INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 6D Guidance Text

Italy

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IN INTERNATIONAL INSOLVENCY LAW

CONTENTS

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN ITALY

Welcome to **Module 6D**, dealing with the insolvency system of **Italy**. This module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of the insolvency laws of Italy;
- a relatively detailed overview of the insolvency system in Italy, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of Italy.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2023**. Please consult the web pages for the Foundation Certificate in International Insolvency Law for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2023 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law on the INSOL International website.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module, you should have a good understanding of the following aspects of insolvency law in Italy:

- the background and historical development of insolvency law in Italy;
- the various pieces of primary and secondary legislation governing insolvency law in Italy;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in Italy;
- the rules relating to the recognition of foreign judgments in Italy.

After having completed this module, you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of insolvency law in Italy; and
- be able to answer questions based on a set of facts relating to insolvency law in Italy.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

In order to assist candidates with the Italian terminology, a glossary of terms used in this guidance text has been provided by the author.

Glossary of Terms

Italian	English
Accordi di ristrutturazione	Restructuring agreements
Accordo del consumatore (pre-2022)	Consumer's Agreement
Amministrazione straordinaria	Extraordinary Administration (procedure)
Attivo patrimoniale	Net equity
Codice Civile (r.d. 262/1942)	(Italian) Civil Code
Codice di Procedura Civile (r.d. 1443/1940)	(Italian) Civil Procedure Code
Commissario giudiziale	Judicial commissioner
Concordato fallimentare	In-liquidation composition
Concordato minore (post-2022)	Minor composition
Concordato preventivo • *Concordato preventivo in bianco* • *Concordato preventivo in continuità*	Pre-insolvency composition • Pre-insolvency composition where the plan is submitted up to 180 days after the filing • Pre-insolvency composition that contemplates business continuation

Italian	English
Creditore • *Chirografario* • *Della procedura, prededucibile* • *Garantito* • *Privilegiato*	Creditor • Unsecured creditor • Post-Adjudication creditor • Secured creditor • Preferred creditor •
Curatore fallimentare *Demanio* • *Demanio necessario* • *Demanio accidentale*	Receiver State property • No direct translation • No direct translation
Esdebitazione	Discharge (outcome); Discharge (procedure)
Fallimento *Fidejussione* *Garanzia Personale*	Corporate Liquidation Surety Personal guarantee
Garanzia Reale *Ipoteca* *Legge Fallimentare (r.d. 267/1942)* *Liquidazione coatta amministrativa* *Liquidazione coatta del lebitore* (post-2022) *Mutuo* ▪ *Mutuo Ipotecario* *Pegno* *Piano attestato di risanamento* *Piano del consumatore* (pre-2022) *Piano di ristrutturazione dei debiti* (post-2022) *Privilegio* • *Privilegio speciale* • *Privilegio generale*	Security Mortgage No direct translation Forced administrative liquidation Personal controlled liquidation Loan ▪ Mortgage loan Pledge Turnaround plan Consumer's plan Consumer's debt restructuring plan Preference • Special lien • General lien

Italian	English
Procedura di liquidazione del patrimonio (pre-2022)	Consumer's liquidation
Pubblico ministero	Public prosecutor
Reato di bancarotta semplice	Simple bankrutpcy (crime)
Scrittura contabile	Accounting entry, book-entry
Tribunale delle imprese	Enterprise court

3. AN INTRODUCTION TO ITALY[1]

Italy became a nation-state in 1861 when the regional states of the peninsula, along with Sardinia and Sicily, were united under King Victor Emmanuel II. An era of parliamentary government came to a close in the early 1920s when Benito Mussolini established a Fascist dictatorship. His alliance with Nazi Germany led to Italy's defeat in World War II.

A democratic republic replaced the monarchy in 1946 and economic revival followed. Italy is a charter member of NATO and the European Economic Community (EEC) and its subsequent successors the EC and the EU. It has been at the forefront of European economic and political unification, joining the Economic and Monetary Union in 1999.

Persistent problems include sluggish economic growth, high youth and female unemployment,[2] organised crime, corruption, and economic disparities between southern Italy and the more prosperous north.

3.1 Legal framework

Italy is a civil law country, meaning that the core principles of its law are codified into a referable system which serves as the primary source of law. The fundamental law of the Italian legal system is represented by its Constitution, enacted in 1947 by the Constituent Assembly specifically appointed for the task. The Constitution is rigid, meaning that any amendments require a complex process of approval from the two Houses of Parliament (*Camera dei Deputati* and *Senato della Repubblica*). If the required majorities are not reached, the Italian population may be called upon to vote on the proposal by means of a referendum. The last time Italian citizens approved a change to the Constitution was in 2001, while on two other occasions (2006 and

1 The majority of the information in this section has been taken from the following website: https://www.cia.gov/library/publications/the-world-factbook/.

2 The most up-to-date statistics on unemployment rate and economic disparities are available here: https://www.istat.it/it/archivio/occupati+e+disoccupati#:~:text=A%20giugno%20occupazione%20in%20aumento,stabile%20all'8%2C1%25&text=Tipo%20di%20documento%3A,Comunicato%20stampa.

2016) they rejected the changes proposed by the government. The failure to obtain approval under the 2016 referendum led to the resignation of the then Prime Minister, Matteo Renzi.

3.2 Economy

Italy is a developed yet declining economy.

Italy's economy comprises a developed industrial north, dominated by private companies and a less-developed, highly subsidised south, with a legacy of unemployment and underdevelopment. The Italian economy is driven in large part by the manufacture of high-quality consumer goods produced by small and medium-sized enterprises, many of them family-owned. Italy also has a sizable underground economy, which by some estimates accounts for as much as 17% of GDP. These activities are most common within the agriculture, construction, and service sectors.

Italy is the third-largest economy in the Eurozone, but its exceptionally high public debt and structural impediments to growth have rendered it vulnerable to scrutiny by financial markets. Public debt has increased steadily since 2007, reaching 134% of GDP in 2017 and 155% of GDP in 2020 as effect of the recession caused by the Sars-Cov-2 pandemic.[3] According to the latest statistics from Eurostat, this ratio has decreased to 150.8% at the end of 2021.[4] Investor concerns about Italy and the broader Eurozone crisis eased in 2013, bringing down Italy's borrowing costs on sovereign government debt from Euro-era records. However, it seems that concerns are growing following the demise of the ex-PM and the ex-president of European Central Bank Mario Draghi and the call for snap elections on 25 September 2022.[5] At the time of writing, it is likely that the right-wing, Eurosceptic and largely populist coalition led by Giorgia Meloni is set to win the snap elections.

The government which will be appointed in the fall of 2022 will face pressure from investors and European partners to sustain its efforts to address Italy's longstanding structural economic problems, including labour market inefficiencies, a sluggish judicial system and a weak banking sector. Italy's economy returned to modest growth in late 2014 for the first time since 2011. In 2015-16, Italy's economy grew at about 1% each year and in 2017 growth accelerated to 1.5% of GDP. In 2017, overall unemployment was 11.4%, but youth unemployment remained high at 37.1%. GDP growth was halted by the effect of the Sars-Cov-2 pandemic. The GDP contracted by 8.87% in 2020, and it is expected that the economy will recover to the pre-pandemic level only some time in 2024-2025.[6] Recent statistics from Eurostat suggest that the Italian economy is still growing, despite the inflationary pressures caused by supply restrictions following the Sars-Cov-2 pandemic and the war in Ukraine.[7]

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3 See https://www.statista.com/statistics/582803/government-debt-to-gdp-ratio-italy/.

4 See here: https://ec.europa.eu/eurostat/documents/2995521/14497745/2-22042022-BP-EN.pdf/90896015-2ac1-081a-2eef-ad8d5f2c0da1.

5 L Fletcher and N Asgari, "Hedge funds build biggest bet against Italian debt since 2008" (*Financial Times*, 25 August 2022), available here: https://www.ft.com/content/5cef309f-9daf-4337-bdc6-f6b2ef8ffe02.

6 Statistics are available here: https://www.statista.com/statistics/263606/gross-domestic-product-gdp-growth-rate-in-italy/.

7 Statistics are available here: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Quarterly_national_accounts_-_GDP_and_employment#GDP_growth_by_Member_State.

After the 2018 general elections, a new coalition formed by the anti-establishment parties Five Star Movement and Lega went into power. Since then, the government has adopted a strong anti-immigration and euro-sceptic policies, which led to a tough fight on the budget with the European Commission. More recently, the Italian Bank and the World Monetary Fund have significantly reduced the growth expectations of the country and there was a real risk that the country could enter into a new recession even before the Sars-Cov-2 pandemic hit.[8]

Things seemed to have improved in more recent times, after the formation of a new coalition between the centre-left Democratic Party and the Five Star Movement. The prime minister, Giuseppe Conte, was providing a modicum of effective government to a population starved of political competency. After having being beaten much harder than its neighbours at the beginning of 2020 due to the Sars-Cov-2 pandemic, Italy managed to bring the situation back under control quicker than other countries. For several months, the number of infections has been significantly lower than France, Germany, Spain and the United Kingdom, despite these countries having similar populations to Italy.

Nevertheless, the complex political arena in Italy meant that the prime minster Giuseppe Conte had to resign at the beginning of 2021. Conte was forced to resign after former Prime Minister Matteo Renzi pulled his small Italia Viva party from the coalition of political forces that was supporting him. On 3 February 2021, in the midst of the Sars-Cov-2 pandemic, Mario Draghi – the former president of the European Central Bank – was invited by Italian President Sergio Mattarella to form a government of national unity. After successful negotiations with parties including the League, the Five Star Movement, the Democratic Party and Forza Italia, Draghi was sworn in as Prime Minister on 13 February, pledging to oversee effective implementation of COVID-19 economic stimulus. Unfortunately, the political differences in the parties supporting the government led to the resignation of Mario Draghi as PM on 21 July 2022.[9] This resulted in the call for snap elections mentioned above.

One of Draghi's key efforts has been the completion of a National Recovery and Resilience Plan,[10] which was broadly outlined and agreed upon by the previous government. This plan outlines how Italy plans to emerge from the COVID-19 crisis by focusing on six "missions" or areas to boost its economy (including digitalisation, green economy, education, etc). The plan was submitted to the European Commission on 30 April 2021, as the European Union is supporting the Italian recovery with more than EUR 200 billion in loans and grants (out of EUR 672.5 billion made available through the Recovery and Resilience Facility).[11] The plan was later

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8 An economic recession is typically defined as a decline in gross domestic product (GDP) for two or more consecutive quarters. The Italian economy unexpectedly shrank 0.1% quarter-on-quarter in the third quarter of 2018. It was the first contraction since the second quarter of 2014. No data was available at the time of writing with reference to the last quarter of 2018.

9 A Giuffrida, "Italian PM Mario Draghi resigns after attempt to salvage coalition fails" (*The Guardian,* 21 July 2022): https://www.theguardian.com/world/2022/jul/21/italian-pm-mario-draghi-resigns-after-attempt-salvage-coalition-fails.

10 Available here: https://www.governo.it/sites/governo.it/files/PNRR.pdf.

11 More information is available here: https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en.

approved on 22 June 2021 and it has to be completed by 2026.[12] However, it is likely that the new appointed government will try to amend some aspects and obligations of the afore-mentioned plan.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

The current Italian *legge fallimentare* has been amended several times in recent years, including by means of legislative decrees[13] 35/2005, 5/2006 and 169/2007. As a result, its rules and principles have significantly evolved and are now remarkably different from those that governed the law when first enacted in 1942.

Starting in 2005, the old provisions were profoundly altered to favour the rescue and restructuring of distressed yet viable debtors. The new rules overhauled the discipline of *concordato preventivo* ("pre-insolvency composition"), the structure of which is loosely based on the US Chapter 11 procedure. The aim of promoting the rescue of viable businesses brought the legislator to introduce the *concordato preventivo in continuità*, a formal corporate insolvency procedure where the debtor is allowed to file a petition (so called "in white" or "incomplete" petition) reserving the right to lodge the proposal and the plan at a later stage.

The statutory leaning towards the use of pre-insolvency compositions ended abruptly in 2015, following concerns on the abusive use of these mechanisms. Currently it is necessary that the debtor ensures the payment of 100 % of the senior / preferred debts and 20% of the unsecured debts to be admitted to the procedure, while creditors have been given the right to submit rival proposals and rival bids.[14]

IMPORTANT: The *legge fallimentare* has been superseded by the reforms discussed below in paragraph 9. The new law applies to all procedures commenced on or after 15 July 2022. For all procedures commenced before that date, the rules outlined in paragraph 6 continue to apply without changes. No significant changes were introduced to the treatment of securities (as these are largely regulated by the Italian Civil Code rather than by the Insolvency Code).

4.2 Evolution of the Italian insolvency law

In Italy, the first rules that governed the insolvency of entrepreneurs and companies were introduced in medieval times. As the country was divided into several city states and small

[12] For more information, see here: https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility/italys-recovery-and-resilience-plan_en.

[13] Throughout this text, reference will be made to "law decrees" and "legislative decrees". Law decrees (Constitution, art 77) are issued by the government in cases of need and urgency and they need to be approved by Parliament within 60 days from their enactment, otherwise they produce no effect from the beginning. Legislative decrees (Constitution, art 76) are issued by the government on the basis of a delegation of powers from Parliament. Parliament has previously passed a law in which it outlined the limits, criteria and objectives of that delegation.

[14] On this topic, see: R Guidotti, "*Le soluzioni della crisi dell'impresa in Italia: il concordato preventivo dopo la riforma dell'estate 2015*", in MP de Vasconcelos (ed), *Recuperação de empresas e insolvência. As experiências italiana, espanhola e portuguesa*, (Euriconv: Porto, 2016) 29.

kingdoms, there was no homogeneous set of rules throughout the Italian territory. However, the majority of insolvency rules were characterised by punitive approaches: insolvent merchants (the most common type of entrepreneurs at that time) were subject to reclusion, loss of all their properties and political rights, and sometimes even to torture and the death penalty.[15]

At that time (that is, the thirteenth and fourteenth century), insolvency was not considered as a situation that could fall on a person due to bad investments or unfortunate events, such as the loss of their cargo ships in a storm. Insolvency was considered as a shameful situation and insolvent debtors as fraudulent people, to the point that Baldo degli Ubaldi coined the motto "*si fallitus, ergo fraudator*" ("if you are bankrupt, you are a fraudster").[16] That rebuttable presumption became final whenever the debtor tried to escape (*fugitivus*) from punishment.

Mercantile-oriented societies such as Venice developed a more debtor-friendly approach to insolvency, thanks in part to the fact that their local gentry (and not simply merchants) were involved in trade. Whenever the insolvency of the debtor was not the consequence of fraud or other crimes, it was possible for the debtor to reach an agreement with the creditors. William Shakespeare depicted this new attitude towards risk and entrepreneurialism in his late 16th-century play "The Merchant of Venice".

This new attitude towards entrepreneurialism meant that in cases where honest but unfortunate entrepreneurs became insolvent, their assets would have been placed in the hands of an administrator appointed by the local authority. These assets were usually liquidated and the proceeds distributed to the creditors according to the priority of their claims. These collective and universal procedures were later adopted throughout Europe with the enactment of the *Ordonnance de Commerce* (1673).[17]

The debtor-friendly approach to insolvency that characterised the *Ordonnance* also influenced the *Code Napoleon* (1807) and French insolvency law (1838). The principles underpinning these laws were later enforced in Italy by means of the *Codice Albertino* (1842) and the *Codice di Commercio* (1865). The Italian laws enacted in the 19th century were heavily influenced by the French models, to the extent that some articles were simply the Italian translation of the French Code.[18] The Italian *Codice di Commercio* encouraged the adoption of agreements between creditors and debtors. Debtors, however, had to contribute with future goods and income to the agreement. Creditors played a leading part in drafting that plan, as the judicial authority only had a secondary role.

Significant changes were introduced with law 197/1903, which introduced a new version of pre-insolvency composition. If the procedure regulated by the *Codice di Commercio* ("*fallimento*") was punitive and mainly in the hand of the creditors, the new pre-insolvency composition provided an opportunity to the honest but unfortunate debtors to put forward an agreement

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15 U Santarelli, *Per la storia del fallimento nelle legislazioni italiane dell'età intermedia* (Padova: Cedam, 1964).

16 B degli Ubaldi, Consilia, vol V, n 382, in *Baldi Ubaldi Perusini Iurisconsulti Omnium Concessu Doctissimi Pariter & Acutissimi, Consiliorum sive responsorum* (Venice, 1574).

17 F Galgano, *Lex Mercatoria* (Bologna: Il Mulino, 2001) 56-57.

18 A Asquini, "*Dal Codice di Commercio del 1865 al Libro del lavoro del Civil Code del 1942*" (1967) Riv Dir Comm 1.

with creditors to which the debtors contributed only with existing assets. If that agreement was approved by the majority of creditors, it became binding on all of them.

The discipline of *fallimento* (corporate liquidation) and pre-insolvency compositions of that time were the product of a liberal legislator. The ideals underpinning these laws were no longer popular at the beginning of the 20th century, which is characterised by the rise of authoritarian movements throughout Europe. The fascist ideology, which informed and heavily influenced laws enacted after the end of October 1922,[19] was based on a corporative view of the economy, where citizens and companies had to contribute to the wealth of the nation and not simply to act in order to maximise their personal benefit and returns.

That line of thinking required the promotion of entrepreneurial activities and creativity, but also repression and punishment whenever entrepreneurs deviated from this ideology. Failure and crisis were considered as exterior manifestations of a crisis, which had its origin in the selfish and individualistic approach to the production of the insolvent entrepreneur / debtor. Therefore, management of the crisis could no longer be left in the hands of the creditors and debtors. The state had to intervene by empowering its judicial arm to check on fraudulent and abusive practices. Law 995/1930 represents a clear manifestation of this attempt to bring back to judges the managerial and not simply directive power over insolvency procedures.

Royal decree 267/1942 (*legge fallimentare*) represents the codification within the same law of all the rules that governed corporate insolvency laws in Italy and that were found in the sources mentioned above. Despite the enactment of a Republican Constitution (1948) founded on the principle of freedom of private economic initiative in article 41), the *legge fallimentare* remained substantially unaltered until 2005 and no personal bankruptcy rules were introduced until 2012.[20] Recent changes to corporate insolvency and personal bankruptcy practice are covered in paragraph 6 of this text.

4.3 Institutional framework

Italy does not have a system of separate insolvency courts as in, for example, the United States. Currently, all formal insolvency procedures are commenced in the court where the debtors have their main place of business (usually, the company's registered office).[21] Any changes in the registered office that occur in the year before the filing cannot affect the court's jurisdiction,[22] unless the criteria outlined by the European Court of Justice in the case C-396/09 *Interedil* are

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[19] Mussolini and the Fascist Party first came to power following the celebrated *Marcia su Roma* (March on Rome), which took place on 28 October 1922. The then prime minister, Luigi Facta (Liberal), wished to declare a state of siege. However, his decision was overruled by King Vittorio Emanuele II, who appointed Benito Mussolini as prime minister on 29 October of that year.

[20] For an analysis of the reasons behind the lack of reforms in the area of insolvency, see: M Fioravanti, "*La genesi e la logica della legge fallimentare del 1942*" in G Morbidelli (ed), *La Cultura negli Anni '30* (Firenze: Passigli Ed, 2014), 178.

[21] *Legge fallimentare*, art 9(1). On the rebuttable presumption that the registered office is the main seat of the company, see among others: C Cass no 14676/2012; C Cass no 16080/2009; Court of Appeal of Turin, 4 August 2009, in (2010) *Fall.* 247.

[22] *Legge fallimentare*, art 9(2).

met.[23] It has been asked whether this presumption is rebuttable or not. The majority of commentators and the Supreme Court argue that in the case of a real transfer of the headquarters of the debtor, the court responsible for opening and supervising the procedure would be the court of the new seat, even if the change occurred less than one year before the insolvency petition.[24] On the contrary, if the transfer occurred within the one-year timeframe and the company was already insolvent at the time of the transfer, there is no possibility to defer the Italian jurisdiction to the foreign country, where the company moved its seat.[25]

When an insolvency petition is filed and a formal insolvency procedure is opened, the court (and judge) that is dealing with the insolvency procedure is responsible for any other connected actions, irrespective of their value.[26]

These courts are the same courts that are entitled to enforce any claims against the debtor when solvent. According to the World Bank *2019 Doing Business Report*, Italy performs particularly badly among developed economies under the "enforcing contracts" indicator. This indicator measures the time and cost needed to resolve a commercial dispute through a local first-instance court and the time needed to enforce that judgment. Italy ranks 111th out of 190 economies with reference to the enforcing contracts indicator.[27] According to the World Bank's report it takes an average of 1,120 days (3 years) to enforce a contract in a first-instance court, of which 840 days (2 years and 3 months) are for the trial to reach a judgment and 270 days (9 months) for enforcing that judgment. Similar results have been observed in the most recent *2020 Doing Business Report*, where Italy ranks 58th with reference to the indicator on the ease of doing business. At the same time, Italy is in a much better position than before in the indicator on the ease of resolving insolvency (21st, just after Ireland and ahead of France). At the time of writing, the statistics for the year 2021 were not yet available.

To improve these outcomes, the government[28] has recently attributed the competence to deal with corporate insolvency matters to specialised sections of the *tribunale delle imprese* (enterprise court). This decision does not affect personal bankruptcies, whose filings will continue to be referred to local courts.

The specialised sections of enterprise courts are not insolvency courts (as, for example, in the US) but a group of specialised judges who deal only with corporate matters. These are only present in the Court of Appeals of each region (two in Lombardy, Sicily and Trentino-Alto Adige,

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23 C Cass, no 7470/2017.

24 C Cass, no 3081/2011; De Sanctis, "*Il nuovo diritto fallimentare*" in Jorio, Fabiani (eds), *Commentario alla legge fallimentare* (Bologna: Zanichelli, 2010).

25 C Cass, no 7470/2011. In this specific instance, the company moved its registered seat when it was already insolvent to the UK, to an address where 33,000 more companies were already registered at the same time. No changes were made to the way the (insolvent) company conducted its business and activities, which were all located in Italy.

26 *Legge fallimentare*, art 24. According to C Cass, Sez 1, no 17279/2010, the *vis attractive* applies to all actions that can potentially, directly or indirectly, affect the composition of the insolvent estate.

27 The country has an equally appalling score in the indicators of dealing with construction permits (104th), getting credit (112th) and paying taxes (118th).

28 See paragraph 9 of this text and art 27 of the draft decree currently being discussed in Parliament to enact law no 155/2017.

none in Valle d'Aosta). They were created by means of law decree 1/2012, which transformed the duties, changed the name and established new sections of existing specialised sections of the Court of Appeals that dealt with intellectual property issues.[29]

This decision is consistent with the findings of the World Bank, according to which Italy performs significantly better in the "resolving insolvency" indicator (21st out of 190 economies according to data collected up to May 2019). The resolving insolvency indicator studies the time, cost and outcome of insolvency proceedings involving domestic legal entities.

Self-Assessment Exercise 1

Outline the main events and laws that have shaped the evolution of Italian insolvency law up until the period of reforms triggered by legislative decree no. 35/2005 (which should be included in the list) and briefly describe their relevance.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY

Under Italian law, parties have a general freedom to grant securities over their assets. There are some assets, however, that cannot be obtained as collateral. These are state-owned assets, which can be divided in two classes:

(a) **Assets that can only belong to the state** (*demanio necessario*).[30] These include seashores, harbours, rivers, streams, lakes and territorial waters, as well as any infrastructure that is essential to protect the state (for example, barracks, military airports, etcetera);

(b) **Assets that cannot be securitised if they belong to the state** (*demanio accidentale*).[31] These include roads, railways, highways, airports, aqueducts, buildings with historical, artistic or archaeological interests and the pieces of art owned by museums, archives and libraries.

Other assets that cannot be securitised are the assets constituting a patrimonial fund,[32] those that cannot be subject to foreclosure[33] and those listed in article 514 of the Civil Procedure Code.

According to article 51, Italian Private International Law,[34] security interests over assets are governed by the law of the jurisdiction in which the relevant assets are located.

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29 Legislative decree no 168/2003.
30 Civil Code, art 822(1).
31 *Idem*, art 822(2).
32 *Idem*, art 167.
33 Civil Procedure Code, art 545.
34 Law no 218/1995.

5.1 Real securities

5.1.1 Generally

The most common form of consensual security over real estate is the **mortgage**.[35] In order to be executed, a deed of mortgage needs to be drafted in notarised form (either a public deed or a private deed with notarised signatures) and registered with the competent land registry.

Italian law, however, knows other forms of securities:

(a) Consensual **liens** over registered movable properties, such as vehicles, aircrafts and ships;

(b) Consensual **pledges**,[36] usually over equity stock, debt instruments and government bonds, as well as on receivables and bank accounts.

It is also possible to grant a security over trademarks and patents, as well as over utility models and designs. Security over these intellectual property rights (primarily patents and trademarks) is granted by way of a pledge.

To be executed, liens over registered movable properties require a notarised deed of mortgage and registration to the competent office. Special formalities apply with reference to the creation of liens over aircrafts and ships. There are central collateral registries for each of these movable properties, as there is a central collateral registry for all mortgages over immovable properties (*Catasto*).

A pledge is a bailment that conveys possessory title to property owned by a debtor (the pledgor) to a creditor (the pledgee) to secure repayment for some debt or obligation and to the mutual benefit of both parties. Pledges require a deed of pledge bearing a certified date and delivery of the movable asset, or the document that confers rights on that asset to the pledgee or a third-party custodian.[37] If the pledge is over a registered asset (for example, a trademark), it must be registered with the competent registry (for trademarks: *Ufficio italiano brevetti e marchi*).

It is possible, pursuant to provisions in the Civil Code and legislative decree 170/2004,[38] to create a consensual pledge over a specific amount of money deposited in a bank account. Unlike the special lien described below, this security is considered by the law as a pledge over receivables (of the pledgor / debtor against the relevant bank). Legislative decree 170/2004 provides for certain advantages in relation to the enforceability of the pledge, as there is no need to rely on courts.[39]

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35 Civil Code, art 2808 *et seq*.
36 *Idem*, art. 2800 *et seq*.
37 *Idem*, art. 2800.
38 This decree implemented Directive 2002/47/EC of the European Parliament and the Council of 6 June 2002 on financial collateral arrangements [2002] OJ L 168/43.
39 See below in para 5.3 of this text.

In standard financial transactions, the owner of the account is usually entitled to use the pledged funds in accordance with the terms and conditions, as well as the instructions provided in the deed of pledge, until the occurrence of an enforcement event or an event of default. In addition, it is also possible to create "irregular pledges",[40] whereby a certain amount is credited by the pledgor on the pledgee's account. The pledgee acquires the ownership of such money but he / she has the obligation to give the money back to the pledgor if no enforcement event occurs.

5.1.2 Liens, Floating charges and Preferences

Some securities are also recognised by the law. The most important are:

(a) *Privilegi generali* (general liens) over movable goods belonging to the debtor;

(b) *Privilegi speciali* (special liens) over both movable and immovable goods belonging to the debtor;

(c) *Privilegi speciali* (special liens) under article 46 of legislative decree 385/1993.

Examples of general liens include the claims of: hoteliers over goods brought into hotels by customers;[41] carriers, over transported goods and custodians, over deposited goods;[42] and dealers over the cars, trucks and machinery sold to debtors.[43] Examples of special liens include the refund of deposits paid in preliminary contracts for the purchase of a real estate.[44]

Unless otherwise provided by the law, special liens are "real" securities as they prevail over rights acquired by third parties after the creation of the lien.[45]

Under Italian law it is not possible to take a floating charge over all the remaining non-secured assets of a business. However, article 46 of legislative decree 385/1993 provides for a specific type of special liens. This instrument can only be given to banks and other financial institutions as collateral for loans exceeding 18 months in duration. It covers equipment, machinery, work in progress, stock and receivables arising from the sale of those items, with the exception of cars, ships, aircrafts and other movables that are registered in a collateral registry.

If the same asset is encumbered by one or more different rights, article 2748 *et seq* of the Civil Code provides some guidance. According to these articles and unless the law provides otherwise:

- pledges prevail over special liens on movable properties (unless the pledgee / creditor knew of the existence of the special lien and acted in bad faith);

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40 Civil Code, art 1851.
41 *Idem*, art 2760.
42 *Idem*, art 2761.
43 *Idem*, art 2762.
44 *Idem*, art 2775-*bis*.
45 *Idem*, art 2747(2).

- special liens on immovable properties are preferred to mortgage creditors.

If several securities encumber the same asset, the criterion chosen by the legislator is *prior in tempore, potior in iure* ("he who is earlier in time is stronger in law"). The creditor who first obtains possession of the asset or the registration of the assets pursuant to the requirements in the law, will prevail over conflicting claims.

In addition to that, the law grants a preferred status to some creditors. It is not possible to make a comprehensive list of all the preferences and ranking of priorities recognised by the law in this text.[46] Preferences are not securities, but allow the beneficiaries to be paid in priority over unsecured creditors.

5.1.3 *Real securities in insolvency*

Pursuant to article 67 of the *legge fallimentare*, it is possible to carry out a successful avoidance action in the following cases:

- pledges, securities and mortgages voluntarily created within one year preceding a declaration of insolvency in respect of pre-existing debts which were not payable;

- pledges, securities and mortgages judicially imposed, or voluntarily constituted, within six months preceding the declaration of insolvency in respect of payable debts.

This action is brought by the insolvency practitioner / trustee on behalf of the debtor and for the benefit of the creditors. Counterparties can resist by demonstrating that they had no knowledge of the state of insolvency of the debtor.

The purpose of this legal action is not to reintegrate the goods into the available assets of the insolvent debtor, it is to avoid a pecuniary loss to the debtor's creditors. As a result, if such action is commenced *after* the buyer has itself entered into a formal insolvency proceeding, the insolvency practitioner / trustee acting on behalf of the debtor cannot demand the return of the goods alienated to the buyer, even if such goods are still part of the buyer's insolvent estate. This is due to the fact that if such action was permitted, the insolvent debtor would be preferred over other equally ranking creditors of the buyer's insolvent estate, thus affecting the principle of *par condicio creditorum* outlined by article 52 of the *legge fallimentare*.[47]

Security rights granted in respect of debt that was simultaneously created (including third party debt) in the six months preceding the declaration of insolvency can be avoided only if the trustee proves that the counterparty was aware of the insolvent condition of the debtor.

Under Italian law, it is possible for secured parties to subordinate their secured claims by agreement, which must be annotated in the same public registry where the security is

[46] See also para 5.6 of this text.
[47] C Cass, SS UU no 12476/2020. The same principles were outlined in an earlier judgment: C Cass, no 30416/2018.

registered. The subordination and order of priority clauses contained in the transaction documents related to a securitisation are also valid and binding under Italian law.

5.1.4 *Securitisation transactions*

Trusts are common law institutions and have not been recognised in Italy for a long time. Following the implementation of the 1985 Hague Convention on the law applicable to trusts and their recognition, trusts created under foreign law can be recognised and enforced under Italian law. However, there is no consolidated case law on the recognition of trusts in Italy.

Law 130/1990 (securitisation law) defines securitisation as any non-gratuitous transfer of receivables or other non-negotiable financial assets that are likely to generate ongoing periodic cash flows, followed by the transformation of such receivables and / or assets into negotiable securities to be placed on the market.

The basic requirements of Italian securitisation law are:

- the special purpose vehicle (SPV) set up to hold the transferred assets must be a company satisfying the requirements of Italian legislation governing financial intermediation and an intermediary dealing exclusively with the management of one or more securitisation transactions;

- the receivables and / or other financial assets comprising each securitisation transaction are considered as being separate from both the SPV's assets and those assets involved in other securitisation transactions. Therefore, the sums paid by the assigned debtors are exclusively employed for the satisfaction of the rights incorporated in the securities by the SPV.

Should any insolvency proceeding be commenced in respect of the relevant custodian, the amount deposited in such accounts and those credited during the course of the relevant proceeding, are not subject to any suspension of payments.

5.2 Personal guarantees

Guarantees are a common form of credit support and are normally created by a written undertaking by the guarantor for the benefit of the lenders. They are expression of the Latin maxim: "*idem fidem tua esse iubes?*", which loosely translates in the following: "I declare and guarantee I want this to happen".

The most common form of personal guarantee is the surety, where the guarantor personally guarantees the fulfilment of the debtor's obligations, jointly and severally with the debtor.[48] One specific peculiarity of sureties is that they are enforceable only if the debtor has no knowledge of their existence.[49] However, the guarantor and creditor may agree on a so called *beneficio excussionis*, which means that the creditor may claim the money owed only after the debtor fails

48 Civil Code, art 1936.
49 *Idem*, art 1936(2).

to repay the debt under the original terms and conditions of the contract between the parties. Sureties are not enforceable if the principal obligation between the debtor and the creditor is void, unless the transaction was entered into with a person unable to act (for instance, because they were under-age).[50]

Other examples of personal guarantees are first demand guarantees, where the guarantor undertakes to pay the beneficiary a certain amount of money upon first demand, regardless of any potential challenge by the debtor.[51] These are further expressions of the principle of freedom of contract.[52] The key distinguishing factor between sureties and first demand guarantees is the absence of a requirement that the latter is linked to a valid contract between debtor and creditor. As a result, creditors are much more inclined to rely on first demand guarantees than sureties. In this context, due to the serious financial implications for the parties. courts have used their discretion to identify the contract entered into by the parties and their business judgment, thus at times going beyond the "letter" of the contract signed by them.[53]

Additionally, first demand guarantees achieve a different purpose than sureties. While sureties are designed to ensure that the creditor receives what was originally bargained by the parties or the functional equivalent, first demand guarantees are designed to protect creditors from any losses arising from the negotiations with the debtor.

A form of personal guarantee particularly favoured by banks is the so-called *fideiussione omnibus*. Basically, this is a surety in which the guarantor undertakes to fulfil not simply existing but also the debtor's future obligations. This is particularly useful in a contract between a debtor / bank account holder and a bank, especially when such account is in overdraft. Following some critical scholarly remarks as well as lower court decisions for breach of the principle of clarity and transparency established by the joint reading of articles 1346 and 1418 of the Civil Code, the legislator clarified that the guarantee in the *fideiussione omnibus* must set forth the maximum amount of the guarantor's liability.[54] The creditor has up to six months after the moment in which the obligations became due, to collect his guarantee against the guarantor.[55] In any case, the Supreme Court in 2017 held that the entire system of *fideiussioni omnibus* entered into by banks since 1992 was in breach of the European anti-trust regulation.[56] The very same template prepared by the Italian Associations of National Banks (*Associazione Bancaria Italiana*) was found to be in breach of European rules.[57] This caused a shockwave in the market, as many of these contracts are now void and banks have no means to rely on these guarantees should the debtors fail on their obligations.

Personal guarantees and real securities (with the exception of first demand guarantees) fulfil the same purpose: to support the credit market and ensure that debtors repay their debts as they

50 *Idem*, art 1939.
51 *Idem*, art 1936.
52 *Idem*, art 1322.
53 C. Cass, no 15108/2013.
54 Law 154/1992, art. 10.
55 Civil Code, art 1957(1).
56 C. Cass., SS.UU. no 29810/2017.
57 *Idem*.

fall due. Unlike securities, personal guarantees do not give to the creditor a right over assets. They only give the creditor a legal claim against a third party, the guarantor.

The guarantor guarantees the loan by putting up his assets as collateral. If the guarantor cannot cover the debt, the assets that he pledged as security for the loan (if any) will be sold to cover the remaining debt.

5.3 Enforcement of securities

Outside insolvency, enforcement can be initiated only if the debt is due and / or the creditor has requested payment and has given proper notice to the debtor. Upon expiry of this notice, creditors can enforce their claims through a court proceeding. No court proceeding is needed for special liens on bank accounts. In all other cases, creditors have the right to enforce their (unpaid) claims against a debtor with a legal proceeding, as all of the debtor's assets not subject to a security right can be sold in satisfaction of a legal commitment entered into by the debtor themselves.[58]

In insolvency cases with real securities, the *legge fallimentare* does not include specific provisions aimed at automatically prohibiting enforcement actions over secured receivables should the debtor enter into a formal insolvency procedure. In formal procedures, however, the receiver, trustee or judicial commissioner has the power to initiate avoidance / claw-back actions.

In the case of a pledge over a bank account, the pledgee is considered a secured creditor in respect of the money credited on the account as of the date of the commencement of the proceedings. All monetary rights that come into existence after the commencement of the proceedings are part of the pledgor's / debtor's estate and available for distribution to all creditors. The pledgee is allowed to enforce the pledge only after the existence and validity of the claim and of the pledge has been recognised by the court and the competent judge has authorised the sale of the pledged asset.

Special rules apply to securities over financial collateral. Pursuant to article 4 of legislative decree 170/2004, if the security is claimed by one of the parties mentioned in article 1 of the same decree, there is no need to go to court. In such a case, the secured creditor / pledgee will inform the debtor of the enforcement and will refund him any of the proceedings left from the sale after the sale has taken place.

In insolvency cases with personal guarantees, if a guarantor pays on behalf of a debtor, they have the right to claim back what they paid from the debtor.[59] This right is called:

- *surrogazione* if a co-debtor pays on behalf of another debtor;[60]

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58 Civil Code, art 2740.
59 *Idem*, arts 1203 and 1949 *et seq*.
60 *Idem*, art 1203(3).

- *regresso* if a third-party, personal guarantor pays on behalf of a debtor.[61]

Both a co-debtor and a guarantor can file a claim for the amount they paid against the insolvent debtor. However, it is only a guarantor who can also claim interest and expenses against the primary debtor. In both cases, a co-debtor or guarantor replaces the original creditor in the list of creditors admitted to the insolvency procedure.[62]

5.4 Special rules

There are some contractual clauses that produce effects that are similar to traditional securities. These are limited-recourse provisions and non-petition clauses. Limited-recourse clauses can determine a reduction of the amount due to the creditor to the funds available to the debtor on the payment date. They can also restrict the remedies available to creditors should the debtor not have enough funds on the payment date. Non-petition clauses are a particular type of *ipso facto* clauses. They are agreements not to commence any formal insolvency proceeding against the debtor in the event of the debtor's default.

Limited-recourse provisions and non-petition clauses are valid under Italian law, as they do not breach the prohibition to introduce limitations of liability by contract.[63] However, they can be enforced only among the parties to the original agreement, which means that they will not bind the insolvency official.

Any breach of these provisions gives rise to a claim for damages. As a result, any petition filed by a creditor who has agreed to a non-petition clause would be deemed to have been validly filed.

5.5 *Quasi*-securities

There are several examples of contracts and transactions that achieve the same purpose of "traditional" security over collateral without the formalities required for their creation.

A traditional example is **sale and leaseback contracts**. A sale and leaseback contract can be defined as an arrangement where one party (a company) sells certain assets to another party (a leasing company) that immediately leases it back to the seller.

Sale and leaseback transactions are common in Italian practice and are not generally considered a security interest. However, sale and leaseback transactions may be declared void for a breach of article 2744 of the Civil Code, if the main purpose of the sale lies in the creation of the security interest rather than in the subsequent lease of the asset.

Significant changes have been introduced to this discipline by virtue of law 124/2017. According to that law, in all leasing contracts the lessor has: (i) the right to claim back the goods from the

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61 *Idem*, art 1950.
62 C Cass, 17 January 2008, no. 903 in 8(2008) *Il Fall* 920.
63 Civil Code, art 2740(2).

(insolvent) lessee and (ii) the right to submit a proof of claim to the insolvent estate for the losses incurred by reason of the contract and not covered by the sale of the goods or a further leasing contract. As a result, law 124/2017 has the result of transforming leasing contracts in *quasi* securities.

Before the introduction of law 124/2017, courts used to distinguish leasing contracts on the basis of their purpose. The approach described above applied only with reference to leasing contracts where the original "objective" purpose was to grant the use of the good to the lessee, without transferring the property to the latter. If, however, the "objective" purpose of the contract was to transfer the property from the lessor to the lessee and this resulted in higher periodic instalments, then the lessor had no right to "grab the asset" in the ensuing insolvency of the lessee. The lessor only had the right to file a proof of claim against the insolvent estate.

After entry into force of law 124/2017, it was not immediately clear whether the new approach applied retrospectively to existing contracts. A positive answer to that question would have greatly favoured lessors, who no longer had to prove that the purpose of the leasing contract was only to grant the use, rather than the use and property, of the goods. However, the Supreme Court held that law 124/2017 does not apply retrospectively and that lessors still have to show the objective purpose of the contract before being entitled to recover the leased goods.[64]

Another form of *quasi*-security that is relatively common in this jurisdiction is **factoring**. Up until the enactment of law 52/1991, the assignment of receivables to third parties was problematic under Italian law, due to the restrictions imposed by article 1260 *et seq* of the Civil Code. After the enactment of that law, present and future receivables can now be assigned (even in bulk) and the assignee may also bear the risk of insolvency of the third party responsible for the repayment of the debt (*cessio pro soluto*).

Factoring is only allowed if the assignor is a partnership, business or individual acting for commercial purposes, and the assigned receivables arise from contracts entered into by the assignor / seller in the conduct of its business. The assignee must be a bank or factoring company authorised to carry out financial activity in Italy pursuant to the Italian Consolidated Banking Act (legislative decree 385/1993).

Other examples of *quasi*-securities are hire purchase agreements and retention of title (ROT) clauses.

Hire purchase agreements are not specifically governed by Italian law and are not common in Italian practice. The purpose of a hire purchase agreement can, in any event, be achieved through similar arrangements such as leasing or ROT clauses.

In the case of **ROT clauses**, a buyer acquires the ownership of the purchased assets only upon payment of the last instalment. The buyer assumes the risk of loss and deterioration of the purchased assets from the moment of its delivery. However, ROT clauses are effective towards other creditors only if it is set forth in a written agreement bearing a certified date and entered

64 C. Cass., SS.UU. 28 January 2021, no 2061.

into prior to an enforcement procedure initiated by such creditors. Depending on the type and value of the relevant assets, ROT clauses must be registered in a special register held by a competent court.

5.6 Order of distribution

Unless otherwise provided by the law, or unless contractually agreed by the relevant parties, the rules outlined above and the specific provisions on preferences and priorities apply to all formal insolvency procedures. As a result, the principle of equality of position among creditors (*par condicio creditorum*) applies only with reference to classes of creditors. The order of distribution is outlined by article 111 *legge fallimentare*.

5.6.1 Post-adjudication creditors

Post-adjudication creditors have claims that arose after the commencement of the formal insolvency procedure. The involvement of these creditors in the formal insolvency procedure is needed to ensure their smooth functioning (for example, expenses and fees incurred by the officeholders) and / or the achievement of the statutory goals (for example, the leaseholder of corporate premises).

Their claims are against the administration of the estate. Therefore, these creditors are paid in priority over any other creditors. Examples of these claims include:

- officeholders' fees and costs;
- the costs of the sale of the assets;
- the rent of the debtor's premises after the commencement of the procedure;
- employees' salaries and social security payments relating to work carried out after the opening of the procedure;
- legal and other advisors' fees.

The list of these creditors includes also suppliers, who entered into a contract with the debtor *after* the commencement of a formal insolvency proceedings but have not been paid for their supply of goods or services. This preferential status is upheld even if a pre-insolvency composition that contemplates business continuation is later converted into a liquidation procedure by a court, provided that the expense was in line (but not necessarily expressly authorised by) the plan originally prepared by the professional and submitted to the creditor.

5.6.2 Secured creditors and lienholders

Some creditors enjoy a preferred status only with reference to certain assets of the debtor. Once these assets have been sold and the proceeds allocated to them according to their priority ranking, they are treated as unsecured creditors for the balance (if any) of their claims.

If claimants have a right of retention over certain assets (for example, pledges and special liens), they have the right to seek the court's authorisation to sell the relevant assets outside the insolvency procedure. In limited and specific circumstances, the receiver can redeem these assets.

5.6.3 *Preferred creditors*

Secured and preferred creditors are paid first. Preferred creditors are those claimants whose claims are given statutory priority over other claims. Preferences / priorities cannot be created contractually. Under Italian law, the list of preferred creditors is particularly long. Examples of preferences include money owed for funerals, infirmity or personal maintenance;[65] money owed to the state for some taxes, including VAT;[66] money owed by the employer on behalf of their employees;[67] and judicial expenses.[68]

Law 155/2017 gave the government the power to reform the laws on preferences and priorities. However, such power was not exercised by the Rordorf Commission – see more about the Commission's work in paragraph 9 of this text. As a result, the system of preferences and priorities have not changed by virtue of the entrance into force of the new insolvency Code on 15 July 2022).

5.6.4 *Unsecured creditors*

Unsecured creditors rank *pari passu* among themselves in the estate, in proportion to the size of their claims.

Self-Assessment Exercise 2

Italian insolvency law provides for a number of exceptions to the principle of equality of creditors (*par condicio creditorum*). It also recognises the enforceability of real securities and personal guarantees in insolvency cases. Outline at least three securities and guarantees recognised by the law and how enforcement differs between insolvency and non-insolvency cases.

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

65 Civil Code, art 2751.
66 *Idem*, art 2752.
67 *Idem*, art 2753-54.
68 *Idem*, art 2777.

6. INSOLVENCY SYSTEM

6.1 General

The rules that govern the consequences arising from personal and corporate failure are included in two separate pieces of legislation. On the one hand, corporate rules are laid out in the *legge fallimentare*, the royal decree 267/1942, as amended over the years. The rules that govern personal and consumer bankruptcy are, on the other hand, included in law 3/2012.[69]

Italy has therefore adopted a unified approach to law drafting in the area of corporate insolvency law, even if some of the rules applicable to insolvency are also found in the Civil and Criminal Codes and in special laws with reference to specific debtors (for example, banks and insurance companies).[70] The introduction of a regime for personal bankruptcies in 2012 has changed this approach. The reforms recently adopted by Parliament[71] also confirm this fragmented approach.

Both these pieces of legislation have been significantly amended since their first entrance into force. The changes to the personal bankruptcy rules are described below in paragraph 6.1. Here, the focus is on the recent changes to corporate insolvency law.

6.1.1 The period of reforms

The first cracks in the corporate insolvency framework designed by the fascist legislator began to appear in the Seventies and Eighties. The condition of general crisis of the economy brought the legislator to think about regulatory reforms in the area of corporate insolvency law. The approach adopted by the legislator was to introduce laws aimed at rescuing single (categories) of enterprises. In this context, the government adopted a new approach to the crisis of large companies known as *amministrazione straordinaria* (extraordinary administration).[72]

The creation of the European single market in 1993[73] (with its state-aid laws) and the resurfacing of liberal ideals made it urgent to implement significant reforms to the existing corporate insolvency framework. This process of reform started with legislative decree 270/1999, which changed and modernised the insolvency procedure for large enterprises (extraordinary administration).

Unfortunately, proposals for organic, systemic reform of the framework were discussed but never approved by Parliament. Nevertheless, Parliament approved significant reforms, especially in the last two decades:

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69 For a general outline of the laws applicable to corporate insolvencies and personal bankruptcies in Italy, see: S Bonfatti and PF Censoni, *Lineamenti di Diritto Fallimentare* (2nd ed, Padova: Cedam, 2017); A Nigro and D Vattermoli, *Diritto della Crisi delle Imprese: Le Procedure Concorsuali* (4th ed, Il Mulino: Bologna, 2017); F Padovini, *Diritto Fallimentare – L Guglielmucci* (8th ed, Torino: Giappichelli, 2017).

70 Legislative decree no. 385/1993 (*testo unico bancario*), Title IV, arts 69-*bis* to 105-*ter*.

71 See below, para 9 of this text.

72 Law no 95/1979.

73 Single European Act, 1987 OJ L 169/1 (amending Treaty Establishing the European Economic Community, Mar 25, 1957, 298 UNTS 11.

- Law 80/2005, which reformed the discipline of agreements with creditors and significantly reduced the period in which transactions are subject to avoidance / claw-back actions;

- Legislative decree 5/2006, which reformed corporate liquidations and abrogated the *amministrazione controllata*, a procedure which gave to a company in distress the possibility of continuing trading for up to two years under the supervision of a receiver and the insolvency court;

- Legislative decree 169/2007, which reformed the procedure of *liquidazione coatta amministrativa* (forced administrative liquidation);

- Law 134/2012, which introduced material innovations regarding pre-insolvency compositions, turnaround plans under article 67 and debt restructuring agreements under article 182-*bis* of the *legge fallimentare*;

- Law decree 69/2013 and law 132/2015, which introduced further changes to pre-insolvency compositions and debt restructuring arrangements.

These reforms have not been organic. Additionally, other laws enacted in the period adopted the same "tailored" approach to corporate insolvency that characterised the reforms enacted in the 80s. Examples of these tailored approaches are law 39/2004 (to deal with the crisis of *Parmalat*) and legislative decree 134/2008 (to deal with the first "modern" crisis of *Alitalia*).

Nevertheless, the reforms mentioned in the bullet points above introduced a new approach to corporate insolvency. This approach is characterised by an urgency to simplify and made existing procedures faster and more efficient; restrict their use to entrepreneurs and companies in significant crisis;[74] promote rescue over liquidation; facilitate debt restructuring and financial support in insolvency procedures; and recognise a more active role for debtors and creditors in the management of crises.[75] These reforms tried in particular to adapt the North American model to Italian peculiarities, even if the recent law 132/2015 seems to have introduced rules that are in contrast with this trend.[76]

The more recent proposals by the *Rordorf Commission* and the recently enacted *Codice della Crisi dell'Impresa e dell'Insolvenza* (CCII) continue along the pattern laid down by these early reforms.[77]

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[74] The legislator wanted to avoid a situation where formal procedures could be triggered by a default on a single invoice, unless the amount of that invoice exceeded a specific threshold.

[75] A Nigro and D Vattermoli, *Diritto della Crisi delle Imprese: Le Procedure Concorsuali* (4th ed, Il Mulino: Bologna, 2017) 30.

[76] See para 6.3 of this text regarding changes to the pre-insolvency composition procedure.

[77] See para 9 of this text.

6.1.2 *Insolvency procedures*

Under Italian law, creditors can choose among a variety of formal procedures, even if access to each of them is restricted by objective and subjective eligibility criteria (discussed below). These are:

- liquidation procedures for companies (*fallimento*) and any other entity that cannot be subject to corporate liquidation (consumer liquidation);

- personal / consumer rescue procedures (consumer agreements and consumer plans);

- corporate rescue procedures (*concordato preventivo* (restructuring agreements) – in the form of *accordi di ristrutturazione, convenzioni di moratoria* and *piani di risanamento* – *liquidazione coatta amministrativa* and *amministrazione straordinaria*).

It is impossible to state in general terms if the Italian insolvency system is creditor- or debtor-friendly. This assessment largely depends on the procedure that is triggered by the debtors and / or their creditors. By and large, it is possible to claim that in judicial procedures[78] such as corporate liquidations and pre-insolvency compositions, the pre-insolvency rights of the creditors are much more protected than in administrative (for example, forced administrative liquidation) and mixed (for example, *amministrazione straordinaria*) procedures.

However, it is also possible to observe a legislative trend towards a more creditor-oriented approach in corporate insolvency law. The reforms enacted between 2005 and 2012 had the common purpose of promoting the early use of rescue and restructuring measures. However, recent reforms (law 132/2015 and law 155/2017) have been characterised by a marked scepticism on the use of restructuring and particularly pre-insolvency agreements. It seems that now the need to promote the creditors' protection and the maximisation of their returns prevails over the equally legitimate debtor's expectation to try to rescue a distressed yet viable business.[79]

6.1.3 *Insolvency procedures – overview*

With reference to corporate procedures, the formal remedies mentioned above are available by and large to commercial entrepreneurs experiencing a situation of financial distress or insolvency, even if each procedure has its own set of eligibility criteria. The petition can usually be submitted by the creditors, even if exceptions apply (pre-insolvency composition and certain cases of extraordinary administration). Some procedures (for example, the pre-insolvency composition) place more emphasis on reaching an agreement with the creditors than others (for example, corporate liquidation).

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[78] Judicial procedures are those formal procedures where courts play a pervasive role in the management of the insolvent estate and in settling any disputes linked to the insolvency procedure.

[79] S Ambrosini, *Il nuovo diritto della crisi d'impresa: l 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016) 69.

All of the insolvency procedures share the characteristic that, upon commencement, they produce effects that are mandatory towards all creditors. This is not to say that a *moratorium* on all individual actions against the debtor applies to all creditors and to all claims. The mandatory nature of the insolvency procedures means that creditors cannot ignore the existence of an open insolvency procedure even when they retain the right to commence or continue a judicial action against the debtor. Other common characteristics are universality and their statutory nature.

It can be said that all formal insolvency procedures are mechanisms aimed at the enforcement of compulsory remedies to address the crisis of the debtor. They require the establishment of a separate insolvent estate and its administration by a third, independent party with the aim of maximising the returns to creditors.[80] The principle of *par condicium creditorum* or equality of treatment among equally ranking creditors, as established in the Civil Code,[81] is rarely circumvented under Italian law,[82] irrespective of the purpose of the insolvency procedure.

All procedures impose a constraint on the debtor's estate, which is administered by or under the supervision of a third, independent party.

6.1.4 Insolvency procedures – key players

In general, courts (and administrative authorities with reference to administrative insolvency procedures) play two significant roles: they direct the insolvency procedure and they check that all the other parties involved in them act according to the rules. In the case of conflicts, they settle and adjudicate any disputes among the key stakeholders.

The management of the insolvency procedure (and the debtor's estate) is entrusted to different entities, depending on the procedure. These are the receivers in corporate liquidations, the debtors themselves in agreements with creditors and a specially appointed judicial commissioner in the forced administrative liquidation and the extraordinary administration. Creditors, either alone or as members of a committee, only play an advisory role.

These entities have autonomous and exclusive roles. It is certainly true that judicial and administrative authorities have the power to appoint, revoke and sometimes give instructions to the entities entrusted with the management of the insolvent estate. However, the powers entrusted by the law in a receiver cannot be exercised by a court and / or a judge, not even in emergency situations.

The role played by each entity is strictly linked to the specific procedure. For instance, debtors have a much more influential role in pre-insolvency compositions than they do in corporate

80 A Nigro and D Vattermoli, *Diritto della Crisi delle Imprese: Le Procedure Concorsuali* (4th edn, Il Mulino: Bologna, 2017) 39.

81 Civil Code, art 2741(1).

82 Exceptions apply and not simply with reference to rescue-oriented procedures. For instance, in corporate liquidation procedures, art 74 *legge fallimentare* holds that if the receiver opts for performing an executory contract, the receiver has to fully pay the price of the goods already delivered or the services already supplied, irrespective of whether the delivery or supply occurred before or after the commencement of the insolvency procedures. Similar exceptions apply with reference to insurance contracts (art 82 *legge fallimentare*) and to the revocability of mortgages (art 67(4) *legge fallimentare*).

liquidations. Therefore, their powers, duties and functions will be outlined in the paragraphs of this text dedicated to the analysis of the above-mentioned formal insolvency procedures.

6.2 Personal / consumer bankruptcy

In 2012, Italy was one of the few countries in the world[83] not to have a system of formal procedures designed to give a second chance to over-indebted consumers and to discharge their debts. This has long been the case because article 2740 of the Civil Code states that debtors have to ensure the repayment of all of their obligations with all of their present and future assets. However, commercial entrepreneurs have for a long time benefited from the possibility of unburdening themselves of their debts by means of either a pre-insolvency composition or an in-liquidation composition.

Individual entrepreneurs had – for an equally long time – relied on the discharge procedure pursuant to article 142 *legge fallimentare*.[84] No similar remedies were available to individuals,[85] as the long established distinction between commercial entrepreneurs (of a certain size) and individuals who are non-entrepreneurs has lasted since the enactment of the Napoleonic *Codice del Commercio* (1807).[86] There have been cases that argued that not granting the same remedies to individuals and companies was a breach of the constitutionally-recognised principle of equality. The Constitutional Court, however, has consistently resisted these attempts of usurping the role of Parliament.[87]

Proposals to introduce a separate discipline of personal / consumer bankruptcy were submitted as early as 2004.[88] However, the current discipline was only introduced by law 3/2012 and soon amended by law 221/2012.[89] These laws introduced the following formal insolvency procedures:

(a) *Accordo del consumatore* (Consumer's Agreement);

(b) *Piano del consumatore* (Consumer's Plan) – originally not included in law 3/2012;

(c) *Procedura di liquidazione del patrimonio* (Consumer's Liquidation).

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83 Greece introduced a similar system in 2010. At that time, only some other countries – such as Bulgaria, China, Ukraine, Hungary, Vietnam and some other South American states – had no system in place to deal with these cases.

84 The discharge procedure described in art 142 *legge fallimentare* is different from the namesake procedure described in law 3/2012 and outlined in paragraph 6.2.4. However, the new Code extends the scope of such procedure to all companies and people.

85 On this topic, see: A Guiotto, "*La nuova procedura per l'insolvenza del soggetto fallibile: osservazioni in itinere*" (2012) Fall 21.

86 D Spagnuolo, "*L'insolvenza del consumatore*" in S Bonfatti and G Falcone (eds), *La nuova legge fallimentare "rivista e corretta"* (Milano: Giuffrè, 2008). Despite dissenting opinions, the revised *Codice del Commercio* (1882) and the *legge fallimentare* (1942) did not include any provisions, which dealt with consumers' failure.

87 See, among others: C Cost, no 43/1970, in *Foro it,* 1970, I, 1017; C Cost, no 94/1970, in *Giur Comm*, 1970, III, 308.

88 Bill no C/5171 of 20 July 2004, presented by hon Fassino (DS).

89 Law no 221/2012 enforced with amendments the legislative decree 179/2012 known as *decreto Sviluppo Bis*. The amendments appeared necessary because a first report on the use of these procedures in the first few months since the enactment of law no 3/2012 showed that they had been used in only two cases at national level.

These are formal insolvency procedures, which will be significantly amended by the introduction of the *Codice della Crisi d'Impresa e dell'Insolvenza* (CCII) discussed in paragraph 9 of this text. In general, the principle of *par condicio creditorum* cannot be derogated by the parties in formal procedures, but exceptions apply with reference to consumer's agreements. These procedures will be referred collectively as "bankruptcy procedures" or "personal procedures" for the rest of this section (even though, as it will become apparent later in this section, some of these procedures can also be triggered by people who carry out professional and business activities).

Beside the procedures outlined in this section, those debtors who do not qualify for corporate insolvency procedures have no remedies to deal with their situation of over-indebtedness. Italian law does not provide a discipline for remedies known and widely used in other jurisdictions, such as summary instalment orders, individual voluntary arrangements, debt relief orders, pre-bankruptcy compositions, etcetera. Also, there are no simplified procedures for small or assetless estates.

6.2.1 Eligibility criteria

6.2.1.1 Who qualifies as a "debtor"

The legislator adopted a seemingly inclusive approach, as the law prescribes that these procedures are available to all debtors that cannot file for any of the other (corporate) insolvency procedures.[90] Pursuant to article 1 *legge fallimentare*, the debtors who cannot file for corporate insolvency procedures are public entities, non-commercial entrepreneurs (for example, professionals and farmers)[91] and commercial entrepreneurs that do not reach specified thresholds of profits, revenues and debts.[92]

This does not mean that there is no eligibility requirement to file for bankruptcy procedures. For instance, if an applicant carries on a business, it is necessary to determine, on a preliminary basis, whether they meet the eligibility criteria for corporate insolvency procedures, as described in the next section. In the case of a positive answer, these applicants won't be allowed to file for personal procedures.

The procedures outlined by law 3/2012 are certainly available to individuals and (corporate) entities that do not carry out entrepreneurial activities, commercial entrepreneurs who do not reach the thresholds mentioned in article 1 *legge fallimentare* and professionals.

Doubts have emerged also with reference to specific categories of applicants. These are farmers and unlimited liability shareholders. As for farmers, the amendments introduced by law 221/2012 have extended to them the right to apply for these procedures. With reference to shareholders, article 147 *legge fallimentare* extends to them the effect of an order for the opening of a formal insolvency procedure. However, because unlimited liability shareholders

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90 Law no. 3/2012, arts 6(1) and 7(2). This choice was praised by some commentators, such as F Macario, "*Finalità e definizioni*" in "*La nuova composizione della crisi da sovraindebitamento*" (Il Civilista, 2013) 17.

91 Farmers can, however, apply for an *accordo di ristrutturazione*, which is a formal corporate insolvency procedure.

92 These thresholds will be discussed later in this text.

cannot autonomously file for corporate liquidation or pre-insolvency compositions, it is commonly accepted that these people can apply for personal procedures.

The only exception is for the case in which a petition for consumer's liquidation is submitted by an unlimited liability shareholder, but the company of which they are part of is still trading and has not yet entered into a formal insolvency procedure. In these cases, recent decisions from lower courts have held that the debtor's position needs to be dealt with as part of a corporate insolvency procedure involving the company, where he is an unlimited liability shareholder.[93] Otherwise, the effect of the consumer's liquidation procedure would be to shield the consumers from further liabilities (discharge) while continuing to benefit from any income arising from the company, of which they are / were unlimited liability shareholders.

Furthermore, there are categories of subjects who seemingly cannot apply for either personal or corporate insolvency procedures. These are entrepreneurs who have debts for less than EUR 30,000 and public bodies who cannot file for forced administrative liquidations, that is, formal insolvency procedures described in the next section.[94]

With reference to consumer's plans (not to be mistaken with consumer's agreements), these procedures are available only to consumers for debts entered into outside their professional or business activity.[95] However, in many situations it is hardly possible to distinguish the debts contracted for entrepreneurial or professional activities from those which are not. Take the case of groceries bought by the owner of a restaurant, or the stationery bought by an accountant: how is it possible to distinguish what was bought in relation to the professional or business activity and what was bought for personal use and consumption?

Finally, all innovative start-ups are subject to the bankruptcy procedures outlined in this section.[96] This provision is extremely problematic. First, start-ups cannot be subject to discharge, as this benefit applies only to people. It is therefore unclear how – if at all – these provisions apply to start-ups and their owners. Additionally, the rationale behind the statutory choice is questionable. By extending bankruptcy procedures to innovative start-ups, the legislator wanted to promote the ability to start afresh for those entrepreneurs who invested in innovative companies yet suffered from the consequences of their failure. However, these entrepreneurs can only be subject to the liquidation procedure outlined by law 3/2012. That procedure has a mandatory minimum duration of four years. That duration exceeds by far the period usually required to liquidate a corporate entity with few or no assets under the rules outlined both by the *legge fallimentare* and by the new Code.

6.2.1.2 Other eligibility criteria

These procedures can be triggered by any person who is in a situation of "over-indebtedness". The law[97] clarifies that a situation of over-indebtedness exists in the following circumstances:

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93 Court of Rimini, 10 February 2020 and 15 October 2020.
94 See also below *sub* 9.3.2.
95 Law no 3/2012, art 6(2)(b).
96 *Idem*, art 25.
97 *Idem*, art 6(2)(a).

(a) when there is an ongoing imbalance between the existing debts and the assets that can be promptly sold, which results in a relevant yet temporary difficulty to meet the existing obligations;

(b) when there is a permanent inability to pay the debts as they fall due.

The criterion under (b) can be described as a situation of cash-flow insolvency. It is the same criterion used by article 5(2) *legge fallimentare* to define the notion of insolvency which is relevant for corporate procedures.

The criterion under (a) can be described as a situation of balance sheet insolvency, that is, as the situation in which the debtor's assets are worth less than its contingent and prospective liabilities. This criterion is equally used in article 5(2) *legge fallimentare* to determine when a company can file for any of the corporate procedures.

Therefore, it can be said that under Italian law, the objective eligibility requirements to file for personal and corporate procedures are the same. It is not clear why the legislator opted to define "over-indebtedness" as a situation which is described as "insolvency" under article 5 *legge fallimentare*.[98] However, it seems that the definition of over-indebtedness includes situations of temporary difficulty to regularly meet the debtor's obligation, a situation not necessarily equivalent to insolvency.

Together with these objective criteria, the legislator introduced some more subjective criteria, outlined in article 12-*bis* of law 3/2012. These criteria apply to both consumer's agreements and plans (but not to a consumer's liquidation). Under the law, a consumer cannot be admitted to the procedure if:

(1) they assumed obligations without a reasonable prospect of meeting them;

(2) they are responsible for causing the over-indebtedness with a reckless conduct;

(3) they relied on credit in a manner that was not proportionate to their income.

The second criterion is mainly objective and looks at the debtor's conduct. Such criterion comes into consideration only in case of reckless conduct (for example, buying luxury goods or gambling). The new Insolvency Code (see paragraph 9) has changed that criterion from recklessness to "gross misconduct", thus further restricting the cases in which the debtor's conduct would disqualify them from commencing such procedures. Nevertheless, this criterion has never been a major obstacle for the opening of such procedures by a consumer.

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98 F Maimeri, "*Presupposti soggettivi ed oggettivi di accesso*" (2012) Fall 1035. Some commentators argue that the definitions of over-indebtedness and insolvency are similar, but not identical: A Guiotto, "*La nuova procedura per l'insolvenza del soggetto fallibile: osservazioni in itinere*" (2012) Fall 24. They therefore argue that it is not clear when consumer debtors should file for any of the procedures outlined in the law: L Modica, *Profili giuridici del sovraindebitamento* (Napoli, 2012) 350; F Macario, "*Finalità e definizioni*" in *La "nuova composizione della crisi da sovraindebitamento* (Il Civilista, 2013) 19.

The other criteria were much more subjective, and the interpretation given by the courts significantly restricted the consumers' ability to submit a proposal for an agreement or plan. As a result, consumers were largely prevented from filing for an agreement or plan unless they were in a state of incapacity or under age when they entered into debt, or unless a future and unforeseeable event dramatically changed their debt condition. As a result, law 176/2020 removed the first and third criteria from the eligibility requirement to access the procedures mentioned above.

Unfortunately, courts occasionally interpret the law as if the amendments introduced in 2020 never occurred. For instance, in a recent decision, the court of Barcellona Pozzo di Gotto held that it constitutes an example of reckless conduct capable of causing the over-indebtedness the debtor's behaviour of relying on credit that it is not proportionate to their income.[99] In other words, criterion three was exhumed by an expansive, judicial interpretation of criterion two, against the legislator's will of ensuring that as many consumers as possible have access to the procedure. Similar approaches have been followed by other courts,[100] thus questioning the relevance of the changes introduced in 2020.

Hopefully, the new "gross misconduct" criterion introduced by the new Code (effective from 15 July 2022) should reduce the instances, where consumers are denied access to these procedures on the basis of subjective criteria. Under the new law, access to the consumer's agreements and plans should be denied only in case the debtor contracted debt in good faith or as a part of a fraudulent deal. The debtor's conduct should be relevant only in exceptional cases, for instance those of gross misconduct.

A final requirement for the opening of such procedures is that the debtor must not have entered into any bankruptcy procedure in the previous five years. Such requirement has no equivalent for corporate procedures, even if in the past a similar limitation applied for the opening of a pre-insolvency composition.

Despite the definition of a detailed set of conditions that have to exist for a debtor to file for personal procedures, the legislator has not included any obligation to file for these mechanisms whenever the debtors find themselves in a situation of over-indebtedness. Nevertheless, article 16 of law 3/2012 introduces a series of criminal penalties for those debtors who behave fraudulently in order to be admitted into any of the personal procedures and for both the debtors and professionals who act fraudulently during these procedures.

6.2.2 Consumer's agreements

The consumer's agreement procedure was the only personal bankruptcy procedure introduced and regulated by law 3/2012. The changes introduced by law 221/2012 have not affected the nomenclature but the substance of the procedure. This has been an unfortunate decision.

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99 Court of Barcellona Pozzo di Gotto, 16 April 2021 (2021, Sez. Merito).

100 Court of Ferrara, 7 April 2021; Court of Catania, 5 March 2021.

In their first version, consumer's agreements were only binding on the parties who signed them. Once approved, that agreement was governed by general contract law rules. This agreement was closely inspired by the restructuring agreements described below in paragraph 6.6.

After the changes introduced by law 221/2012, consumer's agreements are much more closely related to pre-insolvency compositions. Some rules bear a close resemblance to those that govern any pre-insolvency compositions:

- the proposal cannot be voted on by all of the preferred creditors (unless they give up their preferred status), the spouse and those who are related up to the fourth degree of kinship (included) and those who became creditors in the year before the commencement of the procedure;[101]

- those creditors who do not reply to the proposal are assumed to have voted in favour of it;[102]

- the proposal must be approved by creditors representing 60% of the consumer's debt;[103]

- once approved and published, the proposal is binding on all creditors.[104]

The procedure is articulated in four different steps.

Step 1: opening of the procedure

The procedure begins with: (i) a proposal presented by the debtor / consumer and prepared with the help of a panel of independent experts known as *organismo di composizione della crisi* (referred to as *organismo*);[105] and (ii) a plan.

The content of the proposal (and plan) is not restricted by the law, but debtors are required to contribute to the repayment of their creditors with their future income. The proposal (and plan) can also include the appointment of an insolvency practitioner (IP)[106] or the *organismo*[107] as the debtor's trustee. In that case, the IP / *organismo* will sell the debtor's assets and distribute the proceeds to the debtor's creditors.

The proposal must be presented to the competent court, which is the court where the debtor lives or has his primary place of business. The proposal must include certain documents, including a list of all creditors, a declaration from the *organismo* that the plan is feasible and a list of all expenses that are deemed absolutely necessary for the livelihood of the debtor and his

101 Law no 3/2012, art 11(2).
102 *Idem*, art 11(1).
103 *Idem*, art 11(1).
104 According to the original version of the creditor's agreements, dissenting and preferred creditors had to be paid in full.
105 Law no 3/2012, art 15.
106 Under Italian law an insolvency practitioner (IP) is a person who meets the requirements outlined in art 28 *legge fallimentare*.
107 Law no 3/2012, art 15.

family. If the debtor carried out entrepreneurial activity, they have to present the book entries (books) for the previous three fiscal years.

The local court must determine if the debtor meets the eligibility criteria outlined above. In the case of a positive answer, the court will set a date for a hearing to approve the consumer's agreement. That decree determines the formal opening and admission of the debtor to the consumer's agreement procedure. The decree must be communicated to all known creditors by the *organismo*.

The plan can include a division of creditors into classes. No guidance is given on the formation of these classes. However, some commentators argue that, due to the collective nature of the procedure,[108] it would not be possible to ignore the principle of *par condicio creditorum* among similarly ranking creditors.[109] The author of this text disagrees with this interpretation and believes that reasonable deviations from the principle of rateable distribution should be justified in light of the negotiated, contractual nature of the plan.

In general, debtors enjoy wide latitude and discretion in the determining the content of the plan, which may include the sale of book debts, the sale of assets, the creation of new warranties and / or the appointment of new guarantors, etcetera. If the plan is guaranteed by a third party, that party may become liable for any shortcoming should the debtor fail to implement the approved plan.

A list of all the debtor's assets must also accompany the plan. That list must also include future assets, including – for instance – any inheritance that has not yet been accepted by the debtor.

The hearing must take place within 60 days from the submission of the plan and creditors should be informed at least 40 days in advance. As the 60-day deadline is not mandatory and there is no sanction for not respecting it, it is not infrequent for courts to set the first hearing between 120 and 180 days from the submission of the proposal.[110]

From the commencement of the procedure, debtors find themselves in a situation similar to the position of the entrepreneur in a pre-insolvency composition. They can carry out all day-to-day operations without the necessary preliminary approval from the IP (if appointed), the *organismo* or the court. However, any extraordinary disposition of the debtor's assets needs to be approved on a preliminary basis by the competent authority, otherwise it may not be enforceable (not even with respect to third parties acting in good faith).

Step 2: creditors' vote

The debtor's proposal and plan, as well as the court's decree of admission to the procedure, must be communicated to the creditors. The creditors must vote in favour or reject the proposal.

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[108] *Idem*, art 7(2)(a).

[109] V Fabbiano, "*Procedura di Composizione della Crisi da Sovraindebitamento*" (*ilsovraindebitamento.it*, 2013).

[110] The court's approval should be issued within six months from the submission of the proposal, but the legislator has not included any sanctions should this deadline not be respected.

If they do not send their vote to the *organismo* at least 10 days before the hearing, it is assumed that they have voted in favour of it.

Creditors have no right to submit an alternative plan. The creditors' votes on the proposal and plan should be sent to the *organismo* either by post or by electronic means (telex, fax, email).

During the time in which the proposal is subject to voting by creditors, the proposal (and plan) can be modified by the debtor. If that happens, the creditors who voted for the original proposal (and plan) must be contacted again, as they have the right to vote on the amended proposal (and plan). Creditors should be given at least 40 days to vote on the amended proposal (and plan).

If the 60% majority of the creditors (by value) is reached,[111] the *organismo* prepares a final report with the outline of the plan and its final evaluation on its feasibility. This final evaluation must take into consideration any event or changes in circumstances that occurred since the submission of the original proposal.

If the required threshold is not reached, the *organismo* must promptly inform the court. It is not clear, however, whether the *organismo* must make this communication as soon as it receives negative votes from creditors representing more than 40% of the debtor's debt. Against this solution, it can be observed that there might still be time to conceive an alternative plan capable of obtaining the majority prescribed by the law before the hearing set by the court.

If, however, the *organismo* and the debtor decide to agree on a different plan and submit it to the creditor's vote, the right of dissenting creditors might be unduly restricted as the moratorium remains in place and the debtors may continue to dissipate their assets. Unfortunately, creditors do not have the right to apply for an injunction to the court in these circumstances and the *organismo* has no liability for losses caused by the actions of the debtor during this period.

After the plan has been approved, creditors have 10 days to raise objections. After this final deadline has passed, the *organismo* sends the proposal, the final report and the creditors' objections (if any) to the court. These objections are not clearly regulated by the law. It seems that only creditors can submit these objections.[112] However, the following section of the same article "clarifies" that the right to submit an objection is reserved for creditors who did not agree to the plan, those who are not included in the plan and "any other interested person".[113]

Step 3: court's approval

The court can revoke the initial decree of admission to the procedure only in a case of fraudulent behaviour by the debtor.[114] Even if there are no objections from the creditors, the court must ensure that the 60% majority prescribed by the law has been reached. Some commentators argue that courts also have the power to deny approval if the plan appears to be manifestly

[111] This threshold does not include privileged or secured creditors if they are paid in full.
[112] Law no 3/2012, art 12(1).
[113] *Idem*, art 12(2).
[114] *Idem*, art 10(3).

unfeasible.[115] Absent any such reference in the law, it is preferable to conclude that courts do not have such power.[116]

Creditors usually raise objections when they believe that alternative courses of action, such as liquidation, would yield more value and higher returns to them. In such a case, the court cannot approve the plan if the dissenting creditor would receive a higher return in a consumer's liquidation procedure.

The decision of the court to approve or reject the consumer's agreement can be subject of appeal to the same court *in composizione collegiale*. This means that the final decision will be taken by a group of three judges, which will not include the judge who issued the appealed decision.

The court's approval of the plan determines:

(a) the automatic enforceability of the plan against all the creditors for claims that came into existence before the debtor's admission into the procedure;

(b) the stay of all actions against the assets of the debtor that are part of the consumer's agreement, irrespective of the circumstances in which these claims arose for debts contracted before or after the commencement of the procedure.

Step 4: execution of the plan

This aspect is regulated by article 13 of law 3/2012. According to this provision, the leading role is once again taken by the *organismo*. The *organismo* can appoint a liquidator if the plan is designed to sell the assets and distribute the proceeds to the creditors. In all other cases, the *organismo* acts as a conciliator and is bound to inform the creditors of any significant deviations from the approved plan.

The court retains the powers to: (i) appoint and replace the liquidator; (ii) decide on injunctions and objections from creditors; (ii) discontinue the procedure where there are seriously justifiable reasons for doing so; and (iv) cancel any security or charge on the remaining debtor's assets at the end of the plan.

In the executory phase, the plan can be amended by the debtor under the supervision of the *organismo* if the execution of the plan becomes impossible for reasons not attributable to the debtor. The amended proposal will need to follow all the steps described above in order to get approval from the court.

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115 A Nigro and D Vattermoli, *Diritto della Crisi delle Imprese: Le Procedure Concorsuali* (4th ed, Il Mulino: Bologna, 2017) 598.

116 P Porreca, "*L'insolvenza civile*" in A Didone (ed), *Le riforme della legge fallimentare* (Utet, 2009) 2116.

6.2.3 *Consumer's plans*

It is important to clarify, on a preliminary basis, who can submit a consumer's plan. The Italian legislator, in another example of poor legal drafting, has called the procedures outlined in law 3/2012 "consumer's agreement" and "consumer's plan". The previous section has already mentioned the fact that the consumer's agreement is not – in reality – an agreement but a restructuring plan unilaterally drafted by the debtor with the help of the *organismo*, approved by the creditors and enforced by the competent court.

Another element to take into consideration is the notion of "consumer". Article 6(2)(b) of law 3/2012 describes the consumer as an individual acting for purposes that are wholly outside that individual's trade, business, craft or profession. That definition, however, applies only to consumer's plans. Therefore, debtors who are not consumers but do not meet the eligibility requirements for formal corporate insolvency procedures can only apply for "consumer's" agreement or "consumer's" liquidation procedures.

The consumer's plan procedure was first introduced by law 221/2012. Many of the rules apply to both agreements and plans. The key difference between the two procedures is that where in the agreement procedure the debtor must seek the creditors' approval, in the plans procedure the proposal is only subject to the court's approval.

This procedure is still based on the same objective eligibility requirements mentioned in respect of the agreement procedure (the key differences in the subjective requirements have already been dealt with above). In the plans, the *organismo* has an even more pervasive role. Not only does the *organismo* have to assist the debtor in drafting the plan, but also it has to draft a detailed report to the court. In that report, the *organismo* clearly identifies the causes of the debtor's over-indebtedness, assesses the feasibility of the plan in light of the debtor's prior ability to meet his obligations and evaluates the effectiveness of the proposal for the creditors against the alternative courses of action (consumer's agreement and consumer's liquidation).

The opening of the consumer's plan procedure follows the same rules as the procedure for the consumer's agreement. However, the court must immediately verify the existence of fraudulent or negligent acts, as well as the existence of the above-mentioned eligibility criteria. The consumer's plan order will include a date for a hearing, which must take place within 60 days from the order itself. The order is then communicated to all creditors.

During the hearing, the court will assess not only the feasibility of the plan, but also: (i) its ability to ensure the payment of non-dischargeable debts; and (ii) the "worthiness" of the debtor. The latter requirement is not met if it can be shown that the consumer took on obligations without any reasonable chance of being able to pay back their debts.[117] It is also possible for the creditors to raise objections when they believe that alternative courses of action, such as consumer's liquidation, would yield more value and higher returns to them.

[117] Law no 3/2012, art 12-*bis*(3).

The court can either approve or reject (but not amend) the plan. In both circumstances, interested parties can file an appeal against that decision to the same court *in composizione collegiale*. This means that the final decision on the petition will be taken by a group of three judges, which will not include the judge who issued the appealed decision.
The effects of the approval of the plan by the court and the execution of the plan are governed by the same rules described for the creditor's agreement.

6.2.4 *Consumer's liquidation*

Consumer's liquidation represents the equivalent of corporate liquidation for those applicants who cannot be subject to a formal corporate insolvency procedure. As a result, the procedure results in the liquidation of all of the debtor's assets (with the exception of exempt property) and it is binding on all creditors. As there is no agreement or plan, the principle of *par condicio creditorum* – which applies to all creditors in the same class – cannot not be excepted.

There are significant differences when compared to the traditional corporate liquidation procedure. First, the opening of the consumer's liquidation procedure can only be determined by a petition from the debtor but not from their creditors. Secondly, the legislator restricted the possibility of the procedure applying only to those debtors who prove to be "worthy". Unfortunately, the legislator failed to provide precise criteria to determine when a debtor is "worthy".

The consumer's liquidation procedure always represents the standard of comparison against which the judge has to assess the convenience of the consumer's agreement[118] and the consumer's plan.[119] It also has to be taken into consideration that in drafting the rules applicable to consumer's liquidation, the legislator included no reference to the liquidation procedure for companies. This suggests that it is not possible to make references by analogy to the general rules applicable to "companies".[120] The decision of the legislator to create two distinct sets of liquidation procedures, one for consumers and one for companies, governed by discrete rules, has been harshly criticised by commentators.[121] These commentators have very valid arguments. For instance, with reference to consumer's liquidation, we are left in the dark about the discipline applicable to pivotal aspects of that procedure, such as the rules on the distribution of assets.

The rules on consumer's liquidation introduce a collective, non-negotiable procedure based on the principles of collectivity and universality. The main features of these procedures are the crystallisation of the debtor's assets upon the opening of the procedure, their administration by a qualified insolvency practitioner and the focus on the liquidation of the debtor's assets rather than their rehabilitation.

[118] *Idem*, art 12(2).
[119] *Idem*, art 12-*bis*(4).
[120] *Rectius*, all subjects who can file for any of the formal insolvency procedures outlined in the *legge fallimentare*.
[121] Among others, see: A Nigro and D Vattermoli, *Diritto della Crisi delle Imprese: Le Procedure Concorsuali* (4th ed, Il Mulino: Bologna, 2017) 611, describing the lawmaker's approach to drafting this law as a "festival of mistakes, oversights, inaccuracies, illogical and sometimes absurd decisions".

Step 1: opening of the procedure

The procedure can be commenced either by the debtor with a voluntary petition or after the conversion of an unsuccessful consumer's agreement or plan. The eligibility requirements for the applicants are the same as those for the consumer's agreement. Therefore, they differ from those for the consumer's plan for being more inclusive. Anyone who can file for a consumer's plan can also file for a consumer's liquidation.

The requirement that the debtor has not entered into any bankruptcy procedures in the last five 5 years confirms the impression that the legislator wanted to reserve these remedies for honest but unfortunate consumers: a repeat over-indebted consumer is not considered worthy of protection. Unfortunately, reality shows that some of the people who file for bankruptcy have been forced into a situation of over-indebtedness by circumstances that are largely beyond their control (for example, divorce, loss of job, illnesses, etcetera). It might therefore be argued that there is no such category as "unworthy" over-indebted consumers.

The consumer's liquidation petition must be submitted to the court where the debtor lives. Admission to the procedure can be refused in cases of fraud or incomplete documentation.

If the opening of liquidation is the result of a conversion from a different bankruptcy procedure, all the acts made in execution of the original proposal or plan remain enforceable and are not subject to avoidance actions.

In consumer's liquidation cases, the *vis attractiva concursus*, that is, the principle that provides for the concentration of all litigation relating to the debtor in the insolvency court, does not apply. Insolvency courts, therefore, only have the power to appoint (or remove) a liquidator and to decide any disputes on the claims submitted by the creditors.

The pivotal figure in these procedures is the liquidator. The liquidator, who must be a qualified insolvency practitioner, is not appointed by the court in the following two circumstances: (i) if a liquidator had already been appointed as part of the consumer's agreement procedure; and (ii) if the court opts for attributing the powers of the liquidator to the *organismo*. Upon appointment, the liquidator / *organismo* becomes the sole administrator of the debtor's assets and replaces the debtor in any civil proceeding in which he is involved.

Step 2: assessment of claims and sale of assets[122]

In a rather unique twist, the procedure for the assessment of claims (that is, determining how much is owed to each creditor) is run entirely by the qualified insolvency practitioner and not by the court.[123] In any case, the creditors must submit a proof of claim to the liquidator if they want to be admitted to the procedure. These rules apply to any creditors, including secured ones. Only in the case of challenges from creditors will the matter be referred to the competent court.

[122] This step is regulated by law no. 3/2012, arts 14-*sexies* to 14-*octies*.

[123] The only similar case under Italian corporate insolvency law is the forced administrative liquidation, described below.

The liquidator must inform the creditors that they have to submit a proof of claim within a specified deadline. The law does not set any time limits for the liquidator to send that communication or for lodging the claims. Once the deadline has expired, the liquidator prepares a list of creditors, indicating the nature and amount of their claims. Absent any challenges, the liquidator's proposal becomes final and binding.

Law 3/2012 does not introduce any rules on the treatment of late submissions from the creditors, that is, those claims received by the liquidator after the deadline. It has been argued that these claims are still valid and enforceable[124] provided that they reach the liquidator before the closure of the procedure.

Step 3: distribution of proceeds and closure

Even with reference to this phase, there are not many rules and those that do exist are not very detailed. Moreover, the legislator only had consumers and professionals in mind when outlining the rules that govern the sale and distribution of proceeds, as no guidance is given for the treatment of contracts (such as leasing and rents) which might be very common if the debtor is an entrepreneur or farmer.

Once the liquidator has compiled the list of all goods that belongs to the bankrupt, the same liquidator must prepare a proposal for the sale of all of these assets. The proposal must be prepared within 30 days from the communication of the list of assets to the creditors (but there is no time limit for the preparation of that list). If the liquidator plans to promote any voidable action against one or more transactions, their intention should be clear from the proposal. The proposal ought to be modified to include all the goods and assets that the bankrupt acquired throughout the procedure and that are not exempt. The liquidator enjoys significant freedom in choosing the most appropriate method for selling the debtor's assets, provided that the choice appears – at least *ex ante* – capable of maximising the returns to the creditors.

Once all assets have been sold, the liquidator first pays all those claims that emerged during or by reason of the procedure, including their fees. Secured creditors have the right to be paid out of the proceeds obtained by the sale of the charged goods. The general rules on the ranking of creditors apply to bankruptcy procedures (even if there is no specific mention of this in the law).

The closure of the procedure must be declared by the court no earlier than four years after its commencement.[125] The closure of the procedure determines the discharge of all of the debtor's unpaid debts.

6.2.5 Treatment of contracts

Law 3/2012 includes few provisions on the treatment of existing contracts. The lack of any direct reference to the provisions in the *legge fallimentare* means that if the contract does not fall within

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[124] A Nigro and D Vattermoli, *Diritto della Crisi delle Imprese: Le Procedure Concorsuali* (4th ed, Il Mulino: Bologna, 2017) 623.

[125] Law no. 3/2012, art 14-*novies*(5).

one of those outlined below, the parties in the bankruptcy procedure are free to determine the effects on existing contracts.

One of the few cases mentioned in the law is set-off. Creditors can set-off any claims they may have against the debtor with any claim the debtor may have against the creditor, provided that both claims are homogeneous, liquid and due at the time of the opening of the bankruptcy procedure.[126]

The principle that governs the effects of insolvency on executory contracts in corporate insolvency procedures does not seem to apply in bankruptcy cases. As outlined below, the general rule established by article 72 of the *legge fallimentare* is that executory contracts are unaffected by the opening of a formal insolvency procedure. At the same time, the insolvency practitioner has the power to terminate or suspend these contracts.

The lack of any similar provision in law 3/2012 means that all non-executed and pending contracts remain unaffected by the opening of the procedure. At the same time, the liquidator and *organismo* cannot discard or disregard any contract. This is particularly taxing for those debtors who are small entrepreneurs, professional, farmers and agricultural enterprises that may need to renegotiate these contracts as part of these procedures, but cannot do so without the agreement of the creditors.

6.2.6 *Voidable dispositions / impeachable transactions / clawback provisions*

The rules relating to the voidability and termination of the approved plan (for both the consumer's agreement and the consumer's plan) are modelled on the rules applicable to pre-insolvency compositions.

A plan can be **voided** by the court if it can be shown that the debtor has intentionally (or by gross negligence) increased the amount of debt or diminished the amount of their assets. A petition by creditors or any other interested party has to be submitted within six months from the discovery of the fraudulent or negligent act and in any event no later than two years after the deadline for the execution of the plan.

A plan can be **terminated** by the court if the debtor does not comply with the obligations arising from it (especially if they do not obtain the collateral and guarantors promised to the creditors in the plan) and the execution of the plan becomes impossible for reasons not attributable to the debtor. A petition by creditors or any other interested party has to be submitted to the court within six months from the discovery of such cause of action and – in any case – no later than one year after the deadline for the execution of the plan.

If the debtor does not pay the claims that cannot be foreclosed and certain taxes (in particular, VAT and duties due to the European Union),[127] interested parties cannot submit a petition to terminate the plan. However, they can ask for the moratorium against executory actions to be lifted. Similarly, if the debtor fails to pay what is owed under the plan to any public entities, the

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[126] These requirements can be found in the Civil Code, art 1243.
[127] Law no 3/2012, art 7(1).

plan ceases to apply to these entities.[128] As a result, these entities will be allowed to commence or continue any actions to collect their original debt from the debtor.

The cancellation or termination of the original plan does not affect the rights acquired by third parties in good faith. However, it seems that the rules prescribed by the law for voidable transactions can be applied to those transfers to creditors that occurred in the months preceding the cancellation or termination of the plan.[129]

If the debtor is declared *fallito*,[130] the plan ceases to have any effect but the acts, payments and warranties put into place in execution of the plan are not subject to the rules on voidable transactions.[131] Bankruptcy can only be declared if: (i) the thresholds for corporate insolvency procedures are exceeded throughout the execution of the plan; or (ii) the debtor is an unlimited liability shareholder in a company and a corporate insolvency procedure is opened against the company.

With reference to the rules applicable to **voidable transactions**, law 3/2012 does not make any reference to the rules applicable to corporate insolvency cases in the *legge fallimentare* (outlined below). Therefore, it is only possible to rely on the rules applicable to all transactions and outlined in article 2901 *et seq* of the Civil Code. The only person who can institute such action is the liquidator on behalf of and for the benefit of all of the creditors.

6.2.7 Assets

If the consumer's agreement is presented by a person who is carrying out a business, the proposal can include a moratorium of up to one year for the payment of secured and preferred creditors, unless the proposal (and plan) is designed to liquidate the assets of the debtor.[132]

6.2.7.1 Moratorium

The submission of a consumer's agreement (but not a consumer's plan) or a liquidation petition to the local court determines the automatic interruption of any legal or conventional interest. Interest continue to accrue only with reference to secured claims. Imagine that a person owed money to a bank and that a 4% annual interest rate applies to the loan. If that person submits a consumer's agreement or liquidation petition, that interest rate is automatically waived unless the loan is secured by a collateral.

From the time of the debtor's admission to any of the bankruptcy procedures, creditors are not allowed to commence or continue any executory or individual actions against the debtor for the

128 The debtor has 90 days to pay what is owed to public entities under the plan.
129 *Legge fallimentare*, art 67.
130 There is no provision under law no 3/2012 that prevents any creditor from submitting an insolvency petition for corporate liquidation before a competent court. See also: Trib. Milano, 10 November 2009, in *Dir fall*, 2010, II, 213.
131 Law no 3/2012, art 12(5).
132 *Idem*, art 8(4).

satisfaction of their pre-bankruptcy claims.[133] However, this moratorium does not apply to claims that cannot be foreclosed[134] or to debts contracted after the commencement of these procedures.

The submission of a consumer's plan does not automatically determine the enforceability of a moratorium on executory actions.[135] The court could, however, issue first-day orders that suspend any executory actions against the assets of the debtor if it is proven that the successful outcome of these actions could endanger the feasibility of the plan.

6.2.7.2 Exempt property and preferred claims

As a general rule, secured and preferred creditors have the right to receive no less than what they would receive in a liquidation procedure. Consumer's agreements must also ensure that all of the claims that cannot be subject to foreclosure[136] are repaid in full. These are:

(a) the money that a former spouse receives for maintenance of the spouse and any children;

(b) the subsidies and allowances that the debtor receives from the state and other public entities by reason of poverty, maternity, infirmity or illness;

(c) the portion of the debtor's wages and pensions established by the court, in any case for no more than one-fifth for the repayment of taxes and another one-fifth for all other claims;[137]

(d) some of the profits arising from a usufruct over goods owned by the debtor's children;[138]

(e) other goods that cannot be subject to foreclosure by law (for example, a person's wedding band, a set of tables and chairs, some basic pieces of furniture, at least one fridge and one washing machine, etcetera).[139]

If the debtor is the recipient of these amounts, they cannot be included in the assets available to distribution to the creditors.

It is possible to settle social security, pension and fiscal arrears only in part, with the notable exceptions of VAT, duties owed to the European Union and tax deductions operated on behalf of the workers. However, even with reference to the latter, it is possible to postpone or pay the amount due in instalments.

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[133] *Idem*, art 10(2)(c).
[134] The most common example is a former spouse carrying out an executory action for the payment of the money that was awarded by a court as part of a separation or divorce procedure. Only the money that was awarded to ensure the maintenance of the former spouse and the children, will not be subject to the moratorium.
[135] Law no 3/2012, art 12-bis(2).
[136] Civil Procedure Code, art 545.
[137] The first three exemptions are outlined in art 545 of the Civil Procedure Code.
[138] Civil Code, art 170.
[139] Civil Procedure Code, art 514.

If any goods, assets or money are acquired by the debtor in the four years after the opening of the bankruptcy procedure and do not fall under the exemptions outlined above, those goods, assets or money will be available for distribution to the creditors.[140] The law expressly sets a limit of four years, which means that all assets acquired after that period but while the debtor is still subject to the bankruptcy procedure, will not be available for distribution amongst the creditors.

The court can authorise the debtor to continue to use some of the assets that will be sold for the satisfaction of their creditors, but obviously such use can only continue up to the time of the sale of the assets. These assets would include, for example, the house in which the debtor and their family live. There is no homestead exemption under Italian law.

6.2.7.3 Proof of claims by creditors

Creditors do not have to prove their claims in these procedures, with the exception of a consumer's liquidation. However, if they think that the amount declared by the debtor does not correspond to the true state of affairs, they can submit a detailed proof of claim to the *organismo* (under a consumer's agreement) or the court. In a consumer's agreement, the plan can be amended before the creditors' vote in cases of a material mistake. In all other cases, the court will decide on the creditor's request and will apply the changes required to be made to the list of creditors and the plan.

With reference to a consumer's liquidation, the main issue here is that the law is silent on what happens to creditors who submit a claim after the final date set by the liquidator. Under the law, there is no provision which authorises late filing of proofs of claims. At the same time, there is no express provision that prevents parties from filing a late proof of claim. In this context, some courts argued that the term identified by the liquidator should be treated as final, thus not admitting late filings, despite the fact that there is no actual or virtual hearing with the creditors[141] and the law does not expressly state the final nature of the term.[142] However, the majority of courts and scholars[143] have argued that the opposite solution should apply, that is, that the late proof of claims should be admitted as the procedure has essentially an administrative nature. Only in cases where the delay from the creditor was excusable should such debtor be prevented from benefiting from earlier distributions.[144]

The treatment of late filings of creditors' claims will change by reason of the new Insolvency Code. However, until then it is preferable to consider that late filings in consumer's liquidation are admissible. Such a solution has been confirmed by the Supreme Court in 2008 by

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[140] Law no 3/2012, art 14-*undecies*.
[141] Court of Ancona 7 February 2021; Court of Forlì 23 June 2020.
[142] Court of Lucca 3 December 2020; Court of Busto Arsizio 28 October 2020.
[143] For a comprehensive analysis, see: E Staunovo-Polacco, "Sull'ammissibilità delle domande 'tardive' di partecipazione alla liquidazione del patrimonio del sovraindebitato" (8 June 2021, *IlCaso.it*) https://blog.ilcaso.it/news_1115/08-06-21/Sull%E2%80%99ammissibilita_delle_domande_%E2%80%9Ctardive%E2%80%9D_di_partecipazione_alla_liquidazione_del_patrimonio_del_sovraindebitato.
[144] See, among others: Trib. Udine, 7 July 2020 (https://www.unijuris.it/node/5374); Trib. Mantua 1 February 2021 (http://mobile.ilcaso.it/sentenze/ultime/24872).

implication,[145] and there is nothing in the law to suggest that any of the terms outlined for the consumer's liquidation procedure are final in nature.

6.2.8 Discharge provisions

The complete execution of a consumer's agreement or plan results in the discharge of all debts covered in the procedure. However, in the case of liquidation, the debtor must apply to court in order to obtain a discharge order. This procedure is governed by article 14-*terdecies* of law 3/2012.

Esdebitazione (discharge) is only available to individuals (including unlimited liability shareholders) who went through a liquidation procedure. On a preliminary basis, it is necessary that the liquidator executed the liquidation plan and distributed the proceeds to creditors and that the court had subsequently closed the liquidation procedure.

The discharge does not cover all debts. It does not cover any money owed to the former spouse for his maintenance or that of his children, nor does it cover any taxes and duties that emerged during the bankruptcy procedure, even if these concerned events that occurred before the opening of the said procedure. The discharge also applies to creditors with pre-bankruptcy debts who did not take part in the procedure, unless they had no knowledge of the procedure itself.

The discharge is granted only to "worthy" debtors, that is, those debtors who co-operated with the liquidator throughout the procedure, have worked or actively looked for work during the four years of bankruptcy, have at least partially paid unsecured creditors and have not delayed or otherwise hindered the regular performance of the procedure.

A request for a discharge must be submitted within one year from the closure of the liquidation procedure. The creditors who have not received full satisfaction of their claims may lodge an objection against the discharge of the debtor, although it has not been specified how or who should notify the creditors of the opening of the discharge procedure.

The discharge order can be voided if it is shown that some creditors received preferential treatment without having any rights to be preferred, and / or in a case of fraud or gross negligence by the debtor when declaring his assets and liabilities.

6.3 Corporate liquidation

Corporate liquidation is the key formal insolvency procedure under Italian law. All other formal, administrative and mixed procedures have been modelled on the structure and rules applicable to corporate liquidation. This procedure is court-supervised and the insolvent estate is managed by a court-appointed receiver. The aim of the procedure is to liquidate the debtor's assets and to distribute the proceeds in satisfaction of the company's creditors.

[145] C. Cass., no 3380/2008.

6.3.1 *Eligibility requirements*

Corporate liquidation (articles 5-159 of the *legge fallimentare*) is available to all entities that carry out business activity, except for state-owned companies[146] and small companies that **do not** exceed the following thresholds:

(a) the company has had, in each of the three fiscal years before the filing (or from the commencement of the company's business's activity if it has been operating for less than three years), net equity not exceeding EUR 300,000;

(b) the company has achieved, in each of the three fiscal years before the filing (or from the commencement of the business's activity if it has been trading for less than three years), gross revenues not exceeding EUR 200,000;

(c) the company owes debts (even if the debts are not yet due at the time of adjudication) not exceeding EUR 500,000;[147]

(d) the company has overdue (unpaid) debt of less than EUR 30,000.[148]

The applicant has to be in a state of cash-flow or balance-sheet insolvency.[149] Insolvency may be proved if the debtor flees, escapes arrest or shuts down the business premises.[150] Unregistered companies can also be subject to corporate liquidation, provided that insolvency occurred before or within one year of cancellation from the company register. The proceeding has to be initiated within one year from the cancellation from the company register.[151]

6.3.2 *Petition and creditors' claims*

The initiative for opening a corporate liquidation procedure is usually taken by either the debtor or by one or more of its creditors.[152] The public prosecutor can also file a corporate liquidation petition in the circumstances outlined in article 6 *legge fallimentare*. These circumstances are:

- evidence of a situation of insolvency during a criminal case;
- a decision by the debtor to flee, escape arrest or shut down its business premises, as well as by the discovery of serious irregularities in the business accounts;
- a report of a situation of insolvency by a civil judge, who discovers the existence of insolvency regarding one of the parties to a judicial proceeding under his supervision.

146 *Legge fallimentare*, art1(1).
147 *Idem*, art 1(2). These figures are updated by the Ministry of Justice every three years.
148 *Idem*, art 15.
149 *Idem*, art 5. For a definition of "insolvency", see para 6.2 above.
150 *Idem*, art 7.
151 *Idem*, art 10. See also C. Cass, no 19138/2013.
152 *Idem*, art 5.

The insolvent debtor is under no obligation to file for corporate liquidation. However, article 217 *legge fallimentare* 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*) if the delay worsens the debtor's financial distress.[153]

The petition had to be filed in the court where the debtor has its main place of business (usually, the company's registered office).[154] However, the government[155] has recently attributed the competence to deal with corporate insolvency matters to specialised sections of the *tribunale delle imprese* (enterprise court) for large enterprises or groups of enterprises. The petition has to include the documents listed in article 14 *legge fallimentare*.[156]

If the court is satisfied that the debtor meets the eligibility criteria mentioned above, it will admit the debtor to the procedure. The judgment has immediate effect, starting from the day of the docketing, but it can be appealed within 30 days.[157] The insolvency petition[158] includes the appointment of a delegated judge (with a supervisory role over the procedure)[159] and of a receiver (with the duty of managing the insolvent estate).[160]

All creditors and the owners of goods held by the debtor at the time of the petition, must lodge a proof of claim with the receiver at least 30 days before the day of the hearing for the verification of the claims,[161] which results in a statement of liabilities being issued. All communications between the receiver and the creditors occur via certified e-mail.[162] Any disputes regarding these claims are settled by the delegated judge. Late claims submitted up to one year (exceptionally, a year-and-half) after the decree issuing the statement of liabilities, are still considered to be valid. However, late creditors can only share in distributions made after their claims have been admitted.[163]

6.3.3 Receivers and creditors' committees

Receivers are accountants, lawyers (or partnerships between them) and managers who meet the eligibility requirements outlined in article 28 *legge fallimentare* (basically someone who is not a relative or person otherwise connected to, or who has a conflict of interests with, the debtor).

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153 *Idem*, art 217(1)(4).
154 *Idem*, art 9(1).
155 See para 9 of this text and art 27 of the draft decree currently being discussed in Parliament to enact law no 155/2017.
156 These are: (i) the mandatory accounting and fiscal books for the three years prior to the filing, or for the entire period of the existence of the company if less than three years; (ii) a description and valuation of the assets; (iii) a list of the creditors and their relevant claims; (iv) an indication of the gross revenue for the three years prior to the filing; and (v) a list of secured creditors and the collateral they hold.
157 *Legge fallimentare*, art 18.
158 *Idem*, art 16.
159 *Idem*, art 23-24.
160 *Idem*, art 27-39.
161 *Idem*, art 93.
155 *Idem*, art 15, as amended by law 221/2012.
163 *Idem*, art 101.

Receivers have to accept the appointment within two days from the judgment opening the corporate liquidation procedure.[164] Receivers act as public officers and are required to perform their duties in person; however, they may be assisted by professional advisers.[165]

The main duties of a receiver include:

- locating and disposing of the debtor's assets;
- reviewing the creditors' claims, both secured and unsecured;
- preparing a list of the debtor's liabilities;
- reporting to creditors on progress made with the procedure;
- distributing the proceeds to creditors.

Shortly after appointment, a receiver must make an inventory of the debtor's assets and affix their seal on it. The receiver has to draft a liquidation plan within 60 days from the inventory and write progress reports every six months.

In carrying out their duties, a receiver is supported by the creditors' committee[166] which is composed of representatives of the creditor body. These representatives must include a wide variety of creditors. If the creditors are mainly secured and unsecured, the creditors' committee will primarily be made up of secured and unsecured creditors. Preferred creditors cannot hold the majority of votes in the creditors' committee in those circumstances.

The creditors' committee is appointed by the delegated judge dealing with the liquidation within 30 days from the judgment opening the procedure and following consultation with the receiver and creditors. A majority (in terms of value of the claims) of the creditors may appoint new members to the creditors' committee at the hearing for the admission of claims. Law decree 59/2016 considers a creditors' committee to be established at the moment of acceptance (including by electronic means) by the nominees.

The main purpose of the creditors' committee is to check on the receiver. Both as members of a group and as individuals, the creditors appointed in the committee have the duty and power to check that the receiver is acting pursuant to the law and in the interest of the creditors. This is due to the fact that, while the committee can only authorise or deny some acts as a group, the single members of the committee do have the power to inspect documents produced by the receiver, as well as to ask for additional information.

[164] *Idem*, art 29.
[165] *Idem*, art 32.
[166] *Idem*, art 40 to 41.

6.3.4 *Consequences of corporate liquidation*

From the time of the judgment opening the corporate liquidation procedure, the debtor is dispossessed[167] and may no longer act in court as either plaintiff or defendant in relation to the assets subject to the liquidation procedure.[168] All pending proceedings against the debtor are stayed (except for those of a personal nature) and can only be re-initiated by or against the receiver.

The judgment opening the corporate liquidation procedure determines an automatic stay or moratorium on all judicial actions against the insolvent estate.[169]

By default, the opening of the liquidation procedure determines the cessation of all debtor's activities. However, the court can allow business operations to be continued in cases where ceasing operations will cause "serious harm", provided that the continuation of business does not affect the rights of creditors.[170] It is also possible to lease the business premises to a third party, or to sell the company or part of it as a going concern.[171]

Corporate liquidations are terminated in cases of in-liquidation compositions, or for other reasons outlined in article 118 *legge fallimentare*. It is possible to terminate a liquidation procedure if no creditors submit claims, or in cases where all creditors' claims are entirely satisfied. However, termination usually occurs when the receiver has distributed the assets and proceeds according to the rights of creditors in the order of distribution prescribed by law.[172]

Upon request by the receiver and / or the debtor, the delegated judge declares the procedure closed and from that moment the company ceases to exist. The judgment must be registered in the companies' register maintained by the Chamber of Commerce.

6.3.5 *Treatment of contracts (executory, specific and essential)*[173]

The effect of liquidation on existing contracts is regulated by articles 72 to 83-*bis legge fallimentare*. The general principle applied by article 72(1) *legge fallimentare* is that the opening of a liquidation procedure determines the suspension of any ongoing contracts; however, exceptions apply.[174] The receiver has the power to continue to perform in terms of the contract (that is, to assume or reject it). The decision to assume a contract can only be taken with the prior approval of the creditors' committee.

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[167] *Idem*, art 42.
[168] *Idem*, art 43.
[169] *Idem*, art 51.
[170] *Idem*, art 104.
[171] *Idem*, art. 104-*bis*.
[172] *Idem*, art 118(3).
[173] R Guidotti, "National Report from Italy" in J Chuah and E Vaccari (eds), *Executory Contracts in Insolvency Law: A Global Guide* (Edward Elgar Publishing, 2019).
[174] For instance, pursuant to art 72(8) of the *legge fallimentare*, a receiver cannot suspend or otherwise delay real estate sales if the property is due to become the main home of the buyer or one of his close relatives, or is due to become the headquarters of the purchasing corporate entity.

If the receiver fails to take any decision in the few months after the commencement of the procedure (no time limit is set in the law), the other party to the contract can enquire about the fate of the contract. Should the receiver not reply to such an enquiry, the other party can request the court to set a deadline (not exceeding 60 days) for the receiver to notify the other party of a final decision.

Termination (*ipso facto*) clauses are not enforceable under Italian law.[175] The provision only covers clauses that provide for the termination of the contract due to a filing for corporate liquidation. If termination of the contract is caused by any other event of distress (such as failure to pay the debts when they fall due) or by the opening of another formal insolvency procedure, that clause will be enforceable.

If the contract is not performed and / or terminated, the other party has the right to lodge a claim in the insolvency procedure.[176] The creditor's claim cannot include any damages.[177] In certain cases, such as the termination of a preliminary purchase agreement of real estate that has been registered in the regular way, the creditor's claim has a preferred status in insolvency.[178]

Unlike other jurisdictions, there are no special rules about "essential" contracts. However, the legislator has included several provisions on specific contracts.

In limited cases, the law prescribes that the contract continues to be performed, irrespective of the liquidation of one of the parties. These rules apply to corporate and residential leases,[179] as well as insurance contracts (in the case of the failure of the insured party).[180] More generally, this is the approach followed whenever the court authorises the debtor in a corporate liquidation procedure to continue trading.[181]

In certain cases, the legislator opted for the automatic termination of executory contracts that have yet to be fully performed upon insolvency, even if the receiver may sometimes retain the right to perform these contracts. This happens to loans contracted for a specific purpose,[182] partnership agreements,[183] bank account and agency contracts,[184] procurement contracts[185] and stock market forward contracts.[186]

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175 *Legge fallimentare*, art 72(6).
176 *Idem*, art 72(4).
177 *Ibid*.
178 *Idem*, art 72(7).
179 *Idem*, arts 79 and 80.
180 *Idem*, art 82.
181 *Idem*, art 104(7).
182 *Idem*, art 72-*ter*.
183 *Idem*, art 77.
184 *Idem*, art 78.
185 *Idem*, art 81. Automatic termination does not apply if the personal qualities of the parties have not been fundamental in reaching the agreement.
186 *Idem*, art 76. Examples of these contracts include swap contracts (Court of Florence, 15 January 1998, in (1998) *Fall* 857), domestic currency swaps (Court of Turin, 4 April 1998, in (1998) *Fall* 857), options on futures and options on currency (Court of Turin, 23 January 1998, in (1998) *Fall* 534).

In any other cases, the legislator simply restated the validity of the general rule but outlined in detail the consequences in cases of non-performance by either of the parties. Examples include rental and hire-purchase agreements,[187] as well as contracts with retention of title (ROT) clauses.[188]

The law also clarifies the consequences should the receiver decide to perform the contract, such as in the case of long-term supply contracts.[189] In such cases the receiver has to cover any outstanding balance and unpaid obligation before assuming the contract. This applies to any unpaid invoice, irrespective of whether it was for goods delivered or services provided before or after the commencement of the liquidation procedure. The choice of the receiver to be the successor in title of the contract does not necessarily have to be in writing. Assumption of the contract can be tacit and presumed by the conclusive facts, as long as those facts are unequivocal.[190]

Finally, in light of the unique characteristics of some contracts, the legislator introduced *ad hoc* rules that do not follow any of the general approaches described above. This happens with contracts to build new properties,[191] for goods sent but not yet delivered[192] and for publishing contracts.[193]

If the receiver terminates a contract that includes an arbitration clause, that clause cannot be enforced against the insolvent estate and any ongoing arbitration proceeding is suspended.[194]

6.3.6 *Netting and set-off*

Under Italian law, it is possible for creditors to offset claims against the debtor.[195] Automatic set-off requires the claim to be quantified and certain, but not necessarily due. These claims must exist at the commencement of the corporate liquidation procedure. As a result, it is not possible to apply set-off against a clawback claim by the receiver. Additionally, it is not possible to set off claims that were purchased after the commencement of the procedure, or in the previous year.

Parties can also decide to contractually set-off their claims before the opening of a formal corporate liquidation procedure. Contractual set-offs are permissible, but they are subject to the general rules on avoidance actions.

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187 *Idem*, art 72-*quarter*.
188 *Idem*, art 73. The law states that the insolvency of the vendor does not affect the validity of the contract. For the rationale behind this choice, see: Court of Rome, 26 January 2007, in (2007) *Fall* 592; C Cass, 22nd December 2005 no 28480.
189 *Idem*, art 74.
190 C Cass, 22nd May 1996, no 4715.
191 *Legge fallimentare*, art 72-*bis*. The *legge fallimentare* provides that the decision on the dissolution or the continuation of the contract is not (only) given to the receiver, but to both parties. The decision of any of them binds the other. On the special nature of this rule, see: Court of Brescia, 23rd May 2014, in (2015) *Fall* 480.
192 *Idem*, art 75.
193 *Idem*, art 83.
194 *Idem*, art 83-*bis*.
195 *Idem*, art 56.

6.3.7 *Avoidance / clawback actions*

Creditors have the right to challenge the validity of any transactions carried out by the debtor if they significantly affect the possibility of the creditor being repaid, even in cases where the debtors did not have enough assets to repay their creditors from the outset.[196] This action is known as the *actio Pauliana* and it is regulated by articles 2901 *et seq* of the Civil Code. To be successful, the claimant needs to prove that:

- the transaction carried out by the debtor, or the new obligation assumed by the debtor, has significantly affected the creditor's likelihood of being repaid (*eventus damni*);
- the debtor knew or ought to have known that the transaction would have caused significant harm to the creditor (*scientia fraudis aut damni*);
- the third party knew of the potential prejudice caused by the transaction in cases of transactions carried out for consideration (*partecipatio fraudis aut damni tertium*).

This action can be instituted by the receiver in corporate liquidation cases.[197] If a corporate liquidation procedure is ongoing, the petition for the action must be brought before the delegated judge of the insolvency procedure. The successful outcome of the petition means that the goods must be returned to the insolvent estate. However, the rights of third parties acting in good faith are preserved.

The *legge fallimentare* includes specific provisions that not only affect transactions intended to prefer some creditors, but also arm's-length transactions (such as payments in the ordinary course of business). These actions can be brought in addition to the *actio Pauliana* described above. Avoidance actions that apply in corporate liquidation cases only apply to transactions that occurred in close proximity to the filing: that is, six months, one or two years before the opening of the liquidation procedure (as opposed to five years from the date of the transaction for the *actio Pauliana*). However, the burden of proof for the claimant is significantly easier under the procedure regulated by the *legge fallimentare*.

The receiver can challenge deeds executed by the debtor on a gratuitous basis[198] and re-payments of debt that were not due at the time of the opening of the liquidation procedure[199] and which occurred in the two years prior to the opening of the formal insolvency procedure.

The one-year time limit applies to:

(a) transactions at an undervalue;[200]

[196] C Cass no 1366/2017.
[197] *Legge fallimentare*, art 66.
[198] *Idem*, art 64.
[199] *Idem*, art 65.
[200] *Idem*, art 67(1)(1). These are transactions for consideration where the services performed or the obligations undertaken by the debtors exceed of at least 25% of what has been given or promised to them.

(b) the repayment of due debts not effected through cash or ordinary forms of payment;[201] and

(c) pledges, *antichresis* rights[202] and voluntary mortgages granted or set up for pre-existing debts that are not yet due.[203]

The six-month time limit applies to: (i) pledges, *antichresis* rights and voluntary mortgages granted or set up for pre-existing debts that are already due;[204] and (ii) any other transactions in the ordinary course of business.[205] With reference to transactions in the ordinary course of business, the receiver has to prove that the other party knew, or ought to have known, that the debtor was insolvent (*scientia decoctionis*).

Avoidance actions must be commenced within three years from the opening of the corporate liquidation procedure, or within five years from the act or transaction that is being sought to be clawed back, whichever the earlier. Claw-back actions cannot avoid the transactions mentioned in article 67(3) *legge fallimentare*. That list includes, amongst others:

(a) payment for goods and services in the ordinary course of business;

(b) payments on bank accounts, unless such payments have significantly reduced the amount owing on an overdraft facility with the bank.

Special laws have also introduced further exemptions from avoidance actions in insolvency. For instance, law 51/1992 establishes that insolvency avoidance actions do not affect transactions carried out as part of a factoring contract.

6.3.8 *Directors' liability*

The considerations expressed in this section apply to the directors of any company involved in a formal corporate insolvency procedure.

Directors have a general duty to manage the company in a prudent and reasonable manner, in compliance with laws, regulations and the company's articles of association. They owe a fiduciary duty to the company's shareholders. Failure to meet these obligations results in joint and several liability for breach of duty.

In formal insolvency procedures, claims are brought against a director by the officeholder. Liability is proven if:

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201 *Idem*, art 67(1)(2).
202 *Antichresis* is a contract whereby a debtor pledges (ie, conveys possession of but not title to) real property to a creditor, allowing the use and occupation of the pledged property, in lieu of interest on the loan.
203 *Idem*, art 67(1)(3).
204 *Idem*, art 67(1)(4).
205 *Idem*, art 67(2).

(a) The directors failed to act with normal diligence in supervising the conduct of the company's affairs, to do their best to prevent the occurrence of prejudicial acts or reduce their harmful effect, or have acted in conflict of interest;

(b) The directors' actions caused immediate and direct damage to the company.

For companies operating in a regulated market, directors have a duty to call a shareholders' meeting without delay whenever the equity decreases by more than one-third because of the company's losses. These provisions also apply to *de facto* and shadow directors.

Criminal consequences are regulated by article 223 to 235 *legge fallimentare*.

A significant provision is contained in article 224 *legge fallimentare*. This provision extends criminal liability for simple bankruptcy to managers, auditors and officeholders. These persons can be punished with imprisonment of between six months to two years if they unreasonably delayed the commencement of a corporate insolvency procedure, or they have concurred in altering the company's accounting entries. Law 132/2015 provides that all judicial proceedings linked to the liquidation procedure must be dealt with in priority over other (civil) proceedings, in an attempt to reduce the duration of liquidation procedures.[206]

6.3.9 *Small companies and large groups*

There are no specific rules for micro, small and medium enterprises (MSMEs) in corporate liquidation. However, for assetless estates, or if there are insufficient assets to cover the costs of the procedure (particularly the receiver's fees), the court can summarily liquidate the company upon notification by the receiver.[207]

Currently, there are no specific rules that deal with group insolvencies in the *legge fallimentare*. However, following the innovations introduced by articles 56 to 77 of the EIR Recast, law 155/2017 delegated to government to introduce rules that deal with the insolvency of large groups and / or connected companies.

According to the 2017 guidelines issued with the law, a single court will have a supervisory role over the procedure and a sole officeholder will be entitled to run the companies for the duration of the procedure. In the case of rescue procedures, a unitary proposal for the recovery of the group in crisis must be presented. This proposal will regulate intra-group operations and transactions to preserve business continuity, as well as guarantee the protection of the shareholders and the creditors of each subsidiary.

Law 155/2017 also entitles the government to set the criteria to allocate the costs of the procedure among the entities of the group. The officeholder will be able to exercise certain powers also with reference to non-insolvent subsidiaries of the group.

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206 *Idem*, art 43(4).
207 *Idem*, art 118(4).

6.3.10 Concluding remarks

Italian insolvency law provides the parties with an opportunity to reach an in-liquidation composition, which is regulated by articles 124 to 141 and 152 to 153 *legge fallimentare*. In order to preserve the insolvent estate (even in a corporate liquidation procedure), parties are provided with the freedom and autonomy to negotiate an agreement that aims at restructuring the debt and repaying the claims by any (lawful) means.

The proposal for an in-liquidation composition can be submitted by the debtor, a creditor or a third party. It cannot be submitted by either the creditors' committee or the receiver.[208] The proposal must be lodged with the delegated judges. The receiver must give their opinion regarding the feasibility of the composition and convenience to creditors by assessing the proposal against the likely outcome of a corporate liquidation procedure.

The opinion of the receiver is compulsory but not binding. However, in order to be performed, the proposal for an in-liquidation composition must be approved by the creditors' committee and by the creditors that represent the majority of the company's debt.

Absent any appeals against the approved plan (or after a decision on these appeals), the court approves the plan, which becomes binding on all parties and determines the closure of the corporate liquidation procedure. Nevertheless, the receiver and the creditors' committee continue to perform a supervisory role towards the person in charge of performing the agreement.

The agreement can be performed by a third party, who also becomes the owner of the assets of the insolvent estate. The composition can be voided for fraud or cancelled if the third party does not perform it according to the plan. In that case, the company is re-admitted to a corporate liquidation procedure, but parties retain the right to submit a new proposal for an in-liquidation composition.

Pre-insolvency compositions are described in deeper details in paragraph 6.5 of this text.

The order of priorities in insolvency has been discussed in paragraph 5.6 of this text.

Finally, it is possible to convert the corporate liquidation procedure into extraordinary administration. These are extremely rare cases. It is much more likely that a corporate rescue procedure (for example, a pre-insolvency composition) will be converted into a liquidation procedure. It is not possible to convert a corporate liquidation into a forced administrative liquidation, as the companies who can file for one of these procedures cannot file for the other one and *vice versa*.[209]

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[208] *Idem*, art 124(1).
[209] *Idem*, art 2.

6.4 Receivership

Receivership is traditionally understood as an insolvency procedure by means of which a debenture holder has the right to appoint a person to take possession of property subject to a charge and deal with that property for the primary benefit of the holder of the charge. This procedure has proven particularly common in certain common law jurisdictions, such as Australia, England and Singapore.

Under Italian law, secured creditors have never enjoyed the right to directly appoint a receiver out of court. The new Code has not introduced any similar procedure under Italian law.

6.5 Corporate rescue – pre-insolvency compositions

6.5.1 General

Under Italian law, debtors can rely on the following rescue remedies:

(a) pre-insolvency compositions;

(b) restructuring agreements – in the form of *accordi di ristrutturazione, convenzioni di moratoria* and *piani di risanamento*;

(c) forced administrative liquidation; and

(d) extraordinary administration.

In order to keep the length of this text manageable (and because the following are the procedures most commonly used by distressed debtors), this text only focuses on pre-insolvency and restructuring agreements. The choice is also influenced by the nature of the *piani attestati di risanamento* (turnaround plans), which are very similar to out-of-court workouts. In fact, these turnaround plans[210] are not judicial procedures; no automatic stay is granted and no provisions on post-commencement financing and post-adjudication creditors are included in the law. Debtors rely on them in the early stages of a corporate crisis, as their content is extremely flexible and there is no need to respect the principle of *par condicio creditorum* among the creditors.

6.5.1.1 Pre-insolvency compositions: Government's policies over time

Pre-insolvency compositions (articles 160 to 186 *legge fallimentare*) are court-supervised procedures aimed at avoiding a termination of the debtor's activities and / or maximising returns to creditors over alternative liquidation procedures.

The policies underpinning pre-insolvency compositions have significantly changed in the last 15 years.

210 *Idem*, art 67(3)(d).

Before 2005 this procedure was seen as a benefit to be granted only to those entrepreneurs who were trustworthy and honest, but unlucky. Access to the procedure was restricted by several subjective and objective eligibility requirements, including the need to ensure the repayment of at least 40% of the unsecured creditors' claims. The procedure itself was characterised by strong directive and supervisory powers granted to judicial commissioners and courts, even if debtors were not formally dispossessed of their assets.

Law 80/2005 radically changed this approach, in line with a more general attempt to introduce a rescue culture in Italy. Pre-insolvency compositions became the preferred procedures for distressed yet viable businesses. As a result, this procedure was made available to companies that were experiencing situations of crisis (and not necessarily insolvency). Majorities for the approval of the plan were reduced and the law removed the requirement of trustworthiness in order to enter into a pre-insolvency composition.

Along the same lines, legislative decree 5/2006 reduced the directive powers of delegate judges and courts, while legislative decree 169/2007 removed the possibility of the court automatically declaring the opening of a corporate liquidation procedure should the eligibility criteria for pre-insolvency compositions not be met. With reference to creditors' satisfaction, the 2007 reform introduced, for the first time, the possibility of delaying the repayment of preferred and secured creditors in the case of pre-insolvency compositions, thereby ensuring the continuity of business operations (*concordato in continuità*). The same legislative decree also abolished the 40% threshold for the repayment of unsecured creditors.

Law 134/2012 further promoted the use of this procedure by: (i) giving the parties the right to submit a petition without a contextual restructuring plan (which should be submitted at some time during the following 120 / 180 days – *concordato in bianco*);[211] (ii) introducing new, favourable rules for post-commencement financing; and (iii) establishing the principle of tacit consent for the calculation of the creditors' majorities needed to approve the plan.

These reforms promoted the use of these procedures. The number of pre-insolvency petitions went up from 100/150 per term in the early 2000s to the staggering figure of 1,400 per term in the second quarter of 2013.[212] There were concerns that these numbers suggested a strategic, abusive use of pre-insolvency remedies.[213]

There is some evidence of improper use of this procedure in case law. Over the years, the Supreme Court restated on several occasions that courts should not approve pre-insolvency compositions that offered tiny, insignificant percentages of returns to unsecured creditors.[214] Despite that, several courts approved procedures where unsecured creditors obtained little or

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[211] This procedure is known as *concordato in bianco* and is now regulated by art 161 (6)-(10) of the *legge fallimentare*. It represents the most recent attempt to introduce a Chapter 11-type procedure under Italian insolvency law.

[212] Cerved, *Fallimenti, Procedure e Chiusure di Imprese* 35 (Septermber 2018) 8, available at: https://know.cerved.com/uncategorized/fallimenti-procedure-chiusure-impresa/ (31 December 2018).

[213] S Ambrosini, *Il nuovo diritto della crisi d'impresa: l 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016) 13.

[214] C Cass, Sez Un, 23 January 2013 no 1521; C Cass, Sez I, no 5107/2015.

nothing from the pre-insolvency composition.[215] As a result, with law 132/2015 the legislator re-introduced the obligation to pay a fixed percentage (20%) of unsecured creditors' claims.

The 2015 law marked the end of the legislative *favor* towards the use of this procedure, as more stringent procedural and substantive requirements were introduced to limit its use. The law reduced the debtor's powers to amend existing contracts, it extended the duties of judicial commissioners, removed tacit assent for the calculation of the majorities and introduced more stringent rules for post-commencement financing.

This law sits at odds with the European Commission Recommendation on a new approach to business failure.[216] However, it follows the trend that emerges from case law to penalise and not approve those pre-insolvency compositions where unsecured creditors receive no or very small dividends,[217] thus ignoring the potential advantages arising from the continuation of trade for existing creditors, even if such creditors are unsecured.

The Rordorf reform (law 155/2017)[218] shares the same attitude towards pre-insolvency compositions that guided the legislator in 2015. In particular, it reasserts the more stringent approach towards the opening and use of pre-insolvency compositions aimed at liquidating the assets and not continuing the business of the distressed debtor.

These more rigorous criteria brought the number of "traditional" petitions[219] down to a figure of 120 per term[220] in the first six months of 2018. This represents a 27% drop over 2017 numbers.[221] Companies now prefer filing for a *concordato in bianco*, with 728 petitions in the first 6 months of 2018.[222] These figures, however, still represent a drop of 16% over the previous year.[223]

Recent regulatory changes probably pushed debtors to either explore alternative composition mechanisms (such as out-of-court workouts) or delay the filing to the 11th hour, when a condition of insolvency has manifested. It is yet to be seen if and to what extent the 2017 reforms will impact on this trend.

6.5.1.2 Pre-insolvency compositions currently

Pursuant to article 160 of the *legge fallimentare*, pre-insolvency compositions are based on the need for a restructuring plan, which can provide for:

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215 Court of Modena, 3 September 2014; Court of Bergamo, 4 December 2014.

216 European Commission, "Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency" (2014/135/EU) OJ L 74/65.

217 C Cass, 25 September 2013, no 21901, in (2013) *Mass Foro it* 697; C Cass, 17 October 2014, no 22045, in (2015) *Fall* 435.

218 See para 9 of this text.

219 These are petitions where the debtor submits the restructuring plan alongside the petition, as opposed to petitions for a *concordato in bianco* where the debtor has up to 180 days to submit the restructuring plan.

220 Cerved, *Fallimenti, Procedure e Chiusure di Imprese* 35 (Septermber 2018) 8, available at: <https://know.cerved.com/uncategorized/fallimenti-procedure-chiusure-impresa/> (31 December 2018).

221 *Idem*, 7.

222 *Ibid*.

223 *Ibid*.

(a) the restructuring or discharge of debt in whatever form. Plans can provide for the transfer of assets, the 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 convertible bonds) and any other financial instruments;

(b) the transfer of the assets to: (i) a third party (*assuntore*) who also assumes the debt; (ii) creditors of the debtor (or subsidiaries of such creditors); (iii) new companies to be established as part of the pre-insolvency composition;

(c) the division of creditors into classes made up of claimants with similar rights, as well as dissimilar treatments between different classes of creditors.

In an attempt to dissuade strategic filings and better protect the rights of the creditors, law 132/2015 specified that the plan must outline a specific and economically valuable practical benefit (*utilità*) for each of the debtor's creditors.[224]

This plan can be submitted alongside the petition (traditional petitions) or at a later stage (*concordato in bianco*), but in any case between 60 and 120 days[225] from the submission of the original petition. This deadline can be extended to 180 days where there are justifiable reasons for doing so.[226] A petition for a *concordato in bianco* cannot be submitted by a debtor who filed for a pre-insolvency composition in the previous two years and who failed to either be admitted to the procedure or to have the plan approved by the court.[227]

6.5.2 *Eligibility requirements*

The same eligibility criteria laid out in articles 1 and 15(9) *legge fallimentare* apply to companies that file for pre-insolvency compositions. However, there are two additional eligibility requirements for pre-insolvency compositions.

The first one is that the debtor is in a state of crisis rather than in a state of insolvency.[228] A state of crisis can, but does not necessarily have to, be a state of insolvency.[229] It is a situation of economic and financial distress that can lead to insolvency. The existence of this condition has to be demonstrated not only when the company is first admitted to the procedure, but also when the court is asked to approve (*omologare*) the agreement reached by the creditors and the debtor.

A situation of crisis is experienced by companies in dire financial or economic distress which cannot turn around their business by relying on existing out-of-court, contractual remedies. It

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224 For a detailed analysis of the innovations introduced by law no 132/2015 to pre-insolvency compositions (and for a list of unresolved issues), see: S Ambrosini, *Il nuovo diritto della crisi d'impresa: l 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016), ch 1.

225 The 120-day limit cannot be exceeded if a party has submitted a petition for corporate liquidation against the debtor before the submission of the pre-insolvency composition petition: art 161(10) of the *legge fallimentare*.

226 *Legge fallimentare*, art 161(6).

227 *Idem*, art 161(9).

228 *Idem*, art 160(1).

229 *Idem*, art 160(3).

must be demonstrated that the situation of crisis is likely to lead to a condition of insolvency if not properly and timely addressed. In other words, the pre-insolvency composition, whilst being modelled on the US Chapter 11 procedure, has much more stringent eligibility requirements.

Where the North American procedures (and English schemes of arrangement) do not require evidence of insolvency, the Italian legislator opted for introducing a criterion which is remarkably similar to the insolvency requirement. The rationale for this choice was the need to prevent the abusive or strategic use of insolvency procedures by over-indebted, but not necessarily distressed, companies.

The second additional requirement – which does not apply to pre-insolvency compositions that contemplate business continuation (*concordato in continuità*)[230] – is that the plan ensures the payment of at least 20% of the unsecured creditors' claims,[231] while preferred and secured creditor cannot be paid less than what they would receive in a corporate liquidation procedure.[232]

In general, there is no obligation to file for any of the corporate rescue mechanisms described in this text.[233] The choice on whether to commence a restructuring procedure is given to the debtor alone, despite scathing criticism of such an approach by the majority of commentators in this area who have long advocated giving the power also to third parties to commence rescue-oriented procedures.[234] It is not possible for creditors to commence such proceedings. Such choice has been confirmed by the reforms introduced by the CCII (discussed below in paragraph 9 of this module). The major drawback of this system is that debtors end up submitting a proposal for a restructuring plan only when they are hopelessly insolvent and / or as an attempt to block a creditor's petition for liquidation.[235] However, once the debtor's petition has been submitted, the creditors do have the power to submit alternative proposals as explained below in section 6.5.5 of this module.

It is important, at this point, to draw a distinction between "proper" rescue procedures and composition plans promoted within a liquidation procedure. In fact, law 132/2015 changed article 124 *legge fallimentare*, giving to third parties – including non-creditors – the possibility to promote composition procedures during the course of a liquidation. This change allows third parties and creditors to promote solutions designed to increase the money available to distribution, even when the debtor has no incentive to do it.

230 *Idem*, art 186-*bis*, introduced by law no. 134/2012.
231 *Idem*, art 160(4).
232 *Idem*, art 160(2).
233 Different considerations apply with reference to forced administrative liquidation and extraordinary administration, as these procedures have different entry requirements.
234 A Jorio, "La legge fallimentare: pregi e difetti delle nuove regole" (2013) I Giur Comm 712; S Ambrosini, "Il concordato preventive", in Vassalli, Luiso, Gabrielli (eds), *Le altre procedure concorsuali. Trattato di diritto fallimentare e delle altre procedure concorsuali*, *IV* (Giappichelli 2017) 17-18.
235 S De Matteis, *L'emersione anticipata della crisi d'impresa. Modelli attuali e prospettive di sviluppo* (Giuffrè Editore, 2017), 137 ff. and 376-377.

6.5.3 *Petition and creditors' claims*

Unlike corporate liquidation, a pre-insolvency composition can only be commenced upon petition by the debtor. The petition has to be filed in the court where the debtor has its main place of business (usually, the company's registered office). Any changes in the registered office that occurred in the year prior to the filing cannot affect the court's jurisdiction.[236] The petition also has to be sent to the public prosecutor.[237]

Alongside with the petition and the plan (which can be submitted at a later stage if the petition is for a *concordato in bianco*), the debtor's submission to the court must include:

(a) a report on the debtor's balance sheet, economic and financial situation;

(b) a list of assets, liabilities and creditors;

(c) a list of secured, preferred and priority creditors;

(d) a list of assets relating to the unlimited liability shareholders.

These documents must be accompanied by a report by a professional appointed by the debtor. This professional must meet the requirements of independence and professionalism laid out in article 67(3)(d) of the *legge fallimentare*.[238] The report must confirm the accuracy of the company's data and the feasibility of the restructuring plan (if and when the plan is submitted).

The petition must be registered in the companies' register maintained by the Chamber of Commerce on the day following the filing.[239]

Creditors must lodge a proof of claim with the judicial commissioner supervising the procedure. The judicial commissioner must draft a list of verified claims before the creditors' hearing, where the creditors will be asked to vote on the proposed plan(s). Any disputes regarding these claims must be settled by the delegated judge.

6.5.4 *Judicial commissioner*

These are accountants, lawyers (or partnerships between them) and managers that meet the eligibility requirements outlined in article 28 of the *legge fallimentare* (basically not being a relative or person otherwise connected to the debtor, or someone who has a conflict of interest with the debtor).

Nominated judicial commissioners have to accept the appointment within two days from the order that admitted the debtor into the pre-insolvency composition procedure.[240] Judicial

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[236] *Legge fallimentare*, art 161(1).
[237] *Idem*, art 161(5).
[238] *Idem*, art 161(3). These are usually (partnerships of) chartered accountants or auditors.
[239] *Idem*, art 161(5).
[240] *Idem*, art 29.

commissioners act as public officers[241] and are required to perform their duties in person, but they can be assisted by professional advisers.[242] Their appointment can be revoked under the same circumstances applicable to receivers.[243]

Judicial commissioners have a specific duty to provide relevant information to creditors who want to submit alternative restructuring or liquidation plans[244] and to public prosecutors in cases of criminal behaviour.[245]

Judicial commissioners must inform the creditors of the date of the creditors' hearing.[246] They also have to make an inventory of the debtor's assets and to write a detailed report on the causes of the debtor's distress, the debtor's conduct, the debtor's composition plan and the guarantees offered to the creditors. This report must be submitted to the delegated judge 45 days before the creditors' hearing.[247] Judicial commissioners have to write a similarly detailed report with reference to the alternative composition plan submitted by qualified creditors, at least 30 days before the creditors' hearing.[248]

6.5.5 *Procedure*

The competent court must check whether the debtor meets the statutory eligibility requirements and that all documents have been submitted. This is a procedural aspect, where the court checks the legal feasibility (*fattibilità giuridica*) of the procedure.[249] If all conditions are met, the court admits the company into the pre-insolvency composition, appoints a delegated judge and a judicial commissioner and schedules a creditors' meeting within 120 days from the date of the order (1st order: admission to the procedure).[250] The creditors' meeting is usually held electronically.[251] Upon admission to the procedure, the debtor has to pay the court part of the pre-insolvency composition expenses (between 20% to 50% of the total amount).[252] Such decision is taken by the court.

At the creditors' meeting, the judicial commissioner explains the debtor's composition proposal and those that were eventually submitted by the creditors. Since the changes introduced by law 132/2015, creditors representing 10% or more of the company's debt[253] can file an alternative

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241 *Idem*, art 165(1).
242 These may include an expert appraiser – art 172(3) of the *legge fallimentare*.
243 *Legge fallimentare*, art 165(2).
244 *Idem*, art 165(3)-(4).
245 *Idem*, art 165(5).
246 *Idem*, art 171.
247 *Idem*, art 172.
248 *Idem*, art 172(2).
249 C Cass, Sez Un, 20 January 2013, no 1521 in (2013) Fall 149.
250 *Legge fallimentare*, art 163(2).
251 *Idem*, art 163(2-*bis*), introduced by law decree no 59/2016.
252 *Idem*, art 163(2)(4).
253 This threshold can be reached by the purchase of claims from other creditors after the submission of the pre-insolvency composition petition. The claims held by the debtor's holding company, the companies controlled by the debtor and any company jointly controlled by the debtor and the holding company, may not be included in this percentage.

proposal,[254] unless the debtor's plan guarantees the payment of at least 40% of unsecured creditors' claims (30% in the case of a *concordato in continuità*).[255]

Secured and unimpaired creditors (that is those creditors that will receive the amount originally owed under their claim) do not have the right to vote on the proposal, unless the proposal includes partial or deferred payments of their claims. Secured creditors can receive less than the amount claimed against the debtor if they would not receive better treatment in an alternative liquidation procedure.[256]

The debtor's plan must be approved by the majority of unsecured creditors. This vote is designed to test the economic feasibility (*fattibilità economica*) of the plan.[257] Votes are counted according to the amount of the claims and not the number of claims (*per capita*). Where creditors are divided into classes, each class must vote in favour of the proposal. Law 132/2015 removed tacit assent for the calculation of majorities, making it significantly more difficult for applicants to reach the prescribed majority (this is due to the historic lack of participation of creditors in formal insolvency procedures). The removal of tacit assent is also likely to promote those practices – such as hoarding of delegations – that law 134/2012 tried to tackle by making it easier to secure a qualified majority in favour of the plan.[258]

One of the most important innovations introduced by the CCII (see below paragraph 9) is the possibility to cram-down dissenting classes of creditors. However, law decree 125/2020, translated into law 159/2020 (3 December 2020), has introduced the possibility of obtaining confirmation by the court of a restructuring agreement or pre-insolvency composition plan, even if the required majorities in each of the classes of creditors are not met. This innovation is retrospective, as it applies also to procedures that were already opened at the time the law decree first, and conversion law, later entered into force. Under law decree 125/2020, article 3(1-bis), a court will **have to** approve a cram-down on dissenting classes of creditors if the debtor proves that the corporate liquidation will be less advantageous (in terms of distribution of proceeds) than the alternative rescue procedure.[259]

In particular, this change is specifically aimed at overcoming the non-vote, lack of support for the plan or even the dissenting vote of the Italian equivalent to the HMRC. Tax collectors and social security institutions are large unsecured creditors in any restructuring procedure. A dissenting vote from one or both of them has the power to block an otherwise successful and largely supported (by other creditors) restructuring agreement.

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254 *Legge fallimentare*, art 163(4).
255 *Idem*, art 163(5). This choice has been criticised because one of the key elements of the assessment (ie, the date on which the money will be paid to the creditors) has been entirely ignored. Creditors may not be interested in a promise of full payment in 10 years when they can get 30% of what is owing to them immediately. See: S Ambrosini, *Il nuovo diritto della crisi d'impresa: l. 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016) 31.
256 *Idem*, art 160(2).
257 C Cass, Sez Un, 20 January 2013, no 1521 in (2013) Fall 149.
258 S Ambrosini, *Il nuovo diritto della crisi d'impresa: l. 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016) 21.
259 The Supreme Court confirmed that such power and discretion lie entirely on the court: Cass Civ, SS.UU., 25 March 2021, no 8504.

These changes in the law are most welcome, as they *de facto* withdraw a hold-out, veto power from these bodies. Courts have given a broad interpretation of the discretionary powers granted to them. In a recent judgment, the Court in Pescara held that the law results in promoting the collective interest of the creditors as a whole over the dissenting interests of specific categories of creditors, despite their relevance for the procedure or the magnitude of their claims against the debtor.[260] Such extensive interpretation of the judicial powers in a restructuring procedure may, however, be subject to criticism (for not being supported by specific reference in the law), and may not be confirmed by the Supreme Court, should one of these cases be referred to their attention.

Another significant innovation introduced by law 132/2015 is that currently creditors can submit alternative plans[261] and that a detailed, competitive bidding procedure has to be observed in the case of pre-pack pre-insolvency compositions.[262] The bidding procedure also has to be carried out in respect of any proposal for corporate lease,[263] for the whole or part of the company, given the frequent inclusion in these contracts of a pre-emptive right of the lessee over the lessor's business.

This choice and similar proposals, however, have been criticised[264] for being in contrast with the principle of freedom of private economic initiative (article 41 of the Constitution). In pre-insolvency compositions the debtor might simply be in a situation of distress and / or crisis and not necessarily insolvent. This means that the debtor should still be solely responsible for corporate decisions, as the company is not managed in the interests of the creditors. Imposing a particular course of action (bidding procedure) against the will of the debtor may breach the debtor's fundamental rights.[265] Unsurprisingly, the recent Rordorf reform suggested that the duty to carry out a bidding procedure should be limited to cases where the debtor is insolvent.

If the plan is approved, creditors representing 20% or more of the company's debt can file an appeal with the delegated judge. The judge can confirm the approved plan (2nd order: sanctioning (official approval) of the plan) if the judge is satisfied that the dissenting creditors would not receive better treatment under an alternative formal insolvency procedures (for example, corporate liquidation). In other words, the judge exercises US-style cram-down powers over dissenting creditors.[266]

If the plan includes the transfer or sale of assets, the delegated judge appoints a liquidator to execute the plan. The procedure should last no more than nine months from the date of filing,

260 Court of Pescara, 27 May 2021 (Colantonio J).
261 *Legge fallimentare*, art 163(4)-(8).
262 *Idem*, art 163-*bis*. Absent any guidance from the legislator, some courts decided to require the use of competitive bidding procedures in all cases in which the debtor asked for a pre-pack sale to take place before the pre-insolvency composition's sanctioning (official approval): Court of Padova, 6 March 2015, in https://wwww.ilcaso.it, Sez Giurisprudenza, 12291 (31 December 2018).
263 *Idem*, art 163-*bis*(5).
264 L Stanghellini, *Le crisi d'impresa tra diritto ed economia* (Bologna: Il Mulino, 2007) 226 and 240.
265 The Constitutional Court has yet to determine if the choice operated by the legislator in 2015 is compatible with the constitutional principle of freedom of economic initiative.
266 S Ambrosini, *Il nuovo diritto della crisi d'impresa: l. 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016) 15.

subject to a 60-day extension. However, these deadlines are not mandatory and are frequently ignored.

6.5.6 *Consequences of pre-insolvency compositions*

The admission of a company into a pre-insolvency composition results in the rejection of any requests from creditors or the public prosecutor to open a corporate liquidation procedure against the same debtor.

Additionally, the submission of the petition for a pre-insolvency composition (including a petition for a *concordato in bianco*) results in the prohibition on all creditors – except for certain secured creditors – to commence or continue any actions (including executory ones) against the assets of the debtor (moratorium or stay).[267]

In the case of the submission of a petition for a *concordato in bianco*, the debtor can switch to a restructuring agreement procedure (see below) during the period of the automatic stay.

Until the court approves the admission of the debtor into a pre-insolvency composition, the debtor retains the power to carry out payments in the ordinary course of business. Acts of extraordinary administration must be pre-approved by the court to be enforceable against the debtor's pre-composition creditors. In cases of *concordato in bianco*, the court has the power to appoint a temporary judicial commissioner, who will oversee the debtor's activities until the filing of the composition plan.

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

6.5.7 *Treatment of contracts*[268]

The provisions of articles 72 to 83-*bis legge fallimentare* on pending contracts do not apply to pre-insolvency compositions. Therefore, there are no specific provisions that entitle the debtor to disclaim onerous contracts. However, article 169-*bis legge fallimentare* provides some guidance with reference to specific contracts.

In general, as the debtor continues to run the business in a pre-insolvency composition, contracts are deemed to be unaffected by the opening of these procedures.[269] Therefore, should the debtor breach the contract, the other party is usually entitled to terminate the contract.

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[267] *Legge fallimentare*, art 168(1).

[268] R Guidotti, "National Report from Italy" in J Chuah and E Vaccari (eds), *Executory Contracts in Insolvency Law: A Global Guide* (Edward Elgar Publishing, 2019).

[269] *Legge fallimentare*, art 169-*bis*.

There are some exceptions to this general rule. Debtors may seek the judge's authorisation to terminate non-performed or partially performed pending contracts,[270] with some notable exceptions.[271] Should the delegated judge grant the debtor's request, the debtor will have to pay a full indemnification to the counterparty. This indemnification ranks as a pre-filing, unsecured claim.[272]

Unlike the position in a corporate liquidation procedure,[273] the termination of any contracts does not affect the validity of the arbitration clauses included in those contracts.[274]

The debtor may seek a suspension of ongoing contracts for up to 60 days to assess the most appropriate course of action. In exceptional circumstances, this period can be extended to 120 days.[275]

In respect of leasing contracts, if the contract is terminated the lessor has the right to repossess the leased asset and sell it. If the asset is sold for an amount which is more than the amount still owing to the lessor, the difference must be paid to the debtor.

With reference to the payment of goods and services that are essential for the business, if the independent expert agrees that their payment is crucial for the continuation of the business and for ensuring the best interests of all creditors, the debtor may be authorised to pay pre-filing invoices.[276]

If the pre-insolvency composition contemplates business continuation (*concordato in continuità*), the debtor is entitled to continue performing public procurement contracts as well as to take part in public tenders.[277] In the same procedure, executory contracts cannot be terminated by the other party by reason of the debtor having filed for a pre-insolvency composition. In all other cases of pre-insolvency composition, termination clauses triggered by the filing are enforceable.

6.5.8 *Netting and set-off*

There are no specific rules dealing with these clauses in contracts (also not in the case of financial contracts).

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[270] *Idem*, art 169-*bis*(1).
[271] These exceptions are listed in art 169-*bis*(4) of the *legge fallimentare* and include: (i) employment contracts; (ii) real estate contracts where the transferred property is certain to be used as the buyer's (or one of his close relatives) home, or as the company's headquarters; (iii) loans contracted for a specific purpose; and (iv) rental contracts where the debtor in a state of crisis is the owner of the building.
[272] *Legge fallimentare*, art 169-bis(2). However, if the creditor supplied goods or services after the submission of the petition, he will be treated as a post-application creditor for that amount, with the right to be preferred over any other claimant.
[273] See the paragraph dealing with corporate liquidation above.
[274] *Legge fallimentare*, art 169-*bis*(3).
[275] *Idem*, art 169-*bis*(1).
[276] *Idem*, art 182-*quinquies*(5)-6).
[277] *Idem*, art 186-*bis*.

6.5.9 Post-commencement financing

In similar vein to the North American model, the Italian legislator decided to provide super-priority status to post-commencement financing.

Post-commencement lenders are entitled to be treated preferentially as post-adjudication creditors in the repayment of post commencement financing loans. Similarly, claims (including claims for repayment of loans for up to 80% of the amount of shareholder loans) arising in the course of the implementation of the plan – not just after but also before sanctioning (official approval) – are granted the highest priority and must be paid in full.[278]

Significant changes to post-petition financing were introduced in 2012.

Subject to the court's approval, debtors can enter into first priority financing agreements to support the plan, even if they had only submitted a petition for a *concordato in bianco*. The delegated judge's authorisation is subject to a certification to be issued by an independent expert that the new finance is instrumental to the satisfaction of the creditors. These loans may be secured by pledge, mortgage or by an assignment of receivables.[279]

Pursuant to law decree 83/2015, debtors are also entitled to obtain urgent interim financing without the need to file a certification issued by an independent expert. The relevant claims will take precedence over the other creditors' claims in a case of corporate liquidation (post-adjudication claims). In their petition to the court, debtors must specify the purpose of the requested financing, show that there are no alternative sources of finance and demonstrate that failure to receive it will cause imminent and irreparable harm to its business. The Court must decide on this petition within 10 days from its submission, after having heard the opinions of the judicial commissioner and, if necessary, the main creditors.

6.5.10 Execution of the agreement

After sanctioning (official approval) by the delegated judge, the debtor executes the composition plan under the supervision of the judicial commissioner. The judicial commissioner has an obligation to refer to the court any relevant circumstances that may harm the creditors' expectations.[280] If the debtor does not comply with the plan, the court may replace the debtor with the judicial commissioner.[281]

With the exception of compositions resulting in the transfer of assets to third parties,[282] any creditor can ask for the termination of the composition procedure for breach of the approved

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[278] *Idem*, art 182-*quarter*(1)-(3).
[279] *Idem*, art 182-*quinquies*.
[280] *Idem*, art 185(1).
[281] *Idem*, art 185(4).
[282] *Idem*, art 186(4).

plan,[283] unless the breach is not materially relevant.[284] This petition must be submitted within one year of the original termination date of the plan.[285]

The exact implementation of the approved plan results in a discharge of pre-petition debts, with the debtor being able to continue its business if the company has not been sold to a third party. The debtor can be assisted by a liquidator in all those plans aimed at either selling or transferring the assets to a third party.

6.5.11 Avoidance / clawback actions

Law 134/2012 provides that any judicial (that is, based on a judgment) security registered in the companies' register during the 90 days prior to the publication of the request for pre-insolvency compositions is ineffective *vis-à-vis* the creditors at the time of filing of such an application. Additionally, all acts of extraordinary administration carried out by the debtor after the filing of the petition, but without the pre-emptive authorisation of the court / delegated judge, are not enforceable against pre-composition creditors.[286]

No specific avoidance / clawback actions can be carried out in a pre-insolvency composition procedure. The judicial commissioner and the debtor can only carry out "ordinary" avoidance actions regulated by articles 2901 *et seq* of the Civil Code (*actio Pauliana*). Nevertheless, in the preliminary report, the judicial commissioner has to report on the actions that a receiver could carry out in a corporate insolvency procedure,[287] to give creditors the information needed to take a reasoned decision regarding the proposed plan.

6.5.12 Directors' liability

The general rules on directors' liability described above apply to pre-insolvency compositions. Law 132/2015 reinstated that the rules on simple bankruptcy crimes apply to debtors admitted to a pre-insolvency composition.

6.5.13 Small companies and large groups

There are no specific rules that deal with MSMEs or large groups of companies.

6.5.14 Concluding remarks

Pre-insolvency compositions can be converted into any of the other formal insolvency procedures regulated by the *legge fallimentare*. However, there is no need to convert a pre-insolvency composition into a liquidation procedure if the purpose is liquidating rather than rescuing a company. As mentioned at the beginning of this section, pre-insolvency compositions can be used to transfer assets and / or branches of the debtor to third parties, as

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[283] *Idem*, art 186(1).
[284] *Idem*, art 186(2).
[285] *Idem*, art 186(3).
[286] *Idem*, art 167(2).
[287] *Idem*, art 172(1).

well as to sell assets. Therefore, this corporate rescue mechanism can be used for winding down (liquidating) all or a portion of the distressed debtor.

Before the recent period of reforms, the rejection of a pre-insolvency composition proposal determined the automatic conversion of that procedure into corporate liquidation.[288] This is no longer possible, unless creditors or the public prosecutor have submitted an insolvency petition against the company.[289] It is never possible to open a corporate insolvency procedure against a company in a pre-insolvency composition.[290]

Should the judicial commissioner realise that any of the eligibility requirements are no longer being met,[291] or the debtor has acted maliciously by hiding assets, declared non-existing debts or acted in an otherwise fraudulent manner, they have to promptly inform the court of this fact. The court will then open a procedure aimed at terminating the pre-insolvency composition. Prompt notice of these facts must be given to the public prosecutor and the creditors.[292] However, the debtor can be declared insolvent and admitted to a corporate liquidation procedure only upon request by a creditor or the public prosecutor.[293]

Pre-insolvency compositions can in theory be converted into restructuring agreements, but outside cases of *concordato in bianco* this rarely happens in practice. Both procedures are commenced by a petition by the debtor, who can therefore choose from the beginning which procedure it wants to initiate. Equally, there is no obstacle to converting a pre-insolvency composition into an extraordinary administration, or *vice versa*.

6.6 Corporate rescue – restructuring agreements

In the same way as pre-insolvency compositions, restructuring agreements can be proposed by a company experiencing a situation of crisis but not necessarily insolvency. The main rules relating to these agreements are outlined in article 182-*bis et seq legge fallimentare*. Unlike pre-insolvency compositions, restructuring agreements can only be used to rescue the debtor's business or company, and not to liquidate it.

Debtors are never dispossessed under this procedure, not even in the few circumstances foreseen in pre-insolvency compositions. Sometimes, debtors are simply asked to obtain pre-emptive approval from the court before entering into a transaction with a third party. Debtors in a state of crisis need to submit the same documents required for commencing a pre-insolvency composition procedure. These documents must be accompanied by a report from a professional appointed by the debtor. This professional must meet the requirements of independence and professionalism set out in article 67(3)(d) *legge fallimentare*.[294]

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288 See also: C Cass, Sez Un, 23 January 2013, no 1521 in (2013) Fall 149.
289 C Cass, Sez Un, 10 April 2019, no 9146.
290 C Cass, Sez Un, 15 May 2015, no 9935.
291 *Legge fallimentare*, art 173(3).
292 *Idem*, art 173(1).
293 *Idem*, art 173(2).
294 *Idem*, art 182-*bis*(1). These are usually chartered accountants or auditors.

The law does not mandate a specific format for debt restructuring arrangements. The parties can freely determine the specific obligations and how these are to be performed. For instance, they may include waivers of interest, guarantees, total or partial transfer of assets, different treatments between different classes of creditors and / or the deferral of payment of existing obligations.

The restructuring agreement must be approved by creditors representing 60% or more of the debtor's total debt. All dissenting creditors have to be paid in full:

- within 120 days from sanctioning (official approval) for all debts due and payable at that date;

- within 120 days from the date originally agreed by the parties for all debts not yet due and payable at the sanctioning date of the agreement.

The only dissenting creditors that can be bound to the terms and conditions of the restructuring agreement are those banks and other financial institutions that have rights and interests against the debtor similar to those of other banks and financial institutions that have approved the agreement.[295] Extending the effect of the restructuring agreement to these dissenting creditors is only possible if the restructuring agreement is approved by banks and financial institutions representing 75% or more of the financial debts.

In all cases, these dissenting creditors:

(a) have the right to be informed of the opening of negotiations with the other banks and financial institutions and to take part into those negotiations;[296]

(b) cannot be forced to provide new finance or maintain existing financial agreements (such as overdraft facilities or loans) beyond the expiry date originally agreed by the parties in their contracts.[297]

The expert's report must not only confirm the accuracy of the company's data (as in the case of pre-insolvency compositions) but also that the agreement ensures the full payment of dissenting creditors within the deadlines mentioned above.

The agreement (with the support of the required majority of creditors) is published in the companies' register maintained by the Chamber of Commerce and is binding from the date of publication.[298] For 60 days after the date of publication, creditors cannot commence or continue individual actions against the assets of the debtor (automatic stay).[299]

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295 *Idem*, art 182-*septies*(2).
296 *Ibid*.
297 *Idem*, art 182-*septies*(7).
298 *Idem*, art 182-*bis*(2).
299 *Idem*, art 182-*bis*(3).

Following the changes introduced by law 122/2010, debtors can ask for an extension of the automatic stay to also cover the period of negotiations with creditors, which takes place prior to the publication of the agreement. Two conditions are required for the court to grant such an extension:

- the debtor must submit the documents required for commencing a pre-insolvency composition alongside the draft proposal for a restructuring agreement;

- a professional (who meets the requirements set out in article 67(3)(d) *legge fallimentare*) certifies that if the proposal is accepted, the dissenting and / or non-participating creditors can be fully repaid within the timeframe mentioned above.[300]

Within 30 days from its publication, any creditors or interested party can lodge an appeal against the proposed restructuring agreement. The competent court decides on any appeals and sanctions (officially approves) the agreement if the required majorities are met.[301] Appeals cannot be submitted by shareholders who are creditors of the company but have not approved the agreement.[302]

It is not clear under what circumstances courts can deny the sanctioning of a restructuring agreement when it has been approved by the statutory majorities. To fully implement the rescue goals pursued by the legislator with this procedure, the courts should refrain from investigating if the circumstances outlined in the restructuring agreement are likely to occur. Courts should simply check that the formal requirements prescribed by the law are met. However, some courts[303] make use of their discretionary powers to provide public prosecutors with supervisory powers whenever the successful outcome of the restructuring agreement relies on conditions unlikely to occur in the near future.

The rules on post-commencement financing and on the treatment of essential contracts described for pre-insolvency compositions, apply also to restructuring agreements.

A restructuring agreement can at any time be converted into a pre-insolvency composition.

Self-Assessment Exercise 3

Question 1

Recent years have seen a series of reforms in the areas of both corporate insolvency and personal bankruptcy in an attempt to move away from a fragmented, piecemeal approach to failure. These attempts have been largely unsuccessful.

Critically discuss this statement by making reference to statutes, case law and academic papers.

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300 *Idem*, art 182-*bis*(6)-(7).
301 *Idem*, art 182-*bis*(4).
302 Court of Napoli, Sex VII Civile, 3 May 2021.
303 Court of Milan, 10 November 2009.

Question 2

Bankruptcy procedures are available only to a limited set of debtors that meet specific eligibility requirements clearly spelled out in the law.

Do you agree with this statement? In answering this question, please make reference to specific examples and to the enforceable statutes.

Question 3

In May 2015, *Navigazione Mediterranea Srl*, a shipping company based in Naples, paid a *pro forma* of EUR 1,5 million to one of its customers, *Container Rossi Sarl*, by means of one cash instalment of EUR 500,000 from an overdraft account and the transfer of some real estate properties worth EUR 1,2 million. The invoice was only created on 16 September 2016, as the employee responsible for issuing the invoice went on maternity leave and her colleagues did not look into the case until *Container Rossi* was required to file a proof of claim in *Navigazione Mediterranea*'s liquidation procedure.

Navigazione Mediterranea Srl consistently paid *Container Rossi Sarl* ahead of the issuance of any invoice, as there was a tacit agreement between the parties that *Container Rossi* would have provided new goods to carry to *Navigazione Mediterranea* within 60 days from the payment of the *pro forma*. The failure to provide these new goods caused *Navigazione Mediterranea* to enter into a situation of financial difficulty and to file for corporate liquidation on 17 July 2016. During the insolvency procedure, it was established that the directors had culpably delayed the filing, as the company was insolvent as early as March 2015.

Describe the remedies available to the creditors and the insolvency practitioner to challenge the validity of the transaction described above.

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

7. CROSS-BORDER INSOLVENCY LAW

The traditional framework within which cross-border insolvency and rescue law is debated, relies on the divide between universalism and territorialism.

Universalism in its purest form promotes an idealistic world in which each legal system and each national court are compelled to enforce the orders issued by a foreign court that has authority over the main (insolvency) proceeding.[304] Westbrook is the most ardent proponent of a universal

[304] E Adams and J Fincke, "Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism" (2008) 15 Columbia Eur Law 43. See also: J Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and

model for cross-border insolvency, which he simply describes as "the administration of multinational insolvencies by a leading court applying a single bankruptcy law".[305]

Classic territoriality - or pure territorialism - relies on territorial notions of sovereignty, common in 19th-century studies. The territorial approach assumes that each country will have exclusive jurisdiction over the insolvency of a particular debtor and that separate proceedings governed by national laws will be undertaken.[306] No recognition is given to proceedings already underway or completed in other jurisdictions. The most vocal supporter of this approach is LoPucki, but this vision is also shared by other academics.[307]

Other models have been designed, such as procedural incrementalism,[308] contractualism and co-operative territoriality,[309] as well as the modified versions of the models mentioned in the previous two paragraphs.

Academics have vigorously debated which approach to cross-border insolvency is best. However, a detailed analysis of the features and distinguishing elements of these theories falls outside the purposes of this module. This is because none of the approaches mentioned above has been adopted in their purest form by the Italian legislator.

At European level, the difficulty of reconciling these views resulted in long and complex negotiations to harmonise insolvency rules and recognise foreign insolvency proceedings. The first attempt at drafting a European Convention on cross-border insolvency dates back to the 60s and continued until 1984. This project was extremely ambitious. It was not limited to introducing rules on conflicts of jurisdiction and on the recognition of foreign judgments. It was based on universalist ideas and attempted to harmonise substantive aspects of insolvency law.

The 1990 European Convention on Certain Aspects of Bankruptcy (Istanbul Convention) represented a new proposal based on modified universalist ideas. While its content was limited to procedural rules on conflicts of jurisdiction, it was not ratified by enough Member States to ensure it entering into force. Consequently, European institutions drafted and approved the EIR (2000), which entered into force on 31 May 2002. The main features of this regulation are:

- the principles of modified universalism;
- a set of rules on the co-existence and co-ordination between primary and secondary proceedings;

Choice of Forum" (1991) 65 Am Bankr LJ 457; R Rasmussen, "A New Approach to Transnational Insolvencies" (1997) 19 Mich J Int'l Law 1; J Westbrook, "Universal Priorities" (1998) 33 Texas Int'l LJ 27.

305 J Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276, 2277.

306 L LoPucki, "Cooperation in International Bankruptcy" (1999) 84 Cornell L Rev 696.

307 E Adams and J Fincke, "Coordinating Cross-Border Bankruptcy" (2008) 15 Columbia J Eur Law 43, 48. See also: J Westbrook, "Universal Priorities" (1998) 33 Texas Int'l LJ 27, 57.

308 J Pottow, "Procedural Incrementalism: A Model for International Bankruptcy" (2005) 45 Va J Int'l Law 935.

309 For an outline of these, see E Ghio, "Cross-border insolvency and rescue law theory: moving away from the traditional debate on universalism and territorialism" (2018) 29(12) ICCLR. 713.

- the automatic recognition of foreign judgments on the opening of a formal insolvency procedure, except where reasons of public policy dictate otherwise.

This regulation, as amended in 2015 (EIR recast), still outlines the rules applicable in Italy for the recognition of foreign judgments in the area of insolvency issued in another European Member State. As a result, it is appropriate to infer that the principles of modified universalism are applied by Italian courts in all European cross-border cases they deal with.

Additionally, the changes introduced by the EIR recast have proven extremely relevant for the enforceability of Italian insolvency and bankruptcy rulings in other European jurisdictions. Under the rules of the old insolvency regulation, some of the Italian administrative and mixed insolvency procedures did not fall within the EIR's remit. After the changes introduced by the EIR recast, there is little doubt that corporate liquidations, extraordinary administrations, pre-insolvency compositions, restructuring agreements and all personal bankruptcy procedures fall within the remit of the Regulation. This is due to the fact that:

- they are collective proceedings based on laws relating to insolvency;

- their purpose is to rescue, reorganise, adjust the debt or liquidate the assets of the debtor;[310]

- they are commenced in situations of insolvency or the likelihood of insolvency, with the debtor remaining fully or partially in control of its assets and affairs;[311]

- they can promote the rescue of economically viable but distressed businesses and provide entrepreneurs with a second chance;[312]

- they provide for a discharge of debt or debt adjustment in relation to consumers and self-employed persons;[313]

- they include all or a significant part of the debtor's creditors and – if they do not include all creditors – they do not affect the claims of dissenting or non-involved creditors.[314]

All these proceedings are listed in Annex A of the EIR recast, which is basically a detailed list of the domestic procedures that should be automatically recognised across Europe.

For those proceedings not listed in Annex A, automatic recognition seems a little more problematic. However, it appears that the EIR recast applies with reference to restructuring agreements approved by a majority of 75% of banks and financial institutions. This is because recital 14 EIR recast holds that "proceedings which involve only the financial creditors of a debtor should also be covered" by the regulation.

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310 EIR recast, art 1.
311 *Idem*, recital 10 and art 1.
312 *Idem*, Recital 10.
313 *Ibid*.
314 *Idem*, art 2(1).

Unfortunately, it is more likely than not that turnaround plans do not fall within the EIR recast's remit as they are not subject to the supervision of a court or an insolvency practitioner, there is no dispossession or limitation to the debtor's freedom of entrepreneurial activity, and they are entirely confidential.[315] The author of this text supports the conclusion that turnaround plans are excluded from the remit of the EIR recast, as recital 13 of the regulation holds that "insolvency proceedings which are confidential should be excluded from the scope of this Regulation".

This modified universalist approach is, however, tempered by the territorialist vision that has characterised the *legge fallimentare* since its enactment in the 40s. Quite surprisingly, despite the influence of European law and cases, this territorialist approach has not been displaced by the reforms that have taken place in recent years.

An example of the survival of this territorialist approach are the rules on the jurisdiction of insolvency courts in cross-border cases and procedures against foreign-registered companies. Article 9 of the *legge fallimentare* states that Italian first instance courts have the exclusive power to approve a petition to open formal insolvency proceedings against those companies that operate in their jurisdiction.[316] Additionally, they have the power to open formal insolvency proceedings against those companies who transferred their centre of main interest to a different country in the year before the filing.[317] Finally, Italian courts enjoy wide powers to make orders (including the opening of insolvency proceedings) against Italian-based secondary establishments of foreign companies.[318]

Italian courts, however, cannot grant an insolvency petition against the entrepreneur / company that carried out some business in Italy but without establishing secondary premises in this country.[319] Additionally, it is unclear what the position would be if the foreign company / entrepreneur has more than one secondary seat in Italy. Some authors argue that article 9(3) *legge fallimentare* should be linked to article 9(1), which clearly gives priority to the court in which the debtors have their main seat. According to this interpretation, jurisdiction should be recognised by the court of the main secondary establishment of the foreign debtor.

This solution appears incredibly cumbersome and is liable to cause significant litigation among interested parties. The author of this text believes that, in cases of conflict of jurisdiction between Italian courts where the foreign debtor has secondary establishments, the case should be opened and discussed in front of the court that first received the petition from the debtor and / or a third party.[320]

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315 S Ambrosini, *Il nuovo diritto della crisi d'impresa: l. 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016) 53.

316 *Legge fallimentare*, art 9(1).

317 *Idem*, art 9(2).

318 *Idem*, art 9(3). This despite the existence of an ongoing or completed formal insolvency procedure in the foreign state where the company has its COMI.

319 Court of Rome, 26 March 1987, in (1988) Fall 34; C Cass, no 4049/1985, in (1986) Fall 169.

320 This conclusion is in line with the solution adopted by the legislator with reference to conflict of jurisdictions between different Italian courts in domestic cases: see art 9-*ter* of the *legge fallimentare*. See also M Giuliano, *La giurisdizione civile italiana e lo straniero* (2nd ed, Giuffrè: Milano, 1970) 143.

Italian judges interpret these rules with a territorialist mind-frame. For instance, the Supreme Court[321] held that Italian courts have jurisdiction over a petition for corporate insolvency against a limited liability company that transferred its registered office to a different jurisdiction after the emergence of a situation of crisis, even if this occurred before the one-year time limit mentioned in the law.

However, in the same decision the Supreme Court held that Italian courts should not refer the procedure to the foreign authorities only in those cases where the behaviour of the parties suggests a strategic use of insolvency laws. Additionally, this strategic use of insolvency law should have the potential to cause significant harm to the creditors.

In this case, the Supreme Court held that certain elements should be taken into consideration in order to determine the existence of Italian jurisdiction. These include whether: (i) the shareholders and managers of the insolvent company have no link, directly or indirectly, to the jurisdiction where they transferred the registered office of the company; (ii) the company continues to operate as before and its business did not change by reason of the registered office's transfer; (iii) submitting and serving the insolvency petition to the affected parties would be significantly more complex if the main procedure was commenced in the foreign jurisdiction.

In any case, transfer of the registered office to a foreign jurisdiction after a filing for any formal insolvency procedure does not affect the jurisdiction of the Italian court.[322] Finally, the insolvency petition submitted to an Italian court can be based on an unpaid claim that came into existence under foreign, not domestic law (for example, a foreign, executory judgment against the debtor).

If an insolvency petition is submitted in Italy against a foreign company or entrepreneur and the Italian court has jurisdiction in that case, the director or other legal representative of the foreign entity have the right to a hearing before the opening of a formal insolvency proceeding.

While these examples show the Italian legislator's preference for a territorialist approach, this *favor* is somehow mitigated by the need to respect European laws and international conventions, as established by article 9(4) *legge fallimentare*. However, Italy signed few of these conventions. Apart from the convention with the United Kingdom,[323] all other conventions have been agreed with other Member States.[324] These conventions have, therefore, been superseded by the EIR, as amended in 2015.

It follows that, as Italy has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, Italian judges must cope with conflicting guidance from the legislator: modified universalist approach for all European cases, territorialist approach in all other situations. This has resulted in some problematic decisions, such as those described in the next paragraph.

321 C Cass, Sez Un, 15880/2011.
322 *Legge fallimentare*, art 9(5).
323 Signed in 1964 and enforced by law no. 280/1973.
324 These are France (convention signed in 1930 and enforced by law no. 45/1932) and Austria (convention signed in 1977 and enforced by law no. 612/1985).

Self-Assessment Exercise 4

At international and European level, universalist visions of insolvency law have influenced the evolution of cross-border insolvency rules and co-operation. This situation contrasts with the territorialist approach favoured by the Italian legislator in the 1940s. By making reference to case law and statutes, assess whether Italian courts have struck a proper balance between the universalist and territorialist approaches.

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

8. RECOGNITION OF FOREIGN JUDGMENTS

Italy is a Member State of the European Union. As such, pursuant to the EIR recast,[325] any judgment opening insolvency proceedings handed down by a court of a Member State is automatically recognised in Italy.[326] The main *caveat* to obtaining automatic recognition is that the order must have been issued by a court of a Member State within the territory of which the centre of the debtor's main interests is situated. Recognition of such foreign orders and judgments can only be refused where the effects of such recognition or enforcement would be manifestly contrary to the state's public policy.[327]

The situation is more complex with reference to foreign judgments issued in states that are not part of the European Union, or with which Italy does not have any special agreement by means of a bilateral or international treaty. In those cases, article 9 *legge fallimentare* does not apply, the result being that recognition is governed by private international law principles.

Before the reform of Italian private international law by means of law 218/1995, judgments in the area of insolvency law were treated in the same manner as any other civil judgment issued by foreign courts. Their recognition and enforcement required a request to the competent Court of Appeal. The Court of Appeal granted an order for the recognition of the foreign judgment (*exequatur*) if it was shown to the satisfaction of that court that:

(a) the foreign proceeding did not unduly restrict the rights of any parties and was compliant with the adversarial principle;

(b) the foreign court's judgment was final and conclusive;

(c) the foreign court's judgment was not contrary to any other judgment previously issued by an Italian court;

[325] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141/19.
[326] European regulation on insolvency proceedings (recast), art 19.
[327] *Idem*, art 33.

(d) the effects of such recognition or enforcement was not manifestly contrary to Italian public policy.[328]

The 1995 law significantly reformed this context. This law applies to any foreign procedures and orders, including those not issued by judicial authorities, provided that the order is final and binding on the parties.[329]

Article 64 of law 218/1995 determines the automatic recognition of any foreign judgments that meet the criteria originally established for the *exequatur* procedure. Recognition can only be denied if the effects of such recognition would be manifestly contrary to Italian public policy[330] and / or the foreign authority had no competence over the subject matter according to Italian private international law principles.[331]

In the case of a party who does not conform to the foreign judgment compliant with the rules laid out in article 64 of law 218/1995, article 67 of the same law outlines a simplified and swift procedure for the enforcement of the foreign judgment in Italy. This simplified enforcement procedure also applies whenever assistance from Italian administrative authorities is needed to enforce foreign judgments.

However, international and bi-lateral conventions usually exclude from their remit insolvency law issues (and judgments). Therefore, several commentators have argued that article 64 of law 218/1995 does not apply to foreign insolvency orders. This opinion persisted even after the introduction of the EIR, which introduced automatic recognition of foreign insolvency judgments issued within the European Union.[332]

This is not the prevailing opinion at the time of writing. Most commentators now believe that article 64 of law 218/1995 applies to insolvency judgments issued by courts outside the European Union.[333] The automatic recognition of insolvency judgments issued outside the European Union was recently established in a case before the Supreme Court.[334]

The automatic recognition of foreign judgments issued outside the European Union results in the production of some legal consequences. These include the loss of legal capacity[335] and the

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328 See, among others: C Cass, SS UU, 9 December 1991 no 12031, in (1991) I *Giur It* 909; C Cass., SS UU, 3 October 1995 no 10388, in (1996) *Fall* 250.
329 Law 218/1995. art 65.
330 *Idem*, art 64(g).
331 *Idem*, art 64(a).
332 SM Carbone, "*Fallimento internazionale tra riforma italiana e diritto uniforme*" (1998) *Fall* 946; G Campeis and A De Pauli, "*Un'eccezione pattizia ai principi di indelibabilità delle sentenze dichiarative di fallimento e di inesistenza di effetti anticipati delle sentenze di riconoscimento*" (1998) *Giur it* 1159.
333 See, among others: C Vellani, *L'approccio giurisdizionale all'insolvenza straniera* (Giuffrè: Milano, 1996); F De Santis, "*La dichiarazione di fallimento. Giurisdizione e competenza*" in V Buonocore and A Bassi (eds),*Trattato di Diritto Fallimentare* (vol I, Cedam: Milano, 2010) 235; P Gottwald, "*Le insolvenze transfrontaliere: tendenze e soluzioni europee e mondiali*" (1999) *Riv trim dir proc civ* 170. For comprehensive literature on the topic, see: G Carmellino, "*Ricnonscimento di sentenza straniera di apertura di procedura di insolvenza*" (2015) 6 *Fall* 694, 695.
334 C Cass, no 283/2001: no *exequatur* is required for insolvency judgments issued after the entry into force of law no 218/1995.
335 *Legge fallimentare*, art 43.

ability to freely dispose of registered movable and immovable goods belonging to the bankrupt or insolvent company.[336] However, the production of further effects, such as the automatic stay[337] and the inability to use non-registered movable goods,[338] is subject to the court's approval of an order pursuant to article 67 of law 218/1995.

The distinction of the effects arising from the recognition of foreign judgements may lead to unreasonable results. This may be the case where there is an insolvency order against a person who cannot be subject to insolvency proceedings under Italian law (for example, a farmer). A bankruptcy order against a farmer under Chapter 12 of the US Bankruptcy Code can be recognised pursuant to article 64 of law 218/1995. However, if that farmer had assets in Italy, the automatic stay would not apply and local creditors could seize the farmer's assets. Italian courts would not be able to enforce the American judgment and provide assistance to the foreign trustee, since small farmers are not subject to Italian corporate insolvency rules. Any application under article 67 of law 218/1995 would be dismissed.

It can therefore be said that most Italian commentators advocate for a universalist approach towards the recognition of foreign judgments in the area of insolvency. The same approach, however, is not followed by the courts, which have consistently implemented territorialist views in their rulings. Indeed, Italian judges have proven so impervious to enforcing foreign judgments that some commentators describe their approach as being "municipal" and localistic.[339] Most recently, the influential Milanese court held that:

> "Extra-European foreign judgments that determine the opening of formal insolvency procedures do not determine automatic effects in Italy as our jurisdiction – pursuant to article 9(3) *legge fallimentare* – does not follow a universalist, but a territorialist approach to the recognition of foreign judgments."[340]

This judgment represents one of the latest iterations of a consolidated judicial approach.[341] In the wake of regulatory reforms (discussed in the next paragraph), it is submitted that applicants will have a hard time recognising and enforcing extra-European foreign insolvency judgments in Italy.

This judicial approach is particularly problematic following the UK's withdrawal from the EU. The convention mentioned above does not apply to insolvency matters. As a result, the discipline is now regulated by the "EU-UK Trade and Co-operation Agreement" (24 December 2020), which was implemented in the UK via the European Union (Future Relationship) Act 2020.[342]

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336 *Idem*, art 88(2).
337 *Idem*, art 51.
338 *Idem*, art 88(1).
339 M Fabiani, "*Riconoscimento di decisioni dichiarative di fallimento e resistenze giurisprudenziali municipali*" (2008) Int'l Lis 73.
340 Trib Milano, Sez IV civile, 30 October 2014, in (2015)6 *Fall* 693. Translation from Italian by the author of this text.
341 See, among others: Trib Napoli, 10 January 2008m (2008) *Fall* 571.
342 https://www.legislation.gov.uk/ukpga/2020/29/enacted/data.htm.

The matter is extremely technical, and it has been covered by the author in another paper.[343]

With reference to the recognition of Italian insolvency procedures listed in Annex A of the EIR Recast (such as liquidation and pre-insolvency composition) in the UK, this is generally possible under the Cross-Border Insolvency Regulations 2006 (CBIR 2006), article 15(1), Schedule 1. However, this recognition is not automatic, as the Italian insolvency practitioner will have to apply to the English court to have the judgment recognised abroad. Ordinarily, a foreign proceeding would be recognised upon the applicant satisfying the requirements of the CBIR 2006, articles 15-17, Schedule 1. Usually, an application for recognition must be accompanied by:

(a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative.[344]

Following recognition of foreign insolvency proceedings, the article 20(1) stay operates automatically on existing proceedings in the UK. When the foreign insolvency procedure is a restructuring where the debtor continues to trade (such as the Italian pre-insolvency composition), the stay is replaced by the administration moratorium,[345] and it lasts only for the duration of the foreign procedure.[346] However, taking steps to enforce security over the debtor's property is exempted from the automatic stay arising from article 20(1) of the law. Finally, the insolvency judgment and any related decision cannot be enforced in the UK if they go against the *Gibbs* rule as interpreted in the Supreme Court's case of *Rubin v Eurofinance*.[347] The *Gibbs* rule provides that a debt governed by English law cannot be discharged or altered by a foreign law (including a foreign insolvency proceeding) unless the party against whom the order was made was subject to the relevant foreign proceedings.

With reference to restructuring proceedings, it is necessary to distinguish those that involve insolvent companies and are public in nature, from those entered into by companies, that are not yet insolvent.

For the first type of restructuring procedures it may be possible to rely on the CBIR 2006, provided that the foreign procedure was collective in nature, either judicial or administrative, and even of interim nature, pursuant to a law relating to insolvency, as it was in the case of *Bud-Bank*.[348]

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343 E Vaccari, "WHOA, *Brexit!* Will London remain Europe's (largest) bankruptcy brothel?" (2021) *JIBLR* (accepted for publication).
344 CBIR 2006, art 15(2), Sch 1.
345 IA 1986, para 43, Sch B1.
346 *Re 19 Entertainment ltd* [2017] BCC 347, at [20]-[22]; *Re OJSC Int'l Bank of Azerbaijan* [2018] EWHC 59 (Ch), at [97]-[98] (confirmed on appeal by *Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802).
347 *Rubin v Eurofinance* [2012] UKSC 46.
348 *Re Bud-Bank Leasing SP* [2010] B.C.C. 255 (Ch).

For the second type of restructuring procedures, reliance on the Brussels Recast Regulation is no longer possible after the end of the transition period (31 December 2020), for a variety of reasons. These are the lack of reciprocity (as in the case of the EIR recast) and the fact that such regulation was not assimilated into UK domestic law.[349] It is, however, possible to rely on the Regulation (EC) No 593/2008 (Rome I Regulation).[350] However, this alternative route applies only in cases where the restructuring plan involves a compromise of contracts governed by English law. This is because the Rome I Regulation imposes an obligation to respect the choice of law made by the parties with reference to their contractual obligations. Finally, it may be possible to rely on the 2005 Hague Convention on Choice of Court Agreements (Hague Convention).[351] The Hague Convention is an international treaty. While it does not apply to "insolvency, composition and analogous matters",[352] it nevertheless ensures that exclusive choice of court agreements between signatories of international commercial contracts are enforced by courts. The Hague Convention states that only the court that has jurisdiction pursuant to the exclusive jurisdiction clause can hear disputes on such contracts and that any such judgments shall be recognised in any other contracting states.[353] The UK ratified the convention on 1 January 2021, with the Private International Law (Implementation of Agreements) Act 2020. Such convention may therefore be used in the presence of exclusive jurisdiction clauses, but it is less clear whether it applies to the more common non-exclusive or asymmetric jurisdiction clauses in loan agreements.[354] English courts seem not to exclude that non-exclusive or asymmetric clauses could be covered by the convention.[355] In all other cases, recognition of Italian restructuring procedures in the UK is governed by common law rules, subject to the rule in *Gibbs*.

In future it may be possible to rely on the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments (Lugano Convention).[356] This convention would largely replicate the regime under the Brussels Recast Regulation. At the same time, similarly to the Brussels Recast Regulation,[357] it does not apply to "bankruptcy, [insolvent liquidations], judicial arrangements, compositions and analogous proceedings".[358] Therefore, it could only apply to restructuring plans submitted by distressed but not yet insolvent companies and which do not result in the liquidation of the debtor's assets.

The UK applied to join the Lugano Convention in April 2020. However, acceding to the Lugano Convention requires unanimous consent from all parties, including the EU. The EU Commission

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[349] The regulation was repealed pursuant to The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, which also revoked the Brussels Regulation, the Lugano Convention and certain other frameworks.

[350] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6. For Denmark, reference should be made to the 1980 Rome Convention on the law applicable to contractual obligations (consolidated version) [1998] OJ C 27.

[351] https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf.

[352] Hague Convention, art 2(2)(e).

[353] Hague Convention, arts 5(1) and 5(2).

[354] These are clauses where one party is limited to bringing proceedings in one court, but the other is not.

[355] *Etihad Airways PJSC v Prof Dr Lucas Flöther* [2019] EWHC 3107 (Comm). However, on appeal, the court held that the Hague Convention should "probably" be interpreted as not applying to asymmetric jurisdiction clauses, though it was unnecessary to decide the point: *Etihad Airways PJSC v Flöther* [2020] EWCA Civ 1707 at [85]-[88].

[356] Convention on Jurisdiction and the Recognition and Enforcement of Judgments [2007] OJ L 339/3.

[357] Brussels Recast Regulation, art 1(2)(b).

[358] Lugano Convention, art 1(2)(b).

has recently recommended that the EU does not give consent for the UK to join the Lugano Convention, arguing that "the Lugano Convention is a flanking measure of the internal market and relates to the EU-EFTA/EEA context".[359] This position has probably been influenced by the ongoing political tensions between the United Kingdom and Brussels,[360] as the Convention is open to accession to "any other State".[361] Treating the United Kingdom as "any given third country"[362] overlooks the significance of the relationship with that country, as well as the trade agreement signed between the UK and the EU on 24 December 2020.

Self-Assessment Exercise 5

Describe the procedure needed to recognise and enforce a foreign judgment in the area of insolvency law issued by non-EU states in Italy. Comment on both the judicial and academic debate over the automatic enforceability of these judgments in Italy.

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

9. INSOLVENCY LAW REFORM

On 11 October 2017 the *Senato della Repubblica* approved the final version of a law aimed at systemically reforming Italian insolvency law which, in its fundamental elements, dates back to 1942. It was no longer possible to postpone the enactment of a systemic project of reform of the existing insolvency law.

The last two decades have been characterised by frequent yet fragmented changes to the existing law. Despite the relevance of some of these reforms,[363] these changes have resulted in a system that lacks coherence and co-ordination between reformed and non-reformed provisions. As a result, litigation increased, the costs of formal insolvency procedures were inflated, and the judiciary struggled to develop uniform interpretations of the new provision.

[359] Commission, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention" (Communication) COM (2021) 222 final, 4.

[360] Examples of such tensions include the EU's unilateral trigger of an override clause in the Northern Ireland agreement at the end of January 2021 to secure vaccine supplies; the UK's announcement in early March 2021 that it would unilaterally extend temporary rule exemptions intended to help Bri*tish businesses trading with Northern Ireland; and the French threat in early May of cutting the energy supply to British Crown dependency of Jersey amid ongoing disputes over access to UK waters by French fishing companies.

[361] Lugano Convention, art 70(1)(c).

[362] Commission, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention" (Communication) COM (2021) 222 final, 2.

[363] See, among others, legislative decree no 5/2006.

Law 155/2017 was published in the *Gazzetta Ufficiale* on 30 October 2017[364] and entered into force on 14 November 2017.[365]

This reform is based on the preparatory work of the Rordorf Commission, a group of experts appointed by the Ministry of Justice in January 2015 with the task of writing a reform proposal to modernise Italy's insolvency statutes.[366] Both the commission and the government have been inspired by the desire to introduce and comply with international best practice set out by the United Nations Commission on International Trade Law (UNCITRAL) and the EU.

In drafting the law, the Commission took into proper consideration the EIR recast,[367] the recommendation on a new approach to business failure and insolvency[368] and more recent European documents.[369] More importantly for the purposes of this module, the Commission drew inspiration from the principles underpinning the UNCITRAL Model Law on Cross-Border Insolvency[370] to establish simplified procedures for the recognition of qualifying foreign insolvency proceedings.

It can be argued that Italian insolvency law (corporate and personal) already complied with most of the recommendations included in the 2014 document drafted by the Commission. However, the recommendation suggests that European countries should allow debtors to enter a process for restructuring their business without the need to formally open court proceedings.[371] It also suggests that the appointment of mediators and supervisors should not be compulsory, especially in restructuring-oriented procedures.[372] Finally, it suggests that measures should be put in place to deal with the insolvency of groups of companies, particularly if a cross-border element is present.[373] The Rordorf reform introduced changes in the law that go in the direction of enforcing these recommendations, as explained below.

Law 155/2017 did not materially change current legislation. It gave the Government the authority (and 12 months) to amend the law by means of one or more law decrees, which have to conform to the guidelines described below. These reforms have been enacted by means of

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364 Year 158, No 254.

365 For the relevance of this law and a discussion on material changes see, among others: S Ambrosini, *Il nuovo diritto della crisi d'impresa: l. 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016).

366 For an insight on the proposals of reform, see: M Arato and G Domenichini (eds), *Le proposte per una riforma della legge fallimentare* in 402 Quaderni di Giurisprudenza Commerciale (Giuffrè, 2017).

367 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141/19.

368 Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency (2014/135/EU) [2014] OJ L 74/35.

369 These include the Commission Delegated Regulation (EU) 2016/451 of 16 December 2015, laying down general principles and criteria for investment strategy and rules for the administration of the Single Resolution Fund [2016] OJ L 79/2 and the proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU COM(2016) 723 final.

370 UN Comm'n on Int'l Trade Law, "UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation", UN Sales No E14V2 (2014), https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf.

371 2014 Recommendation, art 8.

372 *Idem*, art 9.

373 *Idem*, Recital 11.

legislative decree 14/2019. These reforms should have entered into force on 15 August 2020. However, the impact of the Sars-Cov-2 pandemic on the fragile Italian economy meant that the Government decided to postpone the entry into force of this reform until 1 September 2021. In the meantime, the same Government introduced further changes to the law by means of legislative decree 147/2020 (26 October 2020). The entrance into force of the Code was later postponed until **15 July 2022**, even if parts of it were effective since the fall of 2021.[374] The new Code only applies to formal insolvency procedures opened on or after 15 July 2022.

The newly enacted *Codice della Crisi d'Impresa e dell'Insolvenza* (CCII) is a 391-article long Code which promotes rescue over liquidation, and it aims at reducing the duration and cost of judicial insolvency proceedings. It introduces the notion of a "situation of crisis" alongside "insolvency" and it adopts a single procedural model applicable for all in-court proceedings, irrespective of the nature of the debtor (with the sole exclusion of public entities).

The CCII introduces a series of remedies available to all companies that find themselves in a situation of crisis, that is, a situation of economic or financial imbalance which suggests that a cash-flow insolvency will occur in the following 12 months.[375] To promote the prompt handling of these situations, the CCII introduced alert mechanisms (see below) and greatly simplified the use of restructuring agreements.[376] The revised restructuring agreements do not have to comply with the absolute priority rule (as they are contractual agreements between the parties approved by the majorities prescribed by the law). Other restructuring agreements (*piani di risanamento*) also received more attention in the CCII, with a series of specific articles replacing the broad discipline under article 67(3)(d) *legge fallimentare*.

The CCII introduced new restructuring agreements with "extended scope" (*accordi di ristrutturazione ad efficacia estesa*)[377] which, under certain conditions,[378] are binding also on dissenting creditors (cross-class cram-down). It is particularly remarkable that dissenting banks and the Italian equivalent of the HMRC (*l'Erario – Agenzia delle Entrate*) are expressly mentioned as subjects / creditors, who cannot block the agreement, even if they vote against it. There are also new restructuring agreements with a 30% majority threshold, provided that these agreements are requested by a debtor who did not make any use of protective measures, or when dissenting creditors are paid in full and according to the original terms of the agreement.[379] Even in that case of a lower majority threshold, the *Erario* cannot block the agreement if the judge concludes that the restructuring agreement is more convenient for the *Erario* than liquidation.

The CCII replaces the term "failure" with "liquidation" in order to reduce the stigma associated with insolvency. The CCII also significantly enhances the powers of the curator in liquidation cases. This represents a significant change to the Italian tradition, as the country has always

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[374] Legislative Decree 83/2022.
[375] CCII, art 2.
[376] *Idem*, art 57 *et seq*.
[377] *Idem*, art 61 *et seq*.
[378] *Idem*, art 61(2).
[379] *Idem*, art 60.

preferred to rely on procedures that maximised fairness and transparency (by means of judicial supervision) over maximisation of returns to creditors.

The CCII introduces group proceedings for entities subject to Italian jurisdiction. Should the parties opt for separate proceedings, the CCII prescribes the implementation of co-ordination practices.

The CCII also tries to address the improper use of insolvency procedures by reducing the scope and duration of protective measures for the benefit of the debtors. First, these measures are no longer granted upon opening of the pre-insolvency composition,[380] but only upon explicit request of the debtor. Additionally, they usually last for a period of 30 days, which could be extended by the court up to 12 months.[381]

Significant changes have also been introduced with reference to consumers. The newly enacted article 282 of the CCII allows consumers to obtain a full discharge from their debts once in their lifetime without repaying any money owed to their creditors. This is only possible if the debtor has no money left to repay its creditors after essential expenses and the debt was not the result of fraud or gross and negligent mismanagement. More generally, the rules on consumer restructuring and liquidation have been significantly amended.

Another factor that significantly affected the Italian insolvency law is the Sars-Cov-2 pandemic. As Italy has been one of the worst affected countries in the world, the Italian government introduced a series of timely, temporary and wide-ranging measures to deal with the effects of the pandemic.

Unlike other countries, Italy did not introduce changes to the thresholds of insolvency. However, legislative decree 147/2020 changed the notion of “crisis”. The existence of a situation of crisis is needed in order to commence a formal insolvency or rescue proceeding. This definition changed from “a situation of economic and financial difficulty” to “a significant economic and financial imbalance”, thus making it more difficult the possibility to commence such proceedings from the creditors.

As mentioned above, the Government also postponed the implementation of the CCII and early warning remedies. It also suspended the rules on recapitalisation in the event of significant reduction of the corporate capital until 31 December 2020. Therefore, directors were not compelled to call a shareholders’ meeting for the adoption of the relevant resolutions. Additionally, the 2020 financial statements could be drafted and approved on the assumption of business continuity, provided that such continuity existed before 23 February 2020.

With reference to urgent measures, the filing of bankruptcy and insolvency petitions were stayed until 30 June 2020 (later postponed to the end of the year). Even if a safe harbour rule is not expressly provided by law, the directors are not obliged to immediately start pre-insolvency or insolvency proceedings with a view to avoid personal (and also criminal) liabilities (for example,

[380] *Idem*, arts 78 and 94.
[381] *Idem*, art 8.

for a late opening of insolvency proceedings), but they can act on the basis of a more flexible approach, so as to favour out-of-court solutions. Directors have been invited to: (i) identify which restructuring or insolvency procedures may reasonably be considered as the most appropriate ones to recover from the crisis, and (ii) postpone the decision to activate a restructuring remedy (or insolvency procedure, if needed), as soon as the current emergency is over.

The Government suspended the payment of corporate taxes and granted a moratorium to loans to SMEs (applicable, upon request, on mortgages, leasing agreements, overdraft facilities and short-term loans). With reference to contractual obligations, Italian law already allowed companies not to perform contracts in cases of *force majeure*. The government clarified that the Sars-Cov-2 pandemic was a case of *force majeure*. Companies in financial distress could, therefore, negotiate with third parties and creditors a suspension of the pending agreement, or a moratorium (*pactum de non petendo*) in order to allow a "breathing space" at least until autumn 2020.

From a procedural viewpoint, limitation periods were suspended for several months from 23 February, while any pending debt-restructuring agreements and composition with creditors proceedings were postponed in their duration of at least six months. Finally, upon certain conditions, amendments to the restructuring plan, or composition plan, as well as the filing of a new plan, are allowed, if the plan had not yet been approved yet by creditors on 23 February 2020.

More measures were enacted to grant direct, economic and financial support to companies in crisis. The most recent measures include those outlined by the *Ristori* decrees (October 2020 onwards), by means of which the government pumped another EUR 5.5 billion into the economy and, in particular, to those businesses hit by the second wave of the Sars-Cov-2 pandemic. If these businesses had to close or limit their activities, they were entitled to emergency funds provided by the government to stay afloat. The duration of the Italian equivalent of the furlough scheme, known as *cassa integrazione*, was extended by a further 6 weeks. During the *cassa integrazione*, employees' salaries are paid by a fund to which companies have to contribute. The government waived mandatory contributions by companies. The payment of taxes such as IRPES, IRAP and IRPEF (on personal and business incomes) had been postponed to 30 April 2021. Further, specific measures are tailored to sectors of the economy, such as the automotive industry, agriculture and fishing sector.

Further structural, long-term measures will be introduced when the National Recovery and Resilience Plan comes into full operation. However, these measures fall beyond the scope of this module.

9.1 General rules

The new Code applies to all situations of crisis or insolvency affecting a commercial entrepreneur or company, a farmer or a person. However, special rules continue to apply to some large enterprises as well as to publicly-owned companies.

Article 2 of the Code includes a comprehensive list of key terms. For the purposes of this module, it is important to become familiar with the following:

- crisis: this notion was further changed by legislative decree 83/2022. According to the enacted version of the Code, a debtor is in crisis if it is unlikely that its revenues will be sufficient to meet the debtor's expenses in the following 12 months, thus leading to the debtor's (cash-flow) insolvency;

- insolvency: this is the situation where it is apparent to third parties that the debtor is not capable of meeting its obligations as they fall due;

- over-indebtedness: this concept applies only to consumers, professionals, small entrepreneurs, farmers and innovative start-ups, as well as to any other debtor not subject to any of the liquidation procedures outlined by the Code or by special laws. Over-indebtedness is the situation of crisis or insolvency experienced by any of the above-mentioned parties; and

- small enterprise: this is a company that (i) has had net equity not exceeding EUR 300,000 in each of the three fiscal years before the filing or, if less, from the commencement of the business's activity, (ii) has realised net turnover not exceeding EUR 200,000 in each of the three fiscal years before the filing or, if less, from the commencement of the business's activity; or (iii) owes debts not exceeding EUR 500,000, even if not yet due upon adjudication.

Other key definitions such as consumer, publicly-owned company, group of enterprises and centre of main interest are quite self-explanatory.

Article 3 of the CCII prescribes that all entrepreneurs must adopt a structure or adequate measures to assess in a timely manner if they are experiencing a situation of crisis. Entrepreneurs have a general obligation under the law not to ignore warning signs, and to adopt all the necessary measures in a timely manner. Article 4(1) of the CCII holds that all parties need to act in good faith and correctness during the negotiations and procedures regulated by the Code.

One of the most important innovations introduced by the Code is the principle that the petitions to access any of the procedures regulated by the Code should be regulated in a unitary manner. In the past, the opening of each procedure required different forms and supporting documents. Article 7 of the CCII prescribes the use of a unitary form, to which parties may be required to attach documents and integrate them in case of conversion of one procedure to a different one.

Other key general rules include the maximum duration of the protective measures such as the automatic stay (which cannot exceed 12 months)[382] and the need to rely on electronic communications throughout the procedures regulated by the Code.[383] Except where otherwise provided by international conventions and European laws, Italian courts have jurisdiction over insolvency or restructuring matters whenever the debtor has its centre of main interest or one of

[382] *Idem*, art 8.
[383] *Idem*, art 10.

its premises in Italy.[384] The jurisdiction of Italian courts extends to insolvency-related actions (such as avoidance actions).[385]

9.2 Personal / consumer bankruptcy

Despite having been introduced only recently (in 2012), the procedures regulating consumers' rescue and bankruptcy have been significantly reformed with the enactment of the CCII. This is because the existing procedures were too complex, lengthy and expensive, and this resulted in their infrequent use by people in need.

Since 15 July 2022, the formal insolvency procedures available to people are:

(1) *piano di ristrutturazione dei debiti* (consumer's debt restructuring agreement), regulated by articles 67 to 73 of the CCII and which procedure replaces the old *piano del consumatore*;

(2) *concordato minore* (minor composition), regulated by articles 74 to 83 of the CCII, which procedure replaces the old *accordo di composizione della crisi*; and

(3) *liquidazione controllata del debitore* (personal controlled liquidation), regulated by articles 268 to 277 of the CCII.

As a general rule, the *organismo* carries out the duties attributed by the law to liquidators and judicial commissioners in corporate procedures.[386] Members of the same family can carry out a joint procedure if they live together or if the debt has a common origin,[387] but the claims of each creditor remain separate.

9.2.1 Consumer's debt restructuring agreement

Consumers in a situation of over-indebtedness have the right to submit a proposed restructuring agreement to all of their creditors. The proposal needs to be capable of overcoming the situation of over-indebtedness, and has to be prepared with the help of an *organismo*. There is no mandatory content for such a proposal, but it is possible for the debtor to suggest a partial:

- or differentiated treatment of its creditors;[388] and / or

- payment of secured and preferential creditors, provided that they are paid the liquidation equivalent of their claims.[389]

Together with the proposal, consumers need to submit a list of all of their creditors, a list of all of their assets, detail of any act of extraordinary administration made in the five years before the

[384] *Idem*, art 11(1).
[385] *Idem*, art 11(3).
[386] *Idem*, art 65(3).
[387] *Idem*, art 66(1).
[388] *Idem*, art 67(1).
[389] *Idem*, art 67(4).

filing, the last three tax return declarations and a statement of their income and how much they need to maintain themselves and their families.[390]

One of the greatest benefits of consumers' debt restructuring agreements is the possibility for debtors to keep their homes if they continue paying their mortgage as originally agreed.[391] Additionally, the opening of the procedure suspends the accrual of interests on the debtor's debts, except for secured or preferential creditors.[392]

As mentioned before, in these procedures the *organismo* plays a key role. On the one hand, it acts for the benefit of the debtor's creditors by ensuring the (i) reasons for the over-indebtedness, (ii) debtor's worthiness and commitment to the proposed plan, and (iii) likelihood that the documents provided depict a truthful picture of the situation.[393] However, it also investigates whether some of the debtor's creditors provided loans or other funds without ensuring whether the debtor was capable of repaying them, or if they took advantage of the financially distressed status of the debtor in providing these funds.[394]

A consumer who either (i) received the benefit of discharge in the previous five years or twice already, or (ii) that determined the situation of over-indebtedness voluntarily, in bad faith or due to gross negligence, cannot submit a proposal under this title of the Code.[395] Equally, a creditor who negligently determined or seriously worsened the debtor's situation of over-indebtedness is prevented from opposing the plan at the sanctioning hearing.[396]

If a competent court believes that the plan and proposal are compliant with the law, it require these to be served on the debtor's creditors within 30 days from the convening hearing.[397] The creditors have up to 20 days from the notification of these documents to make comments.[398] It is possible to obtain a stay on executory actions against the debtor, if the continuance of such actions could affect the successful outcome of the plan.[399] Any temporary measure and prohibition of conducting extra-ordinary administration acts can be revoked where needed.[400]

After having received comments (or where none were received), the *organismo* refers back to the judge and suggests any amendments. The competent court then sanctions the plan, which is then communicated to the creditors in the following 48 hours.[401] In sanctioning the plan, the court decides on any objections from the creditors. It is also possible for the court to refuse the

390 *Idem*, art 67(2).
391 *Idem*, art 67(5).
392 *Idem*, art 68(5).
393 *Idem*, art 68(2).
394 *Idem*, art 68(3).
395 *Idem*, art 69(1).
396 *Idem*, art 69(2).
397 *Idem*, art 70(1).
398 *Idem*, art 70(3).
399 *Idem*, art 70(4).
400 *Idem*, art 70(5).
401 *Idem*, art 70(8).

sanctioning where it believes that it is not feasible, or where statutory provisions have not been complied with.[402]

The plan is then executed by the debtor under the supervision of the *organismo*. The *organismo* has to submit regular, six-monthly reports to the competent court. Any payment or transaction that was not made in compliance with the approved plan is ineffective towards the debtor's creditors.[403] If the plan is fully executed, the residual pre-plan claims are discharged, and the debtor is authorised to pay the *organismo*. If the plan is not fully executed, the court can grant additional time to the debtor or revoke the sanctioning of the plan. In any case, the competent court authorises the payment of the fees for the *organismo*. If the sanctioning is revoked (either because the plan was not fully implemented or because the debtor had hidden assets, augmented their liabilities or otherwise behaved fraudulently), the procedure is converted into a personal controlled liquidation.[404]

9.2.2 *Minor composition*

This procedure is available to professionals, small entrepreneurs, farmers and innovative start-ups.[405] It is also available to all joint debtors, whenever one of them is not a consumer.[406] The purpose of such procedure is to allow proponents to continue their entrepreneurial activities while undertaking a debt restructuring plan. However, it is also possible to trigger this procedure whenever the debtor provides additional assets, with the result that creditors receive a significantly higher return than in any other consumer procedure.[407]

Debtors are not restricted as to the content of their proposal. Creditors can be divided into classes, and they have to be treated separately if their claims are guaranteed by third parties. The minor composition mirrors the procedure for pre-insolvency compositions. Therefore, the law states that if there are any omissions in the law regarding minor compositions, parties and courts should look at the provisions and case law on pre-insolvency compositions for guidance.[408]

Upon submission of the petition to the competent court, the debtor needs to submit a series of accounting documents laid out in article 75(1) of the CCII. The plan may foresee a partial payment of secured and preferential creditors, provided that they are not paid less than the liquidation value of their claims.[409] Even if the petition is submitted by a debtor, they have to be assisted by an *organismo*.[410] The role of the *organismo* is to assess whether the proposed plan is feasible by submitting a series of documents and reports that will guide the creditors in making their decision on the plan.[411] One of the advantages of this procedure is that the

[402] *Idem*, art 70(9)-(10).
[403] *Idem*, art 71(3).
[404] *Idem*, art 73(1).
[405] *Idem*, art 74(1).
[406] *Idem*, art 66(1).
[407] *Idem*, art 74(2).
[408] *Idem*, art 74(4).
[409] *Idem*, art 75(2).
[410] *Idem*, art 76.
[411] *Idem*, art 76(2).

submission of a petition suspends the accrual of interests on existing debt, except if the claim is secured or privileged.[412]

Debtors cannot commence a minor composition if they had their debts discharged in the previous five years or more than twice in their lifetime; or if it appears that they behaved in a fraudulent manner in the running-up to the minor composition petition.[413] Where the competent court believes that the petition is compliant with the law, it opens the procedure with an order that cannot be appealed.[414]

With the opening order, the delegated judge establishes a deadline not exceeding 30 days for the creditors to express their votes on the plan. Should the creditors not contact the *organismo*, the law assumes that they are in favour of the plan.[415] If requested by the debtor, the same order may provide for the automatic stay of ongoing or new executory or individual actions against the debtor based on pre-petition claims.[416] The *organismo* may be replaced by a judicial commissioner if (i) the court granted an automatic stay on executory and individual actions, (ii) the debtor is continuing their entrepreneurial activity, and (iii) the debtor has asked for the appointment of such professional.[417] In all other cases, the *organismo* is responsible for supervising the procedure.[418]

The minor composition plan is approved if creditors representing the majority in value of the claims against the debtor vote in favour of it.[419] In the event that only one creditor holds the majority in value of the claims against the debtor, the law requires a majority by number as well for the plan to be approved.[420] If the creditors are divided into classes, the plan needs to be approved by the majority of these classes.[421] As usual, the vote of non-impaired or connected parties is not relevant for the purposes of achieving the majorities required by the law.

Once the plan had been approved, the delegated judge sanctions the plan and closes the procedure.[422] In case of opposition of one or more creditors, the approval is subject to proof that the dissenting creditors receive the liquidation value of their claims. If the plan is opposed by the revenue authorities, the competent judge will sanction it even if their dissent results in the majorities prescribed by the law not being met, provided that the revenue authorities receive the liquidation equivalent of their claims.[423]

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412 *Idem*, art 76(5).
413 *Idem*, art 77.
414 *Idem*, art 78(1).
415 *Idem*, art 79(3). This mechanism is known as *silenzio-assenso*, where the law infers that the silence of one of the parties is a form of acceptance of the terms and conditions in a contract. This is hard to accept for common law jurisdictions such as the UK, where acceptance cannot be inferred from silence but only from the behaviour of the parties.
416 *Idem*, art 78(2).
417 *Idem*, art 78(2-*bis*).
418 *Idem*, art 78(3).
419 *Idem*, art 79(1).
420 *Ibid*.
421 *Ibid*.
422 *Idem*, art 80(1)-(2).
423 *Idem*, art 80(3).

Like pre-insolvency compositions, minor compositions are debtor-in-possession procedures. The *organismo* is charged with supervising the implementation of the approved plan, and with reporting deviations or problems to the competent judge. The *organismo* submits a final statement to the competent judge once the debtor had completed the implementation of the plan. Any deviations from the plan must be authorised by the competent judge. If the debtor does not fulfil the obligations within the revised deadline provided by the competent judge, the sanctioning can be revoked. Article 82 of the CCII lists the circumstances where the sanctioning can be revoked, with the result that the procedure will be converted in a personal controlled liquidation.[424]

9.2.3 *Personal controlled liquidation*

This procedure is broadly similar to corporate liquidations. However, it is available to consumers, professionals, farmers, small entrepreneurs, innovative start-ups and any other debtor not eligible for corporate liquidations.

9.2.3.1 *Eligibility criteria*

The applicant needs to be in a situation of over-indebtedness, that is either crisis or insolvency. This procedure is also available to unlimited liability shareholders of certain types of companies such as *società in nome collettivo* (s.n.c.), *società in accomandita semplice* (s.a.s.) and *società in accomandita semplice per azioni* (s.a.p.a.), provided that the debt was not caused by the entrepreneurial activity and that the personal controlled liquidation will not detrimentally affect the company's creditors.[425]

9.2.3.2 *Organs of the procedure*

The procedure occurs before the competent court, being the court where the debtors have their centre of main interest or their residences. The petition needs to be submitted by the local *organismo*, that has to intervene in all personal controlled liquidation procedures. The debtors need the support of a qualified lawyer.

In the past, the only persons authorised to submit such petition were the debtor themselves. Nowadays, it is possible not only to convert a rescue-oriented consumer procedure into a personal controlled liquidation, but public prosecutors and creditors can also submit a petition. Public prosecutors can only submit such petition for entrepreneurs, or to convert a rescue-oriented in a personal liquidation procedure. Creditors can submit such petition during individual executory actions against the debtor (provided that the debtor's indebtedness exceeds EUR 50,000) or to convert a rescue-oriented procedure in liquidation. If the petition is submitted by the creditors or the public prosecutor, the competent court may provide the debtor with the opportunity to submit additional documents to convert the personal controlled liquidation into any of the other rescue-oriented procedures applicable to consumers.[426]

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[424] *Idem*, art 83.
[425] Under the old *legge fallimentare*, these shareholders were only subject to corporate liquidation.
[426] CCII, art 271.

9.2.3.3 Procedure and treatment of contracts

With this procedure, debtors require the competent court to liquidate their remaining assets in satisfaction of their creditors. Not all the debtor's assets can be sold in satisfaction of the creditors' claims. Pursuant to article 268(4) of the CCII, it is not possible to include the following goods in the personal controlled liquidation procedure:

(a) assets that cannot be subject to liquidation pursuant to article 545 of the Code of Civil Procedure;

(b) maintenance and ailment payments, together with salaries in the measure that the court deems necessary to ensure the maintenance of the petitioner and their family;

(c) any income arising from the use of assets belonging to the petitioner's offspring, including trusts established for their benefit; and

(d) things that cannot be foreclosed under the law.

The petition results in the crystallisation of claims against the debtor. This includes any interests arising from those claims, except with reference to secured or preferential creditors. Within seven days from the submission of the petition, the *organismo* serves the petition on the fiscal agencies as well as on the interested local entities to allow them to lodge a claim in the procedure. All executory contracts are suspended,[427] unless the liquidator assumes those contracts or decides to withdraw from them. It is not possible to withdraw from contracts for the purchase of real estate when the property has already vested in the debtor or the third party. Third parties have the right to solicit a decision from the liquidator within a 60-day deadline from their request.

At the first hearing, the court issues an order in which it may approve the opening of the personal controlled liquidation procedures if all the above-mentioned eligibility criteria are met. With that order, the court appoints a delegated judge and a liquidator (usually, the same *organismo* that assisted the debtor in submitting the petition), and makes any other necessary ancillary order. The order results in the dispossession of the debtor's assets and in an automatic stay of all executory actions against the debtor.

The liquidator gives the creditors a deadline of up to 60 days to lodge their claims against the debtor. The list of the debtor's creditors becomes binding in the same way as with corporate liquidation procedure, after a hearing in front of the delegated judge and after the settlement of any disputes. Within 90 days from the opening of the procedure, the liquidator prepares a liquidation and distribution plan, which shall include all the initiatives that the liquidator aims to take as part of the procedure.

[427] *Idem*, art 270(6).

Once the liquidator had executed the plan,[428] he prepares a final statement to be submitted to the delegated judge. The judge can either approve or reject the statement. If the judge rejects it, the judge can ask for integrations and additional actions, or appoint a new liquidator. The money collected as part of the procedure are distributed to the debtor's creditors in terms of a distribution plan, which can be challenged by the creditors within 15 days of notification.

9.2.3.4 *Termination and discharge*

The termination of the procedure is declared by the delegated judge with an order. That order authorises the payment of the liquidator's fees. Creditors of post-petition claims cannot commence executory actions against the goods subject to the personal controlled liquidation procedure.[429] Claims that came into existence during the procedure have a preferential status.

Under the previous law, the debtor did not obtain an automatic discharge at the end of the consumer's liquidation procedure. This aspect has changed. The new rules on discharge are set out in articles 278 to 283 of the CCII. While the rules on commercial entrepreneurs largely replicate the pre-2022 regime, articles 282 and 283 have extended the benefit of automatic discharge to over-indebted consumers who completed a personal controlled liquidation. The discharge operates as soon as the procedure is terminated, or after three years from the opening of the controlled liquidation, whichever the earliest.[430]

The discharge petition is submitted by the *organismo*, which shall also submit a statement outlining whether the debtor complied with the statutory obligations.[431] The benefit of discharge does not apply if the debtor had:

(a) been convicted with a final judgment for a crime of bankruptcy;

(b) hidden goods or other assets from the procedure, or illegally augmented his liabilities;

(c) hindered or otherwise slowed down the procedure; or

(d) obtained the benefit of discharge from debts in the previous five years or more than twice in his life.[432]

As a general rule, if in the four years following the commencement of the procedure the debtor receives assets or other goods capable of paying 10% or more of the creditors' claims, the debtor will have to make those assets available to the creditors.[433] The debtor will have to submit an annual statement to the competent court to declare whether he had received any such assets.

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[428] During the execution of the plan, the liquidator has to submit written progress updates every six months to the delegated judge in terms of CCII, art 275(1).
[429] CCII, art 277.
[430] *Idem*, arts 279 and 282.
[431] *Idem*, art 283(3).
[432] *Idem*, art 280.
[433] *Idem*, art 283(1). Loans are not considered for this purpose.

The benefit is also offered to a debtor who had no assets and no possibility of repaying creditors in the future, even if the debtor had not commenced a controlled liquidation procedure.[434] In the latter case, however, debtors will have to prove that they are "worthy",[435] and they can only rely on such discharge once in their lifetime.

The discharge does not extinguish obligations owed to the creditors by third parties such as guarantors. Additionally, it does not operate with reference to some claims, such as alimonies, compensation orders, and certain penalties and other fines issued by public bodies and courts.[436] However, the discharge operates for the benefit of unlimited liability shareholders of companies admitted to a corporate liquidation procedure.[437]

9.3 Corporate liquidation procedures

9.3.1 Corporate liquidation

Corporate liquidation proceedings are governed by articles 121 to 283 of the CCII. The fundamental goal of corporate liquidation proceedings is to liquidate the assets of the insolvent debtor in an orderly manner. This goal has not changed under the new law, which has otherwise tried to remove any stigma or negative connotation associated with failure. As a result, the term "failure" has been removed from the Code.

Corporate liquidation proceedings are practitioner-in-possession procedures.[438] As a result, the existing management and the owners of the insolvent company lose not simply the management, but also the possession of the goods owned by the debtor. The order opening a liquidation procedure results in the appointment of a liquidator (*curatore*), who collects, sells and distributes the debtor's assets to the creditors. Corporate liquidation procedures are available to all insolvent entrepreneurs,[439] except small enterprises and farmers.[440]

Under Italian insolvency law,[441] a company is small if it:

- has had net equity not exceeding EUR 300,000 in each of the three fiscal years before the filing or, if less, from the commencement of the business's activity;

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434 *Idem*, art 283.
435 This means that the debtor shall not have caused the over-indebtedness with bad faith, voluntarily or with gross negligence: see CCII, art 282(2).
436 CCII, art 278(6).
437 *Idem*, art 278(5).
438 *Idem*, art 142.
439 *Idem*, art 121.
440 Civil Code, art 2135. Farmers are defined following a qualitative, rather than quantitative approach. It is not required that the majority of our income is related to the use of a piece of land. It is required, however, that farmers conduct special activities, such as forestry, growing crops, farming, etc. It is irrelevant whether these activities are carried out in an intensive or more traditional way. Some enterprises closely connected with agriculture and preservation of territory, such as hospitality venues like *agriturismi*, also fall within the notion of farmers under Italian law.
441 There is another definition of small entrepreneurs under Civil Code, art 2083, as the person who carries out an enterprise primarily with their own work, or the work of close members of their family. However, such definition is not relevant for insolvency purposes.

- has realised net turnover not exceeding EUR 200,000 in each of the three fiscal years before the filing or, if less, from the commencement of the business's activity; or

- owes debts not exceeding EUR 500,000, even if not yet due upon adjudication.[442]

Corporate liquidation procedures can also be opened against unlimited liability shareholders of those companies that meet the eligibility requirements for corporate insolvency procedures.[443] This is only possible if the procedure is first opened against the company. The consumer liquidation procedure of unlimited liability shareholders does not result in the automatic liquidation of the company where they are shareholders.[444] It is also possible to extend the corporate liquidation procedure to *de facto* unlimited liability shareholders discovered after the commencement of the procedure.[445] The liquidations of the company and of its unlimited liability shareholders remain separate, but the law requires a certain degree of co-ordination between the procedures.[446]

Corporate liquidation procedures cannot be opened against companies which ceased trading more than one year before the petition is filed,[447] provided that the debtor was insolvent before it ceased trading, or in the year after that. A company is deemed to have ceased trading when it is cancelled from the Companies Register, or when third parties received news from the company that it has ceased trading.

The commencement of corporate liquidation proceedings determines two sets of consequences for the debtors. Firstly, there are financial consequences: the debtors lose possession (but not ownership) of all of their assets, which are managed by the liquidator up until they are sold or distributed to the creditors. Secondly there are also personal consequences, such as obligations to co-operate with the court, the creditors and the liquidator as well as to provide the required information to the same parties.

Up until 2006, the commencement of corporate liquidation proceedings resulted in punitive consequences for the debtor company (and its directors). The people responsible for the company's failure would have to be put on a list (*pubblico registro dei falliti*, in terms of article 50 of the *legge fallimentare*) and lose some rights, including the right to vote and be elected. Legislative decree 5/2006 abolished these punitive provisions.

9.3.1.1 Liquidator and creditors' committee

The liquidator appointed by the competent court assumes responsibility over the insolvent estate and protects the interests of the creditors. Following the commencement of the procedure, all of the company's debts become due and payable and legal interests cease to accrue on debts until the corporate liquidation case is closed. All creditors must be treated

442 CCII, art 2(1)(d).
443 *Idem*, art 256(1).
444 *Idem*, art 258.
445 *Idem*, art 256(4).
446 *Idem*, art 257.
447 *Idem*, art 33(1).

equally (in terms of the principle of *par condicio creditorum*), unless contractual or legal provisions allow them to be paid in priority. There is a general ban on enforcement measures promoted by unsecured creditors (automatic stay).

The insolvency order records the appointment of the designated judge (*giudice delegato*) and the liquidator. Following the insolvency order, the court assumes competence over the insolvency case and any connected proceedings. When an insolvency petition is filed and a formal insolvency procedure is opened, the court (and the judge) dealing with the insolvency procedure is responsible for any other connected claims, irrespective of their value. The Supreme Court clarified that this *vis attractiva* applies to all petitions that can potentially, directly or indirectly, affect the composition of the insolvent estate.[448]

As stated above, with the order opening the liquidation procedure, the delegated judge appoints a liquidator.[449] The liquidator is chosen from a public register of regulated professionals and is not chosen by the debtor. The liquidator must accept this appointment in the two days following the order.[450] Liquidators are public officials[451] charged with running the liquidation procedure, collecting the debtor's assets and selling them for the benefit of the creditors. Liquidators represent the debtor in any proceeding against them. Except for tax disputes, they cannot stand for trial on the debtor's behalf as the debtor needs to be represented by an independent lawyer.[452]

Liquidators shall exercise their duties personally. However, upon authorisation from the creditors' committee, liquidators can be authorised to delegate some of their functions to third parties.[453] Liquidators have a duty to report periodically to the delegated judge. Their reports are published and shared with the creditors, except for the parts that outline possible criminal liabilities against the debtor or third parties, the legal actions that the liquidator plans to pursue in the near future, and non-relevant issues that affect the debtor's personal circumstances.[454]

Liquidators have limited powers to conduct acts of extraordinary administration. In most cases, they will have to preliminarily ask for the creditors' committee approval.[455] Their acts and omissions are subject to an appeal procedure lodged with the delegated judge. Such appeal must be proposed within eight days from obtaining knowledge of the act, or within eight days after the deadline by which the liquidator was supposed to act.[456] The appeal can be submitted by the creditors' committee, the debtor or any other interested party. In cases of serious omissions, the delegated judge can remove the appointed liquidator. This order is subject to appeal in front of the competent Court of Appeal.[457] One of the innovations of the recent law

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[448] Supreme Court 17279/2010.
[449] CCII, art 125.
[450] *Idem*, art 126.
[451] *Idem*, art 127.
[452] *Idem*, art 128(3).
[453] *Idem*, art 129.
[454] *Idem*, art 130(8).
[455] *Idem*, art 132.
[456] *Idem*, art 133.
[457] *Idem*, art 134.

has been the possibility for the debtors and creditors to ask for the replacement of a liquidator in case of conflicts of interest.[458]

The liquidator shall distribute the money collected as part of the procedure during the procedure itself – there is no need to wait until the end of the procedure.[459] The payment of the liquidator's fees is authorised by the designated judge.[460]

The designated judge must appoint a creditors' committee within 30 days from the liquidation order.[461] This committee consists of three to five creditors, who represent the quantity and quality of the debtor's creditors in a balanced manner. Before the reforms enforced in the years of 2006 to 2007, the creditors' committee had an advisory function, which resulted in many commentators questioning the utility of this instrument. Since these reforms, the importance of the creditors' committee has increased significantly.

Nowadays, creditors' committees exercise some supervisory powers over the liquidators and some powers of authorisation with reference to certain activities and transactions.[462] For instance, the liquidator cannot appoint experts, invest the debtor's money, perform acts of extraordinary administration, continue performing some contracts, renounce assets, etcetera, without the prior written approval of the creditors' committee. Where the creditors' committee retains advisory powers, these are usually not compulsory. The creditors' committee also has the power to ask for the removal of the liquidator and to appeal against the decisions of the designated judge. At the same time, the acts and omissions of the creditors' committee can also be appealed to the competent delegated judge within eight days from obtaining such knowledge.[463]

9.3.1.2 Consequences of corporate liquidation

For the most part the consequences of corporate liquidation are basically the same as in the pre-2022 system. The opening of the procedure results in the debtor being dispossessed of the company and its assets, including those that accrue to the insolvent estate after the opening of the liquidation procedure.[464] It is possible for the liquidator to discharge goods if the cost for acquiring or maintaining them exceed their resale value.[465] Any acts or payments made by the debtor after the opening of the liquidation procedure are ineffective towards the company's creditors.[466]

The liquidator replaces the insolvent debtor in all ongoing and future disputes, except for those that may have personal effects on individuals previously controlling or owning the debtor. The opening of a liquidation procedure determines the automatic interruption of any litigation, and

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[458] *Idem*, art 135.
[459] *Idem*, art 136(2).
[460] *Idem*, art 137.
[461] *Idem*, art 138.
[462] *Idem*, art 140.
[463] *Idem*, art 141.
[464] *Idem*, art 142. Some exceptions apply: see CCII, arts 146-148.
[465] *Idem*, art 142(3).
[466] *Idem*, art 144.

third parties have the burden of resuming the litigation (if interested) within a limitation period set by the law.[467]

The opening of a corporate liquidation procedure does not only affect the debtor – creditors are prevented from continuing or promoting any individual executory or summary proceeding against the debtor for pre-insolvency order claims.[468] Except where otherwise provided, the creditors take part in the liquidation procedure on an equal basis, meaning that they are entitled to a proportionate part of the proceedings arising from the sale of the debtor's assets (*par condicio creditorum*).[469]

The Code includes a specific series of provisions applicable to claw-back actions. According to the law, it is possible to challenge the validity of the following transactions:

- gifts effected in the two years before the liquidation order, unless they were not disproportionate compared to the donor's assets, or they were made in situations where it is common and usual to make such gifts;[470]

- payments of claims that were not yet due at the time of the liquidation order that were made either in the two years before the opening of the procedure or after it;[471]

- payments of loans made by the company's shareholders if the amount was not yet due at the time of the liquidation order, provided that such payments occurred after or one year before the opening of the liquidation procedure;[472] and

- transactions that can be challenged under the rules contained in the Civil Code (*azione revocatoria ordinaria*),[473] and all those transactions in which the other party knew or ought to have known that the debtor was insolvent.[474]

Pursuant to article 170 of the CCII, these judicial proceedings cannot be opened more than three years after the liquidation order, or more than five years after the transaction was effected.

With reference to executory contracts, article 172 of the CCII states that the opening of the liquidation procedure determines the automatic suspension of such contracts until the:

- creditors' committee authorises the liquidator to continue the performance of these contracts;[475] or

[467] *Idem*, art 143.
[468] *Idem*, art 150.
[469] *Idem*, art 151.
[470] *Idem*, art 163.
[471] *Idem*, art 164(1).
[472] *Idem*, art 164(2).
[473] *Idem*, art 165.
[474] *Idem*, art 166.
[475] *Idem*, art 172(1).

- liquidator declares their willingness to continue an ongoing contract after the counter-party had asked the delegated judge to give the liquidator a deadline not exceeding 60 days to clarify their position on the ongoing contract.[476]

If a contract is terminated, the counter-party can claim what is due to them as an unsecured creditor in the liquidation procedure. The counter-party is never entitled to damages for the early termination of executory contracts.[477] *Ipso facto* and termination clauses triggered by the opening of the liquidation procedure are ineffective under Italian law.[478] The rules on the treatment of special types of contracts outlined above continue to apply unchanged.

9.3.1.3 Procedure

As mentioned above, shortly after the opening of the procedure the liquidator obtains physical possession of movable goods and informs the competent registry of the opening of the liquidation procedure for all immovable or otherwise registered goods.[479] Together with the list of the debtor's assets, the liquidator is asked to prepare a list of the debtor's creditors.[480]

Once these formalities have been completed, the liquidator serves on all of the debtor's creditors the invitation to lodge their proofs of claims against the debtor, together with the supporting evidence. These claims need to be submitted 30 days before the date of the hearing aimed at discussing the creditors' claims.[481] Late submissions are possible up to six months after the hearing, but only if the creditor proves that it is not to be blamed for the delay.[482] A distribution proposal is sent to the delegated judge and to the creditors 15 days before the hearing. Parties have the right to submit objections and comments up to five days before the hearing. The distribution plan becomes binding at such hearing. Creditors have 30 days to challenge the distribution plan with a petition to the competent court.[483]

It is possible for the insolvent debtor admitted to a liquidation procedure to continue operating, either as a whole or only with reference to certain branches or sectors of the company. The continuation of the company's operations needs to be approved by the delegated judge, either upon the opening of the liquidation procedure or later upon a proposal coming from the liquidator. The continuation of the company's operation cannot detrimentally affect the debtor's creditors.[484]

Within 60 days from the approval of the list of the debtor's assets and, in any case, within 150 days from the liquidation order, the liquidator must send a distribution plan to the debtor's

[476] *Idem*, art 172(2).
[477] *Idem*, art 172(4).
[478] *Idem*, art 172(6).
[479] *Idem*, arts 193-197.
[480] *Idem*, art 198.
[481] *Idem*, art 201.
[482] *Idem*, art 208.
[483] *Idem*, art 207.
[484] *Idem*, art 211.

creditors.[485] After the company's assets and claims against third parties have been sold,[486] the delegated judge authorises the distribution of the proceeds. The law outlines specific rules for the payment of each category of creditors and for interim distributions.[487] The general rules are that the liquidator needs to send a six-monthly update to the creditors, effect partial distributions if money is available, and prepare a final statement once all assets have been sold and the liquidator is ready to make the final distribution.[488] This statement is sent to the delegated judge and the creditors at least 15 days before the final hearing. If no objections are raised, the delegated judge authorises the liquidator to make the final payments. Otherwise, the competent court (made up of three judges) decides on these oppositions and authorises the distribution.[489]

9.3.1.4 Termination and discharge

Except when converted into an insolvent composition, liquidation procedures terminate in one of the following ways, namely if:[490]

(a) no creditor submits a proof of claim within the deadline set by the liquidation order;

(b) creditors' claims and liquidation expenses are fully paid up;

(c) the liquidator has completed the final distribution from the proceeds arising from the sale of the debtor's assets. In this case, the procedure terminates even if there is some pending litigation against the debtor. However, the liquidator has to continue representing the debtor in these proceedings if there is an interest by all parties in their continuation (except when otherwise authorised by the delegated judge);[491] or

(d) it becomes clear that the money available for distribution is not sufficient to pay either unsecured or preferential creditors.

The closure of the liquidation procedure is declared with an order (*decreto motivato*) of the competent court. The debtor and the creditors' committee need to be heard by such court in case the termination is declared for lack of available money for distribution (in respect of (d) above). It is possible to reopen such procedure in the five years following its termination, provided that there is evidence of previously undeclared assets that—if sold—would result in a meaningful distribution to the debtor's creditors.[492]

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[485] *Idem*, art 213.
[486] *Idem*, arts 214-218.
[487] *Idem*, arts 221-230.
[488] *Idem*, art 231.
[489] *Idem*, arts 231-232.
[490] *Idem*, art 233.
[491] *Idem*, art 234. The procedure is not reopened if the debtor is awarded more money as a result of a judgment in pending proceedings, but this money needs to be distributed among the debtor's creditors with an additional distribution order.
[492] *Idem*, art 237.

The closure of the liquidation procedure results in the removal of the company from the Companies Register, and in the discharge of any pre-petition claim.[493]

9.3.1.5 In-liquidation composition

A composition of the debtor's debts can be suggested by the creditors or by interested third parties, even before the hearing aimed at certifying the creditors' claims against the debtor. The proposal cannot be submitted by the debtor or companies subject to their control, unless:

- they submit such request after one year but before the end of two years following the opening of the liquidation procedure; or
- the proponents bring in new money capable of increasing the value of the debtor's assets by 10% at least.[494]

A proposal for insolvent composition can result in the division of creditors in uniform classes, as well as differential treatments between classes of creditors. There are no restrictions as to the content of the plan.[495] Secured and preferential creditor may be paid only in part, provided that they receive the liquidation equivalent of their claims.[496]

The proposal is submitted to the delegated judge, who must ask for the liquidator's view on the proposal. If the creditors' committee approves the proposal, the liquidator will have to submit it to the creditors. The creditors will have between 20 to 30 days to send any oppositions to the plan. Usually, in case of more than one proposal, the creditors' committee chooses which one to send to the creditors. However, the delegated judge may choose to send more than one proposal to the creditors.[497]

The creditors (except those who are paid in full or that are connected to the debtor) need to vote on the proposal. The plan is approved if creditors representing the majority of claims against the debtor vote in favour of it (majority by value). If the creditors are divided into classes, such majority should be verified in each class. Unlike traditional pre-insolvency composition procedures, if a creditor does not express its dissent within the deadline established by the delegated judge, such creditor is considered as being supportive of the plan.[498] The plan is finally sanctioned by the delegated judge, and any oppositions to it are settled by the competent court before the plan is sanctioned.[499]

An insolvency composition is binding on all pre-petition creditors, including dissenting ones. Like liquidation orders, insolvency compositions do not affect the creditors' rights and claims towards third parties such as guarantors.[500] The execution of the insolvency composition is

493 For the rules on discharge, see para 9.2.3.4 above.
494 CCII, art 240(1).
495 *Idem*, art 240(2).
496 *Idem*, art 240(4).
497 *Idem*, art 241.
498 *Idem*, art 244.
499 *Idem*, art 245.
500 *Idem*, art 248.

charged on the debtor who operates under the supervision of the liquidator and the creditors' committee.[501] In case of major breaches of the obligations arising from the plan, the creditors can petition the court to terminate it (up to one year after the deadline for completing the plan).[502] The delegated judge may then order the debtor to revert to the liquidation procedure.

9.3.1.6 Groups of companies

Pursuant to article 287 of the CCII, the companies of a same group having their centers of main interest in Italy, may submit a petition for a joint liquidation procedure if the liquidation of their activities is linked and if the procedure is in the best interest of the debtors' creditors. In any case, there is no substantive consolidation of these procedures, meaning that the assets of the debtors and the creditors' claims do remain separate. If the petition is approved, the competent court appoints one liquidator and one creditors' committee for all the companies in the group.

The expenses of the procedure are charged to the companies within the group in a proportional manner. Even if no joint liquidation procedure is ordered, the liquidators of the single debtors have a legal duty to co-operate with each other in the exercise of their functions.[503]

One of the main differences with traditional liquidation procedures is that claw-back actions can affect intra-group transactions effected in the five years before the opening of the insolvency procedure, provided that the effect of the challenged transaction had been to inequitably affect the creditors of one of the companies in the group.[504] The beneficiary of that transaction can resist that challenge by proving that they were not aware of the detrimental nature of the transaction for the debtor's creditors. Another significant difference is that claims from the holding company or owner against intra-group companies are subordinated to unsecured claims arising from the subsidiary's creditors.[505]

9.3.2 Forced administrative liquidation

Forced administrative liquidation (provided for in articles 293 to 316 of the CCII) is a particular formal insolvency procedure available to companies (totally or partially) owned by the state, or which promote or protect interests that deserve special protection. The list of companies that can be subject to forced administrative liquidation includes insurance companies,[506] co-operative enterprises,[507] banks[508] and financial brokers.[509] For some of these companies (including banks and other financial entities, insurance companies, trusts, etcetera), forced administrative liquidation represents the only procedure to wind-up their business. However, other companies (such as certain co-operative enterprises, groups of co-operative enterprises, etcetera) can be subject to both forced administrative and corporate liquidation. Unless

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[501] *Idem*, art 249(1).
[502] *Idem*, art 250.
[503] *Idem*, art 288. Limited exceptions apply: see CCII, art 102.
[504] *Idem*, art 290(1).
[505] *Idem*, art 292.
[506] Legislative decree 209/2005.
[507] Civil Code, art 2454-*ter*.
[508] Law 385/1993.
[509] Law 58/1998.

otherwise stated by special laws, the companies subject to forced administrative liquidation can also be subject to pre-insolvency composition.[510]

In most cases, it is irrelevant whether these companies are public or private, but forced administrative liquidation is not available to public entities such as councils. Forced administrative liquidation is ordered by the relevant administrative authority that oversees the sector of the economy in which the debtor operates. The relevant order is published in the Companies Register.[511]

As discussed above, the key requirement to file for liquidation is being insolvent. In forced administrative liquidation, the special laws require additional eligibility requirements, such as breach of administrative and regulatory rules or other public interest reasons (such as alleged fraud). As a result, unlike corporate liquidation proceedings, the primary purpose of forced administrative liquidations is to exclude the debtor from the market while preserving the stability of this market and the trust of the other players. The sale and distribution of the debtor's assets for the satisfaction of the creditors is not the main purpose of the procedure.

Forced administrative liquidation is mainly an administrative procedure. In fact, the procedure is commenced by the regulatory authority, which supervises the company. The same authority appoints the liquidator, who is a public official.[512] The regulatory authority exercises the powers and duties, which are granted to the court during the traditional liquidation procedure.

The competent court (which is the court where the company has its real seat)[513] is involved only for the settling of disputes. In particular, the court intervenes to ascertain whether the petitioner is effectively insolvent. Courts also decide any challenge from the creditors on the recognition of their claims by the liquidator, as well as on disputes on the distribution plan and the final report of the liquidator.

The two central figures in forced administrative liquidations are the liquidator and the regulatory authority. The liquidator has similar powers and duties to the "traditional" liquidator, including the power to dispose of the company's goods and to run the debtor's business. However, any act exceeding ordinary administration needs to be approved by the regulatory authority, which appointed them. Up to three liquidators can be appointed in more complex procedures. The creditors' committee is replaced by a surveillance committee, which is made up of experts in the area where the company operates, and preferably consists of some of its creditors.[514] The surveillance committee is not due for the liquidation of co-operative enterprises, and it has mainly consultative functions.

The opening of forced administrative liquidation results in the automatic stay of executory actions against the debtor, with some exceptions provided by special laws for co-operative

510 CCII, art 296.
511 *Idem*, art 300.
512 *Idem*, art 302.
513 Any transfer of the company's centre of main interest occurred in the year prior to the opening of the procedure is not relevant: CCII, art 297(2).
514 CCII, art 301(1).

companies and for the benefit of the *Agenzia delle Entrate*.[515] After a preliminary phase where the liquidator is charged to assess the claim owed by each creditor and analyse the debtor's situation,[516] the liquidator may decide to liquidate the assets and distribute the proceeds to the creditors, or to reach an agreement or composition with the creditors with a view of continuing the debtor's activity. Anything different from liquidation needs to be preliminary approved by the regulatory authority.

Similar to corporate liquidation procedures, it is possible for the debtor to reach an agreement with the creditors during the forced administrative liquidation procedure.[517] The competent administrative authority shall authorise the debtor, one or more creditors and even a third party to submit a composition proposal. The proposal shall be published by the court and served on all the creditors. The creditors have the power to challenge it within 30 days from service. Third interested parties can also challenge the proposal, but in this case the 30-day time limit starts from the publication of the proposal. If the competent court approves the proposal for a composition with the creditors, the liquidator oversees the implementation of the plan.

The effects of the forced administrative liquidations on creditors are largely the same as under corporate liquidation proceedings.

The original version of the CCII restricted access to this procedure to companies which experienced serious administrative irregularities. However, the legislator decided to not significantly amend the current discipline, thus ensuring a broad scope for forced administrative liquidation. At the same time, companies that can file for forced administrative liquidation can usually file for other procedures. As a result, it is likely that this procedure will be used when it is not appropriate to rely on other mechanisms, such as in case of significant administrative irregularities, which led to the debtor's insolvency.

9.4 Rescue-oriented insolvency procedures

Despite having introduced a unified procedural model, the Code has significantly incremented the rescue options available to a debtor. There is the risk that some of these options will be under-used, as professionals will tend to rely on tried-and-tested measures such as pre-insolvency compositions while they familiarise themselves with new ones. It is also questionable whether there was a need to have so many detailed procedures in the Code, as some of these mainly appear to be last-minute additions to the statute designed to align the Italian law to the obligations arising from the implementation of the European Preventive Restructuring Directive. Perhaps, if in the years 2018 to 2022 the Italian political system had not been affected by severe political uncertainties and emergency economic challenges, it would and should have been preferable to re-think some aspects of existing procedures (such as pre-insolvency composition) to make them compliant with the European rules rather than creating new ones.

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[515] *Idem*, art 304.

[516] In forced administrative liquidations, the creditors do not lodge proofs of claims. However, in case of mistakes and omissions, creditors and third parties can submit petition to the liquidator within 60 days from the publication of the forced administrative liquidation order in the *Gazzetta Ufficiale* – see CCII, art 309.

[517] *Idem*, arts 314-315.

This section outlines the rescue-oriented mechanisms available to debtors in distress. It does not cover the *piani attestati di risanamento* (turnaround plans), which are negotiated solutions briefly regulated by article 56 of the CCII that are only binding for the creditors who sign them. The rescue-oriented procedures available to distressed debtors are:

- *composizione negoziata della crisi* (negotiated agreements) and *concordato semplificato* (simplified composition), regulated by articles 12 to 25-*speties* of the CCII. These procedures replace the alert procedures included in earlier versions of the Code. The Code does outline some residual "alert mechanisms" in articles 25-*octies* to 25-*undecies* of the CCII;

- *piani attestati di risanamento* (turnaround plans), regulated by article 56 of the CCII;

- *accordi di ristrutturazione dei debiti* (debt restructuring agreements), regulated by articles 57 to 64 of the CCII. Separate rules apply for those debt restructuring agreements subject to a court's sanctioning (articles 64-*bis* to 64-*quarter* of the CCII); and

- *concordato preventivo* (pre-insolvency composition), regulated by articles 84 to 120 of the CCII.

9.4.1 Negotiated agreement and simplified composition

This procedure has been available to Italian companies since 15 November 2021, as its regulation was introduced by law decree 118/2021. When introduced, the legislator expected that up to 10,000 companies per year could avail themselves of the use of independent experts to reach an agreement with their creditors in order to avoid the dire consequences associated with a situation of crisis or insolvency. Access to this procedure is on a voluntary basis. However, as mentioned in paragraph 9.1, entrepreneurs are under the general obligation to show that they consistently acted for the best interest of the creditors when their companies were experiencing some economic or financial difficulties.

Any company, commercial entrepreneur or farmer can approach the local Chamber of Commerce to ask for the assistance of one of its experts whenever they find themselves in an economic, financial or balance-sheet situation that makes it likely that they will experience a situation of crisis or insolvency in the near future. It must be reasonably likely that the business of the company, entrepreneur or farmer can be rescued as a going concern.[518] Throughout the procedure, the debtor must behave professionally, truthfully outline their economic and financial situation to the expert, and run his business in a way that does not prejudice creditors' interests.[519]

The main purpose of the expert is to facilitate the negotiations on a rescue plan between the debtor and its creditors. The law does establish the creation of a website,[520] where debtor can see:

[518] *Idem*, art 12(1)
[519] *Idem*, art 16(4).
[520] *Idem*, art 13(1).

- the list of experts that can be appointed by each Chamber of Commerce;
- a draft and some useful information on how to draft a rescue plan for MSMEs; and
- a test to assess whether there is a sufficient likelihood to be rescued.

These "experts" can be:

- chartered accountants with more than five years of experience;
- lawyers with more than five years of experience and previous familiarity with rescue procedures;
- labour consultant with more than five years of experience and previous direct involvement in at least three cases of rescue procedures; or
- any other person who had administration or directorial roles in companies involved in rescue-oriented procedures that did not result in the liquidation of the company's assets.[521]

A person in possession of the above-mentioned requirements who wants to be included in the list of experts needs to submit a request to the competent regulatory body, which is then assessed by an independent panel appointed by the local Chamber of Commerce. The expert operates in an independent manner and should not have worked for the petitioning debtor in the previous five years.[522]

This website is used by the experts to interact with other public bodies, such as the Central Bank of Italy, the revenues agencies and social security entities. It is also used by the debtor's creditors to lodge their claims and to consult the documents submitted by the debtor and the expert during the procedure.[523] It is expressly provided that the opening of a negotiated agreement does not in itself authorise banks and other financial institutions to trigger early termination or acceleration clauses.[524]

9.4.1.1 Procedure

The procedure is commenced by the entrepreneur, who submits a petition online (on the above-mentioned website) to appoint an independent expert. Together with the petition, the debtor needs to submit the company books from the previous three years, the proposed plan, the list of creditors and some other ancillary documents.[525] The appointed expert will have two business days to accept the appointment.[526]

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521 *Idem*, art 13(3).
522 *Idem*, art 16.
523 *Idem*, art 15.
524 *Idem*, art 16(5). In other words, the law introduces a ban on the enforceability of *ipso facto* clauses triggered by the opening of a negotiated agreement to facilitate the chances of success of such procedure.
525 *Idem*, art 17(3).
526 *Idem*, art 17(4).

After that, the expert will have a meeting with the petitioning debtor, who may be assisted by lawyers and consultants. If the expert believes that there is a serious possibility of the debtor being rescued, the expert will then have meetings with the other interested parties. Should the procedure go ahead, the expert can suggest changes to executory contracts. If the expert does not find it likely for the debtor to be rescued, the procedure is closed.

With the petition for the appointment of an expert, the debtor may also ask the implementation of some "protective measures" from the competent court.[527] These are the prohibition of obtaining additional secured rights on the debtor's assets (unless in terms of a previous agreement with the debtors themselves) and, more importantly, the prohibition of starting or continuing executory actions against the debtor's assets.[528] If the competent judge authorises these measures, the order has to be registered on the Companies Register and the webpage mentioned above. While the protective measures can apply to categories of creditors, employees cannot be singled out as the only creditors to whom these measures apply. The creditors against whom the protective measures apply cannot unilaterally modify or terminate ongoing contracts. The procedure for obtaining, amending or extending the duration or revoking such measures is outlined in article 19 of the CCII. This is basically a simplified procedure, which takes place *via* video conference.

The submission of such petition prevents the competent court from declaring the debtor insolvent or from opening a liquidation procedure, unless the petition is revoked.[529] It also exonerates an entrepreneur from complying with some rules outlined in the Civil Code, for instance on the subject of minimum capital requirements. Other reward measures are outlined by article 25-*bis* of the CCII, and mainly take the form of a reduction in the accrual of the interest rates on existing debts for the duration of the negotiations.

This is a debtor-in-possession procedure. The debtor must pre-emptively inform the expert of extra-ordinary administration acts or of any payment that is not in line with the negotiated plan or that may affect the company rescue. If the expert dissents on the opportunity of making this transaction and, nevertheless, the entrepreneur decides to go ahead with it, the expert has to register his dissent in the Companies Register if such transaction may affect the creditors' interests.[530] Acts such as agreeing to further secured loans, or the transfer of the companies or part thereof to third parties, need to be pre-emptively authorised by the competent court.[531]

Pursuant to article 23(1) of the CCII, if at the end of the negotiations the parties reach an agreement, it can take the form of:

(1) a binding contract capable of ensuring the debtor's activity for at least two years;

[527] This court is identified pursuant to CCII, art 27. This is basically the local court where the debtor has their centre of main interest, or the enterprise court for extraordinary administration procedures and group of large enterprises.
[528] CCII, art 18.
[529] *Idem*, art 18(4).
[530] *Idem*, art 21(4).
[531] *Idem*, art 22.

(2) a moratorium arrangement pursuant to article 62 of the CCII;[532] or

(3) an agreement pursuant to article 166(d) of the CCII.[533]

Pursuant to article 23(2) of the CCII, if at the end of the negotiations the parties fail to reach an agreement, the debtor can:

(1) submit a turnaround plan pursuant to article 56 of the CCII;

(2) submit a proposal for a debt restructuring agreement;

(3) submit a proposal for a simplified composition for the liquidation of the company's assets; or

(4) commence any of the other procedures for rescuing or liquidating distressed debtors regulated by the Code and other special laws.

Generally speaking, the acts and transactions entered into during the negotiation period cannot be revoked unless the expert registered his dissent.[534] Special rules apply to groups of enterprises[535] as well as to small entrepreneurs.[536]

The procedure may not last for more than 180 days.[537] At the end of the procedure, the expert uploads a final statement on the website. Any summary measure granted by the court during the procedure ceases to have effect when this document is submitted. The debtor cannot submit another petition for a negotiated agreement in the following year.[538]

9.4.1.2 Simplified composition for the liquidation of the company's assets

This procedure is available to those debtors that engaged in good faith in the negotiations described above, but failed to reach an agreement with their creditors. In the 60 days following the failure of those negotiations, the debtor can submit a liquidation plan together with the documents outlined in article 39 of the CCII. The plan may divide the creditors into classes.

The proposal is submitted to the court where the company has its centre of main interest. After having verified the admissibility of the petition, the court appoints a public official (*ausiliario*) to oversee the operations, and it orders for the petition to be served on the creditors. The court also sets a date for a sanctioning hearing, which shall take place in the ensuing 45 days. At the sanctioning hearing, the court decides any disputes and sanctions the composition. The assets

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[532] See para 9.4.2.2 below.

[533] The advantage of such agreement is that any act or transaction in execution of that agreement cannot be revoked at a later stage if the company files for another formal insolvency or restructuring procedure.

[534] CCII, art 24.

[535] *Idem*, art 25.

[536] *Idem*, art 25-*quarter*.

[537] *Idem*, art 17(7).

[538] *Idem*, art 17(9).

are liquidated by a court-appointed liquidator.[539] The plan may also include the sale of all or part of the debtor's business to a third party, which can also take place before the sanctioning hearing (pre-packaged liquidation).

9.4.1.3 Alert mechanisms

In earlier drafts of the Code, some parties had an obligation to commence a negotiation procedure similar to the one described above whenever they were significantly concerned that the debtor could become insolvent or was in a state of crisis. Due to the strong criticism of earlier versions of that procedure, the legislator decided to do away with it and replace it with a mandatory alert mechanism. This means that the people and bodies identified in articles 25-*octies* to 25–*decies* of the CCII only have an obligation to report the existence of a situation of crisis or insolvency to the debtor. If debtors ignore these "warnings", they may be personally liable for damages towards the companies' creditors.

The bodies identified by the law are:

- independent managers and accounting bodies;[540]
- qualified public agencies, such as the revenue authority;[541] and
- banks and other financial institutions.[542]

The final article of this section of the Code (article 25-*undecies* of the CCII) outlines the content of an instrument that should become available on the website mentioned above and that should allow each debtor to check if they are likely to become insolvent or in a state of crisis in the near future. This should allow them to check independently, even in the absence of any alert from independent parties, if they are in a position for triggering a negotiated agreement procedure.

9.4.2 *Debt restructuring agreements*

Debt restructuring agreements are agreements between the debtor in a situation of crisis or insolvency (*stato di crisi*) and creditors representing at least 60% of the company's debts.[543] The percentage is reduced to 30% of the debt if the plan does not propose any delay of the payment of dissenting creditors, and if no automatic stay is requested from the court.[544] The petitioner needs to be a commercial company other than a small one.[545] The agreement, which is usually negotiated out of court before the company files for its confirmation, has to reduce and / or restructure the debtor's debts. The agreement must be found reasonable by an independent professional (generally an external auditor or audit firm) who meets the criteria set out in article 2(1)(o) of the CCII. This expert is appointed by the debtor and must state that:

539 *Idem*, art 25-*septies*.
540 *Idem*, art 25-*octies*.
541 *Idem*, art 25-*novies*.
542 *Idem*, art 25-*decies*.
543 *Idem*, art 57(1).
544 *Idem*, art 60.
545 *Idem*, art 57(1).

(a) the financial resources available to satisfy the obligations under the voluntary composition agreement are sufficient; and

(b) that the rescue plan is feasible.

The independent professional must also declare that the debtor is likely to pay all debt owed to dissenting creditors within 120 days from the court's ratification, or within 120 days from the moment at which the debt becomes due, in case this occurs after the court's ratification.[546] The agreement must be ratified by the court in order to become effective.

Debt restructuring agreements represent valid alternatives to (pre-insolvency) composition agreements, debt enforcement actions and, ultimately, corporate liquidations. The main advantages of debt restructuring agreements over other formal procedures are flexibility, duration and costs.

While participating creditors need to accept the conditions in the plan (including a decrease in their nominal claims against the debtor), non-participating creditors cannot be affected by the plan (unless in case of a debt restructuring agreement-on-steroids, discussed below). As a result, non-participating creditors need to be paid in full and according to the original terms and conditions of their contracts with the debtor or within 120 days (as stated above).

A debt restructuring agreement may also contain a proposed tax settlement for the partial or deferred payment of certain overdue taxes,[547] provided that the independent professional states that the revenue agency is likely to receive a higher dividend than in a liquidation procedure. The settlement must be approved by the competent office of the revenue authority within 90 days from submission. The competent court may approve the tax settlement when the agency had not replied or rejected the tax settlement proposal, if this is essential for the successful outcome of the debt restructuring agreement, the independent professional supports the measure, and the agency would receive a higher dividend than in liquidation.[548] Such settlements automatically cease to have effect if the debtor delays their payment under the settlement scheme for 60 days or more.[549]

It is possible to renegotiate a debt restructuring agreement before the court's ratification. In this case, however, 60% of the creditors need to renew their support of the modified plan.[550] If the changes occur after the court's ratification, the independent professional must renew the declaration mentioned above. The revised plan is published in the Companies Register and served on the creditors, who may file objections to the revised plan within 30 days from service.[551]

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546 *Idem*, art 57(4).
547 *Idem*, art 63.
548 *Idem*, art 63(2-*bis*).
549 *Idem*, art 63(3).
550 *Idem*, art 58(1).
551 *Idem*, art 58(2).

A change introduced by the CCII is the possibility for the debtor to submit a debt restructuring agreement *in bianco*. Similarly to pre-insolvency compositions *in bianco*, these are petitions to the court to enter into the procedure, while asking for a term to submit the other essential documents (including the agreement) to the court. The debt restructuring agreement must be published by the Companies Register. The publication of the agreement determines a moratorium of 60 days on all proceedings against the debtor. Such moratorium can also be requested by the debtor to the court pending negotiations with the creditors (that is, prior to the debt restructuring agreement's execution and publication).

Within 30 days from publication, creditors may file objections to the agreement. The outcome of any objections is decided by the court. The court must also confirm the agreement by a special decree (*decreto di omologazione*).

Pursuant to law decree 83/2012, after the filing of an application for the ratification of a debt restructuring agreement, certain corporate law provisions relating to:

(i) the reduction of share capital under the minimum threshold required by law as a result of losses; and

(ii) the mandatory winding-up of the company in case of a reduction of share capital under the minimum threshold required by law,

do not apply. The agreement becomes binding on the date of publication by the Companies Register, regardless of any objections from the company's creditors.

The application for such a "stay" must be published in the Companies Register and, as from the date of the application's publication, it provides a temporary stay on the commencement or continuation of any enforcement, legal or precautionary proceedings, as well as any action to obtain pre-emption rights (*diritti di prelazione*) against the debtor. The court shall check the existence of the conditions prescribed by the law for debt restructuring agreements before confirming them.

9.4.2.1 Debt restructuring agreements on "steroids"

A particular type of restructuring agreement is known as *accordo di ristrutturazione con intermediari finanziari*. Introduced by law 132/2015, it is available to companies which are primarily (50% or more) indebted towards banks and other financial institutions. Unlike traditional debt restructuring agreements, these special agreements would be binding on dissenting financial creditors if 75% or more of the creditors in the class voted in favour of them.

Under the old discipline, to extend the effects of the agreement to dissenting banks and financial institutions, it was necessary that: (a) at least 50% of the overall indebtedness of the debtor was represented by debts towards banks and financial institutions, (b) the debt restructuring agreement provided for the division of such creditors in one or more categories with similar characteristics, (c) the plan had been approved by banks and financial institutions representing at least 75% of the debtor's overall indebtedness against these creditors, and (d) all creditors belonging to the relevant category had been informed of the ongoing negotiations and had been allowed to participate to such negotiations in good faith.

The court enforced the debt restructuring agreement upon having ascertained that the negotiations have been carried out in good faith. They also had to enquire whether the banks and financial intermediaries in respect of which the debtor requests the extension of the effects of the agreement:

(a) had legal status and economic interests similar to those of the banks and financial intermediaries which have agreed to the debt restructuring agreement;

(b) had received complete and updated information on the assets, economic and financial situation of the debtor as well as on the debt restructuring agreement and its effects;

(c) had been invited to participate in the negotiations; and

(d) obtained no less than they would with alternative solutions (mainly, the liquidation value).

These "agreements on steroids" have now been extended to all types of creditors.[552] If the debtor reaches an agreement with creditors representing 75% or more of the class, such agreement will also be binding on the dissenting creditors of that class, provided that the agreement is reached in good faith and it has not the purpose of liquidating the debtor's business. The dissenting creditors have the right to be paid at least as much as they are expected to receive in corporate liquidation.

Dissenting creditors can file objections to the debt restructuring agreement within 30 days from service of the order approving the plan.[553] In any case, the plan cannot bind dissenting creditors to provide new services or goods beyond those originally agreed upon with the debtor. However, dissenting creditors do not have the right to terminate early tenancy agreements, even if that right is granted by the contract between the parties.[554]

9.4.2.2 Moratorium arrangements

Under the old *legge fallimentare*, debtors could enter into a moratorium arrangement (*convenzione di moratoria*) with selected banks and financial institutions. This was basically a contractual automatic stay on executory individual actions against the debtor, or an agreement to postpone repayment of contractual obligations.

Similar to debt restructuring agreements on "steroids", the new Code extends this discipline to all creditors within the same class.[555] Non-consenting and dissenting creditors are bound by this contractual automatic stay provided that some conditions are met.[556] Firstly, they need to have

[552] *Idem*, art 61.
[553] *Idem*, art 61(3).
[554] *Idem*, art 61(4).
[555] *Idem*, art 62.
[556] *Idem*, art 62(2).

been informed and invited to participate in such negotiations in good faith. Secondly, the moratorium needs to have been approved by at least 75% of the creditors belonging to this class. Dissenting creditors need to be paid as much as they are expected to receive in corporate liquidation. An independent professional must have checked that this is likely to be the case, and that the debtor had not lied about their financial situation. Despite this, dissenting creditors can file an appeal (*opposizione*) within 30 days after service of the moratorium arrangement.[557]

Moratorium arrangements can never impose the performance of new obligations on the non-adhering creditors. They can, however, grant new over-draft facilities, and maintain the possibility to utilise existing or new facilities.[558]

9.4.2.3 Debt restructuring plans (subject to court's sanctioning)

This restructuring plan was only introduced by legislative decree 83/2022. It represents the mechanism to implement articles 9 to 11 of the Preventive Restructuring Directive[559] into Italian law. However, unlike the European directive, the Italian legislator opted not to introduce a mechanism to bind dissenting classes of creditors, thus making these restructuring plans more similar to the English schemes of arrangement rather than the restructuring plans regulated by part 26A of the Companies Act 2006.

The Italian restructuring plan allows debtors which are insolvent or encountering financial difficulties the possibility to submit to their approval a plan, which allows for deviations from the rules on the distribution of assets and proceeds discussed in paragraph 5 above. The only exception applies to the treatment of employees, which cannot be worse than the general rules on distribution.

The petition is submitted in the same forms as any other introductory petition,[560] and an independent professional must certify that the information in the company's books is likely to be accurate and that the plan is feasible.[561] The debtor's creditors are divided in classes. Each class shall include creditors having similar economic interests and legal rights against the debtor. Only if all classes vote in favour of the plan, this can be sanctioned by the court and the deviations from the traditional rules of distribution can become effective.

The competent court convenes the creditors' meetings if it believes that the procedural rules on the composition of the classes and the submission of the petition have been followed. During this time, the debtor remains in possession of their company, and they may be authorised by a judicial commissioner to carry out acts of extraordinary administration of the company.[562]

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557 *Idem*, art 62(5).
558 *Idem*, art 62(3).
559 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) OJ L 172/18.
560 CCII, art 64-*bis*(2), referring to CCII, art 40(1)(a).
561 *Idem*, art 64-*bis*(3).
562 *Idem*, art 64-*bis*(5-6).

The plan is approved if, in each class:

- the absolute majority of the creditors by value approve the plan; or
- two-thirds of the voting creditors representing 50% or more of the creditors voting in the class approve the plan.

If the majorities are reached in each class, the competent court approves the plan. Dissenting creditors are entitled to receive at least as much as they would receive in a liquidation procedure. If not all classes vote in favour of the plan, the court may (even *ex officio*) convert the procedure in a liquidation.[563] Alternatively, the debtor can ask to convert the procedure into a pre-insolvency composition.[564] As a general rule, it is also possible for debtor to convert a pre-insolvency composition procedure into a debt restructuring plan.[565]

9.4.3 Pre-insolvency compositions

Pre-insolvency compositions (*concordato preventivo*) are debtor-in-possession procedures supervised by a court administrator (*commissario giudiziale*) and carried out under the control of the designated judge from the place where the company has its center of main interest. Creditors have to vote on a turnaround plan prepared by the debtor with the help of some legal advisers.

Pre-insolvency compositions are regulated by articles 84 to 120 of the CCII, which has significantly changed the law in this area. Pursuant to article 84 of the CCII, a pre-insolvency composition can have several goals, including to liquidate the company's assets (*concordato preventivo liquidatorio*), or rescue the company or its business (*concordato preventivo con continuità aziendale*). It is essential that, irrespective of the goal pursued by the debtor, creditors are paid more than in a liquidation procedure. A third type of pre-insolvency composition known as *concordato in bianco*, is characterised by an incomplete petition for the commencement of the procedure, followed by the submission of the documents required by the law within the deadline provided by the competent court.

Pre-insolvency composition is only available to companies that can file for liquidation or forced administrative liquidation. Pre-insolvency composition can be filed by companies that are in a situation of crisis or insolvency.

A situation of crisis is not a state of insolvency.[566] "Crisis" is described as a situation of economic and financial distress that can lead to cash-flow insolvency in the ensuing 12 months. The existence of this condition has to be demonstrated when the company is first admitted to the procedure. A situation of crisis is experienced by companies in dire financial conditions or in a situation of economic distress if they cannot turn around their business by relying on contractual out-of-court remedies. It must be demonstrated that the situation of crisis is likely to lead to a

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[563] *Idem*, art 64-*ter*.
[564] *Idem*, art 64-*quarter*.
[565] *Idem*, art 64-*quarter*(5).
[566] For a distinction, see CCII, art 2(1)(a) for "crisis" and art 2(1)(b) for "insolvency".

condition of insolvency if not properly and timely addressed. "Insolvency" is the situation in which the debtor is not able to meet their obligations on a day-to-day basis, and that is made apparent to third parties by behaviours such as missed or delayed payments to the company's creditors.

In a *concordato preventivo con continuità aziendale*, the debtor either uses the proceeds arising from the continued activity of the company to implement the plan and pay part of the money owed to their creditors, or sells the business to a third party.[567] This solution is also available to debtors which are insolvent at the time of filing. The plan may suggest the continuation of the company's activity by the old management and shareholders (rescue of the company), or the sale of its business to a different enterprise (rescue of the business). Rescue of the business by means of pre-insolvency composition is only possible if the new buyer plans to hire at least half of the workers of the old company.

The *concordato liquidatorio* is only possible where more resources than the mere assets of the debtor are made available for the benefit of the creditors, and whether return to creditors is at least 10% higher than a traditional liquidation procedure.[568] In any case, unsecured creditors shall see a return no lower than 20 cent per euro. In other words, debtors cannot resort to a debtor-in-possession liquidation, unless more money is made available for the benefit of the creditors. In case of such pre-insolvency composition, the competent court will appoint one or more liquidators, as well as a creditors' committee, to assist the debtor in winding up the company and its business.[569]

Other noteworthy features of pre-insolvency composition proceedings are:

- all third-party claims arising from both ordinary and extraordinary activities performed by the debtor after it has been admitted to a pre-insolvency composition are considered as "preferential claims" (*crediti prededucibili*). These claims will be paid in priority over any other claim (except for the expenses of the procedure) in the event of a subsequent liquidation of the debtor;

- the unenforceability of certain corporate law provisions relating to: (i) the reduction of share capital under the minimum threshold required by law as a result of losses, and (ii) the mandatory winding-up of the company in the case of a reduction of share capital under the minimum threshold required by law;[570]

- the possibility to include tax settlements for the partial or deferred payment of certain overdue taxes;[571] and

- the more limited powers recognised to courts and insolvency practitioners compared to corporate liquidation procedures. Courts only exercise supervisory powers in pre-insolvency

[567] *Idem*, art 84(3).
[568] *Idem*, art 84(4).
[569] *Idem*, art 112(5).
[570] *Idem*, art 89.
[571] *Idem*, art 88.

compositions. Court administrators do not run the company. They only have supervisory powers over the implementation of the plan. Courts administrators also have a duty to inform the creditors and the court of significant deviations from the original plan or when it is clear that the purposes of the procedure can no longer be achieved.

9.4.3.1 Procedure

In a traditional pre-insolvency composition, the company files together with the petition all the documents needed for the procedure, including the draft rescue or restructuring plan. Alternatively, the company can simply file a petition together with a request for a period of time to file the plan to be voted on by the creditors (*concordato in bianco*). In the case of a *concordato in bianco*, the petitioner only needs to file the balance sheets for the previous three years together with a detailed list of the creditors. The remaining documents (mainly, the plan to be voted on by the creditors) need to be filed in the following 30 to 60 days, which can be further extended by the court for a maximum of 60 days.

The procedure is commenced upon a decree from the competent court. The opening of the procedure determines an automatic stay of executory actions against the debtor (except for a petition for a *concordato in bianco*). However, debtors can submit an injunction for an automatic stay at the time they submit petitions for a *concordato in bianco*. The stay takes effect on the date on which the petition is published in the Companies Register, and it remains in force until the date of final sanctioning (*omologazione*) of the pre-insolvency composition by the court. During this time, pre-existing creditors cannot secure their pre-petition claims (unless so authorised by the court). The mortgages registered within 90 days preceding the date on which the petition for the pre-insolvency composition is published in the Companies Register are ineffective against pre-existing creditors.

The petition is based on a plan submitted at the time of the filing (or, in the case of a *concordato in bianco,* at a later stage). The plan may include a restructuring of existing debts and credits, the sale of all or some parts of the business to third par- ties, the division of creditors into classes and differential treatments between classes of creditors.[572]

The petition is approved if the court is satisfied that there are no irregularities, and that the proposed plan can be implemented by the debtor. Upon the opening of the procedure, the court appoints an independent administrator (*commissario giudiziale*) to supervise the implementation of the plan (if it is approved by the creditors).[573]

The debtor retains the control of the company for the whole duration of the procedure (debtor-in-possession procedure).[574] However, certain acts and transactions outside of the ordinary course of business must be authorised in advance by the designated judge.[575] Additionally, their

[572] *Idem*, art 87.
[573] *Idem*, art 92.
[574] *Idem*, art 94(1).
[575] *Idem*, art 94(2).

actions are subject to the control and supervision of a judicial commissioner (*commissario giudiziale*), who should also tasked to help creditors in formulating alternative plans.[576]

Executory contracts (that is, contracts that are not fully executed at the time of the opening of the procedure) continue unaffected during pre-insolvency compositions, and any agreement to the contrary (for instance, *ipso facto* or termination clauses) is ineffective.[577] However, the debtor can ask for these contracts to be suspended if they are no longer in the interest of the company in light of the proposed plan, or if their continuation represents an obstacle to the approval and implementation of the plan. These contracts can also be waived in the same circumstances, provided that the debtor submits the plan to the court. The petitions to suspend or waive an executory contract can be opposed by the performing party. Finally, the debtor can be authorized to pay pre-petition claims in pre-insolvency compositions aimed at rescuing the company or its business, if the payment of these goods or services is critical for the continuation of the debtor's business and would ensure a higher return to creditors as a whole.[578]

After having been sent the plan and other necessary documentation by the judicial commissioner,[579] the creditors need to vote electronically on the plan.[580] Silence is no longer considered as a mechanism to express assent to the proposal. The plan can foresee a differential treatment for the creditors, as well as their division in different classes. The division of creditors into different classes is mandatory in pre-insolvency compositions aimed at rescuing the company or its business.[581]

The court administrator has to prepare a report to be submitted to the creditors and the court at least 45 days before the vote on the plan. This report must include evidence on the financial condition of the debtor, as well as their conduct and the feasibility of the plan. At least 15 days before the vote, the court administrator must send a revised and final plan, which can be subject to criticism, suggestions and counter-proposals by any interested parties in the five following days. The revised plan can also foresee a lower return for the creditors, provided that the general conditions for the admission to the procedure continue to be met. The final report with comments on alternative proposals and remarks needs to be submitted five days before the creditors' vote. Alternative plans can only be submitted by creditors representing at least 10% of the debt, and no later than 30 days before the date of the creditor's vote.[582]

There is no need for the privileged creditors to be paid in full, but privileged creditors need to receive the liquidation value of the secured or privileged assets.[583] As mentioned above, special rules apply to tax claims, which can be partially waived or paid over a longer period of time if

[576] *Idem*, art 92(3).
[577] *Idem*, arts 94-*bis* and 97(1). Article 94-*bis* represents the direct implementation under Italian law of the European rules on the treatment of executory contracts in insolvency.
[578] *Idem*, arts 100-102.
[579] *Idem*, art 104
[580] *Idem*, art 107.
[581] *Idem*, art 85.
[582] *Idem*, art 90.
[583] *Idem*, art 84(5).

certain conditions are met.[584] The competent court can also cram-down the dissent of the tax agency.[585]

The plan[586] is approved if the creditors representing the majority of debt vote in favour of it. If the majority of debt is owned by one creditor, the plan is approved only if the majority of creditors vote in favour of it. If creditors are split in different classes, the plan is approved if most of the classes have voted in favour of the plan.[587] In case of a *concordato preventivo con continuità aziendale*, where not all classes have voted in favour of the plan, a court can sanction it if the following conditions are met:

(a) creditors will receive at least the liquidation value of their claims (absolute priority rule);

(b) if creditors will receive more than the liquidation value, dissenting creditors shall be treated as well as equally-ranking creditors and better than lower-ranking creditors (relative priority rule);[588]

(c) no creditor gets more than what they originally claimed against the debtor; and

(d) the plan has been approved by privileged or impaired classes of creditors.

If more than one plan is admitted to the vote, the plan which received the most votes is approved. If the plan proposed by the debtor has obtained the same majority as the plan proposed by one or more creditors, the plan proposed by the debtor is approved.[589] Only impaired creditors (those that are not fully paid under the proposed plan) can vote on the plan(s).[590] Close relatives are also excluded from the vote, irrespective of whether their claims are impaired by the plan.[591]

The creditors' decision is then sanctioned (*omologata*) by an order of the competent court. This order (which shall be issued within 12 months from the submission of the petition) closes the pre-insolvency composition procedure.[592] In the same hearing, the court will have the power to decide on petitions from dissenting creditors, provided that they represent at least 20% of the dissenting class. If the plan is not approved by the creditors, the court has to convert the procedure into liquidation.[593]

The approved plan is binding on all creditors. These creditors may execute their claims against co-debtors.[594] If the plan aims at liquidating the debtor's assets, the competent court appoints

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[584] *Idem*, art 88.
[585] *Idem*, art 88(2-*bis*).
[586] For a detailed outline of the content of the plan, see CCII, art 87.
[587] *Idem*, art 109(1).
[588] These changes were introduced to better comply with art 11(2) of the Preventive Restructuring Directive.
[589] CCII, art 109(2).
[590] *Idem*, art 109(3).
[591] *Idem*, art 109(6).
[592] *Idem*, art 113.
[593] *Idem*, art 111.
[594] *Idem*, art 117(1).

one or more liquidators with the same order that sanctions the creditors' vote.[595] The liquidation procedure will follow the rules applicable to general liquidations. If the plan aims at rescuing the company or its business, it is executed by the debtor under the supervision of the judicial commissioner. Such commissioner will have to write regular six-monthly reports to the competent court, which will then share them with the interested parties.[596] If there are delays in the implementation of the plan, the competent court may authorise the judicial commissioner to take the necessary steps to protect the rights of the creditors.

The plan may be revoked upon petition of the creditors or the court administrator for serious breaches of its terms, and until one year after the last act under the plan should have been effected. In case of fraudulent increase of the debt or in case the existing management had fraudulently taken money from the debtor before or during the pre-insolvency composition, the court-appointed administrator and the creditors can petition the court to have the plan voided.[597]

9.4.3.2 Group of companies

Pursuant to article 284 of the CCII, companies having their center of main interests in Italy and which belong to the same group, can submit a joint pre-insolvency composition, a joint debt restructuring agreement petition or linked pre-insolvency composition plans. In any case, there is no substantive consolidation of these procedures, meaning that the assets of the debtor and the creditors' claims do remain separate. These procedures are available only if they appear in the best interest of the debtors' creditors. The joint petition needs to quantify the expected benefit for them.

10. USEFUL INFORMATION

There are not many websites that provide information in English about Italian insolvency law. However, some material can be found on the following websites:

- *OCI - Osservatorio sulle Crisi d'Impresa* for debates on recent proposals for reform and case law (https://www.osservatorio-oci.org/);

- *Rivista Orizzonti del Diritto Commerciale* for journal articles in the area of corporate insolvency law (http://rivistaodc.eu/edizioni/2018/2/);

- *Il Fallimentarista* (http://ilfallimentarista.it/), *il Quotidiano Giuridico* (https://www.quotidianogiuridico.it/commerciale/crisi-d-impresa-e-procedura-oncorsuali) and *Il Caso* (http://www.ilcaso.it/dirittofallimentare.php) for journal articles and case comments on all areas of insolvency law; and

- *Cerved* (https://know.cerved.com/uncategorized/fallimenti-procedure-chiusure-impresa/) for statistical data on Italian insolvency procedures.

[595] *Idem*, art 114.
[596] *Idem*, art 118.
[597] *Idem*, art 119.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Outline the main events and laws that have shaped the evolution of Italian insolvency law up until the period of reforms triggered by legislative decree no. 35/2005 (which should be included in the list) and briefly describe their relevance.

Commentary and Feedback on Self-Assessment Exercise 1

- Medieval times – Introduction of rules that governed the insolvency of entrepreneurs and companies only, no personal bankruptcy system;
- XVI-XVII century – People and not simply companies are subject to bankruptcy rules;
- XIX century – Enactment of French-influenced laws resulted in a debtor-friendly approach to insolvency for both corporate entities and individuals. However, procedures were punitive and mainly in the hands of creditors;
- Law no 197/1903 – Changes to corporate liquidation and pre-insolvency composition influenced by a liberal legislator, little involvement of the state;
- Royal decree no 267/1942 – Corporatists view of the economy and the state meant that management of the crisis could no longer be left in the hands of the creditors and debtors. The state had to intervene by empowering its judicial arm to uncover fraudulent and abusive practices;
- Legislative decree 35/2005 – Marked the commencement of a period in which the legislator favoured rescue-oriented solutions such as pre-insolvency compositions to deal with corporate distress.

Self-Assessment Exercise 2

Italian insolvency law provides for a number of exceptions to the principle of equality of creditors (*par condicio creditorum*). It also recognises the enforceability of real securities and personal guarantees in insolvency cases. Outline at least three securities and guarantees recognised by the law and how enforcement differs between insolvency and non-insolvency cases.

Commentary and Feedback on Self-Assessment Exercise 2

Securities:
- Mortgages;
- Consensual liens over registered movable properties, such as vehicles, aircrafts and ships;
- Consensual pledges, usually over equity stock, debt instruments and government bonds, as well as on receivables and bank accounts;

- Securitisation transactions.

Liens can be classified as:
- *Privilegi generali* (general liens) over movable goods belonging to the debtor;
- *Privilegi speciali* (special liens) over both movable and immovable goods belonging to the debtor;
- *Privilegi speciali* (special liens) under article 46 of legislative decree 385/1993.

Guarantees are usually in the form of sureties.

Enforcement:
- Outside insolvency, enforcement can be initiated only if the debt is due and / or the creditor has requested payment and has given proper notice to the debtor. Upon expiry of this notice, the creditors can enforce their claims through court proceedings. No court proceeding is needed to obtain special liens on bank accounts;
- In insolvency, creditors can still seize the assets subject to consensual liens, but the office holder has the power to initiate avoidance / claw-back actions. Enforcement over pledges can occur only after the existence and validity of the claim and of the pledge has been recognised by the court and the competent judge has authorised the sale of the pledged asset. Special rules apply to securities over financial collaterals. Remember that in the case of personal guarantees, the guarantor has the right to claim back what he paid to the debtor (difference between *surrogazione* and *regresso*).

Self-Assessment Exercise 3

Question 1

Recent years have seen a series of reforms in the areas of both corporate insolvency and personal bankruptcy in an attempt to move away from a fragmented, piecemeal approach to failure. These attempts have been largely unsuccessful.

Critically discuss this statement by making reference to statutes, case law and academic papers.

Question 2

Bankruptcy procedures are available only to a limited set of debtors that meet specific eligibility requirements clearly spelled out in the law.

Do you agree with this statement? In answering this question, please make reference to specific examples and to the enforceable statutes.

Question 3

In May 2015, *Navigazione Mediterranea Srl*, a shipping company based in Naples, paid a *pro forma* of EUR 1,5 million to one of its customers, *Container Rossi Sarl*, by means of one cash instalment of EUR 500,000 from an overdraft account and the transfer of some real estate properties worth EUR 1,2 million. The invoice was only created on 16 September 2016, as the employee responsible for issuing the invoice went on maternity leave and her colleagues did not look into the case until *Container Rossi* was required to file a proof of claim in *Navigazione Mediterranea*'s liquidation procedure.

Navigazione Mediterranea Srl consistently paid *Container Rossi Sarl* ahead of the issuance of any invoice, as there was a tacit agreement between the parties that *Container Rossi* would have provided new goods to carry to *Navigazione Mediterranea* within 60 days from the payment of the *pro forma*. The failure to provide these new goods caused *Navigazione Mediterranea* to enter into a situation of financial difficulty and to file for corporate liquidation on 17 July 2016. During the insolvency procedure, it was established that the directors had culpably delayed the filing, as the company was insolvent as early as March 2015.

Describe the remedies available to the creditors and the insolvency practitioner to challenge the validity of the transaction described above.

Commentary and Feedback on Self-Assessment Exercise 3

Question 1

It could be argued that the *legge fallimentare* (royal decree no. 267/1942) represented a unified approach to law drafting and that it was only in recent years that new rules were introduced for specific sectors of the economy (for example, banks and insurance companies) and non-traders. However, some of the rules applicable to insolvency cases have always been found in other statutes, such as the Civil and Criminal Codes.

The real issue here is not to determine whether the rules are included in one or more statutes. The issue is to discuss whether the statutes enacted in recent years adopt a uniform approach to corporate and personal failure. Candidates should highlight that reforms:

- have not been organic, as they addressed the critical issues that emerged from time to time with no long-term vision;
- did not follow a similar drafting approach, with some laws adopting a tailored approach (that is, focus on specific companies and sectors of the economy) and others questioning or reforming the overarching goals and principles underpinning the system;

- share some characteristics, such as the goals to simplify and enhance speed of completion for existing procedures; restrict their use to entrepreneurs and companies in significant crisis; promote rescue over liquidation; facilitate debt restructuring and financial support in insolvency procedures; and give a more active role to debtors and creditors in the management of crises.

Question 2

The eligibility requirement to file for any bankruptcy procedures regulated under Italian insolvency law is set out by article 1 *legge fallimentare* and it is seemingly broad and unambiguous: all debtors that cannot file for any of the other (corporate) insolvency procedures can file for bankruptcy one.

This choice is in itself problematic, as some of the bankruptcy procedures (for example, consumers' plans) are not available to discharge debts made while carrying out business activities. Nevertheless, it may be problematic to distinguish the personal or commercial nature of each debt, particularly for certain categories of debtors (for example, professionals).

There is a lack of clarity with reference to certain categories of applicants (for example, entrepreneurs who have debts for less than EUR 30,000 and public bodies which cannot file for alternative corporate procedures), but statutes and case law have dispelled doubts with reference to other players (unlimited liability shareholders and farmers; see law 221/2012).

The choice to include certain debtors (for example, innovative start-ups) among those entities subject to bankruptcy procedures is as questionable as the different eligibility requirements for each of the three formal bankruptcy procedures. The legislator should probably have offered only one general procedure for all personal bankruptcies, with the possibility of introducing specific changes in light of the circumstances of each case.

Finally, it is not clear why the legislator suggested that applicants should be in a position of over-indebtedness, but in reality described this situation as a condition of cash-flow or balance-sheet insolvency. Should the debtor be in the same distressed condition as a corporate entity to file for personal bankruptcy? Do situations of temporary difficulty in fulfilling payments satisfy the objective eligibility requirement set out by article 6(2)(a) of law no 3/2012?

In general, it can be said that the statement in question is accurate, but there are categories of debtors for which more clarity is needed and some legislative choices in the identification of the entities subject to bankruptcy procedures that are questionable due to their lack of any apparent theoretical justification.

Question 3

It should first be observed that the only person who has *locus standi* in the present situation is the liquidator. The creditors cannot commence any action against the directors of *Navigazione Mediterranea Srl*.

It could be argued that this represents a challenge to the repayment of a debt not due at the time of the opening of the liquidation procedure. If that was the case, the liquidator would be within the two-year time limit to file the claim. Further requirements are that avoidance actions need to be commenced within three years from the opening of the corporate liquidation procedure or five years from the act or transaction to be clawed back, whichever is earlier.

However, it is stated in the problem that *Navigazione Mediterranea* used to pay *Container Rossi* upon issuance of a *pro forma*. As a result, courts are likely to consider this as a transaction that occurred in the ordinary course of business. The liquidator is no longer within the one-year time limit to commence the action and the circumstance that the debtor was insolvent at the time of the payment is irrelevant for the successful outcome of an avoidance action in insolvency. At the same time, the fact that there has been an overpayment may suggest that this is not a transaction in the ordinary course of business.

It might be argued that parties can still rely on the remedy of the *actio Pauliana*. However, while the claimants could prove the first two requirements for this action (*eventus damni* and *Scientia fraudis aut damni*), the last one (participation *fraudis aut damni tertium*) cannot be established on the basis of the information provided in the example.

It is likely that neither the creditors nor the liquidator have any remedy to challenge the validity of the transaction described in this problem.

Self-Assessment Exercise 4

At international and European level, universalist visions of insolvency law have influenced the evolution of cross-border insolvency rules and co-operation. This situation contrasts with the territorialist approach favoured by the Italian legislator in the 1940s. By making reference to case law and statutes, assess whether Italian courts have struck a proper balance between the universalist and territorialist approaches.

Commentary and Feedback on Self-Assessment Exercise 4

Italian law clearly adopts a territorialist approach to the handling of cross-border insolvency cases. Article 9 *legge fallimentare* states that Italian first instance courts have the exclusive power to approve a petition to open formal insolvency proceedings against those companies that operate in their jurisdiction. Additionally, they have the power to open formal insolvency proceedings against those companies that have transferred their centre of main interest (COMI) to a different country in the year before the filing. Finally, Italian courts enjoy wide powers to make orders (including the opening of insolvency proceedings) against Italian-based secondary establishments of foreign companies.

These powers are not without limits and a proper answer would discuss the relevance and extent of the exceptions recognised under the current law and cases.

One of the key elements of the answer is to identify the rationale adopted by the courts dealing with cross-border insolvency cases. It could be useful to extensively analyse the decision of the Supreme Court in case no 15880/2011. While the Supreme Court extended the competence of the Italian judges beyond what was reasonable to expect from the letter of the law, it did not do so by embracing a territorialist mind-frame. The Supreme Court held that Italian courts should refer the procedure to foreign authorities only in those cases where the behaviour of the parties suggests a strategic use of insolvency laws capable of harming the debtor's creditors. On all other occasions, Italian courts should refrain from intervening in the insolvency case, thus adopting what is commonly known as a modified universalist approach.

The key element in any good answer is to show that the Italian legislator's preference for territorialist views is mitigated by case law and the need to abide to well-established trends at international and European level. Italian law may look territorialist, but in practice it is not.

Self-Assessment Exercise 5

Describe the procedure needed to recognise and enforce a foreign judgment in the area of insolvency law issued by non-EU states in Italy. Comment on both the judicial and academic debate over the automatic enforceability of these judgments in Italy.

Commentary and Feedback on Self-Assessment Exercise 5

Procedure:

Article 64 of law 218/1995 determines the automatic recognition of any foreign judgments, which meet the criteria originally established for the *exequatur* procedure. Recognition could only be denied if the effects of such recognition would be manifestly in contrast with Italy's public policy (article 64(g)) and / or the foreign authority had no competence over the subject matter according to Italian private international law principles (article 64(a)). Article 67 of the same law outlines a simplified procedure for the enforcement of the foreign judgment, should the Italian party not conform to the foreign judgment.

Universalist view:

Vellani (1996); De Santis (2010); Gottwald (1999); Carmelino (2015); Supreme Court (2001); Article 64 of law 218/1995 applies to insolvency judgments issued by courts outside the European Union.

Territorialist view:

- Carbone (1998); Campeis and De Pauli (1998); Trib Milano (2014);
- Article 64 of law 218/1995 does not apply to foreign insolvency orders as international and bilateral conventions usually exclude from their remit insolvency law issues (and judgments).

Comment:

- Highlight the legal consequences arising from each of the proposed approaches and discuss why some commentators and courts are reluctant to give automatic recognition to foreign insolvency judgments;
- Discuss the role and powers of the courts under the Italian insolvency system and highlight the consequences that automatic recognition would have on their supervisory and directory powers;
- Is the territorialist approach an example of municipal and localistic enforcement of Italian laws or have similar issues emerged in other countries?

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