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GUIDE TO RESTRUCTURING AND INSOLVENCY IN ITALY



OVERVIEW

This note outlines the various formal and informal insolvency proceedings available in Italy. It also explains the importance of certain other issues on an insolvency of a company under Italian law, including transactions prior to insolvency that may be challenged, and the effect of insolvency on contracts and directors' liability.

1. INTRODUCTION

Italian insolvency law was overhauled in 2005 and 2006. A full review of the legislation took place in January 2006 with effect from 16 July 2006. Further amendments to the previous regime have been made in September 2007 and entered into force on the 1 January 2008.

Liquidation of an insolvent company is governed by the Insolvency Legislation, while liquidation of a solvent company is governed by the rules of the Italian Civil Code.

The basic aims of corporate insolvency law are to rehabilitate or liquidate a company under either a Court supervised or a creditor supervised liquidation procedure. The regime is now more creditor-focused for small and medium size insolvency (bankruptcy); whilst large insolvencies (governed by "Prodi-bis" and "Marzano" laws) are more focused on protection of the level of employment.

Restructuring processes are also available outside of formal insolvency procedures. These have helped to foster a rescue culture in the Italian market.

2. INSOLVENCY PROCEDURES

The key insolvency procedure is bankruptcy (*fallimento*), which is governed by new insolvency legislation effective from 16 July 2006 as finally amended and effective from 1 January 2008. A bankruptcy opened before 16 July 2006 will follow the "Old Regime". For the sake of completeness we will illustrate both regimes referring to "New Regime", when describing provisions applicable to bankruptcies opened from 16 July 2006 and "Old Regime", when describing provisions applicable to bankruptcy opened before 16 July 2006.

A specific procedure (introduced by "Prodi-bis") applies to insolvency of companies employing more than 200 employees whose liabilities exceed two thirds of assets and revenues.

Furthermore in response to large corporate collapses (such as Parmalat in 2004), a further regime, based on "Prodi-bis" was introduced (by "Marzano"), to deal with large scale corporate rescues of companies having more than 500 employees and indebtedness exceeding € 300 m.

There are also specific liquidation provisions (*liquidazione coatta amministrativa*) applicable to companies subject to supervision by a public regulatory authority such as banks, insurance companies, financial institutions and cooperatives. These are beyond the scope of this note.

There are also three restructuring processes that are outside of insolvency proceedings. An alternative to formal insolvency procedures is to effect a pre-insolvent composition with creditors, which is a debtor in possession regime. It is also possible to enter into a formal restructuring agreement (*accordo di ristrutturazione*) or a turn-around plan (*piano di risanamento*)

There are separate provisions for the liquidation of a solvent company under the Italian Civil Code. These are discussed in Section 5 of this note.

2.1 **Bankruptcy (*fallimento*)**

(a) **General**

Liquidation is a Court supervised process for the realisation and distribution of a company's assets. It results in the company's dissolution.

(b) **Conditions for Liquidation**

A company is insolvent if it is not able to meet its debts when due.

(c) **Appointment of trustee and of the creditors' committee**

The judgment declaring the insolvency can be appealed before the Court of Appeal. The appeal does not stay the insolvency procedure. However, the liquidation of assets may be stayed pending the appeal.

Under the "Old Regime" the only restriction regarding the appointment of a trustee was that a person having a conflict of interest with the bankrupted company or the insolvency procedure could not be appointed. In addition to this requirement, the "New Regime" expressly provides that a trustee can be a lawyer, an accountant, a person who has acted as financial officer or controller, or a law or accountancy firm.

Creditors are given wide powers under the "New Regime": a trustee can be replaced by the majority by value of creditors.

The creditors' committee will be composed of three to five representative creditors. Under the "New Regime" it is expressly provided that these representatives must reflect the type (the preferred, secured and unsecured claims) and quantity of creditors' claims. The creditors' committee is appointed by the delegated judge handling the liquidation within 30 days from the judgment declaring insolvency, following consultation with the receiver and creditors. Under the "New Regime" the majority by value of creditors are able to appoint new members to the creditors' committee at the hearing for the assessment of claims. In this case the type and quantity requirements must be satisfied.

(d) **Effect of Bankruptcy**

The declaration of insolvency results in a stay of any pending enforcement action against the insolvent company and no new enforcement actions can be commenced against the insolvent company.

The Court may order the temporary continuation of the insolvent company's business if serious damage might result from its interruption. Under the "Old Regime" the creditors' committee was requested to give its non binding opinion on the continuation proposed by the Court. Under the "New Regime" continuation is proposed by the trustee and the majority of creditors' committee have veto rights on the company's temporary management. Expenses related to the company's temporary continuation (together with the fees of the receiver himself) have priority in the liquidation.

Under the "Old Regime" assets of the insolvent company are managed by the receiver under the supervision of the deputy judge. Whilst in the "Old Regime" the delegated judge could authorise extraordinary transactions, these transactions will now be authorised by the creditors' committee in the "New Regime".

The "New Regime" expressly provides that clauses in contracts providing for the termination of an agreement in case of insolvency are not effective. This principle was indirectly acknowledged by case law in the "Old Regime".

(e) **Creditor Claims**

Whilst no time bar is provided in the "Old Regime", in the "New Regime" creditors should submit their claims at least 30 days before the hearing for the assessment of their claims. The receiver should prepare and send a preliminary list of liabilities to the creditors 7 days before the hearing. Creditors must provide any response no later than 2 days before the hearing.

At the hearing, the deputy judge either admits or rejects the claims. Once analysis of all claims is completed, the judge fixes a list of liabilities by issuing a decree to this effect. Creditors may challenge a rejection in whole or in part of their own claim, or the admission of any other creditor's claim.

Whilst no time bar is provided for late claims (those filed after the judge's decree) in the "Old Regime", in the "New Regime" late claims may be admitted up to one year after the judicial decree fixing liabilities. Such creditors will only share in subsequent distributions.

(f) **Conduct of Liquidation**

The trustee fixes his seal on the assets of the insolvent entity shortly after his appointment. In the "Old Regime" the liquidation of assets was made on a piecemeal basis to be authorised. In the "New Regime" the receiver must prepare a liquidation plan within 60 days from the fixing of his seal for the approval of creditors' committee members. The delegated judge receives a communication relevant to the approved plan and authorizes the execution of the acts as provided by the plan.

The plan can mention the existence of an insolvent composition with creditors. Such a proposal may be put forward by the debtor, by creditors and third parties, and it may provide for creditors to be dealt with by class and/or for liabilities to be dealt with by transfer of assets (which may include the right to pursue actions to claw back assets) from the company creditors. A proposal must be approved by a majority of unsecured creditors by value in aggregate and in each class. A cram-down mechanism in case of a dissenting class is available provided that dissenting creditors can obtain no less favourable treatment than that which would be available under liquidation. Preferred creditors and secured creditors do not vote to the extent satisfied by the recovery from the sale of their secure assets, for the remaining part of the claim, if any, they will be treated as unsecured.

If the settlement is approved the deputy judge informs the company and the dissenting creditors fixing a deadline within which they can file their objections. If no objections have been filed, the Court will review the legitimacy of the procedure and outcome of the vote before issuing a decree finally approving the settlement. If objections are filed, the decree will be issued but subject to the outcome of the objections.

(g) **Exit**

Under the "New Regime", if there are insufficient assets in the estate to cover the costs of the bankruptcy (for example the receiver's fees), the receiver will notify the Court and the Court will summarily liquidate the company, terminating the bankruptcy.

Once all the assets have been liquidated and relevant payment made to creditors, upon request of the trustee or of the debtor, the Court declares the bankruptcy closed.

Termination of liquidation is advertised in the Register of Companies held by the Chamber of Commerce

(h) **Priority of Payments**

The order of priority of payment of creditors is set out below.

- (1) Costs and indebtedness incurred by the receiver during the insolvency proceedings (including the receiver's fees).
- (2) Claims of preferred creditors (such as employees which are secured on movable assets, not pledges)
- (3) Claims of secured creditors (including mortgages, pledges) on liquidation of the secured assets; and
- (4) Unsecured creditors, ranking in pari passu,
- (5) Shareholders loans.

(i) **Antecedent Transactions**

Under the "Old Regime", which is still applicable to insolvency procedures opened before March 2005, the following transactions are subject to claw back .

Look back period	Transactions	Comment/Burden of proof
2 years before opening of the insolvency procedure	Gratuitous transactions	Automatic - no defence available to the defendant
	Payments due on the date of insolvency declaration or thereafter if such payment is made 2 years before the opening of the procedure	Automatic - no defence available to the defendant
	Transactions not at fair value	Clawed back unless creditor can show he had no knowledge of insolvent state
	Payment of a debt (due and enforceable) not made with normal means	
	Security for a debt not due	
1 year before opening of the insolvency procedure	Security for a debt due	Clawed back unless creditor can show he had no knowledge of insolvent state
	Payment of a debt due and enforceable	Clawed back if the trustee can show that the creditor had knowledge of insolvent state
	Transactions for a value	
	Security for debt originating at the same time as security	

The "New Regime" has amended the above chart so that (i) the "look back" period is shorter: where it was two years it is now one year and where it was one year it is now six months; (ii) it has defined the meaning of a "transaction not at fair value" as being a transaction in which the value given by the insolvent company is greater by

one quarter than that received from the counterparty; (iii) it has provided some exemptions.

As a result the Antecedent Transactions under the "New Regime" are as follows:

Look back period	Transactions	Comment/Burden of proof
2 years before opening of the insolvency procedure	Gratuitous transactions	Automatic - no defence available to the defendant
	Payments due on the date of insolvency declaration or thereafter if such payment is made 2 years before the opening of the procedure	
1 year before the opening of the insolvency procedure	Transactions in which the value given by the insolvent company is greater of one quarter than that received from the counterparty	Clawed back unless creditor can show he had no knowledge of insolvent state
	Payment of a debt (due and enforceable) not made with normal means	
	Security for a debt not due	
6 months opening of the insolvency procedure	Security for a debt due	Clawed back if the trustee can show that the creditor had knowledge of insolvent state
	Payment of a debt due and enforceable	
	Transactions for a value	
	Security for debt originating at the same time as security	

Certain types of transaction are exempted from these provisions. The following are the most important exemptions:

- (i) payments for goods or services made in carrying on the ordinary business of the company in accordance with commercial custom;
- (ii) banking remittances, except those that substantially and in a sustained manner reduced the indebtedness of the company to the bank;
- (iii) acts, payments and securities over the company's assets provided these have been entered into pursuant to a turn-around plan on which an opinion as to "reasonableness" was given by an expert;
- (iv) acts, payments and security entered into or given pursuant to a composition with creditors (including restructuring agreements and pre-insolvent compositions);
- (v) payment of salaries to employees and fees to consultants;
- (vi) payments of due and enforceable debts made in order to obtain services necessary to accede to the composition with creditors and controlled administration procedure.

2.2 "Prodi-bis" and "Marzano" laws

Since 1999, large companies have been able to apply for "extraordinary administration", a procedure established under "Prodi-bis" law to facilitate the rescue of large companies with at least 200 employees and liabilities exceeding two-thirds of asset and revenue value. A moratorium applies against creditor action. If there are chances of recovery the debtor company will not be liquidated and the administrator may opt either for a sale of the business as a going concern or for the restructuring process. In other words, the business must be sold as a going concern within one year or be restructured over a two year period from the debtor company being admitted to the extraordinary administration. If the business is sold, the purchaser must undertake to continue its activities for at least two years and to maintain a specified number of employees.

"Marzano" law created a stand alone extraordinary administration procedure (with its origins in "Prodi-bis") for companies with at least 500 employees and €300 million indebtedness. It was enacted in response to the Parmalat collapse and is aimed at company rescue. A commissioner files a restructuring plan within 180 days from his appointment without having to pass through the chance of recovery test applicable to the extraordinary administration. The restructuring plan may include an arrangement with creditors restructuring debt by means of, *inter alia*, a debt for equity swap or the creation of a new entity to acquire the assets of the insolvent company. It is possible to provide for different classes of creditors and to treat different classes differently.

Since both "Prodi-bis" and "Marzano" laws deal with large insolvencies, the legislator provided for control by the government. This is through the Minister of Productive Activities and the Commissioners managing the insolvency procedure. These procedures cross refer to the main Bankruptcy procedure with reference to paragraphs (a), (b), (e), (h) and (i) above. In particular, whilst claw backs with reference to the antecedent transactions set out above are available in "Marzano" law, they are only available in "Prodi-bis" law to the extent that the commissioner opts for the sale of business. Therefore, no claw backs are available in the context of a restructuring plan.

3. RESTRUCTURING PROCEDURES

There are three restructuring procedures: turn-around plans, restructuring agreements and pre-insolvent compositions with creditors. Restructuring procedures are debtor driven and are available to a company regardless of its size or the level of debt. Whilst the turn-around plan and the restructuring agreement are more suitable at the early stages of a financial crisis, a pre-insolvent composition can be proposed by a debtor when creditors have commenced legal proceedings.

3.1 Turn-around plan (*piano di risanamento*)

The reforms introduced the concept of a turn-around plan into Italian law. A turn-around plan is an agreement with creditors and seeks to restructure a company's liabilities. Under the "Old Regime", a turn-around could only be achieved by means of a capital increase which could be unravelled or "clawed back" on a subsequent insolvency. Under the exemption provided for the antecedent transaction (see paragraph 2.1(i) (iii) above) it is possible to achieve a turn-around by means of a debt transaction which is protected from challenge. The turn-around plan must be supported by an auditor's opinion as to its reasonableness. For large limited companies (*società per azioni*), the auditor is appointed by the court. However, save for such appointments, there is no further Court involvement or approval required.

There are no specific requirements as to the financial condition of the debtor; ie the debtor does not have to be insolvent to implement a turn-around plan.

The turn-around plan can be kept confidential, although disclosure is required for listed companies. The plan is not filed at Court or at the Register of Companies. The turn-around plan does not provide a moratorium on legal proceedings. The advantage of the turn-around plan is that its provisions cannot be challenged on a subsequent insolvency.

3.2 **Restructuring Agreement (*accordo di ristrutturazione*)**

A company, whether in financial difficulty or insolvent, may enter into a formal restructuring agreement with creditors. The approval of creditors representing 60% (in value) of claims is required, together with an expert's report on the feasibility of the restructuring agreement and, in particular, its ability to satisfy the regular payment of those creditors who are not party to the restructuring agreement. The agreement is published in the Register of Companies and is subject to challenge by creditors and any other interested party for a period of 30 days. If no challenge is made within this time, the Court approves the restructuring. Regardless any possible challenge a 60 days moratorium applies from the publication of the restructuring agreement, preventing creditors from enforcing their claims against the company.

Like a turn-around plan, transactions entered into pursuant to a restructuring agreement are protected from challenge on a subsequent insolvency (see paragraph (i) (iv) above).

3.3 **Pre-insolvent composition (*concordato preventivo*)**

Under the previous regime, a composition with creditors was only available to an insolvent company. Following reforms in 2005, a solvent company in financial difficulty may enter into a composition with creditors. It is likely that this tool will be used to prevent insolvency.

The approval requirements for a composition with creditors for companies in financial difficulty and insolvent companies have been reduced. Previously a company could only be admitted to a composition with its creditors if it could prove it was insolvent and was capable of paying 40% (in value) of unsecured creditors and 100% of secured creditors. The requirement to be able to pay 40% of unsecured creditors has been removed.

The debtor files the composition plan at Court. The plan can provide for:

- (a) debt restructuring and satisfaction of creditors' claims by any means, including the transfer of shares, transfer of assets or assumption of liabilities to creditors or a company controlled by creditors;
- (b) transfer of some or all of the assets of the company to an assumpor (*assuntore*). Creditors or companies controlled by creditors may act as assumpors, whose shares are allocated to creditors as a result of the composition;
- (c) the division of creditors into classes according to their legal status and similar economic claims; or
- (d) the different treatment of creditors from different classes.

The plan can include tax liabilities.

The plan must include the following documents:

- (a) updated balance sheet and profit and loss accounts;
- (b) a list and estimate of assets with a nominal list of creditors indicating their claims and priority, if any;
- (c) a list of persons having priority over the debtor's assets other than creditors;

- (d) the value of the assets and shareholder contributions, if any; and
- (e) a report from an independent expert assessing the figures and feasibility of the plan.

Following the filing, the Court assesses the documents and the feasibility of the Plan as proposed in the course of a chamber hearing. The Court issues a decree admitting the company to a composition with creditors. A judge and a commissioner are appointed within 30 days of the order and an order is made for the payment of a percentage between 20% and 50% of the future expenses of the procedure. Rejection of the plan by the Court does not necessarily lead to the bankruptcy of the debtor.

If the Court approves the plan, there is a stay on creditor action pending approval of the plan by a majority of unsecured creditors (*omologazione*) and the final approval of the Court. When there is more than one class of creditors, the proposal must be approved by the majority of creditors by value and by the majority of the classes.

Cram-down is available and the proposal also may include a "haircut" for secured creditors, which however cannot be paid less than the market value of the secured asset.

The company maintains control over its business but it is subject to supervision by the commissioner and directions of the delegated judge.

3.4 Main features of the restructuring arrangements

In broad terms these are the main features of pre-insolvency arrangements.

	Debtor-driven	Out of Court	Consensual	Moratorium	Protected from claw back challenge	Confidential
Turn-around (piano di risanamento)	Yes	Yes	Yes (pure consensual)	No	Yes	Yes (if not listed)
Restructuring agreement (accordo di ristrutturazione)	Yes	No	Yes (pure consensual)	Yes (60 days from publication)	Yes	No
Pre-insolvency composition (concordato preventivo)	Yes	No	Yes (minority by value can vote against)	Yes (time necessary to implement the plan)	Yes	No

4. DIRECTORS' LIABILITY

Where a company has gone into bankruptcy, the liquidator may pursue directors of the company for any wrongdoing.

Corporate law provides for the liability of the company or entity which, exercising direction and coordination of the insolvent company, has acted not in the interests of the insolvent company so breaching the principle of correct management. It is a rebuttable presumption that the company controlling the insolvent company exercises direction and coordination of the insolvent subsidiary.

5. **CROSS-BORDER RECOGNITION**

Italy is party to the EC Regulation on Insolvency Proceedings and will therefore recognise procedures in relevant states.

For proceedings commenced in non-EU jurisdictions, it will generally be necessary to open ancillary proceedings in Italy in order to protect local assets.

There are no plans to introduce the UNCITRAL model law.

6. **SOLVENT LIQUIDATION**

Solvent liquidation must be effected following a shareholders' resolution to that effect or on certain constitutional grounds. It must also be effected if a company fails to maintain a minimum level of capital required by statute (€120,000 for a *Società per azioni* and €10,000 for a *Società a responsabilità limitata*) and another source of funds cannot be found.

Failure to cause the company to enter liquidation results in potential personal liability for the directors in respect of any subsequent losses.

Liquidation is commenced by an extraordinary shareholders' meeting at which liquidators are appointed. The liquidators take control and possession of the company's assets and records. They are responsible for the realisation of assets and the distribution of the proceeds in accordance with the priority of payments and distribution of any surplus to shareholders.

Shareholders have 3 months to object to the liquidator's final accounts, after which the company will be removed from the companies register. Unpaid creditors retain the right to enforce against the former shareholders to the extent of the surplus received by that shareholder.

Avv. Silvio Tersilla

Partner, Business Restructuring and Insolvency

Lovells Studio Legale

Piazza Venezia 11

00187 Rome

Italy

Tel: +39 06 6758231

Fax: +39 06 67582323

silvio.tersilla@lovells.com