main creditors.

A debtor that has made a preliminary filing for pre-bankruptcy composition and obtained the automatic stay (discussed above) may continue to benefit from the stay even if, instead of filing a formal proposal for *concordato*, it decides to propose a debt restructuring arrangement.

The Development Decree has also exempted debtors filing for homologation of a debt restructuring arrangement, from the minimum equity requirements under the Civil Code. Consequently, during the proceeding (after filing), directors are no longer under a duty to call a shareholder’s meeting in order for it to resolve upon such recapitalisation. (The same provisions apply to the pre-bankruptcy composition procedure).

Courts have interpreted in different ways the type of review that the Bankruptcy Court has to perform in order to homologate the debt restructuring arrangement. It is generally held that the Bankruptcy Court must primarily assess the reliability, logic and consistency of the expert's report; given that most often the report will in turn rely on the likelihood of the occurrence of certain circumstances (e.g. new credit being granted). However, some Bankruptcy Courts have extended their scrutiny to such circumstances on which the report is based. The Bankruptcy Court of Milan in a case of 10 November 2009, while approving a plan despite the report being based on long-term conditions the reasonableness of which was impossible to assess, without any statutory basis gave the public prosecutor the task of monitoring the implementation of the plan.

Article 48 of Law Decree no. 78 of 31 May 2010, as converted by Law no. 122 of 30 July 2010, has strengthened the protection of the debt restructuring arrangement by allowing a debtor to seek a court-ordered moratorium during the course of the negotiations with creditors and before the approval of the arrangement itself. As mentioned above, during the moratorium no creditor is entitled to start or continue enforcement procedures or procedures aimed at obtaining precautionary measures or priority rights. In addition, the debtor must file with the competent Court: (i) a proposal of debt restructuring arrangement, accompanied by a self-certified declaration confirming that, between it and creditors representing at least 60% of its debt, negotiations on the proposal are pending; (ii) the documents requested for the pre-bankruptcy composition plan (see "Formalities of Filing for Pre-Bankruptcy Composition" above); and (iii) the declaration of an independent expert confirming the existence of the conditions to ensure the regular payment of creditors not included in the debt restructuring arrangement.

As soon as the above-mentioned documentation is filed and the request for moratorium is published in the companies' register, the Bankruptcy Court verifies that the documentation is complete and schedules a hearing for discussion within 30 days from the filing of the request, ordering the transmission of the documentation to the creditors. During the hearing, the Bankruptcy Court verifies the existence of the conditions to approve the debt restructuring arrangement and decides by motivated decree. If the request is granted, the Bankruptcy Court issues the prohibition against starting or continuing enforcement procedures and procedures aimed at obtaining precautionary measures against the debtor, fixing a term not longer than 60 days for the filing of the debt restructuring arrangement.

Finally priority is granted to claims arising out of the implementation of the plan not only after homologation (this extends to shareholder loans, up to 80% of their value, as a departure from the general principle of subordination), but also prior thereto, during and prior to the filing phase, conditional upon such claims (e.g. new credit) being contemplated in the petition and the priority being confirmed by the court upon homologation.

It is worth pointing out that Decree no. 83/2015 has introduced Article 182-*septies* thus creating a special procedure as regards debt restructuring agreements involving mainly financial intermediaries. In particular, the restructuring agreement pursuant to Article 182-*bis* may indicate one or more categories of such banks/financial intermediaries having the same economic interests and legal position. In this case, the debtor can request to extend the effects of the executed restructuring agreement also to the minority of non-adhering financial creditors belonging to the same category, if: (i) at least 50% of the overall claims towards the company are *vis-à-vis* banks or financial intermediaries; (ii) the financial creditors who have executed the restructuring agreement represent at least 75% of the claims of the relevant category; (iii) the non-adhering creditors of the category have been informed of the negotiations and have been given the chance to participate. The Bankruptcy Court homologates the agreement after having ascertained the following:

- That negotiations have been carried on in bona fide; and
- That non-adhering banks and financial intermediaries:
  - have legal positions and economic interests similar to those of the adhering financial creditors;

- have been provided with complete and updated information about the economic situation and financial position of the debtor, as well as about the contents and effects of the restructuring agreement; and
- can be satisfied according to the agreement in a way which is not worse than the one which is likely to occur in case of any other concretely feasible scenarios.

The non-adhering creditors can challenge this extension if the aforesaid conditions are not met by filing a formal objection before the Bankruptcy Court within 30 days from the service upon them of the restructuring agreement.

A similar procedure is provided for by Decree no. 83/2015 in order to extend to non-adhering financial creditors also the effects of a standstill agreement executed prior to the restructuring agreement by the debtor and banks/financial intermediaries representing the aforesaid 75% majority. More specifically, this agreement shall also apply to creditors which did not take part in it provided that: (i) they have been informed of the negotiations and have been given the chance to participate; and (ii) an expert appointed pursuant to Article 67, third paragraph, letter d) has attested that all the creditors subject to the standstill have the same legal position and economic interests. The non-adhering creditors can challenge this extension by filing a formal objection within 30 days from the service upon them of the executed standstill agreement.

### **Tax Legislation**

In the case of a debt restructuring agreement that has been formally validated by the Bankruptcy Court, any agreed reduction of the company's liability shall not constitute a taxable gain.

### **Turnaround Plans pursuant to Article 67(3)(d)**

As discussed above, the law governing turnaround plans ("*piani attestati di risanamento*") provides an exemption from clawback for contracts, payments and security on the debtor's assets where these have been put in place in furtherance of a plan to bring the debts and the financial situation back under control and an expert has certified the "*reasonableness*" of the transaction. In particular, as provided by the recent Development Decree, the expert must certify the trustworthiness of the company's financial data and the feasibility of the plan. An expert who provides false information or omits to communicate relevant information may be criminally liable.

Because these arrangements are not formally approved by the Bankruptcy Court, the debtor does not run the risk of informing the court of its possible insolvency, which, in the case of debt restructuring arrangements, could ultimately lead to a declaration of bankruptcy. For this reason, and because the debt restructuring arrangement did not add much protection or advantage, these agreements under Article 67 have so far had much more success than debt restructuring arrangements.

### **Tax Legislation**

As long as a turnaround plan has been published in the companies' register, any agreed reduction of the company's liabilities shall not constitute a taxable gain.

## **Extraordinary Administration**

### **Requisites for the Admission**

Extraordinary Administration ("*amministrazione straordinaria delle grandi imprese in stato di crisi*"), which is regulated by Law no. 270 of 8 July 1999 ("**Prodi-bis Law**"), replaces the previous special administration for large companies in state of crisis ("*amministrazione straordinaria delle grandi Imprese in crisi*"), introduced by Law no. 95 of 3 April 1979 ("**Prodi Law**"). The benefits of the Extraordinary Administration are available only to companies (and their affiliates): that had at least 200 employees in the previous year; and with total liabilities of at least two-thirds of either its total assets or its turnover in the previous financial year.

The procedure is divided into two phases:

- The first phase leads to the declaration of the state of insolvency (to be verified on the same basis as bankruptcy); and
- The second phase, resulting in the admission of the insolvent company to the extraordinary administration procedure or, alternatively, to adjudication in bankruptcy.

## **Commencement of Extraordinary Administration**

### ***The First Phase – Declaration of the State of Insolvency***

The first phase is mainly focused on the ascertainment of the requisites for the admission of the debtor to Extraordinary Administration and is aimed at the declaration of the state of insolvency.

The procedure for the declaration of the state of insolvency is commenced by a petition filed by: the debtor; any of the debtor's creditors; the public prosecutor; or the Bankruptcy Court itself (*ex officio*).

If the request is filed by the debtor, in its petition to the court it must illustrate the reasons for the insolvency and supply all relevant information regarding the existence of the aforementioned requirements.

The following documents, *inter alia*, must be attached to the application: the debtor's accounting records; the balance sheet for the previous two years; an up-to-date financial statement; a list of all the debtor's creditors; and a list of creditors having rights over moveable assets in the debtor's possession.

Should the requisites for the admission to Extraordinary Administration be satisfied, the Bankruptcy Court where the debtor has its main place of business declares the state of insolvency. In its judgment, the Bankruptcy Court: appoints the delegated judge who will supervise the procedure and one or three judicial commissioners; sets the deadline for the creditors to present their proofs of claim and the date of the hearing at which such claims will be examined by the delegated judge; and decides whether the management of the insolvent company should remain with the debtor or pass to one or three judicial commissioners (a panel of judicial commissioners is appointed in cases of exceptional relevance and complexity of the procedure). Such a decision is discretionary and involves a case-by-case determination whether is appropriate for the debtor's management to remain in possession, based on a judgment of what they would do if they remain in possession, on the basis of their track record and all foreseeable circumstances. In principle, based on some relevant precedents, the management of the enterprise is generally passed to the judicial commissioner. The judicial commissioner acts as a public officer. If three judicial commissioners are appointed, they make decisions by majority and one of them is named legal representative of the insolvent company. The Bankruptcy Court can dismiss the petition if the statutory conditions are not met. In such cases, the Bankruptcy Court declares the debtor bankrupt.

### ***The Second Phase – Opening of the Procedure***

Following the declaration of insolvency, the large company is eligible to be admitted to the benefits of Extraordinary Administration.

Pursuant to Article 27 of Law no. 270, this procedure is open solely to companies which demonstrate "*concrete possibilities of recovery of economical balance of their activities*". Pursuant to the second paragraph of Article 27, the debtor submits a recovery plan. The recovery contemplated may be achieved through the transfer of the debtor's business, after a year of continued operation, or an economic and financial restructuring of the debts.

The evaluation of whether these prerequisites have been met is made by the Bankruptcy Court that declared the state of insolvency on the basis of: a report made by the judicial commissioner(s) and filed with the Bankruptcy Court within 30 days of the declaration of the state of insolvency; and the opinion of the Ministry of Economic Development, to be filed within 10 days after receipt of the extraordinary commissioner's report.

Within 30 days of the filing of the judicial commissioner's report, and taking into account the opinion of the Ministry of Economic Development, the Bankruptcy Court, should the conditions provided by

Article 27 of Law no. 270 be met, declares the opening of the procedure. Otherwise, it declares the debtor company bankrupt.

The procedure is conducted by one or three extraordinary commissioners under the supervision of the Ministry, except for some specific decisions which are expressly reserved to the delegated judge and the Bankruptcy Court.

The extraordinary commissioners are appointed by the Ministry within five days of the decree opening the procedure. The extraordinary commissioners have the power to manage the company and its assets under the supervision of the Ministry. They act on the basis of a recovery plan prepared by them and authorised by the Ministry after consultation with a surveillance committee ("*comitato di sorveglianza*") composed of members chosen from among the unsecured creditors and persons with specific expertise in the field of activities of the debtor. The surveillance committee gives its opinion on the most important actions to be taken by the extraordinary commissioners and whenever else the Ministry deems it appropriate.

At any time during the procedure, if any statutory conditions are not fulfilled the extraordinary administration can be converted into bankruptcy.

### **Effect of Commencement of the Extraordinary Administration**

The declaration of the state of insolvency produces certain immediate effects, such as the automatic stay of all legal actions by creditors against the debtor's assets and the freezing of the accrual of interest.

The procedure also affects pending contracts. Article 50 of the Law no. 270 provides that the extraordinary commissioner has the discretion to continue or terminate any contract which has not been performed in whole or in part by either party, at any time during the procedure. Until the judicial commissioner takes such action, the contract remains in full force and effect. After approval of the recovery programme, the other party to the contract can request that the extraordinary commissioner notify him within 30 days of his decision whether to continue or terminate the agreement. In the absence of a response from the extraordinary commissioner, the contract is deemed to be terminated. This termination does not occur with respect to employment agreements and lease agreements regarding real estate property where the debtor is the lessor. As regards the rights of the other party, the rules of the Italian Bankruptcy Law regarding the status of contracts in the event of bankruptcy are applicable.

The effects of the admission to the extraordinary administration (second phase) are that the stay of actions continues and clawback actions become possible.<sup>3</sup> Debts incurred in the continuation of the business generally will have priority over any other secured and unsecured claim ("*in prededuzione*") pursuant to Article 111 of the Italian Bankruptcy Law.

In an effort to better coordinate procedures and avoid fraudulent transfers, Article 8.3(c) of Law-Decree no. 70 of 13 May 2011, as converted by Law no. 106 of 12 July 2011, has introduced a new Article 50-*bis*, which addresses the situation where: an enterprise or portion thereof has been transferred prior to insolvency; the property transferred constitutes the major part of the assets of the transferee; and the transferor and the transferee both become insolvent within a year from the transfer and are both subject to extraordinary administration procedures. In such a case, the transferor is jointly liable with the transferee for all debts and liabilities incurred after the transfer. Also, in such case the Ministry of Economic Development may appoint the same commissioners for the two procedures. The new law also empowers the Ministry to issue guidelines to ensure that the programmes for the two procedures are coordinated.

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<sup>3</sup> Such clawback actions are only possible if the recovery program envisages the transfer of the debtor's business.

## **Administration of the Procedure**

### ***The Court***

The Bankruptcy Court of the debtor's main place of business is competent for the declaration of the state of insolvency as well as for the initiation of the extraordinary administration procedure. All legal actions arising out of the declaration of the state of insolvency must be submitted to this court.

During the first phase, a delegated judge appointed in the judgment declaring the state of insolvency has certain authority, the extent of which depends on whether the debtor remains in possession. During the second phase, the delegated judge has more limited powers, in that he is only responsible for the admission of the creditors' claims and the distribution of any liquidation proceeds.

### ***Appointment of Commissioners***

As illustrated above, one or three judicial commissioners are appointed during the first phase. Like the delegated judge, the judicial commissioners' duties depend on whether the debtor remains in possession.

If the debtor is admitted to the second phase, extraordinary commissioners are appointed by the Minister of Economic Development to manage the debtor's operations under the Minister's supervision on the basis of the recovery program previously prepared by him.

According to Article 8.3 of Law-Decree no. 70 of 13 May 2011, the Ministry for the Economic Development, in conjunction with the Ministry for Economy and Finance, lays down the rules for the remuneration of commissioners and members of the surveillance committee, which must be based on results obtained, achievement of the objectives set in the programme and creditors' satisfaction.

### ***Government Agencies***

The Ministry of Economic Development plays an important role both in relation to the admission of the debtor to the second phase, in that it is called to express its opinion as to the existence of the conditions for the recovery, and during the entire second phase, since it appoints, and supervises the activities of, the extraordinary commissioners. Certain transactions, such as transfers of business undertakings or of real estate, require the approval of the Ministry. The Ministry can appoint experts and can deploy tax police ("*guardia di finanza*") for the necessary controls and investigations and adoption of the necessary actions.

### ***Creditors***

The unsecured creditors are exclusively represented by one or two members of the surveillance committee, which has consulting duties.

Creditors can file their proofs of claim and have right to distribution of proceeds.

Creditors can also oppose the declaration of the state of insolvency as well as the admission to the second phase.

Under Article 53 of Law no. 270, the rules established by the Italian Bankruptcy Law regarding the creditors' proofs of claim also apply to the extraordinary administration.

### ***Recovery Program***

The work-out is based on a recovery programme ("*programma di ristrutturazione*"), which, as already illustrated, is prepared by the extraordinary commissioner(s) within 60 days of the decree opening the procedure. The programme can be based on either the transfer of the debtor's business, after one year of continuation of the operations, or on an economic and financial restructuring of the large debtor on the basis of a restructuring plan not exceeding two years. This programme must be approved by the Ministry of Economic Development and implemented by the extraordinary commissioners by carrying out all planned restructuring activities. The programme can also be amended or replaced in the course of the procedure with the approval of the Ministry.

More specifically, the recovery programme must contain: (i) an indication of the core business on which the company's recovery should concentrate; (ii) a plan for liquidating the assets that are not strategic for the business; (iii) an indication of the financial resources required to support the implementation of the procedure; and (iv) the economic and financial expectations and goals of the continuation of the business.

### **Failure**

The Extraordinary Administration can at any time be converted into bankruptcy upon request by the extraordinary commissioner, or even *ex officio*, if the procedure cannot be positively continued. At the end of the procedure, upon request of the extraordinary commissioner or even *ex officio*, the Bankruptcy Court will declare the conversion of the procedure into bankruptcy when either the sale of the assets has been not performed within the term stipulated in the programme, or the business has not recovered its ability to regularly perform its obligations.

### **Completion and Termination**

Should the recovery programme underpinning the transfer of the business be completed within the term set, the Bankruptcy Court, upon request of the extraordinary commissioners or *ex officio*, declares the closing down of the business. The decree is communicated to the Ministry of Economic Development and to the companies' register by the clerk office.

The procedure can also end if: no creditors have presented claims; the entrepreneur has recovered his capacity to regularly satisfy his liabilities; the debtor has applied for in-bankruptcy composition and the application has been finally approved; all claims have been satisfied in full; or the proceeds from the assets' liquidation have been entirely distributed.

### **The Marzano Decree**

In the wake of the Parmalat case, the Marzano Decree introduced a faster procedure aimed at saving and turning around large insolvent companies in order to preserve their technical, commercial, productive and employment value. This procedure restructures the company's debts and sells those assets that are not strategic or do not form part of the company's core business.

The extraordinary administration procedure under the Marzano Decree introduced the following innovations:

- The debtor must apply to the Minister of Economic Development for immediate admission to the procedure, while at the same time filing a petition with the Bankruptcy Court in order to confirm its insolvency status. It is the Minister, rather than the Bankruptcy Court, that has chief responsibility for supervising the procedure; the Bankruptcy Court is requested only to confirm the company's insolvency status and verify the lawfulness of the proceeding with respect to the verification of claims;
- If the debtor is admitted to the procedure, other insolvent companies in the same corporate group may also participate, even if they do not satisfy the relevant requirements;
- The procedure is focused on restructuring rather than on the liquidation of the debtor's assets. It is based on the implementation of a two-year recovery plan subject to the Minister's approval. The restructuring plan may be converted into a sale plan – and/or into a bankruptcy procedure – if the Minister does not authorise the implementation of the restructuring plan;
- The recovery plan can provide for the satisfaction of creditors' claims through a composition, which must specify any conditions of its implementation and describe any offered guarantees. The composition can consist of:
  - the restructuring of debts and satisfaction of creditors' claims through any technical or legal means, including the assumption of debts, mergers and other corporate transactions; in particular, the composition can allow for the allocation to creditors (or classes of creditors) of stock, quotas or bonds, including convertible bonds, or other financial instruments;

- the transfer of the assets of all companies involved in the proposed composition to a third party;
- the division of creditors into classes, according to their legal position and uniform economic interests and the different treatment of creditors belonging to different classes;
- the transfer of clawback actions to a third party;
- The extraordinary commissioner may bring clawback actions for the benefit of creditors during the implementation of a recovery plan. In contrast, in cases of extraordinary administration, as regulated by Law no. 270, clawback actions are possible only where a sale plan is established.

## Forced Administrative Liquidation

Forced Administrative Liquidation is a special bankruptcy procedure provided by the Italian Bankruptcy Law (Articles 194–213 and numerous special laws) for some types of enterprises – in particular, it applies to insurance companies, credit institutions,<sup>4</sup> cooperative companies (“*società cooperative*”), trusts and auditing companies, cooperative consortia (“*consorzi di cooperative*”) granting public contracts, mandatory consortia (“*consorzi obbligatori*”), and in other cases contemplated by special laws. Its aim is to liquidate the debtor.

The debtor, the directors of an insolvent company, or one or more creditor(s) may apply to the Bankruptcy Court. The Bankruptcy Court must seek the advice of the government agency responsible for supervising the debtor’s enterprise. The judge may initiate proceedings by declaring the debtor insolvent and appointing a liquidator. All legal actions by creditors against the debtor are then stayed, with the exception of those aiming to ascertain the amount of any claim.

The liquidator acts as a public officer and is assisted by a supervisory committee consisting of between two and five experts (who may or may not be creditors) in the debtor’s industry. In the case of large businesses, up to three liquidators may be appointed. Unlike other procedures, there is no delegated judge, as the procedure is mainly administrative in nature.

The liquidator must review claims and consider whether a composition is feasible. If so, he will prepare with the debtor a plan of repayment, to be submitted to the creditors. If a composition does not appear feasible, arrangements are made for the disposal of the debtor’s assets and the distribution of proceeds among the creditors in the same order of priority as in bankruptcy.

## Directors’ Duties and Liability

Directors have a general duty to prudently manage the company, in compliance with laws and regulations, and owe their shareholders a fiduciary duty. Directors are jointly and severally liable for breach of their duties, except where one can establish lack of fault.

A claim may be brought against a director by the company, a shareholder or a creditor who has suffered a loss as a consequence of the director’s fault. If the company is bankrupt or subject to any analogous procedure, the claim may be brought by the bankruptcy receiver.

Where a director has breached the law or articles of association (e.g. has failed to act with normal diligence in supervising the conduct of the company’s affairs, has failed to do his best to prevent the occurrence of prejudicial acts or reduce their harmful effects or has acted in conflict of interest), and the company suffers damage as an immediate and direct consequence, the director is personally and jointly liable to the company for the damage suffered.

Directors are under a duty to call a meeting without delay in the event that the equity capital decreases by more than one-third because of the company’s losses. It is unusual for a court to find

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<sup>4</sup> This procedure is compulsory for banks, while in the case of other public entities it is an alternative to bankruptcy. The evolution of Italian legislation has led to the extension of the banking model to other financial institutions, such as investment firms (“SIM”), fund management companies (“SGR”), and open-end investment companies (“SICAV”), and to financial intermediaries disciplined by Article 107 of the Italian Banking Law.

liability for this breach, due to the difficulty in proving causation. However, courts may impose liability for negligent mismanagement in not having acted to prevent losses.

Duties imposed on directors apply equally to those who, although not formally appointed to the office, carry out *de facto* management activities or are involved in the running of the company.

## Extraterritorial Jurisdiction/Enforceability

### Recognition of Foreign Insolvency Proceedings

Italian Courts may recognise the existence of foreign insolvency proceedings or an order of a foreign Bankruptcy Court, provided that the following principles are satisfied:

- The foreign court has international jurisdiction over the case; and
- Such foreign proceedings or orders do not produce effects which are contrary to Italian public policy ("*ordre public*").<sup>5</sup>

Neither the Italian Bankruptcy Law nor Law no. 218 of 31 May 1995 concerning the modification of the Italian system of international private law contain any specific rule relating to international jurisdiction over insolvency proceedings.

Additionally, Council Regulation (EC) no. 44 of 22 December 2001, on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (both enforced in Italy), cannot be applied to bankruptcy, winding-up proceedings, judicial arrangements, composition and analogous proceedings. Nor has this provision been amended by Regulation no. 1215/2012 of the European Parliament and of the Council dated 12 December 2012.

Article 3, paragraph 1, of the Council Regulation (EC) no. 1346 of 29 May 2000 (the "**EC Bankruptcy Regulation**") provides that the court of the member state "within the territory of which the centre of the debtor's main interests is situated" is competent to commence the main insolvency proceedings. "Centre" refers to, in the case of a company or legal entity, the place of its registered office.<sup>6</sup>

As set forth in Article 3, paragraph 2, the courts of a member state in which the debtor has a permanent establishment can initiate secondary insolvency proceedings against a debtor whose centre of main interests is within another member state. In such an event, the effects of the secondary proceedings are limited to the assets situated in the territory of the first member state and aimed at the liquidation of the insolvent company.

On 20 May 2015, the European Parliament and the Council enacted the EU Regulation no. 848/2015 (the "**Recast Bankruptcy Regulation**"), which entered into force on 25 June 2015 and will be applicable to insolvency proceedings starting from 26 June 2017, with few exceptions (Articles 24, first paragraph, 25 and 86). The new rules also apply to proceedings which provide for the restructuring of a debtor, the so-called "hybrid proceedings", for example the Italian debt restructuring arrangements pursuant to Article 182-*bis* of the Bankruptcy Law.

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<sup>5</sup> Italian legal commentators distinguish between "*international public policy*" (which refers to the general principles that are universally enforceable, namely the inviolable rights of the individuals) and "*internal public policy*" (which includes the ethical, economical, political and social principles peculiar to the Italian legal system). Only the first is relevant with respect to the recognition of proceedings.

Article 26 of the EC Bankruptcy Regulation prevents any member state from recognizing an insolvency proceeding and enforcing a judgment relating to it if they are manifestly contrary to the relevant state's public policy, "*in particular to its fundamental principles or the constitutional rights and liberties of the individual*".

It is worth underlining that Article 26 of the EC Bankruptcy Regulation contains a general definition of "*international public policy*", which is deemed to be the fundamental principles of any member state, as well as the constitutional rights and liberties of the individual.

<sup>6</sup> Pursuant to Article 2(a) and (c) of the EC Bankruptcy Regulation, insolvency proceedings which may be commenced in Italy are the *fallimento*, *concordato preventivo*, *liquidazione coatta amministrativa* and *amministrazione straordinaria*. The *fallimento* and *liquidazione coatta amministrativa* are considered to be "*liquidation proceedings*".

This reform does not change the main framework of cross-border insolvency proceedings as set out under the EC Bankruptcy Regulation, but anyway introduces some important changes. The aforementioned “centre of the debtor’s main interests” pursuant to Article 3 has been more precisely defined as the “*place where the debtor carries on the administration of its interest on a regular basis and which is verifiable by third parties*”.

Another important amendment is set forth by Article 4 of the Recast Bankruptcy Regulation, stating that the court before which a request to start insolvency proceedings has been filed shall have to examine *ex officio* whether it has jurisdiction on the case. Should the court decide to open the proceedings, it shall have to specify in its decision if the proceedings are the main proceedings or secondary proceedings, pursuant to Article 3.

Immediate recognition of the foreign bankruptcy judgments and measures are denied by Italian courts (only) if they may produce effects that are contrary to Italian public policy, for example, if they do not grant all creditors equal treatment.<sup>7</sup>

Where the EC Bankruptcy Regulation is not applicable, Italian Bankruptcy Law applies. Article 9, paragraph 1 provides that bankruptcy can be declared by the court of the place where the debtor has its “*main office*”. In order to give emphasis to the notion of “main office”, Italian case law does not make reference to the place where the productive activity is usually carried out, but to the management centre of the business, i.e. the place where the business decisions of the company are taken.

Pursuant to Article 9, paragraph 2, the transfer of the registered office of a company in the year prior to the filing of the petition for bankruptcy is disregarded for the purpose of determining the venue and jurisdiction of the bankruptcy proceedings of such company.

According to Article 9, paragraph 3, the debtor who has its main office abroad can be declared bankrupt in Italy, even if a declaration of bankruptcy has been rendered abroad. Furthermore, the relocation of the business to a foreign country does not exclude the jurisdiction of Italian courts, if it occurred after the filing of a petition for bankruptcy or the request of the Public Prosecutor.

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<sup>7</sup> Corte di Cassazione, judgment no. 12031 of 19 December 1990.