INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 6D Guidance Text

Italy

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CONTENTS

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INSOL International

6-7 Queen Street, London, EC4N 1SP, UK
Tel: +44 (0)20 7248 3333
Fax: +44 (0)20 7248 3384

www.insol.org

Module Author

Dr Eugenio Vaccari
Senior Lecturer in Law
Department of Law and Criminology
School of Law and Social Sciences
Royal Holloway, University of London
United Kingdom

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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 2024**. 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 2024 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 / Liquidator 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* *Guidice Delegato* *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*	Security Mortgage Delegated Judge No direct translation Forced administrative liquidation Personal controlled liquidation Loan ▪ Mortgage loan Pledge Turnaround plan Consumer's plan Consumer's debt restructuring plan Preference

Italian	English
Privilegio speciale *Privilegio generale*	Special lien General lien
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; organised crime; corruption; low natality rate and ageing population; more frequent and intense natural disasters caused by man-made climate change; and finally economic disparities between southern Italy and the more prosperous north. However, despite all these issues, Italy is still a prosperous country. Besides being one of the top tourist destinations in the world, the country does have a comparatively low crime rate; good transport links between different areas of the country and in the main cities; a strong economy and a stable political and financial system.

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

[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/.

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 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 Covid-19 pandemic.[2] According to the latest statistics from Eurostat, this ratio has decreased to 144.4% at the end of 2021.[3] 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.

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 Covid-19 pandemic hit.[4]

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

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

3 See here: https://ec.europa.eu/eurostat/documents/2995521/16349859/2-21042023-BP-EN.pdf/282de4e3-e6f2-0571-a5da-6eb8391788f5#:~:text=The%20highest%20ratios%20of%20government,%25)%20and%20Luxembourg%20(24.6%25).

4 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.

beginning of 2020 due to the Covid-19 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 Covid-19 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.[5] This resulted in snap elections.

One of Draghi's key efforts has been the completion of a National Recovery and Resilience Plan,[6] 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).[7] The plan was later approved on 22 June 2021 and it has to be completed by 2026.[8]

Following the September 2022 snap elections, a new right-wing coalition government led by Giorgia Meloni was appointed. Giorgia Meloni leads a coalition with other right-wing and centre-right parties, including Lega (led by Matteo Salvini) and Forza Italia (led by former PM Silvio Berlusconi). Since its appointment, the government has adopted several policies that restricted the rights of minority ethnic and members of the LGBTQ+ community. The government also tried to reduce immigration and supported policies for the redistribution of asylum seekers and migrants across all of the EU Member States. There have been ongoing issues in the adoption and implementation of the National Recovery and Resilience Plan, to the point that it is not clear if the European Union will pay entirely the money allocated to Italy under such plan. However, the government has adopted some measures that effectively limited inflation in the country and promoted economic growth, to the point that the Italian economic

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5 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.

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

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

8 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.

is growing at a faster pace than all of its key European neighbours (France, Germany and the United Kingdom).

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

Italian insolvency law used to be governed by the *legge fallimentare* (Royal decree 267/1942). This law has been amended several times in recent years, including by means of legislative decrees[9] 35/2005, 5/2006 and 169/2007. As a result, its rules and principles have significantly evolved and were 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.

The *legge fallimentare* has been superseded by the *Codice della Crisi d'Impresa e dell'Insolvenza* (CCII), which applies to all procedures commenced on or after 15 July 2022. 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). For reasons of space, this guidance text covers only the rules applicable to proceedings commended on or after 15 July 2022.

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 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.[10]

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[9] 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.

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

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").[11] 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).[12]

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.[13] 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 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

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

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

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

movements throughout Europe. The fascist ideology, which informed and heavily influenced laws enacted after the end of October 1922,[14] 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.[15] Finally, a brand new Insolvency Code was enacted between 2017 and 2022. The rules included in the CCII apply to all procedures commenced on or after 15 July 2022.

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).[16] Any changes in the registered office that occur in the year before the filing cannot affect the court's jurisdiction,[17] unless the criteria outlined by the European Court of Justice in the case C-396/09 *Interedil* are met.[18] 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.[19] On the contrary, if the transfer occurred within the one-year timeframe and

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14 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.

15 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.

16 CCII, art 27(2). 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.

17 CCII, art 28.

18 C Cass, no 7470/2017.

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

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.[20] These courts are the same courts that are entitled to enforce any claims against the debtor when solvent.

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.[21]

For groups of companies of relevant size[22] as well as for companies in extraordinary administration,[23] the jurisdiction is allocated to specialised sections of the *tribunale delle imprese* (enterprise or commercial courts).[24] These courts are identified pursuant to article 4, legislative decree 168/2003. Reference is still made to the place where the large company or group of companies have their centre of main interests.

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, 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.[25]

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 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

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[20] 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.

[21] CCII, art 31(1). 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.

[22] For the definition of "*gruppi di imprese di rilevante dimensione*", see CCII, art 2(i). To identify these groups of companies, the legislator did not provide an autonomous definition. The legislator referred to Directive (EU) 2013/34 of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings OJ L 182/2023. The Italian legislator used the word "relevant" because it wanted to include in the definition both medium sized and large sized groups of companies. For the most up-to-date limits to qualify as a medium or large size group of companies, please check art 3(6) and 3(7) of the Directive.

[23] This procedure is regulated by legislative decree 270/1999 and law decree 347/2003.

[24] CCII, art 27(1).

[25] Legislative decree no 168/2003.

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*).[26] 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*).[27] 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,[28] those that cannot be subject to foreclosure[29] and those listed in article 514 of the Civil Procedure Code.

According to article 51, Italian Private International Law,[30] security interests over assets are governed by the law of the jurisdiction in which the relevant assets are located.

5.1 Real securities

5.1.1 Generally

The most common form of consensual security over real estate is the **mortgage**.[31] 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**,[32] 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.

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26 Civil Code, art 822(1).
27 *Idem*, art 822(2).
28 *Idem*, art 167.
29 Civil Procedure Code, art 545.
30 Law no 218/1995.
31 Civil Code, art 2808 *et seq*.
32 *Idem*, art 2800 *et seq*.

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.[33] 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,[34] 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.[35]

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",[36] 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.

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[33] *Idem*, art 2800.

[34] 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.

[35] See below in para 5.3 of this text.

[36] Civil Code, art 1851.

Examples of general liens include the claims of: hoteliers over goods brought into hotels by customers;[37] carriers, over transported goods and custodians, over deposited goods;[38] and dealers over the cars, trucks and machinery sold to debtors.[39] Examples of special liens include the refund of deposits paid in preliminary contracts for the purchase of a real estate.[40]

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.[41]

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);

- 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.[42] 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:

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37 *Idem*, art 2760.
38 *Idem*, art 2761.
39 *Idem*, art 2762.
40 *Idem*, art 2775-*bis*.
41 *Idem*, art 2747(2).
42 See also para 5.6 of this text.

- 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*.[43]

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 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:

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[43] C Cass, SS UU no 12476/2020. The same principles were outlined in an earlier judgment: C Cass, no 30416/2018.

- 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.[44] One specific peculiarity of sureties is that they are enforceable only if the debtor has no knowledge of their existence.[45] 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 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).[46]

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.[47] These are further expressions of the principle of freedom of contract.[48] 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.[49]

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[44] Civil Code, art 1936.
[45] *Idem*, art 1936(2).
[46] *Idem*, art 1939.
[47] *Idem*, art 1936.
[48] *Idem*, art 1322.
[49] C Cass, no 15108/2013.

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.[50] The creditor has up to six months after the moment in which the obligations became due, to collect his guarantee against the guarantor.[51] 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.[52] The very same template prepared by the Italian Associations of National Banks (*Associazione Bancaria Italiana*) was found to be in breach of European rules.[53] 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 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.[54]

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[50] Law 154/1992, art. 10.
[51] Civil Code, art 1957(1).
[52] C Cass, SS UU no 29810/2017.
[53] *Idem*.
[54] Civil Code, art 2740.

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.[55] This right is called:

- *surrogazione* if a co-debtor pays on behalf of another debtor;[56]
- *regresso* if a third-party, personal guarantor pays on behalf of a debtor.[57]

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.[58]

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.

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[55] *Idem*, arts 1203 and 1949 *et seq*.
[56] *Idem*, art 1203(3).
[57] *Idem*, art 1950.
[58] C Cass, 17 January 2008, no 903 in 8(2008) *Il Fall* 920.

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.[59] 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 (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.[60]

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59 Civil Code, art 2740(2).
60 C Cass, SS UU 28 January 2021, no 2061.

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 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 for the case of subordination of debt, 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.

There are some goods that do not form part of the insolvent estate. Besides those that belong to the state, article 146 of the Code states that the following goods cannot become part of the insolvent estate:

(a) assets and rights of a strictly personal nature;

(b) alimonies, child support allowances, pensions, salaries and what the debtor earns with their activity, the latter three within the limits of what is necessary for the debtor and their family's maintenance;

(c) the fruits deriving from the legal usufruct on the assets of the children, the assets established in the patrimonial fund and the fruits of them, except as provided for by article 170 of the Civil Code; and

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

All other goods can become part of the insolvent estate and sold for the benefit of the creditors. Once they have been sold, the officeholder will distribute the proceeds (or the goods subject to a specific claim) to the creditors pursuant to the order of distribution is outlined by article 221 of the Code. If no distribution will take place (for example, for restructuring procedures), the debtor will still have to demonstrate that the creditors will get a higher return than in liquidation.

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.

Post-adjudication creditors are entitled to the full payment of capital, interests and expenses. However, the assets that are subject to a real security cannot be used for the payment of post-adjudication claims, except if there is equity left after having paid the secured creditor.[61]

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[61] CCII, art 222.

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. Secured creditors are entitled to interests and expenses arising from their claims. Liquidators need to set up special accounts for the payment of these claims.[62]

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;[63] money owed to the state for some taxes, including VAT;[64] money owed by the employer on behalf of their employees;[65] and judicial expenses.[66]

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. 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.

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[62] *Idem*, art 223.
[63] Civil Code, art 2751.
[64] *Idem*, art 2752.
[65] *Idem*, art 2753-54.
[66] *Idem*, art 2777.

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

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 *Codice della Crisi d'Impresa e dell'Insolvenza*, legislative decree 14/2019, as amended over the years. The rules that govern personal and consumer bankruptcy are, on the other hand, included in law 3/2012.[67]

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).[68]

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).[69]

The creation of the European single market in 1993[70] (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

[67] For a general outline of the laws applicable to corporate insolvencies and personal bankruptcies in Italy pre-2022 reforms, 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). For books that discuss the post-2022 law, see: A Nigro and D Vattermoli, *Diritto della Crisi delle Imprese: Le Procedure Concorsuali* (Il Mulino 2020) (not including the most recent changes to the law); G D'Attorre, *Manuale di Diritto della Crisi e dell'Insolvenza* (Giappichelli Ed. 2022); L Lambertini and F Platania (eds), *Il Diritto Commerciale della Crisi: Profili Societari e Finanziari* (Giuffrè Ed. 2023).

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

[69] Law no 95/1979.

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

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:

- 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 1980s. 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;[71] 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.[72] 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.[73]

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

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71 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.

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

73 See para 6.5.1.1 of this text regarding changes to the pre-insolvency composition procedure.

1942. Law 155/2017 was published in the *Gazzetta Ufficiale* on 30 October 2017[74] and entered into force on 14 November 2017.[75]

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.[76] 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,[77] the recommendation on a new approach to business failure and insolvency[78] (which later became binding with the enactment of the enactment of the European Preventive Restructuring Directive)[79] and more recent European documents.[80] More importantly for the purposes of this module, the Commission drew inspiration from the principles underpinning the UNCITRAL Model Law on Cross-Border Insolvency[81] to establish simplified procedures for the recognition of qualifying foreign insolvency proceedings.

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 legislative decree 14/2019. These reforms should have entered into force on 15 August 2020. However, the impact of the Covid-19 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.[82] The new Code only applies to formal insolvency procedures opened on or after 15 July 2022. Further

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74 Year 158, No 254.

75 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).

76 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).

77 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.

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

79 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 172/2019.

80 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.

81 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), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf.

82 Legislative Decree 83/2022.

changes have been introduced by laws 14/2023 and 41/2023, as well as by legislative decree 36/2023.

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.[83] To promote the prompt handling of these situations, the CCII introduced alert mechanisms and greatly simplified the use of restructuring agreements.[84] 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*)[85] which, under certain conditions,[86] 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.[87] 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 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.

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[83] CCII, art 2.
[84] *Idem*, art 57 *et seq*.
[85] *Idem*, art 61 *et seq*.
[86] *Idem*, art 61(2).
[87] *Idem*, art 60.

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,[88] 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.[89]

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 Covid-19 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, 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.

[88] *Idem*, arts 78 and 94.
[89] *Idem*, art 8.

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 Covid-19 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 Covid-19 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 six 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.

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 and any other entity that cannot be subject to corporate liquidation (personal controlled liquidation);

- personal / consumer rescue procedures (consumer's debt restructuring agreements and minor compositions);

- corporate rescue procedures in the form of:

- *composizione negoziata della crisi* (negotiated agreements) and *concordato semplificato* (simplified composition), regulated by articles 12 to 25-*speties* 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; and

- special procedures in the form of *liquidazione coatta amministrativa* (forced administrative liquidaiton) and *amministrazione straordinaria* (extraordinary administration).

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[90] 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 in recent years, including with the adoption of the new Code, shared 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.[91]

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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[90] 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.

[91] 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.[92] The principle of *par condicium creditorum* or equality of treatment among equally ranking creditors, as established in the Civil Code,[93] is rarely circumvented under Italian law,[94] 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 liquidators / 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 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.

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

93 Civil Code, art 2741(1).

94 Exceptions apply and not simply with reference to rescue-oriented procedures.

6.2 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:

(a) *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*;

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

(c) *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.[95] Members of the same family can carry out a joint procedure if they live together or if the debt has a common origin,[96] but the claims of each creditor remain separate.

6.2.1 Eligibility criteria

6.2.1.1 Who qualifies as a "debtor"

The procedures discussed in this section are available to over-indebted debtors as described pursuant to articles 65(1) and 2(1)(c) of the Code. The word "over-indebtedness" (*sovraindebitamento*) is synonym for either crisis[97] or insolvency.[98] Over-indebtedness is the situation of crisis or insolvency experienced by 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.

If the debtors form part of the same family, it is possible to open only one procedure. However, the appointed officeholder will have to keep the creditors' claims separate. There is no substantive consolidation of the claims against the debtors.

If an applicant carries on a business as an entrepreneur, it is necessary to determine, on a preliminary basis, whether such applicant meets the eligibility criteria for corporate insolvency procedures, as described in the next section. In the case of a positive answer (that is, should they not be a "minor enterprise"), these applicants will not be allowed to file for personal procedures.

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95 CCII, art 65(3).
96 *Idem*, art 66(1).
97 *Idem*, art 2(1)(a).
98 *Idem*, art 2(1)(b).

Under the previous formulation of the law, doubts had emerged with reference to specific categories of applicants. These are farmers and unlimited liability shareholders. As for farmers, the amendments introduced by law 221/2012 had extended to them the right to apply for these procedures. The new wording of article 2(1)(c) of the Code clarified any residual doubt. With reference to unlimited liability shareholders, article 256(1) of the Code extends to them the effect of an order for the opening of a formal insolvency procedure. However, because unlimited liability shareholders 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.[99] 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.

6.2.1.2 *Other eligibility criteria*

The previous law (law no 3/2012) used to include very restrictive subjective and objective criteria to have access to any of the procedures regulated herein. The new Code has drastically simplified the scenario.

With reference to consumer's debt restructuring agreements, article 69(1) of the Code only states that these are not available to debtors, who benefited from debts' discharge in the previous five years, more than twice, or if the over-indebtedness was caused by the debtor's gross negligence, bad faith or fraud.

Minor compositions are not available to consumers. They are only available to debtors who are carrying out an entrepreneurial or professional activity, and only if the composition will allow them to continue that activity.[100] In all other cases, minor compositions are only available if the debtor brings in additional resources that would result in a significantly higher (*apprezzabile*) return to creditors.[101]

Finally, the law does not allow for the opening of personal controlled liquidation procedures if the overall due and unpaid debt does not exceed EUR 50,000.[102] If the controlled liquidation petition is submitted by a creditor against an individual (consumer not exercising entrepreneurial or professional activity), the petition will be dismissed if the *organism* certifies that it is not possible to gather any assets and distribute proceeds to the debtor's creditors.[103]

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99 Court of Rimini, 10 February 2020 and 15 October 2020.
100 CCII, art 74(1).
101 *Idem*, art 74(2).
102 *Idem*, art 268(2).
103 *Idem*, art 268(3).

Still with reference to personal controlled liquidation, 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.[104]

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.

6.2.2 Consumer's debt restructuring agreements

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;[105] and / or

- payment of secured and preferential creditors, provided that they are paid the liquidation equivalent of their claims.[106]

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 filing, the last three tax return declarations and a statement of their income and how much they need to maintain themselves and their families.[107]

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.[108] Additionally, the opening of the procedure suspends the accrual of interests on the debtor's debts, except for secured or preferential creditors.[109]

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.[110] However, it also investigates whether some of the debtor's creditors provided loans or other funds without ensuring whether the debtor was

[104] Under the old *legge fallimentare*, these shareholders were only subject to corporate liquidation.
[105] CCII, art 67(1).
[106] *Idem*, art 67(4).
[107] *Idem*, art 67(2).
[108] *Idem*, art 67(5).
[109] *Idem*, art 68(5).
[110] *Idem*, art 68(2).

capable of repaying them, or if they took advantage of the financially distressed status of the debtor in providing these funds.[111]

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.[112]

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.[113] The creditors have up to 20 days from the notification of these documents to make comments.[114] 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.[115] Any temporary measure and prohibition of conducting extra-ordinary administration acts can be revoked where needed.[116]

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.[117] In sanctioning the plan, the court decides on any objections from the creditors. It is also possible for the court to refuse the sanctioning where it believes that it is not feasible, or where statutory provisions have not been complied with.[118]

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.[119] 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.[120]

6.2.3 *Minor composition*

As mentioned above, this procedure is available to professionals, small entrepreneurs, farmers and innovative start-ups.[121] It is also available to all joint debtors, whenever one of them is not a

[111] *Idem*, art 68(3).
[112] *Idem*, art 69(2).
[113] *Idem*, art 70(1).
[114] *Idem*, art 70(3).
[115] *Idem*, art 70(4).
[116] *Idem*, art 70(5).
[117] *Idem*, art 70(8).
[118] *Idem*, art 70(9)-(10).
[119] *Idem*, art 71(3).
[120] *Idem*, art 73(1).
[121] *Idem*, art 74(1).

consumer.[122] 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.[123]

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.[124]

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.[125] Even if the petition is submitted by a debtor, they have to be assisted by an *organismo*.[126] 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.[127] One of the advantages of this procedure is that the submission of a petition suspends the accrual of interests on existing debt, except if the claim is secured or privileged.[128]

Where the competent court believes that the petition is compliant with the law, it opens the procedure with an order that cannot be appealed.[129] 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.[130] 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.[131] 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.[132] In all other cases, the *organismo* is responsible for supervising the procedure.[133]

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[122] *Idem*, art 66(1).
[123] *Idem*, art 74(2).
[124] *Idem*, art 74(4).
[125] *Idem*, art 75(2).
[126] *Idem*, art 76.
[127] *Idem*, art 76(2).
[128] *Idem*, art 76(5).
[129] *Idem*, art 78(1).
[130] *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.
[131] *Idem*, art 78(2).
[132] *Idem*, art 78(2-*bis*).
[133] *Idem*, art 78(3).

The minor composition plan is approved if creditors representing the majority in value of the claims against the debtor vote in favour of it.[134] 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.[135] If the creditors are divided into classes, the plan needs to be approved by the majority of these classes.[136] 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.[137] 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.[138]

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.[139]

6.2.4 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.

6.2.4.1 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.

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134 *Idem*, art 79(1).
135 *Ibid*.
136 *Ibid*.
137 *Idem*, art 80(1)-(2).
138 *Idem*, art 80(3).
139 *Idem*, art 83.

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.[140]

6.2.4.2 *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 Code, 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,[141] 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.

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[140] *Idem*, art 271.
[141] *Idem*, art 270(6).

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.

Once the liquidator had executed the plan,[142] 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.

6.2.4.3 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.[143] Claims that came into existence during the procedure have a preferential status.

6.2.5 Treatment of contracts

Law 3/2012 included few provisions on the treatment of existing contracts. The lack of any direct reference to the provisions in the old *legge fallimentare* meant that if the contract did not fall within one of those covered by the special law, the parties in the bankruptcy procedure were free to determine the effects on existing contracts.

The situation is now different, as personal procedures are now regulated within the Code. As a result, the general rules outlined for the treatment of executory contracts in liquidation apply to personal controlled liquidation. *Vice versa*, the general rules applicable to restructuring procedures apply to consumer's debt restructuring agreements and minor compositions.

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 debt restructuring agreements and minor compositions) are modelled on the rules applicable to pre-insolvency compositions. *Vice versa*, the rules on claw back actions in liquidation also apply to controlled liquidation proceedings.

6.2.7 Assets

The general rules applicable to the assets available in restructuring and liquidation procedures also apply to these proceedings. Clearly, the rules on assets in liquidation apply to personal

[142] 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).
[143] CCII, art 277.

controlled liquidations. The rules on assets in restructuring proceedings (particularly on pre-insolvency composition) apply to consumer's debt restructuring agreements and minor compositions.

6.2.7.1 Moratorium

There is no automatic moratorium upon the opening of a consumer's debt restructuring agreement. However, when the competent court sanctions a restructuring plan validly voted by the creditors, the same court may order a moratorium on all individual executory actions that may detrimentally affect the successful execution of the plan.[144]

There is no automatic moratorium even upon the opening of a minor composition. However, the petitioning debtor can ask for such an order to be issued with the order opening the procedure.[145] There is an automatic moratorium on all individual executory actions against the debtor in case of a personal controlled liquidation.[146]

Interest continues to accrue only with reference to secured claims.[147] 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 debt restructuring agreement or personal controlled liquidation petition, that interest rate is automatically waived unless the loan is secured by a collateral.

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.[148] However, the content of the plan in both the creditors' debt restructuring agreement and minor composition is free (meaning that there are no restrictions on its content).

In minor compositions, it is possible to divide creditors in different classes.[149]

As for minor liquidation procedures, article 268(4) of the Code clarifies that the following assets are not included in the procedure:

(a) credits that cannot be foreclosed pursuant to article 545 of the Code of Civil Procedure (mainly alimonies and maintenance subsidies, as well as salaries and pensions up to 1/5 of their gross amount);

(b) alimonies, salaries, pensions, salaries and what the debtor earns with his activity within the limits, indicated by the judge, of what is necessary for his maintenance and that of his family;

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144 *Idem,* art 70(4).
145 *Idem*, art 78(2)(d).
146 *Idem*, art 270(5).
147 See article 68(5) of the Code with reference to consumer's debt restructuring agreements, article 76(5) of the Code with reference to minor compositions and article 268(5) of the Code with reference to personal controlled liquidations.
148 CCII, art 67(4) for consumer's debt restructuring agreements and art 75(2) with reference to minor compositions.
149 *Idem*, art 74(3).

(c) the fruits deriving from the legal usufruct on the assets of the children, the assets established in the patrimonial fund and the fruits of them, except for the provisions of article 170 of the Civil Code; and

(d) things that cannot be foreclosed by other, special laws.

Claims for goods and services supplied after the commencement of the procedure have to be paid from assets not subject to the liquidation procedure. The expenses of the liquidation procedure are paid in priority over any other expense.[150]

6.2.7.3 Proof of claims by creditors

With reference to creditor's debt restructuring agreements and minor compositions, fiscal agencies have an obligation to declare the amount owed by the over-indebted debtor within 15 days from a request from the *organismo*.[151] Creditors do not have to prove their claims in these procedures. 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*. Should their objection not be taken into consideration, they can also appeal against the enforcement of the approved plan.

In personal controlled liquidation procedures, the creditors have to lodge their claims against the debtor within the deadline (that cannot exceed 60 days) set by the liquidator. The procedure for lodging a claim is the same as in any other liquidation procedure. With reference to liquidation, 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, under the previous version of the law 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[152] and the law does not expressly state the final nature of the term.[153] However, the majority of courts and scholars[154] 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.[155] This now seems the preferable solution, considering that the discipline of personal controlled liquidation procedures is laid out in the Code, and that the Code allows for the submission of late claims in "traditional" liquidation procedures.

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150 *Idem*, art 277.
151 *Idem*, arts 68(4) and 76(4).
152 Court of Ancona 7 February 2021; Court of Forlì 23 June 2020.
153 Court of Lucca 3 December 2020; Court of Busto Arsizio 28 October 2020.
154 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.
155 See, among others: Trib. Udine, 7 July 2020; Trib. Mantua 1 February 2021.

6.2.8 *Discharge provisions*

The complete execution of a consumer's debt restructuring agreement or minor composition results in the discharge of all debts covered in the procedure.[156]

By contrast, *esdebitazione* (discharge) is only available to individuals (including unlimited liability shareholders) who went through a personal controlled 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.

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.[157]

The discharge petition is submitted by the *organismo*, which shall also submit a statement outlining whether the debtor complied with the statutory obligations.[158] 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.[159]

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.[160] The debtor will have to submit an annual statement to the competent court to declare whether he had received any such assets.

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.[161] In

[156] See article 71(2) of the Code for the consumer's debt restructuring agreement and article 81(2) of the Code for the minor composition.
[157] CCII, arts 279 and 282.
[158] *Idem*, art 283(3).
[159] *Idem*, art 280.
[160] *Idem*, art 283(1). Loans are not considered for this purpose.
[161] *Idem*, art 283.

the latter case, however, debtors will have to prove that they are "worthy",[162] 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.[163] However, the discharge operates for the benefit of unlimited liability shareholders of companies admitted to a corporate liquidation procedure.[164]

Pursuant to article 283(1) of the Code, besides the cases of discharge after a controlled personal liquidation, a "worthy" debtor, who is unable to offer creditors any payment, direct or indirect, not even in the future, can benefit from discharge once in his life. This order is subject to the obligation to pay any outstanding debt if, within four years from the discharge order, the debtor obtains significant benefits or additional income that allow him to pay at least 10% of the unpaid claims towards his creditors.

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 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 CCII compared to the old *legge fallimentare*. The new CCII simply 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.[165] 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,[166] except small enterprises and farmers.[167]

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[162] 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).
[163] CCII, art 278(6).
[164] *Idem*, art 278(5).
[165] *Idem*, art 142.
[166] *Idem*, art 121.
[167] 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.

Under Italian insolvency law,[168] 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;
- 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.[169]

Corporate liquidation procedures can also be opened against unlimited liability shareholders of those companies that meet the eligibility requirements for corporate insolvency procedures.[170] 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.[171] It is also possible to extend the corporate liquidation procedure to *de facto* unlimited liability shareholders discovered after the commencement of the procedure.[172] 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.[173]

Corporate liquidation procedures cannot be opened against companies which ceased trading more than one year before the petition is filed,[174] 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.

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168 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.
169 CCII, art 2(1)(d).
170 *Idem*, art 256(1).
171 *Idem*, art 258.
172 *Idem*, art 256(4).
173 *Idem*, art 257.
174 *Idem*, art 33(1).

6.3.1 *Procedure*

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.[175] Together with the list of the debtor's assets, the liquidator is asked to prepare a list of the debtor's creditors.[176]

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.[177] 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.[178] 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.[179]

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.[180]

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 creditors.[181] After the company's assets and claims against third parties have been sold,[182] 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.[183] 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.[184] 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.[185]

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175 *Idem*, arts 193-197.
176 *Idem*, art 198.
177 *Idem*, art 201.
178 *Idem*, art 208.
179 *Idem*, art 207.
180 *Idem*, art 211.
181 *Idem*, art 213.
182 *Idem*, arts 214-218.
183 *Idem*, arts 221-230.
184 *Idem*, art 231.
185 *Idem*, arts 231-232.

6.3.2 *Termination and discharge*

Except when converted into an insolvent composition, liquidation procedures terminate in one of the following ways, namely if:[186]

(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);[187] 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.[188]

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.

6.3.3 *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.[189]

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[186] *Idem*, art 233.
[187] *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.
[188] *Idem*, art 237.
[189] CCII, art 240(1).

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.[190] Secured and preferential creditor may be paid only in part, provided that they receive the liquidation equivalent of their claims.[191]

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.[192]

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.[193] 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.[194]

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.[195] The execution of the insolvency composition is charged on the debtor who operates under the supervision of the liquidator and the creditors' committee.[196] 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).[197] The delegated judge may then order the debtor to revert to the liquidation procedure.

6.3.4 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.

[190] *Idem*, art 240(2).
[191] *Idem*, art 240(4).
[192] *Idem*, art 241.
[193] *Idem*, art 244.
[194] *Idem*, art 245.
[195] *Idem*, art 248.
[196] *Idem*, art 249(1).
[197] *Idem*, art 250.

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.[198]

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.[199] 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.[200]

6.3.5 *Eligibility requirements*

As a general rule, the Code applies to any debtor (consumer, professional, entrepreneur or company) including state-owned enterprises, but with the exception of the state itself and public entities (such as councils, regions and provinces).[201]

Despite this, articles 1(2) and 1(3) of the CCII states that the rules on extraordinary administration, forced administrative liquidation and state-owned enterprises continue to be applicable (*lex specialis derogate legi generali*). This means that the companies subject to these special procedures cannot be liquidated using the corporate liquidation procedure outlined under the Code.

The old *legge fallimentare* identified the companies subject to corporate liquidation by listing the entities that were eligible for that procedure. Over the years, this led to issues as to whether certain people and entities were subject to either personal or corporate liquidation procedure, or to any other formal insolvency procedure regulated by the *legge fallimentare* or by special law. The new Code has aptly changed the *status quo* by establishing that corporate liquidation procedures are available to all insolvent entities that are not "minor enterprises" pursuant to article 2(1)(d) of the CCII. Should a debtor fail to meet the criteria mentioned below, they will have to apply for one of the personal insolvency procedures described *sub* 6.2 of the present guidance.

Under article 2(1)(d) of the CCII, a "minor enterprise" is a company which does not meet the following criteria:

(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;

[198] *Idem*, art 288. Limited exceptions apply – see CCII, art 102.
[199] *Idem*, art 290(1).
[200] *Idem*, art 292.
[201] *Idem*, art 1(1).

(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; and

(c) the company owes debts (even if the debts are not yet due at the time of adjudication) not exceeding EUR 500,000.[202]

The new rules make it clear that farmers and farming companies are not subject to corporate liquidation. It is also praiseworthy that the legislator co-ordinated this definition with the analogous definition of commercial entrepreneur found in article 2195 of the Civil Code. The middle-ground category of "civil entrepreneurs"[203] is treated in the same manner as commercial entrepreneurs. Civil entrepreneurs are those that do not engage in strictly industrial or commercial activities. However, because of the nature of their business (artistic, artisanal, investigative, etcetera), they share many features with commercial entrepreneurs and, as a result, they are subject to commercial liquidation (provided that they are not a "minor enterprise").

The debtor does not have to demonstrate that they were engaged in a for-profit business activity. However, if they are engaged in different types of activities and only some of them have commercial nature, the debtor needs to demonstrate that the prevailing nature of their business is commercial.[204] The effects of corporate liquidation are extended to unlimited liability shareholders. Individual entrepreneurs are not subject to corporate liquidation. They rely on the personal restructuring and bankruptcy provisions outlined.[205]

The applicant has to be in a state of insolvency.[206] 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. Insolvency may be proved if the debtor flees, escapes arrest or shuts down the business premises. For insolvency to occur, the debtor shall not be in a situation of temporary lack of liquidity. Insolvency requires a non-transitory inability to meet the obligations as they fall due. Debtors are generally considered insolvent not only when they do not pay their suppliers (manifest insolvency), but also when they rely on "abnormal" means to pay for ordinary obligations (for example, if the debtors need to sell part of the company's real estate to pay for the salaries of their employees).

A debtor is not insolvent if their inability to pay debts is caused by a third party, who is also their creditor and who had been acting in bad faith to cause the debtor's insolvency.[207] A debtor can be declared insolvent if they missed the payment of small debts.[208] A debtor is not insolvent if they challenged in good faith the payment of a contested claim. The new Code has not reported the presumptions of insolvency listed under the old *legge fallimentare*. However, these

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[202] *Idem*, art 1(2). These figures are updated by the Ministry of Justice every three years.
[203] Civil Code, art 2135.
[204] C Cass no 5770/1979; C Cass, no 341/1983; C Cass, no 9589/1993; and Trib Genoa (7 June 2001) in *Vita not.* 02, 683.
[205] On this point, see also: CCII, art 2(1)(c). This is also outlined in *para* 6.2 above.
[206] *Idem*, art 2(1)(b).
[207] C Cass, no 12405/2000; C Cass, no 15769/2004.
[208] Trib Milano (5 Sept. 1988) in *D. fall.* 89, II, 643; Trib. Roma (31 Jan 1989) in *Fall.* 89, 761; C Cass, no 11393/2004.

situations (for example, the attempted suicide of the debtor, the sale of all of the company's assets, etcetera) can still be mentioned in the petition for granting a liquidation order.

Under Italian law, insolvency has to be assessed at the time of the opening of the insolvency procedure. Part payments of existing debts on the eve of the insolvency hearing (especially if made after the submission of an insolvency petition) are likely to be considered evidence of insolvency and to be successfully challenged by an appointed liquidator as preferential payments. "Likelihood of insolvency" is not a concept recognised under Italian law. If the company is still paying their debts as they fall due, such company is very unlikely to be considered insolvent (but could, potentially, be described as being in a situation of crisis).

As a general rule, a petitioner needs to demonstrate that the debtor is insolvent. The respondent needs to demonstrate that either they are not insolvent or that they are not subject to a liquidation procedure (for example, because they are a minor enterprise).

Two concepts linked with insolvency are:

- "crisis":[209] 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. If a debtor is in crisis, they can commence one of the restructuring procedures for consumers or companies described by the Code; and

- over-indebtedness:[210] 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.

6.3.6 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.

The petition had to be filed in the court where the debtor has its main place of business (usually, the company's registered office).

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 10 days (90 days if the order was not served on the appealing party).[211] The appeal does not suspend the executory nature of the order.[212] The insolvency order includes the appointment of a delegated judge (with a supervisory role over

[209] CCII, art 2(1)(a).
[210] *Idem*, art 2(1)(c).
[211] *Idem*, art 124.
[212] *Idem*, art 124(4).

the procedure)[213] and of a receiver / liquidator (with the duty of managing the insolvent estate).[214] The receiver is a public official.[215] The receiver needs to approve the appointment within two days from the insolvency order being served on them.[216]

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,[217] which results in a statement of liabilities being issued. Any disputes regarding these claims are settled by the delegated judge. Late claims submitted up to six months (exceptionally, one year in case of very complex procedures and only if the competent court has expressly authorised such extension) after the decree issuing the statement of liabilities, are still considered to be valid.[218] However, late creditors can only share in distributions made after their claims have been admitted. In exceptional circumstances, creditors are allowed to disregard the time limits mentioned above. This is only possible if the creditor demonstrates that they are not responsible for the delay, and only if they submit a proof of claim within 60 days from discovering of the existence of the procedure and while the procedure is still ongoing.[219]

All communications between the receiver and the creditors occur via certified e-mail, unless this address is not known.[220] If the debtor is resident or domiciled abroad, the communication will have to be sent to their residence or domicile, unless they have a representative in Italy.[221]

6.3.7 Liquidators and creditors' committees

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 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.[222]

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213 *Idem*, art 123.
214 *Idem*, art 125.
215 *Idem*, art 127.
216 *Idem*, art 126.
217 *Idem*, art 201(1).
218 *Idem*, art 208(1).
219 *Idem*, art 208(3).
155 *Idem*, art 200(1).
221 *Idem*, art 200(2).
222 C Cass, no 17279/2010.

As stated above, with the order opening the liquidation procedure, the delegated judge appoints a liquidator.[223] 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.[224] Liquidators are public officials[225] 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.[226]

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.[227] 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.[228]

Liquidators have limited powers to conduct acts of extraordinary administration. In most cases, they will have to preliminarily ask for the creditors' committee approval.[229] 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.[230] 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.[231] One of the innovations of the recent law has been the possibility for the debtors and creditors to ask for the replacement of a liquidator in case of conflicts of interest.[232]

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.[233] The payment of the liquidator's fees is authorised by the designated judge.[234]

The designated judge must appoint a creditors' committee within 30 days from the liquidation order.[235] 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

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223 CCII, art 125.
224 *Idem*, art 126.
225 *Idem*, art 127.
226 *Idem*, art 128(3).
227 *Idem*, art 129.
228 *Idem*, art 130(8).
229 *Idem*, art 132.
230 *Idem*, art 133.
231 *Idem*, art 134.
232 *Idem*, art 135.
233 *Idem*, art 136(2).
234 *Idem*, art 137.
235 *Idem*, art 138.

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.[236] 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.[237]

6.3.8 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.[238] It is possible for the liquidator to discharge goods if the cost for acquiring or maintaining them exceed their resale value.[239] Any acts or payments made by the debtor after the opening of the liquidation procedure are ineffective towards the company's creditors.[240]

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 third parties have the burden of resuming the litigation (if interested) within a limitation period set by the law.[241]

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.[242] 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*).[243]

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[236] *Idem*, art 140.
[237] *Idem*, art 141.
[238] *Idem*, art 142. Some exceptions apply: see CCII, arts 146-148.
[239] *Idem*, art 142(3).
[240] *Idem*, art 144.
[241] *Idem*, art 143.
[242] *Idem*, art 150.
[243] *Idem*, art 151.

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;[244]

- 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;[245]

- 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;[246] and

- transactions that can be challenged under the rules contained in the Civil Code (*azione revocatoria ordinaria*),[247] and all those transactions in which the other party knew or ought to have known that the debtor was insolvent.[248]

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;[249] or

- 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.[250]

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.[251] *Ipso facto* and termination clauses triggered by the opening of the liquidation procedure are ineffective under Italian law.[252] The rules on the treatment of special types of contracts outlined above continue to apply unchanged.

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[244] *Idem*, art 163.
[245] *Idem*, art 164(1).
[246] *Idem*, art 164(2).
[247] *Idem*, art 165.
[248] *Idem*, art 166.
[249] *Idem*, art 172(1).
[250] *Idem*, art 172(2).
[251] *Idem*, art 172(4).
[252] *Idem*, art 172(6).

6.3.9 *Treatment of contracts (executory, specific and essential)*[253]

The effect of liquidation on existing contracts is regulated by articles 172 to 192 of the CCII. The general principle applied by article 172(1) of the CCII is that the opening of a liquidation procedure determines the suspension of any ongoing contracts. The receiver has the power to continue to perform under the terms of the existing 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 (and sometimes, as in the case of employment contracts, of the delegated judge). As a general rule, if the contract is continued, only the claims arising after the receiver's declaration to continue such contract enjoy a preferential treatment in insolvency.

If the receiver fails to take any action in the few months after the commencement of the procedure (no time limit is set in the law, except in case of special contracts such as employment ones), 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.[254]

Termination (*ipso facto*) clauses based on the other party's entrance into a liquidation procedure are not enforceable under Italian law.[255] 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. Special rules apply to contracts with the public administration, including with reference to the enforceability of *ipso facto* clauses.[256]

If the contract is not performed and / or terminated, the other party has the right to lodge a claim in the insolvency procedure.[257] The creditor's claim cannot include any damages.[258] 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.[259]

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.[260]

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[253] R Guidotti, "Executory Contracts in Insolvency: the Italian Perspective" in J Chuah and E Vaccari (eds), *Executory Contracts in Insolvency Law: A Global Guide* (2nd ed, Edward Elgar Publishing, 2022).
[254] CCII, art 172(2).
[255] *Idem*, art 172(6).
[256] *Idem*, art 172(7).
[257] *Idem*, art 172(4).
[258] *Ibid*.
[259] *Idem*, art 173(2).
[260] *Idem*, arts 184 (commercial leases) and 185 (residential leases). In commercial leases, if the insolvent debtor is the landlord, the receiver can terminate the contract within 60 days from appointment and with the prior authorisation of the creditors' committee. If this happened, the solvent tenant has a right to an equitable compensation for the early termination of the lease. In residential leases, the curator of an insolvent landlord can terminate a tenancy

More generally, this is the approach followed whenever the court authorises the debtor in a corporate liquidation procedure to continue trading.[261]

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,[262] partnership agreements,[263] bank account and agency contracts,[264] and procurement contracts.[265]

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,[266] as well as contracts with retention of title (ROT) clauses.[267]

The law also clarifies the consequences should the receiver decide to perform the contract, such as in the case of long-term supply contracts.[268] In such cases, the receiver has to cover any outstanding balance and unpaid obligation for goods and deliveries of services provided *after* the commencement of the liquidation procedure before they are able of assuming the contract. This is a significant change from the previous *legge fallimentare*, which forced the receiver to pay any unpaid invoice, irrespective of whether it was for goods delivered or services provided before or after the commencement of the liquidation procedure. This marks a significant pro-rescue and pro-continuation shift in dealing with executory contracts, for the benefit of all the parties involved in good faith and reasonably profitable deals.

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.[269]

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agreement only within one year from appointment, if the tenancy agreement would have lasted for more than four years from the opening of the procedure and only with the prior authorisation of the creditors' committee. The solvent tenant is entitled to an equitable compensation. In both commercial and residential leases, if the insolvent debtor is the tenant, the receiver has a right to terminate the lease at any time, with the prior authorisation of the creditors' committee and only subject to an equitable compensation for the insolvent tenant.

261 *Idem*, art 211(8).

262 *Idem*, art 72-*ter*.

263 *Idem*, art 77.

264 *Idem*, art 78.

265 *Idem*, art 186. The receiver may, however, communicate to the other party the intention to continue performing a procurement contract within 60 days from appointment and with the prior authorisation of the creditors' committee. Such decision is binding on the other party unless the personal qualities of the insolvent contractor were essential for the other contracting party. In that case, should the receiver for the insolvent contractor offer to perform the procurement contract, the contracting party will have to consent to the continuation of that contract.

266 *Idem*, art 177.

267 *Idem*, art 178. 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.

268 *Idem*, art 179.

269 C Cass, 22nd May 1996, no 4715.

Under the old *legge fallimentare*, special rules applied to contracts to build new real estate. These rules allowed each of the parties in the contract the power to terminate it.[270] The new Code has given the buyer the power to unilaterally terminate such contracts by demanding the restitution of the surety paid for the construction of the real estate.[271] Should the solvent buyer not demand the restitution of the surety, the receiver of the insolvent debtor may elicit to continue in the performance of the contract. Should they decide not to perform, the surety will be returned to the (inactive) buyer.

The Code also outlines special rules for contracts of personal nature. Where the qualities of the other party are known to be an essential reason for concluding a contract, both parties will have to agree to the continuation of the contract with the insolvent debtor.[272] Special rules also apply to contracts for goods sent but not yet delivered,[273] for insurance contracts[274] and publishing contracts.[275]

With reference to employment contracts, the new Code states that the opening of a formal liquidation procedure is not a justified reason for making an employee redundant.[276] Employment contracts are suspended until the liquidator declares whether they want to continue or terminate them. Such decision can only be taken after having consulted the creditors' committee and the delegated judge.[277] While termination is effective from the opening of the liquidation procedure, continuation is only effective from the moment in which it is served on the workers.[278]

If the liquidator needs to act as a matter of urgency, they may unilaterally terminate existing employment contracts. In any case, if the liquidator does not serve any decision on the workers within four months from the opening of the liquidation procedure, the employment contracts are deemed to be terminated.[279] Special rules apply in case of collective redundancy of a large workforce.[280] If the debtor has been authorised to continue trading, employment contracts are unaffected unless the liquidator decides to suspend or terminate them in accordance with the existing non-insolvency rules.[281]

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[270] On the special nature of this rule, see: Court of Brescia, 23rd May 2014, in (2015) *Fall* 480.

[271] CCII, art 174. 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.

[272] *Idem*, art 175.

[273] *Idem*, art 180. In case of an insolvent buyer, the vendor can stop the delivery (provided that neither the buyer nor a third party has acquired proprietary rights on the goods) and claim back the goods at their own expenses, unless they prefer completing the sale and claiming the amount owed to them as part of the liquidation procedure.

[274] *Idem*, art 187.

[275] *Idem*, art 188.

[276] *Idem*, art 189(1).

[277] *Ibid*.

[278] *Idem*, art 189(2).

[279] *Idem*, art 189(3).

[280] *Idem*, art 189(6).

[281] *Idem*, art 189(9).

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.[282]

6.3.10 *Netting and set-off*

Under Italian law, it is possible for creditors to offset claims against the debtor.[283] 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.[284]

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.

6.3.11 *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.[285] 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.[286] 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 Code 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

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282 *Idem*, art 192.
283 *Idem*, art 155.
284 *Idem*, art 155(2).
285 C Cass no 1366/2017.
286 CCII, art 165.

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 Code.

The receiver can challenge deeds executed by the debtor on a gratuitous basis[287] and re-payments of debt that were not due at the time of the opening of the liquidation procedure[288] 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;[289]

(b) the repayment of due debts not effected through cash or ordinary forms of payment;[290] and

(c) pledges, *antichresis* rights[291] and voluntary mortgages granted or set up for pre-existing debts that are not yet due.[292]

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,[293] and (ii) any other transactions in the ordinary course of business.[294] 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. If the debtor was originally admitted to a procedure other than liquidation, and the procedure was later converted into a liquidation procedure, the time limits mentioned above apply from the moment of the opening of the original formal insolvency procedure (that is, not from the conversion).[295]

Claw-back actions cannot avoid the transactions mentioned in article 166(3) of the CCII. That list includes, amongst others:

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[287] *Idem*, art 163.
[288] *Idem*, art 164.
[289] *Idem*, art 166(1)(a). 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.
[290] *Idem*, art 166(1)(b).
[291] *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.
[292] CCII, art 166(1)(c).
[293] *Idem*, art 166(1)(d).
[294] *Idem*, art 166(2).
[295] *Idem*, art 170.

(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.

6.3.12 Directors' liability

The considerations expressed in this section apply to the directors of any company involved in a formal corporate insolvency procedure. However, specific criminal provisions apply to the directors of companies involved in restructuring procedures and coerced administrative liquidation.[296]

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 the:

(a) 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) 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 articles 322 to 347 of the Code.

Pursuant to article 322 of the Code (*bancarotta fraudolenta*), a director faces a potential jail term between three and 10 years if they have:

(a) distracted, concealed, destroyed or dissipated all or part of the company's assets or, in order to cause damage to creditors, have exposed or recognised non-existent liabilities;[297] or

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[296] *Idem*, arts 341-345.

[297] The same punishment applies to directors who act in that manner during the liquidation procedure, after the appointment of the liquidators: CCII, art 322(2).

(b) stolen, destroyed or falsified, in whole or in part, with the aim of procuring an unjust profit for himself or others or to cause damage to creditors, the books or other accounting records or has kept them in the guise of not make possible the reconstruction of assets or the movement of business.

The jail term is reduced to one to five years if the director of a company in judicial liquidation, before or during the procedure, made payments to or simulated pre-emption titles for the advantage of certain claimants with the goal of favouring (some of) them to the undue detriment of others.[298] This rule also applies to the debtor's liquidator(s) and auditors for their actions during their tenure in the office[299] and, more generally, to anyone else who helped the liquidator(s) in carrying out their functions.[300]

A significant provision is contained in article 323 of the Code. This provision (*bancarotta semplice*) 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. This rule also applies to the debtor's liquidator(s) and auditors for their actions during their tenure in the office[301] and, more generally, to anyone else who helped the liquidator(s) in carrying out their functions.[302]

The provisions on *bancarotta fraudolenta* or *bancarotta semplice* do not apply if the payments and transactions had been made in execution of a pre-emptive composition, a debt restructuring agreement, a minor composition or similar procedures and / or with the pre-emptive authorisation of the delegated judge.[303]

Finally, article 325 of the Code states that directors and officeholders who rely on loans and other forms of credit in an abusive manner (that is, when the debtor was already hopelessly insolvent) can be convicted for this behaviour and face a jail term between six months and three years. This period is extended in case the company operated in the financial market.[304] This rule also applies to the debtor's liquidator(s) for their actions during their tenure in the office[305] and, more generally, to anyone else who helped the liquidator(s) in carrying out their functions.[306]

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.

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298 CCII, art 322(3).
299 *Idem*, art 329.
300 *Idem*, art 337.
301 *Idem*, art 330.
302 *Idem*, art 337.
303 *Idem*, art 324.
304 *Idem*, art 325.
305 *Idem*, art 331.
306 *Idem*, art 337.

6.3.13 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.[307]

There are specific provisions regarding groups of companies, which have been introduced to enact the European Preventive Restructuring Directive.[308] Some of these provisions apply to groups of companies undertaking a restructuring process.[309] Others to apply to groups of companies in liquidation.[310] Finally, some provisions apply to both types of proceedings.[311] This section only covers provisions applicable to liquidation procedures and common provisions.

If a group is made of two or more insolvent companies with the centre of main interest in Italy and eligible for a liquidation procedure, it is possible to open a unitary liquidation procedure. Even if only one liquidator, one creditors' committee and one delegated judge are appointed for the group liquidation proceeding, the liquidator will have to prepare separate distribution plans for each of the companies involved in the group liquidation. The law states that co-ordination measures can be agreed by the competent court.[312] The cost of the procedure are distributed across the companies involved in proportion of their debt.[313] The law also provides for co-ordination rules in case more than one insolvency petition is submitted at the same time or at close distance in front of different Italian courts.[314]

Even if the companies opt not to conduct a unitary liquidation procedure, there is a general obligation on the officeholders to co-ordinate their work in the separate liquidation procedures of the companies of the same group.[315] To determine if a group liquidation procedure is needed, the petition for the liquidation of a company that is part of a group shall mention this aspect, and whether it is believed that other companies in the group are facing solvency issues.[316]

Liquidators have the right to promote claw-back actions with reference to transactions that transferred funds from one company to another enterprise of the same group. This is possible if the transfer caused a detriment to the company's creditors and took place in the five years before the insolvency petition.[317] The beneficiary company can resist such claim by

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[307] *Idem*, arts 130(6) and 209.

[308] 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 172/2019, recitals 15, 22 and 24.

[309] Discussed below in para 6.5.13.

[310] CCII, arts 287-289.

[311] *Idem*, art 290-292.

[312] *Idem*, art 287(1).

[313] *Idem*, art 287(3).

[314] *Idem*, art 287(4).

[315] *Idem*, art 288.

[316] *Idem*, art 289.

[317] *Idem*, art 290(1).

demonstrating that they were not aware that the transfer would have detrimentally affected the creditors of the debtor. Liquidators can also promote the clawback actions listed in art 166 of the Code (transaction at undervalue, preferential transactions, etcetera).[318]

Finally, as a general rule it is possible to subordinate intra-group claims created after or in the year before the opening of a liquidation procedure. These transactions can be challenged pursuant to article 164 of the Code if they occurred in the two years before the opening of the procedure and the debt was not yet due at the time the transaction was made.[319]

6.3.14 Concluding remarks

Italian insolvency law provides the parties with an opportunity to reach an in-liquidation composition, which is regulated by articles 240 to 253 of the Code. 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. If the proposal comes from the debtor or a controlled entity, these have to contribute with new resources worth at least 10% of the company's assets.[320] The content of the proposal is not limited by the law, provided that the in-liquidation plan is in principle able to address the company's insolvency.

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.[321]

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. At that point, the proposal is sent to the other creditors and subject to their vote.[322]

The plan is to be voted by impaired creditors (that is, those creditors that are not paid in full according to the plan itself). Parties closely connected to the debtor are not allowed to vote on the proposed plan.[323] The plan is approved by creditors representing the majority of claims admitted to the vote. If creditors are divided into classes, the majority of classes need to vote in favour of the plan for it to be approved. If creditors do not express a dissenting opinion on the plan by the deadline for the vote, they are assumed to be in favour thereof (*silenzion-assenso*).

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318 *Idem*, art 290(3).
319 *Idem*, art 292.
320 *Idem*, art 240(1).
321 *Idem*, art 241(1).
322 *Idem*, art 241(2).
323 *Idem*, art 243.

If more proposals as subject to the creditors' vote, the proposal with the highest approval rate is deemed as approved.[324]

If an in-liquidation composition is approved, the proposal is sent to the debtor and to the dissenting creditors. If none of them submits an appeal against the plan pursuant to article 124 of the Code, the plan is deemed as approved and the competent court sanctions it. Alternatively, the competent court decides on the appeals before sanctioning it (or refusing to do it).[325] In very limited circumstances, the order sanctioning an in-liquidation plan can be further appealed.[326] Once it is sanctioned, the in-liquidation plan becomes binding to all creditors, and its execution is supervised by the company's receiver and the creditors' committee.[327] If the plan is not properly executed[328] or if significant irregularities are discovered after the plan had been sanctioned,[329] the court can annul the in-liquidation composition and the company reverts to liquidation.[330] New plans can be submitted even if a company reverts back to liquidation.[331]

The agreement can be performed by a third party, who also becomes the owner of the assets of the insolvent estate.

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*.

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.

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324 *Idem*, art 244.
325 *Idem*, art 245.
326 *Idem*, art 247.
327 *Idem*, art 249.
328 *Idem*, art 250.
329 *Idem*, art 251.
330 *Idem*, art 252.
331 *Idem*, art 253.

6.5 Corporate rescue – pre-insolvency compositions

6.5.1 General

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.

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 other rescue-oriented procedures available to distressed debtors are:

(a) *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;

(b) *piani attestati di risanamento* (turnaround plans), regulated by article 56 of the CCII;

(c) *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);

(d) *concordato preventivo* (pre-insolvency composition), regulated by articles 84 to 120 of the CCII;

(e) forced administrative liquidation; and

(f) extraordinary administration.

In order to keep the length of this text manageable, this guidance text mainly focuses on pre-insolvency compositions. The extraordinary administration procedure is not covered due to its administrative nature, its high level of political discretion and its limited use (as it is only available to very large companies).

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

Pre-insolvency compositions 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.

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*),[332] (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

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

the second quarter of 2013.[333] There were concerns that these numbers suggested a strategic, abusive use of pre-insolvency remedies.[334]

There was 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.[335] Despite that, several courts approved procedures where unsecured creditors obtained little or nothing from the pre-insolvency composition.[336] 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[337] and the ensuing European Preventive Restructuring Directive. 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,[338] 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) shared the same attitude towards pre-insolvency compositions that guided the legislator in 2015. In particular, it reasserted 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[339] down to a figure of 120 per term[340] in the first six months of 2018. This represents a 27% drop over 2017 numbers.[341] Companies now prefer filing for a *concordato in bianco*, with 728 petitions in the first six months of 2018.[342] These figures, however, still represent a drop of 16% over the previous year.[343]

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333 Cerved, *Fallimenti, Procedure e Chiusure di Imprese* 35 (Septermber 2018) 8.
334 S Ambrosini, *Il nuovo diritto della crisi d'impresa: l 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016) 13.
335 C Cass, SS UU, 23 January 2013 no 1521; C Cass, Sez I, no 5107/2015.
336 Court of Modena, 3 September 2014; Court of Bergamo, 4 December 2014.
337 European Commission, "Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency" (2014/135/EU) OJ L 74/65.
338 C Cass, 25 September 2013, no 21901, in (2013) *Mass Foro it* 697; C Cass, 17 October 2014, no 22045, in (2015) *Fall* 435.
339 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.
340 Cerved, *Fallimenti, Procedure e Chiusure di Imprese* 35 (September 2018) 8.
341 *Idem*, 7.
342 *Ibid*.
343 *Ibid*.

The Covid-19 pandemic and recent regulatory changes have had an impact on the use of these procedures by distressed yet viable debtors. Statistics for the previous years are not relevant, as the law changed in July 2022. The following sections describe the revised pre-insolvency composition procedure.

6.5.1.2 Pre-insolvency compositions currently

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. These rules have 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.

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.[344] 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.[345] In any case, unsecured creditors shall see a return no lower than 20 cents 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.[346]

[344] *Idem*, art 84(3).
[345] *Idem*, art 84(4).
[346] *Idem*, art 112(5).

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;[347]

- the possibility to include tax settlements for the partial or deferred payment of certain overdue taxes;[348] and

- the more limited powers recognised to courts and insolvency practitioners compared to corporate liquidation procedures. Courts only exercise supervisory powers in pre-insolvency 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.

6.5.2 *Eligibility requirements*

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.[349] "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 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 behaviour such as missed or delayed payments to the company's creditors. 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

[347] *Idem*, art 89.
[348] *Idem*, art 88.
[349] For a distinction, see CCII, art 2(1)(a) for "crisis" and art 2(1)(b) for "insolvency".

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.

In pre-insolvency compositions that contemplate business continuation (*concordato in continuità*),[350] the law states that creditors need to be paid with any proceeds arising from the continuation of the business activity. In pre-insolvency compositions aimed at liquidating the debtor's assets (*concordato liquidatorio*), the proposal needs to include new assets worth 10% or more of the assets already available for distribution, and unsecured creditors are entitled to a return of at least 20 cents per euro. New resources can be allocated in a manner that is not compliant with the statutory order of distribution, provided that all unsecured creditors receive a return of at least 20% of their original claim.[351] It is essential that, irrespective of the goal pursued by the debtor, creditors are paid more than in a liquidation procedure.[352]

In general, there is no obligation to file for any of the corporate rescue mechanisms described in this text.[353] 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.[354] It is not possible for creditors to commence such proceedings. 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.[355] However, once the debtor's petition has been submitted, the creditors do have the power to submit alternative proposals as explained below in paragraph 6.5.5 of this guidance text.

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.[356]

Alongside with the petition and the plan (which can be submitted at a later stage if the petition is for a *concordato in bianco*),[357] the debtor's submission to the court must include a:

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[350] *Idem*, art 84(3). This procedure was originally introduced by law no. 134/2012.
[351] *Idem*, art 84(4).
[352] *Idem*, art 84(1).
[353] Different considerations apply with reference to forced administrative liquidation and extraordinary administration, as these procedures have different entry requirements.
[354] 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.
[355] S De Matteis, *L'emersione anticipata della crisi d'impresa. Modelli attuali e prospettive di sviluppo* (Giuffrè Editore, 2017), 137 ff. and 376-377.
[356] CCII, art 26(2) (for the transfer of the COMI to a different jurisdiction) and art 28 (for domestic forum shopping).
[357] *Idem*, art 44. In this case, the competent court will give the debtor a deadline between 30 and 60 days from filing to submit the plan and the supporting documentation. This deadline can be postponed by another 60 days only

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

(b) list of assets, liabilities and creditors;

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

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

These documents must be accompanied by a report by an independent professional appointed by the debtor. 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. If some of the companies' goods are registered, the order opening the procedure shall also be registered in these registries.[358]

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 2(1)(o) of the Code. Judicial commissioners cannot be closely connected to the debtor and / or be bankrupt or otherwise incapacitated.[359] Judicial commissioners must be listed in the registry of lawyers and / or accountants entitled to provide these services, and they should not have worked for the company in the five years before the filing. In case a partnership is acting as independent professional for the debtor, the five-year limit applies to the professional working within that company.[360]

Nominated judicial commissioners have to accept the appointment within two days from the order that admitted the debtor into the pre-insolvency composition procedure.[361] Judicial commissioners act as public officers[362] and are required to perform their duties in person, but they can be assisted by professional advisers.[363] Their appointment can be revoked under the same circumstances applicable to receivers.[364]

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if there is no petition for the commencement of an insolvency liquidation against the debtor, and if there are justified reasons to grant this further extension.

[358] *Idem*, art 93.

[359] Civil Code, arts 2392 and 2399.

[360] CCII, art 2(1)(o).

[361] *Idem*, art 92(2), referring to art 126 of the Code.

[362] *Idem*, art 165(1).

[363] These may include an expert appraiser.

[364] CCII, art 92(2) referring to art 136 of the Code.

Judicial commissioners have a specific duty to provide relevant information to creditors who want to submit alternative restructuring or liquidation plans[365] and to public prosecutors in cases of criminal behaviour.[366]

Judicial commissioners must inform the creditors via certified electronic email of the date of the creditors' hearing.[367] 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.[368] Judicial commissioners have to write a similarly detailed report with reference to the alternative composition plan submitted by qualified creditors, at least 15 days before the creditors' hearing.[369]

6.5.5 *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*).[370] 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 parties, the division of creditors into classes and differential treatments between classes of creditors.[371]

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[365] *Idem*, art 92(3)-(4).
[366] *Idem*, art 92(5).
[367] *Idem*, art 104(2).
[368] *Idem*, art 105.
[369] *Idem*, art 105(3).
[370] *Idem*, art 54(2).
[371] *Idem*, art 87.

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).[372]

The debtor retains the control of the company for the whole duration of the procedure (debtor-in-possession procedure).[373] However, certain acts and transactions outside of the ordinary course of business must be authorised in advance by the designated judge.[374] Additionally, their 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.[375]

After having been sent the plan and other necessary documentation by the judicial commissioner,[376] the creditors need to vote electronically on the plan.[377] 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.[378]

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.[379]

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.[380] As mentioned above, special rules apply to tax claims, which can be partially waived or paid over a longer period of time if certain conditions are met.[381] The competent court can also cram-down the dissent of the tax agency.[382]

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[372] *Idem*, art 92.
[373] *Idem*, art 94(1).
[374] *Idem*, art 94(2).
[375] *Idem*, art 92(3).
[376] *Idem*, art 104
[377] *Idem*, art 107.
[378] *Idem*, art 85.
[379] *Idem*, art 90.
[380] *Idem*, art 84(5).
[381] *Idem*, art 88.
[382] *Idem*, art 88(2-*bis*).

The plan[383] 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.[384] 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);[385]

(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.[386] Only impaired creditors (those that are not fully paid under the proposed plan) can vote on the plan(s).[387] Close relatives are also excluded from the vote, irrespective of whether their claims are impaired by the plan.[388]

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.[389] 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.[390]

The approved plan is binding on all creditors. These creditors may execute their claims against co-debtors.[391] If the plan aims at liquidating the debtor's assets, the competent court appoints one or more liquidators with the same order that sanctions the creditors' vote.[392] 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

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[383] For a detailed outline of the content of the plan, see CCII, art 87.
[384] *Idem*, art 109(1).
[385] These changes were introduced to better comply with art 11(2) of the Preventive Restructuring Directive.
[386] CCII, art 109(2).
[387] *Idem*, art 109(3).
[388] *Idem*, art 109(6).
[389] *Idem*, art 113.
[390] *Idem*, art 111.
[391] *Idem*, art 117(1).
[392] *Idem*, art 114.

competent court, which will then share them with the interested parties.[393] 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.[394]

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) if such moratorium is requested by the debtor in his petition.[395]

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.[396] 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. The commissioner will have to report to the court any fraudulent act against the creditors' interest not mentioned in the petition submitted by the debtor, or any other action from the debtor which may affect the successful outcome of the rescue attempt.

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. The competent court may authorise the debtor to conclude some extraordinary administration act below a certain value threshold.[397] The threshold is determined by the judge after a factual analysis, and is based solely on the circumstances of the case. For the sale of certain assets as well as for leasing contracts of all or part of the debtor's business,

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[393] *Idem*, art 118.
[394] *Idem*, art 119.
[395] *Idem*, art 54(2).
[396] *Idem*, art 94(2)-(3).
[397] *Idem*, art 94(4).

the law prescribes the need for competitive procedures unless this would not be in the best interest of the procedure and / or in case of urgency.[398]

6.5.7 *Treatment of contracts*[399]

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.[400] This is only if the termination, acceleration or amendment clause is triggered by the debtor's commencement of a formal corporate rescue procedure.

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.[401] In case of suspension or termination by the debtor, the performing party is entitled to compensation. However, such compensation is treated as an unsecured, pre-petition claim.[402] Any arbitration clause included in these contracts continue to be effective after their termination or suspension.[403]

With reference to essential contracts in *concordato in continuità*, the debtor can be authorised 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.[404] Additionally, the Code expressly states that essential suppliers cannot unilaterally terminate or modify to the debtor's detriment their supply contracts only because the debtor failed to process the payments for pre-petition supplies.[405]

The law describes as "essential" those contracts for the supply of electricity as well as any other contract that is essential for the prosecution of the debtor's activity.

The law aptly clarifies that the same discipline applies to contracts with the public administration. This means that these contracts cannot be suspended simply because of the commencement of a formal corporate rescue procedure. The suspension and potential continuation of an existing contract in accordance with an approved rescue plan can also operate for the benefit of the

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398 *Idem*, art 94(5)-(6).
399 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).
400 CCII, 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.
401 *Idem*, art 97(2)-(7).
402 *Idem*, art 97(11).
403 *Idem*, art 97(8).
404 *Idem*, arts 100-102.
405 *Idem*, art 94-*bis*(2).

buyer of the debtor's business,[406] provided that the independent professional certified that the plan is compliant with the law and has good chances of being implemented successfully.

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).

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 in those cases of pre-insolvency compositions.

Post-commencement lenders are entitled to be treated preferentially as post-adjudication creditors in the repayment of post commencement financing loans. Such preferential treatment is confirmed even in case the pre-insolvency composition is later converted into a liquidation, provided that: either (1) the proposal for the restructuring plan was not based on fraudulent information or deliberately missing information that was relevant for the approval of the plan, or (2) the debtor has acted in fraud of the creditors and the lenders knew or ought to have known this when they granted the additional funds.[407]

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. If a person / company became a shareholder in execution of the plan, the protection covers the full amount of the loan .[408]

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'

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[406] *Idem*, art 95(2).
[407] *Idem*, art 101.
[408] *Idem*, art 102.

expectations.[409] If the debtor does not comply with the plan, the court may replace the debtor with the judicial commissioner.[410]

With the exception of compositions resulting in the transfer of assets to third parties,[411] any creditor can ask for the termination of the composition procedure for breach of the approved plan,[412] unless the breach is not materially relevant.[413] This petition must be submitted within one year of the original termination date of the plan.[414]

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.[415]

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 debtor must identify the avoidance actions that a receiver could carry out in a corporate insolvency procedure,[416] 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.

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409 *Idem*, art 118(1).
410 *Idem*, art 118(4).
411 *Idem*, art 119(5).
412 *Idem*, art 119(1).
413 *Idem*, art 119(3).
414 *Idem*, art 119(4).
415 *Idem*, art 94(2).
416 *Idem*, art 87(1)(h).

6.5.13 Small companies and large groups

There are no specific rules that deal with MSMEs. 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.

6.5.14 Concluding remarks

Pre-insolvency compositions can be converted into any of the other formal insolvency procedures regulated by the Code. 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 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.[417] This is no longer possible, unless creditors or the public prosecutor have submitted an insolvency petition against the company.[418] It is never possible to open a corporate insolvency procedure against a company in a pre-insolvency composition.

Should the judicial commissioner realise that any of the eligibility requirements are no longer being met, 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. However, the debtor can be declared insolvent and admitted to a corporate liquidation procedure only upon request by a creditor or the public prosecutor.

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*.

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[417] See also: C Cass, SS UU, 23 January 2013, no 1521 in (2013) Fall 149.
[418] C Cass, SS UU, 10 April 2019, no 9146.

6.6 Corporate rescue – negotiated agreement and simplified composition

6.6.1 General

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, 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.[419] 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.[420]

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,[421] where debtor can see:

- 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

419 CCII, art 12(1)
420 *Idem*, art 16(4).
421 *Idem*, art 13(1).

- 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.[422]

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.[423]

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.[424] 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.[425]

6.6.2 *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.[426] The appointed expert will have two business days to accept the appointment.[427]
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.[428] 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.[429] 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

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422 *Idem*, art 13(3).
423 *Idem*, art 16.
424 *Idem*, art 15.
425 *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.
426 *Idem*, art 17(3).
427 *Idem*, art 17(4).
428 This court is identified pursuant to CCII, art 27. This is 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.
429 CCII, art 18.

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.[430] 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.[431] 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.[432]

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;

(2) a moratorium arrangement pursuant to article 62 of the CCII; or

(3) an agreement pursuant to article 166(d) of the CCII.[433]

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.

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[430] *Idem*, art 18(4).
[431] *Idem*, art 21(4).
[432] *Idem*, art 22.
[433] 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.

Generally speaking, the acts and transactions entered into during the negotiation period cannot be revoked unless the expert registered his dissent.[434] Special rules apply to groups of enterprises[435] as well as to small entrepreneurs.[436]

The procedure may not last for more than 180 days.[437] 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.[438]

6.6.3 *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 are liquidated by a court-appointed liquidator.[439] 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).

6.6.4 *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.

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434 CCII, art 24.
435 *Idem*, art 25.
436 *Idem*, art 25-*quarter*.
437 *Idem*, art 17(7).
438 *Idem*, art 17(9).
439 *Idem*, art 25-*septies*.

The bodies identified by the law are:

- independent managers and accounting bodies;[440]

- qualified public agencies, such as the revenue authority;[441] and

- banks and other financial institutions.[442]

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.

6.7 Corporate rescue – debt restructuring agreements

6.7.1 General

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.[443] 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.[444] The petitioner needs to be a commercial company other than a small one.[445] 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 the:

(a) financial resources available to satisfy the obligations under the voluntary composition agreement are sufficient; and

(b) 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.[446] 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

440 *Idem*, art 25-*octies*.
441 *Idem*, art 25-*novies*.
442 *Idem*, art 25-*decies*.
443 *Idem*, art 57(1).
444 *Idem*, art 60.
445 *Idem*, art 57(1).
446 *Idem*, art 57(4).

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,[447] 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.[448] Such settlements automatically cease to have effect if the debtor delays their payment under the settlement scheme for 60 days or more.[449]

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.[450] 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.[451]

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*).

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447 *Idem*, art 63.
448 *Idem*, art 63(2-*bis*).
449 *Idem*, art 63(3).
450 *Idem*, art 58(1).
451 *Idem*, art 58(2).

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 the:

(i) reduction of share capital under the minimum threshold required by law as a result of losses; and

(ii) 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.

6.7.2 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.[452] 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.[453] 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.[454]

6.7.3 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.[455] Non-consenting and dissenting creditors are bound by this contractual automatic stay provided that some conditions are met.[456] Firstly, they need to have 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.[457]

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.[458]

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[452] *Idem*, art 61.
[453] *Idem*, art 61(3).
[454] *Idem*, art 61(4).
[455] *Idem*, art 62.
[456] *Idem*, art 62(2).
[457] *Idem*, art 62(5).
[458] *Idem*, art 62(3).

6.7.4 *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[459] 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,[460] 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.[461] 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.[462]

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.[463] Alternatively, the debtor can ask to convert the procedure into a

[459] 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.
[460] CCII, art 64-*bis*(2), referring to CCII, art 40(1)(a).
[461] *Idem*, art 64-*bis*(3).
[462] *Idem*, art 64-*bis*(5-6).
[463] *Idem*, art 64-*ter*.

pre-insolvency composition.[464] As a general rule, it is also possible for debtor to convert a pre-insolvency composition procedure into a debt restructuring plan.[465]

6.8 Corporate rescue – 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,[466] co-operative enterprises,[467] banks[468] and financial brokers.[469] 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 otherwise stated by special laws, the companies subject to forced administrative liquidation can also be subject to pre-insolvency composition.[470]

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.[471]

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.[472] The regulatory authority exercises the powers and duties, which are granted to the court during the traditional liquidation procedure.

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464 *Idem*, art 64-*quarter*.
465 *Idem*, art 64-*quarter*(5).
466 Legislative decree 209/2005.
467 Civil Code, art 2454-*ter*.
468 Law no 385/1993.
469 Law no 58/1998.
470 CCII, art 296.
471 *Idem*, art 300.
472 *Idem*, art 302.

The competent court (which is the court where the company has its real seat)[473] 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.[474] 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 companies and for the benefit of the *Agenzia delle Entrate*.[475] After a preliminary phase where the liquidator is charged to assess the claim owed by each creditor and analyse the debtor's situation,[476] 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.[477] 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

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473 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).
474 CCII, art 301(1).
475 *Idem*, art 304.
476 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.
477 *Idem*, arts 314-315.

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.

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 and corporate insolvency 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 2021, *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 2022, 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 November 2022. During the insolvency procedure, it was established that the directors had culpably delayed the filing, as the company was insolvent as early as March 2020.

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.[478] Westbrook is the most ardent proponent of a universal model for cross-border insolvency, which he simply describes as "the administration of multinational insolvencies by a leading court applying a single bankruptcy law".[479]

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.[480] 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.[481]

Other models have been designed, such as procedural incrementalism,[482] contractualism and co-operative territoriality,[483] 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

478 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 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.

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

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

481 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.

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

483 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.

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;
- 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;[484]
- 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;[485]
- they can promote the rescue of economically viable but distressed businesses and provide entrepreneurs with a second chance;[486]

[484] EIR Recast, art 1.
[485] *Idem*, recital 10 and art 1.
[486] *Idem*, recital 10.

- they provide for a discharge of debt or debt adjustment in relation to consumers and self-employed persons;[487]

- 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.[488]

Not all of these proceedings are listed in Annex A of the EIR Recast, which is essentially a detailed list of the domestic procedures that should be automatically recognised across Europe. This is due to the fact that the process for amending the EIR Recast (and its Annexes) is complex and lengthy. However, there are little doubts that the procedures discussed in this guidance text are included within the scope of the EIR Recast.

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.[489] As recital 13 of the EIR Recast holds that "insolvency proceedings which are confidential should be excluded from the scope of this Regulation", it is safe to assume that they do not fall within the remit of the Recast Insolvency Regulation.

This modified universalist approach has been tempered by the territorialist vision that has characterised the *legge fallimentare* since its enactment in the 1940s. Quite surprisingly, despite the influence of European law and cases, this territorialist approach had not been entirely displaced by the reforms that have taken place in recent years. The enactment of the new Code has partially changed the situation.

The rules on jurisdiction are found in articles 11 and 26 of the Code, with article 11 being the only one dedicated to international jurisdiction. Pursuant to article 11, Italian courts do have jurisdiction to open a formal insolvency or rescue procedure against a debtor that has in Italy either his centre of main interest (COMI) or an establishment. Italian courts can only exercise their jurisdiction if this is compliant with the international conventions signed by the country, as well as EU law.[490] Any party can appeal an order opening a formal insolvency proceeding if the decision is not compliant with those rules.[491] When a court opens an insolvency proceeding, they are competent for all other actions connected to or derived from the main insolvency proceeding (that is, insolvency-related proceedings).[492]

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[487] *Ibid*.
[488] *Idem*, art 2(1).
[489] S Ambrosini, *Il nuovo diritto della crisi d'impresa: l. 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016) 53.
[490] CCII, art 11(1).
[491] *Idem*, art 11(1). It has been argued that anyone could also appeal a judgment, by means of which an Italian court does not find they have jurisdiction on the case.
[492] *Idem*, art 11(3). This is known as *vis attractive concursus*, which was present in the old version of the *legge fallimentare* and is also found in art 6 of the European Insolvency Regulation (recast). The main difference between the European and the Italian law is that the European law requires a "close" connection, while the Italian law does not.

Article 26 completes this provision by stating that Italian courts may open insolvency or rescue proceedings against a debtor with a COMI in a different jurisdiction, if such debtor does have an establishment in Italy.[493] There is no autonomous definition of "establishment" under the Italian law. Therefore, it is likely that Italian courts will interpret it in accordance with the European case law. The European law definition of "establishment" is found in article 2(10) of the EIR Recast, pursuant to which it is "any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets". The three-month limit is unlikely to be applied by Italian courts, given the lack of reference to the analogous time limit for the definition of COMI.

It is welcome that the legislator clarified that the debtor needs to have an establishment in Italy. Unlike the approach followed by other countries (for example the United Kingdom), the Italian legislator explained that simply having some goods in the country won't suffice to establish the Italian jurisdiction, even if only for a secondary or territorial procedure.[494] Accordingly, Italian courts have traditionally declined to open territorial proceedings in Italy when a debtor based in a different country only appointed a legal representative in Italy, and that representative only had limited powers to conclude a selected range of transactions.[495] However, the rule allows Italian courts to conduct insolvency proceedings against debtors who transferred their COMI to a different country less than a year before the opening of the procedure, while retaining some establishment in Italy.[496] This runs contrary to the approach advocated by the EIR Recast, which does not restrict freedom of establishment across the European Union as significantly as the Italian legislator.

As mentioned above, article 26(2) of the Code also states that a transfer of a COMI from Italy to a foreign country that occurred in the year before the opening of an insolvency procedure is not effective.[497] While the following provision states that this rule shall be interpreted in accordance with the international conventions signed by Italy as well as EU law, there is a clear mismatch between the Italian and European provisions on this point. This is because article 3(1) of the EIR Recast states that there is a presumption that companies can forum shop and transfer their COMI to a different country if the transfer occurred in the three months before the filing. There have been cases in which other countries have recognised as effective a transfer of COMI that occurred shortly after the afore mentioned three-month threshold.[498] Article 26 of the Code concludes by stating that when a court opens an insolvency proceeding that falls within the scope of the EIR Recast,[499] they will have to declare if the proceedings is a main, secondary or territorial one.

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[493] *Idem*, art 26(1). An old version of the law referred to the company's main seat. It is praiseworthy that the Code refers to the European concept of COMI.

[494] M Salerno, *La riforma della crisi d'impresa* (Simone Ed. 2019) 33.

[495] Trib. Treviso (29 June 2016).

[496] It is debated whether the debtor can demonstrate that the COMI transfer is effective if it occurred within a year from the opening of the insolvency procedure. On this point, see: G Leogrande and F Ghignone, *Crisi di impresa e insolvenza. Commento ragionato alla riforma fallimentare* (Magggioli Ed. 2019) 19, 43.

[497] CCII, art 26(2).

[498] See, among others: *In the Matter of Swissport Holding International S.Á R.L.* [2020] EWHC 3556 (Ch).

[499] EIR Recast, art 4(1).

Despite the issues highlighted above, the new rules mark a significant improvement over the old *legge fallimentare*. They better co-ordinate Italian and European rules, and they mark a shift towards a more modified universalist approach to jurisdictional matter. The Code expressly introduced in the Italian insolvency framework the notion of COMI, while the old law only referred to the concept of "registered office". Under article 3(1) of the European Insolvency Regulation (recast), COMI is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. The European case law in the area[500] clarified that:

(a) there is a rebuttable presumption that a company's COMI is located in the Member State of its registered office;

(b) the factual question for the court is to identify where the debtor conducts the administration of its interests on a regular basis, making a comprehensive assessment of all the relevant factors;

(c) the location of the COMI must be objectively ascertainable by third parties;

(d) in carrying out the exercise of ascertaining the COMI, special consideration is to be given to the creditors and their perception as to where a debtor conducts the administration of its interests;

(e) where there has been a shift in a debtor's COMI, this may require the debtor to inform its creditors of the new location from which it is carrying out its activities;

(f) a debtor's COMI is to be determined at the time the court is required to decide whether to open insolvency proceedings having regard to the facts as they are at the relevant time, but including historical facts and the need for an element of permanence looking forward; and

(g) there is no principle of immutability: a debtor is free to choose where it carries on the administration of its interests and it may do so for what has been called a self-serving purpose, more particularly where insolvency threatens.

Italian judges will interpret the provisions of the Code in light of this case law. Finally, as Italy has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, special rules apply for the recognition of foreign insolvency (and insolvency-related) judgments, especially if recognition is sought from a non-European Member State (with the exception of Denmark). These issues are explored in the next section.

[500] See, among others: *Proceedings Brought by Staubitz-Schreiber* (Case C-1/04); *Eurofood IFSC Ltd, In re* (Case C-341/04); *Interedil Srl v Fallimento Interedil Srl* (Case C-396/09); *Galapagos BidCo Sarl v DE* (Case C-723/20).

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,[501] any judgment opening insolvency proceedings handed down by a court of a Member State is automatically recognised in Italy.[502] 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.[503]

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, 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 the:

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

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

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

[501] 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.
[502] European regulation on insolvency proceedings (recast), art 19.
[503] *Idem*, art 33.

(d) effects of such recognition or enforcement was not manifestly contrary to Italian public policy.[504]

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.[505]

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[506] and / or the foreign authority had no competence over the subject matter according to Italian private international law principles.[507]

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.[508]

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.[509] The automatic recognition of insolvency judgments issued outside the European Union was also acknowledged in a case before the Supreme Court.[510]

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[511] and the

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504 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.

505 Law 218/1995, art 65.

506 *Idem*, art 64(g).

507 *Idem*, art 64(a).

508 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.

509 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.

510 C Cass, no 283/2001: no *exequatur* is required for insolvency judgments issued after the entry into force of law no 218/1995.

511 *Legge fallimentare*, art 43.

ability to freely dispose of registered movable and immovable goods belonging to the bankrupt or insolvent company.[512] However, the production of further effects, such as the automatic stay[513] and the inability to use non-registered movable goods,[514] 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 small enterprise or 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.[515] 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."[516]

This judgment represents one of the latest iterations of a consolidated judicial approach.[517] In the wake of regulatory reforms, 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.[518]

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512 *Idem*, art 88(2).
513 *Idem*, art 51.
514 *Idem*, art 88(1).
515 M Fabiani, "*Riconoscimento di decisioni dichiarative di fallimento e resistenze giurisprudenziali municipali*" (2008) Int'l Lis 73.
516 Trib Milano, Sez IV civile, 30 October 2014, in (2015)6 *Fall* 693. Translation from Italian by the author of this text.
517 See, among others: Trib Napoli, 10 January 2008m (2008) *Fall* 571.
518 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.[519]

With reference to the recognition of Italian insolvency procedures listed in Annex A of the EIR Recast (such as liquidation and pre-insolvency composition)[520] 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.[521]

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,[522] and it lasts only for the duration of the foreign procedure.[523] 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*.[524] 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.

The UK government has recently announced their intention to implement the UNCITRAL Model Law on Insolvency-related Judgments (MLIJ).[525] However, rather than introducing a free-standing system for the recognition of foreign insolvency-related judgments, the UK will probably opt to add Article X of the MLIJ to the existing framework (CBIR 2006). Article X simply clarifies that the relief available under the existing article 21 of the MLCBI does apply to

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519 E Vaccari, "WHOA, *Brexit!* Which future for London as Europe's (largest) insolvency forum?" (2022) 37(2) JIBLR 46.

520 The list obviously includes the proceedings introduced by the Code.

521 CBIR 2006, art 15(2), Sch 1.

522 IA 1986, para 43, Sch B1.

523 *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).

524 *Rubin v Eurofinance* [2012] UKSC 46.

525 See the consultation launched on 7 July 2022: https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/outcome/implementation-of-two-uncitral-model-laws-on-insolvency-summary-of-consultation-responses-and-government-response. For the model law, see: UN Comm'n on Int'l Trade Law, "UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment and Interpretation", UN Sales No E19V8 (2019), https://uncitral.un.org/sites/uncitral.un.org/files/ml_recognition-gte.pdf.

insolvency-related judgments. In other words, the article will give UK courts discretion to implement foreign insolvency-related judgments in the UK without necessarily overruling the rule in *Gibbs*.

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*.[526]

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.[527] It is, however, possible to rely on the Regulation (EC) No 593/2008 (Rome I Regulation).[528] 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).[529] The Hague Convention is an international treaty. While it does not apply to "insolvency, composition and analogous matters",[530] 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.[531] 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.[532] English courts seem not to exclude that non-exclusive or asymmetric clauses could be covered by the convention.[533] In all other cases, recognition of Italian restructuring procedures in the UK is governed by common law rules, subject to the rule in *Gibbs*.

526 *Re Bud-Bank Leasing SP* [2010] B.C.C. 255 (Ch).
527 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.
528 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.
529 https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf.
530 Hague Convention, art 2(2)(e).
531 *Idem*, arts 5(1) and 5(2).
532 These are clauses where one party is limited to bringing proceedings in one court, but the other is not.
533 *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].

In future it may be possible to rely on the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments (Lugano Convention).[534] This convention would largely replicate the regime under the Brussels Recast Regulation. At the same time, similarly to the Brussels Recast Regulation,[535] it does not apply to "bankruptcy, [insolvent liquidations], judicial arrangements, compositions and analogous proceedings".[536] 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 has 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".[537] This position has probably been influenced by the ongoing political tensions between the United Kingdom and Brussels,[538] as the Convention is open to accession to "any other State".[539] Treating the United Kingdom as "any given third country"[540] 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

[534] Convention on Jurisdiction and the Recognition and Enforcement of Judgments [2007] OJ L 339/3.
[535] Brussels Recast Regulation, art 1(2)(b).
[536] Lugano Convention, art 1(2)(b).
[537] 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.
[538] 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.
[539] Lugano Convention, art 70(1)(c).
[540] 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.

9. INSOLVENCY LAW REFORM

9.1 General rules

There have not been other significant reforms since the enactment of the *Codice della Crisi dell'Impresa e dell'Insolvenza* in July 2022. 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)[541] and the need to rely on electronic communications throughout the procedures regulated by the Code.[542] 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 its premises in Italy.[543] The jurisdiction of Italian courts extends to insolvency-related actions (such as avoidance actions).[544]

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://www.rivistaodc.eu/HomePage);

- *Il Fallimentarista* (http://ilfallimentarista.it/), *il Quotidiano Giuridico* (https://www.quotidianogiuridico.it/commerciale/crisi-d-impresa-e-procedura-oncorsuali) and *Il Caso* (https://www.ilcaso.it/riviste/CrisiImpresa) for journal articles and case comments on all areas of insolvency law; and

- *Cerved* (https://research.cerved.com/temi/fallimenti/) for statistical data on Italian insolvency procedures.

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541 *Idem*, art 8.
542 *Idem*, art 10.
543 *Idem*, art 11(1).
544 *Idem*, art 11(3).

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 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 and corporate insolvency 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 2021, *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 Srl*, 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 2022, 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 November 2022. During the insolvency procedure, it was established that the directors had culpably delayed the filing, as the company was insolvent as early as March 2020.

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 until the new Code:

- 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.

Things have changed with the enactment of the new Code. This is because on the one hand the new Code grouped under the same statute all main corporate insolvency and personal bankruptcy procedures. Exceptions still apply (for example extraordinary administration, banks and insurance companies, etcetera), but the vast majority of players will look at the provision in the Code to determine what happens if they cannot repay their creditors. Moreover, article 7 of the Code introduced the principle of "unitary treatment of liquidation and restructuring procedures". This means that all petitions and proceedings regarding the same debtor or group of debtors will be heard in front of the same court, and co-ordinated by the same officeholder. On top of this, articles 40 and 41 of the Code introduced the principle of "unitary procedure for opening both liquidation and restructuring procedures". This means that not only these procedures are heard in front of the same court, but also that the petition for opening them is submitted following a series of uniform rules. Article 40 states what needs to be included in the petition, where it should be submitted, the effects of the presentation of such petition (including for those cases where debtors require protection measures from individual executory actions from their creditors) and the process for serving these petitions and the following court orders. As a result, ultimately, with the approval of the new Code, the legislator has successfully moved away from a fragmented, piecemeal approach to failure.

Question 2

The answer would have been "yes" under the old system. However, the new Code has significantly changed over the old *legge fallimentare*. As a result, there is arguably much more clarity on the rules applicable to insolvent debtors.

The old *legge fallimentare* was clear that medium and large companies could file for liquidation and rescue remedies, and that individuals could file for personal bankruptcy procedures, either rescue or liquidation oriented. There was lack of clarity for all the other players in between, from small and micro companies to individual entrepreneurs, innovative start-ups and farmers.

Now the situation is much clearer. Starting with liquidation and corporate rescue procedures, they are only available to insolvent entrepreneurs, except small enterprises and farmers. The law does describe clearly who small entrepreneurs and farmers are, so there should be minimal litigation on these definitions (although the opportunity of excluding farmers from corporate procedures is questionable). With reference to corporate rescue procedures, these debtors can also be in a state of crisis, in order to facilitate the early emersion of crisis and increase the chances of successful turnaround of these debtors.

Vice versa, personal liquidation or rescue procedures are available to over-indebted (insolvent or distressed) debtors. These can be consumers, professionals, small entrepreneurs, farmers and innovative start-ups, as well as any other debtor not subject to any of the liquidation procedures outlined by the Code or by special laws.

As a result, candidates will have a hard time in demonstrating that they agree with the statement in the question.

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 used to adopt a territorialist approach to the handling of cross-border insolvency cases. Article 9 of the old *legge fallimentare* stated 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.

The new Code better co-ordinates Italian and European rules. The new Code (and particularly articles 11 and 26) mark a shift towards a more modified universalist approach to jurisdictional matter. The Code expressly introduced in the Italian insolvency framework the notion of COMI, while the old law only referred to the concept of "registered office". The new Code clarified that concepts that are present under both Italian and European rules need to be interpreted in accordance with the European case law. However, the Italian legislator still argues that a transfer of COMI that occurred in they year before the petition is not relevant, while European rules have reduced this timeframe to three months.

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 (especially the old *legge fallimentare*), 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?

INSOL International
6-7 Queen Street
London
EC4N 1SP
Tel: +44(0) 20 7248 3333 | Fax: +44(0) 20 7248 3384
www.insol.org