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Module 6D

Guidance Text

Italy

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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 on 31 July 2021**. 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 2021 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	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 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
Creditore • *Chirografario* • *Della procedura, prededucibile* • *Garantito* • *Privilegiato*	Creditor • Unsecured creditor • Post-Adjudication creditor • Secured creditor • Preferred creditor
Curatore fallimentare	Receiver

Italian	English
Demanio • *Demanio necessario* • *Demanio accidentale*	State property • No direct translation • No direct translation
Esdebitazione	Discharge (outcome); Discharge (procedure)
Fallimento *Fidejussione* *Garanzia Personale*	Corporate Liquidation Surety Personal guarantee
Garanzia Reale *Ipoteca* *Legge Fallimentare (r.d. 267/1942)* *Liquidazione coatta amministrativa* *Mutuo* ▪ *Mutuo Ipotecario* *Pegno* *Piano attestato di risanamento* *Piano del consumatore* *Privilegio* • *Privilegio speciale* • *Privilegio generale* *Procedura di liquidazione del patrimonio* *Pubblico ministero* *Reato di bancarotta semplice* *Scrittura contabile* *Tribunale delle imprese*	Security Mortgage No direct translation Forced administrative liquidation Loan ▪ Mortgage loan Pledge Turnaround plan Consumer's plan Preference • Special lien • General lien Consumer's liquidation Public prosecutor Simple bankrutpcy (crime) Accounting entry, book-entry 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, and economic disparities between southern Italy and the more prosperous north.

3.1 Legal framework

Italy is a civil law country, meaning that the core principles of its law are codified into a referable system which serves as the primary source of law. The fundamental law of the Italian legal system is represented by its Constitution, enacted in 1947 by the Constituent Assembly specifically appointed for the task. The Constitution is rigid, meaning that any amendments require a complex process of approval from the two Houses of Parliament (*Camera dei Deputati* and *Senato della Repubblica*). If the required majorities are not reached, the Italian population may be called upon to vote on the proposal by means of a referendum. The last time Italian citizens approved a change to the Constitution was in 2001, while on two other occasions (2006 and 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 131% of GDP in 2017. 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.

[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/.

The government still faces pressure from investors and European partners to sustain its efforts to address Italy's longstanding structural economic problems, including labour market inefficiencies, a sluggish judicial system and a weak banking sector. Italy's economy returned to modest growth in late 2014 for the first time since 2011. In 2015-16, Italy's economy grew at about 1% each year and in 2017 growth accelerated to 1.5% of GDP. In 2017, overall unemployment was 11.4%, but youth unemployment remained high at 37.1%. GDP growth is projected to slow slightly in 2018.

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 is the real risk that the country could enter into a new recession in the following months.[2]

Things seem 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, is providing a modicum of effective government to a population starved of political competency. After being beaten much harder than its neighbours at the beginning of 2020 due to the Sars-Cov-2 pandemic, Italy managed to bring the situation back under control quicker than other countries. For several months, the number of infections has been significantly lower than France, Germany, Spain and the United Kingdom, despite these countries having similar populations to Italy. The economy is growing faster than expected by the European Union and the World Monetary Fund and the government managed to re-nationalise the Italian highways after the Morandi bridge collapse in August 2018 and to complete the MOSE project to save Venice from high tides.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

The current Italian *legge fallimentare* has been amended several times in recent years, including by means of legislative decrees[3] 35/2005, 5/2006 and 169/2007. As a result, its rules and principles have significantly evolved and are now remarkably different from those that governed the law when first enacted in 1942. This discontinuity will be even more marked when the government implements the reforms discussed below in paragraph 9.

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

[2] 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 percent 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.

[3] Throughout this text, reference will be mentioned 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 previously have passed a law in which it outlined the limits, criteria and objectives of that delegation.

viable businesses brought the legislator to introduce the *concordato preventivo in continuità*, a formal corporate insolvency procedure where the debtor is allowed to file a petition (so called “in white” or “incomplete” petition) reserving the right to lodge the proposal and the plan at a later stage.

The statutory leaning towards the use of pre-insolvency compositions ended abruptly in 2015, following concerns on the abusive use of these mechanisms. Currently it is necessary that the debtor ensures the payment of 100 % of the senior / preferred debts and 20% of the unsecured debts to be admitted to the procedure, while creditors have been given the right to submit rival proposals and rival bids.[4]

At the time of writing, ailing companies have the opportunity to choose among a wide variety of procedures to liquidate or turn around their business, which will be described in more detail below.

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 empires, 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.[5]

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”).[6] 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).[7]

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

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

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

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

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.[8] 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 movements throughout Europe. The fascist ideology, which informed and heavily influenced laws enacted after the end of October 1922,[9] 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.[10] Recent changes to corporate insolvency and personal bankruptcy practice are covered in paragraph 6 of this text.

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

9 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.

10 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.

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).[11] Any changes in the registered office that occur in the year before the filing cannot affect the court's jurisdiction.[12] 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.[13]

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.[14]

These courts are the same courts that are entitled to enforce any claims against the debtor when solvent. According to the World Bank *2019 Doing Business Report*, Italy performs particularly badly among developed economies under the "enforcing contracts" indicator. This indicator measures the time and cost needed to resolve a commercial dispute through a local first-instance court and the time needed to enforce that judgment. Italy ranks 111th out of 190 economies with reference to the enforcing contracts indicator.[15] According to the World Bank's report it takes an average of 1,120 days (3 years) to enforce a contract in a first-instance court, of which 840 days (2 years and 3 months) are for the trial to reach a judgment and 270 days (9 months) for enforcing that judgment. Similar results have been observed in the most recent *2020 Doing Business Report*, where Italy ranks 58th with reference to the indicator on the ease of doing business. At the same time, Italy is in a much better position than before in the indicator on the ease of resolving insolvency (21st, just after Ireland and ahead of France).

To improve these outcomes, the government[16] has recently attributed the competence to deal with corporate insolvency matters to specialised sections of the *tribunale delle imprese* (enterprise court). This decision does not affect personal bankruptcies, whose filings will continue to be referred to local courts.

The specialised sections of enterprise courts are not insolvency courts (as, for example, in the US) but a group of specialised judges who deal only with corporate matters. These are only present in the Court of Appeals of each region (two in Lombardy, Sicily and Trentino-Alto Adige, none in Valle d'Aosta). They were created by means of law decree 1/2012, which transformed the duties, changed the name

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

12 *Legge fallimentare*, art 9(2).

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

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

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

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

and established new sections of existing specialised sections of the Court of Appeals that dealt with intellectual property issues.[17]

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

Self-Assessment Exercise 1
Outline the main events and laws that have shaped the evolution of Italian insolvency law up until the period of reforms triggered by legislative decree no. 35/2005 (which should be included in the list) *and* briefly describe their relevance.

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

5. SECURITY

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

(a) **Assets that can only belong to the state** (*demanio necessario*).[18] 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*).[19] 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,[20] those that cannot be subject to foreclosure[21] and those listed in article 514 of the Civil Procedure Code.

According to article 51, Italian Private International Law,[22] security interests over assets are governed by the law of the jurisdiction in which the relevant assets are located.

17 Legislative decree no 168/2003.
18 Civil Code, art 822(1).
19 *Idem*, art 822(2).
20 *Idem*, art 167.
21 Civil Procedure Code, art 545.
22 Law no 218/1995.

5.1 Real securities

5.1.1 Generally

The most common form of consensual security over real estate is the **mortgage**.[23] 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**,[24] usually over equity stock, debt instruments and government bonds, as well as on receivables and bank accounts.

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

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

A pledge is a bailment that conveys possessory title to property owned by a debtor (the pledgor) to a creditor (the pledgee) to secure repayment for some debt or obligation and to the mutual benefit of both parties. Pledges require a deed of pledge bearing a certified date and delivery of the movable asset, or the document that confers rights on that asset to the pledgee or a third party custodian.[25] 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,[26] to create a consensual pledge over a specific amount 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.[27]

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”,[28] whereby a certain amount is credited by the pledgor on the pledgee’s

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23 Civil Code, art 2808 *et seq*.
24 *Idem*, art. 2800 *et seq*.
25 *Idem*, art. 2800.
26 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.
27 See below in para 5.3 of this text.
28 Civil Code, art 1851.

account. The pledgee acquires the ownership of such money but he / she has the obligation to give the money back to the pledgor if no enforcement event occurs.

5.1.2 Liens, Floating charges and Preferences

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

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

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

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

Examples of general liens include the claims of: hoteliers over goods brought into hotels by customers;[29] carriers, over transported goods and custodians, over deposited goods;[30] and dealers over the cars, trucks and machinery sold to debtors.[31] Examples of special liens include the refund of deposits paid in preliminary contracts for the purchase of a real estate.[32]

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.[33]

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.[34] Preferences are not securities, but allow the beneficiaries to be paid in priority over unsecured creditors.

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[29] *Idem*, art 2760.
[30] *Idem*, art 2761.
[31] *Idem*, art 2762.
[32] *Idem*, art 2775-*bis*.
[33] *Idem*, art 2747(2).
[34] See also para 5.6 of this text.

5.1.3 Real securities in insolvency

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

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

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

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

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:

- 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.

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.[35] One specific peculiarity of sureties is that they are enforceable only if the debtor has no knowledge of their existence.[36] 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.

In any event, the guarantee must set forth the maximum amount of the guarantor's liability. The creditor has up to six months after the moment in which the obligations became due, to collect his guarantee against the guarantor.[37]

Personal guarantees and real securities 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 but only 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, the creditors can enforce their claims through a court proceeding. No court proceeding is needed for special liens on bank accounts.

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.

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35 Civil Code, art 1936.
36 *Idem*, art 1936(2).
37 *Idem*, art 1957(1).

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 the guarantor pays on behalf of the debtor, he has the right to claim back what he paid from the debtor.[38] This right is called:

- *surrogazione* if the co-debtor pays on behalf of another debtor;[39]
- *regresso* if the third-party, personal guarantor pays on behalf of the debtor.[40]

Both the co-debtor and the guarantor can file a claim for the amount they paid against the insolvent debtor. However, it is only the guarantor who can also claim interest and expenses against the primary debtor. In both cases, the co-debtor or guarantor replaces the original creditor in the list of creditors admitted to the insolvency procedure.[41]

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 institute against the debtor any formal insolvency proceeding in the event of the debtor's default.

Limited-recourse provisions and non-petition clauses are valid under Italian law, as they do not breach the prohibition to introduce limitations of liability by contract.[42] 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.

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38 *Idem*, arts 1203 and 1949 *et seq*.
39 *Idem*, art 1203(3).
40 *Idem*, art 1950.
41 C Cass, 17 January 2008, no. 903 in 8(2008) *Il Fall* 920.
42 Civil Code, art 2740(2).

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.

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**, the 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, the ROT clause must furthermore be registered with a special register held by competent courts.

5.6 Order of distribution

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

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.

Secured creditors and lienholders

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

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

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;[43] money owed to the state for some taxes, including VAT;[44] money owed by the employer on behalf of their employees;[45] and judicial expenses.[46]

Unsecured creditors

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

43 *Idem*, art 2751.
44 *Idem*, art 2752.
45 *Idem*, art 2753-54.
46 *Idem*, art 2777.

Self-Assessment Exercise 2

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

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

6. INSOLVENCY SYSTEM

6.1 General

The rules that govern the consequences arising from personal and corporate failure are included in two separate pieces of legislation. On the one hand, corporate rules are laid out in the *legge fallimentare*, the royal decree 267/1942, as amended over the years. The rules that govern personal and consumer bankruptcy are, on the other hand, included in law 3/2012.[47]

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).[48] The introduction of a regime for personal bankruptcies in 2012 has changed this approach. The reforms recently adopted by Parliament[49] also confirm this fragmented approach.

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

6.1.1 The period of reforms

The first cracks in the corporate insolvency framework designed by the fascist legislator began to appear in the Seventies and Eighties. The condition of general crisis of the economy brought the legislator to think about regulatory reforms in the area of corporate insolvency law. The approach adopted by the legislator was to introduce laws aimed at rescuing single (categories) of enterprises. In this context, the government adopted a new approach to the crisis of large companies known as *amministrazione straordinaria* (extraordinary administration).[50]

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

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

[49] See below, para 9 of this text.

[50] Law no 95/1979.

The creation of the European single market in 1993[51] (with its state-aid laws) and the resurfacing of liberal ideals made it urgent to implement significant reforms to the existing corporate insolvency framework. This process of reform started with legislative decree 270/1999, which changed and modernised the insolvency procedure for large enterprises (extraordinary administration).

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

- Law 80/2005, which reformed the discipline of agreements with creditors and significantly reduced the period in which transactions are subject to avoidance / claw-back actions;
- Legislative decree 5/2006, which reformed corporate liquidations and abrogated the *amministrazione controllata*, a procedure which gave to a company in distress the possibility of continuing trading for up to two years under the supervision of a receiver and the insolvency court;
- Legislative decree 169/2007, which reformed the procedure of *liquidazione coatta amministrativa* (forced administrative liquidation);
- Law 134/2012, which introduced material innovations regarding pre-insolvency compositions, turnaround plans under article 67 and debt restructuring agreements under article 182-*bis* of the *legge fallimentare*;
- Law decree 69/2013 and law 132/2015, which introduced further changes to pre-insolvency compositions and debt restructuring arrangements.

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

Nevertheless, the reforms mentioned in the bullet points above introduced a new approach to corporate insolvency. This approach is characterised by an urgency to simplify and made existing procedures faster and more efficient; restrict their use to entrepreneurs and companies in significant crisis;[52] 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.[53] 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.[54]

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

[52] 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.

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

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

The more recent proposals by the *Rordorf Commission* and the recently enacted *Codice della Crisi dell'Impresa e dell'Insolvenza* (CCII) continue along the pattern laid down by these early reforms.[55]

6.1.2 Insolvency procedures

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

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

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

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

It is impossible to state in general terms if the Italian insolvency system is creditor- or debtor-friendly. This assessment largely depends on the procedure that is triggered by the debtors and / or their creditors. By and large, it is possible to claim that in judicial procedures[56] such as corporate liquidations and pre-insolvency compositions, the pre-insolvency rights of the creditors are much more protected than in administrative (for example, forced administrative liquidation) and mixed (for example, *amministrazione straordinaria*) procedures.

However, it is also possible to observe a legislative trend towards a more creditor-oriented approach in corporate insolvency law. The reforms enacted between 2005 and 2012 had the common purpose of promoting the early use of rescue and restructuring measures. However, recent reforms (law 132/2015 and law 155/2017) have been characterised by a marked scepticism on the use of restructuring and particularly pre-insolvency agreements. It seems that now the need to promote the creditors' protection and the maximisation of their returns prevails over the equally legitimate debtor's expectation to try to rescue a distressed yet viable business.[57]

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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55 See para 9 of this text.

56 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.

57 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.[58] The principle of *par condicium creditorum* or equality of treatment among equally ranking creditors, as established in the Civil Code,[59] is rarely circumvented under Italian law,[60] irrespective of the purpose of the insolvency procedure.

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

6.1.4 Insolvency procedures – key players

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

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

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

The role played by each entity is strictly linked to the specific procedure. For instance, debtors have a much more influential role in pre-insolvency compositions than they do in corporate 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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58 A Nigro and D Vattermoli, *Diritto della Crisi delle Imprese: Le Procedure Concorsuali* (4th edn, Il Mulino: Bologna, 2017) 39.

59 Civil Code, art 2741(1).

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

6.2 Personal / consumer bankruptcy

In 2012, Italy was one of the few countries in the world[61] not to have a system of formal procedures designed to give a second chance to over-indebted consumers and to discharge their debts. Article 2740 of the Civil Code states that debtors have to ensure the repayment of all of their obligations with all of their present and future assets. However, commercial entrepreneurs have for a long time benefited from the possibility of unburdening themselves of their debts by means of either a pre-insolvency composition or an in-liquidation composition. Individual entrepreneurs had – for an equally long time – relied on the discharge procedure pursuant to article 142 *legge fallimentare*.[62] No similar remedies were available to individuals,[63] as the long established distinction between commercial entrepreneurs (of a certain size) and individuals has lasted since the enactment of the Napoleonic *Codice del Commercio* (1807).[64] There have been cases that argued that not granting the same remedies to individuals and companies was a breach of the constitutionally-recognised principle of equality. The Constitutional Court, however, has consistently resisted these attempts of usurping the role of Parliament.[65]

Proposals to introduce a separate discipline of personal / consumer bankruptcy were submitted as early as 2004.[66] However, the current discipline was only introduced by law 3/2012 and soon amended by law 221/2012.[67] These laws introduced the following formal insolvency procedures:

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

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

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

These are formal insolvency procedures. In general, the principle of *par condicio creditorum* cannot be derogated by the parties in formal procedures, but exceptions apply with reference to consumer's agreements. These procedures will be referred collectively as "bankruptcy procedures" or "personal procedures" for the rest of this section (even though, as it will become apparent later in this section, some of these procedures can also be triggered by people who carry out professional and business activities).

Beside the procedures outlined in this section, those debtors who do not qualify for corporate insolvency procedures have no remedies to deal with their situation of over-indebtedness. Italian law does not provide a discipline for remedies known and

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

62 The discharge procedure described in art 142 *legge fallimentare* is not applicable to individuals and it is different from the namesake procedure described in art 3/2012 and outlined in paragraph 6.2(h).

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

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

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

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

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

widely used in other jurisdictions, such as summary instalment orders, individual voluntary arrangements, debt relief orders, pre-bankruptcy compositions, etcetera. Also, there are no simplified procedures for small or assetless estates.

6.2.1 Eligibility criteria

6.2.1.1 Who qualifies as a "debtor"

The legislator adopted a seemingly inclusive approach, as the law prescribes that these procedures are available to all debtors that cannot file for any of the other (corporate) insolvency procedures.[68] Pursuant to article 1 *legge fallimentare*, the debtors who cannot file for corporate insolvency procedures are public entities, non-commercial entrepreneurs (for example, professionals and farmers)[69] and commercial entrepreneurs that do not reach specified thresholds of profits, revenues and debts.[70]

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

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

Doubts have emerged also with reference to specific categories of applicants. These are farmers and unlimited liability shareholders. With reference to shareholders, article 147 *legge fallimentare* extends to them the effect of an order for the opening of a formal insolvency procedure. However, because unlimited liability shareholders cannot autonomously file for corporate liquidation or pre-insolvency compositions, it is commonly accepted that these people can apply for personal procedures. As for farmers, the amendments introduced by law 221/2012 have extended to them the right to apply for these procedures.

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

With reference to consumer's plans (not to be mistaken with consumer's agreements), these procedures are available only to consumers for debts entered into outside their professional or business activity.[71] However, in many situations it is hardly possible to distinguish the debts contracted for entrepreneurial or professional activities from those which are not. Take the case of groceries bought by the owner of a restaurant, or the stationery bought by an accountant: how is it possible to

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

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

[70] These thresholds will be discussed later in this text.

[71] Law no 3/2012, art 6(2)(b).

distinguish what was bought in relation to the professional or business activity and what was bought for personal use and consumption?

Finally, all innovative start-ups are subject to the bankruptcy procedures outlined in this section.[72] This provision is extremely problematic. First, start-ups cannot be subject to discharge, as this benefit applies only to people. It is therefore unclear how – if at all – these provisions apply to start-ups and their owners. Additionally, the rationale behind the statutory choice is questionable. By extending bankruptcy procedures to innovative start-ups, the legislator wanted to promote the ability to start afresh for those entrepreneurs who invested in innovative companies yet suffered from the consequences of their failure. However, these entrepreneurs can only be subject to the liquidation procedure outlined by law 3/2012. That procedure has a mandatory minimum duration of four years. That duration exceeds by far the period usually required to liquidate a corporate entity with few or no assets under the rules outlined by the *legge fallimentare*.

6.2.1.2 Other eligibility criteria

These procedures can be triggered by any person who is in a situation of "over-indebtedness". The law[73] clarifies that a situation of over-indebtedness exists in the following circumstances:

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

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

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

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

Therefore, it can be said that under Italian law, the objective eligibility requirements to file for personal and corporate procedures are the same. It is not clear why the legislator opted to define "over-indebtedness" as a situation which is described as "insolvency" under article 5 *legge fallimentare*.[74] However, it seems that the definition of over-indebtedness includes situations of temporary difficulty to regularly meet the debtor's obligation, a situation not necessarily equivalent to insolvency.

A final requirement for the opening of such procedures is that the debtor must not have entered into any bankruptcy procedure in the previous five years. Such

72 *Idem*, art 25.
73 *Idem*, art 6(2)(a).
74 F Maimeri, "*Presupposti soggettivi ed oggettivi di accesso*" (2012) Fall 1035. Some commentators argue that the definitions of over-indebtedness and insolvency are similar, but not identical: A Guiotto, "*La nuova procedura per l'insolvenza del soggetto fallibile: osservazioni in itinere*" (2012) Fall 24. They therefore argue that it is not clear when consumer debtors should file for any of the procedures outlined in the law: L Modica, *Profili giuridici del sovraindebitamento* (Napoli, 2012) 350; F Macario, "*Finalità e definizioni*" in *La "nuova composizione della crisi da sovraindebitamento* (Il Civilista, 2013) 19.

requirement has no equivalent for corporate procedures, even if in the past a similar limitation applied for the opening of a pre-insolvency composition.

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

6.2.2 Consumer's agreements

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

The first version of the consumer's agreements were true agreements: the debtor and (some of) its creditors had to negotiate and reach an agreement. Once approved, that agreement was binding only on those who signed it and was governed by general contract law rules. This agreement was closely inspired by the restructuring agreements described below in paragraph 6.5.

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

- the proposal cannot be voted on by all of the preferred creditors (unless they give up their preferred status), the spouse and those who are related up to the fourth degree of kinship (included) and those who became creditors in the last year;[75]
- those creditors who do not reply to the proposal are assumed to have voted in favour of it;[76]
- the proposal must be approved by creditors representing 60% of the consumer's debt;[77]
- once approved and published, the proposal is binding on all creditors.[78]

The procedure is articulated in four different steps.

Step 1: opening of the procedure

The procedure begins with: (i) a proposal presented by the debtor / consumer and prepared with the help of a panel of independent experts known as *organismo di composizione della crisi* (referred to as *organismo*);[79] and (ii) a plan.

[75] Law no 3/2012, art 11(2).
[76] *Idem*, art 11(1).
[77] *Idem*, art 11(1).
[78] According to the original version of the creditor's agreements, dissenting and preferred creditors had to be paid in full.
[79] Law no 3/2012, art 15.

The content of the proposal (and plan) is not restricted by the law, but debtors are required to contribute to the repayment of their creditors with their future income. The proposal (and plan) can also include the appointment of an insolvency practitioner (IP)[80] or the *organismo*[81] as the debtor's trustee. In that case, the IP / *organismo* will sell the debtor's assets and distribute the proceeds to the debtor's creditors.

The proposal must be presented to the competent court, which is the court where the debtor lives or has his primary place of business. The proposal must include certain documents, including a list of all creditors, a declaration from the *organismo* that the plan is feasible and a list of all expenses that are deemed absolutely necessary for the livelihood of the debtor and his family. If the debtor carried out entrepreneurial activity, he has to present the book entries (books) for the previous three fiscal years. The local court must determine if the debtor meets the eligibility criteria outlined above. In the case of a positive answer, the court will set a date for a hearing to approve the consumer's agreement. That decree determines the formal opening and admission of the debtor to the consumer's agreement procedure and it must be communicated to all known creditors by the *organismo*.

The plan can include a division of creditors into classes. No guidance is given on the formation of these classes. However, some commentators argue that, due to the collective nature of the procedure,[82] it would not be possible to ignore the principle of *par condicio creditorum* among similarly ranking creditors.[83] The author of this text disagrees with this interpretation and believes that reasonable deviations from the principle of rateable distribution should be justified in light of the negotiated, contractual nature of the plan.

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

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

The hearing must take place within 60 days from the submission of the plan and creditors should be informed at least 40 days in advance. As the 60-day deadline is not mandatory and there is no sanction for not respecting it, it is not infrequent to see that some courts set the first hearing between 120 and 180 days from the submission of the proposal.[84]

From the commencement of the procedure, debtors find themselves in a situation similar to the position of the entrepreneur in a pre-insolvency composition. They can carry out all day-to-day operations without the necessary preliminary approval from the IP (if appointed), the *organismo* or the court. However, any extraordinary disposition of the debtor's assets needs to be approved on a preliminary basis by the

80 Under Italian law an insolvency practitioner (IP) is a person who meets the requirements outlined in art 28 *legge fallimentare*.
81 Law no 3/2012, art 15.
82 *Idem*, art 7(2)(a).
83 V Fabbiano, "*Procedura di Composizione della Crisi da Sovraindebitamento*" (*ilsovraindebitamento.it*, 2013).
84 The court's approval should be issued within six months from the submission of the proposal, but the legislator has not included any sanctions should this deadline not be respected.

competent authority, otherwise it may not be enforceable (not even with respect to third parties acting in good faith).

Step 2: creditors' vote

The debtor's proposal and plan, as well as the court's decree of admission to the procedure, must be communicated to the creditors. The creditors must vote in favour or reject the proposal. If they do not send their vote to the *organismo* at least 10 days before the hearing, it is assumed that they have voted in favour of it.

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

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

If the 60% majority of the creditors (by value) is reached,[85] the *organismo* prepares a final report with the outline of the plan and its final evaluation on its feasibility. This final evaluation must take into consideration any event or changes in circumstances that occurred since the submission of the original proposal.

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

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

After the plan has been approved, creditors have 10 days to raise objections. After this final deadline has passed, the *organismo* sends the proposal, the final report and the creditors' objections (if any) to the court. These objections are not clearly regulated by the law. It seems that only creditors can submit these objections.[86] However, the following section of the same article "clarifies" that the right to submit an objection is reserved for creditors who did not agree to the plan, those who are not included in the plan and "any other interested person".[87]

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85 This threshold does not include privileged or secured creditors if they are paid in full.
86 Law no 3/2012, art 12(1).
87 *Idem*, art 12(2).

Step 3: court's approval

The court can revoke the initial decree of admission to the procedure only in a case of fraudulent behaviour by the debtor.[88] Even if there are no objections from the creditors, the court must ensure that the 60% majority prescribed by the law has been reached. Some commentators argue that courts also have the power to deny approval if the plan appears to be manifestly unfeasible.[89] Absent any such reference in the law, it is preferable to conclude that courts do not have such powers.[90]

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

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

The court's approval of the plan determines:

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

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

Step 4: execution of the plan

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

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

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

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88 *Idem*, art 10(3).

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

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

6.2.3 Consumer's plans

It is important to clarify, on a preliminary basis, who can submit a consumer's plan.

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

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

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

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

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

During the hearing, the court will assess not only the feasibility of the plan, but also: (i) its ability to ensure the payment of non-dischargeable debts; and (ii) the "worthiness" of the debtor. The latter requirement is not met if it can be shown that the consumer took on obligations without any reasonable chance of being able to pay back his debts.[91] It is also possible for the creditors to raise objections when they believe that alternative courses of action, such as consumer's liquidation, would yield more value and higher returns to them.

The court can either approve or reject (but not amend) the plan. In both circumstances, interested parties can file an appeal against that decision to the same court *in composizione collegiale*. This means that the final decision on the petition will

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

be taken by a group of three judges, which will not include the judge who issued the appealed decision.

The effects of the approval of the plan by the court and the execution of the plan are governed by the same rules described for the creditor's agreement.

6.2.4 Consumer's liquidation

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

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

The consumer's liquidation procedure always represents the standard of comparison against which the judge has to assess the convenience of the consumer's agreement[92] and the consumer's plan.[93] It also has to be taken into consideration that in drafting the rules applicable to consumer's liquidation, the legislator included no reference to the liquidation procedure for companies. This suggests that it is not possible to make references by analogy to the general rules applicable to "companies".[94] The decision of the legislator to create two distinct sets of liquidation procedures, one for consumers and one for companies and governed by discrete rules, has been harshly criticised by commentators.[95] These commentators have very valid arguments. For instance, with reference to consumer's liquidation, we are left in the dark about the discipline applicable to pivotal aspects of that procedure, such as the rules governing the allocation of assets.

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

Step 1: opening of the procedure

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

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[92] Idem, art 12(2).

[93] Idem, art 12-*bis*(4).

[94] *Rectius*, all subjects who can file for any of the formal insolvency procedures outlined in the *legge fallimentare*.

[95] Among others, see: A Nigro and D Vattermoli, *Diritto della Crisi delle Imprese: Le Procedure Concorsuali* (4th ed, Il Mulino: Bologna, 2017) 611, describing the lawmaker's approach to drafting this law as a "festival of mistakes, oversights, inaccuracies, illogical and sometimes absurd decisions".

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

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

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

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

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

Step 2: assessment of claims and sale of assets[96]

In a rather unique twist, the procedure for the assessment of claims (that is, determining how much is owed to each creditor) is run entirely by the qualified insolvency practitioner and not by the court.[97] In any case, the creditors have to submit a proof of claim to the liquidator if they want to be admitted to the procedure. These rules apply to any creditors, including secured ones. Only in the case of challenges from creditors will the matter be referred to the competent court.

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

Law 3/2012 does not introduce any rules on the treatment of late submissions from the creditors, that is, those claims received by the liquidator after the deadline. It has

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

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

been argued that these claims are still valid and enforceable[98] provided that they reach the liquidator before the closure of the procedure.

Step 3: distribution of proceeds and closure

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

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

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

The closure of the procedure must be declared by the court no earlier than four years after the opening of the procedure.[99] The closure of the procedure determines the discharge of all of the debtor's unpaid debts.

6.2.5 Treatment of contracts

Law 3/2012 includes few provisions on the treatment of existing contracts. The lack of any direct reference to the provisions in the *legge fallimentare* means that if the contract does not fall within one of those outlined below, the parties in the bankruptcy procedure are free to determine the effects on existing contracts.

One of the few cases mentioned in the law is set-off. Creditors can set-off any claims they may have against the debtor with any claim the debtor himself may have against the creditor, provided that both claims are homogeneous, liquid and due at the time of the opening of the bankruptcy procedure.[100]

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

98 A Nigro and D Vattermoli, *Diritto della Crisi delle Imprese: Le Procedure Concorsuali* (4th ed, Il Mulino: Bologna, 2017) 623.
99 Law no. 3/2012, art 14-*novies*(5).
100 These requirements can be found in the Civil Code, art 1243.

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

6.2.6 Voidable dispositions / impeachable transactions / clawback provisions

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

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

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

If the debtor does not pay the claims that cannot be foreclosed and certain taxes (in particular, VAT and duties due to the European Union),[101] interested parties cannot submit a petition to terminate the plan. However, they can ask for the moratorium against executory actions to be lifted. Similarly, if the debtor fails to pay what is owed under the plan to any public entities, the plan ceases to apply to these entities.[102] As a result, these entities will be allowed to commence or continue any actions to collect their original debt from the debtor.

The cancellation or termination of the original plan does not affect the rights acquired by third parties in good faith. However, it seems that the rules prescribed by the law for voidable transactions can be applied to those transfers to creditors that occurred in the months preceding the cancellation or termination of the plan.[103]

If the debtor is declared *fallito*,[104] the plan ceases to have any effect but the acts, payments and warranties put into place in execution of the plan are not subject to the rules on voidable transactions.[105] Bankruptcy can only be declared if: (i) the thresholds for corporate insolvency procedures are exceeded throughout the execution of the plan; or (ii) the debtor is an unlimited liability shareholder in a company and a corporate insolvency procedure is opened against the company.

[101] Law no 3/2012, art 7(1).
[102] The debtor has 90 days to pay what is owed to public entities under the plan.
[103] *Legge fallimentare*, art 67.
[104] There is no provision under law no 3/2012 that prevents any creditor from submitting an insolvency petition for corporate liquidation before a competent court. See also: Trib. Milano, 10 November 2009, in *Dir fall*, 2010, II, 213.
[105] Law no 3/2012, art 12(5).

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

6.2.7 Assets

If the consumer's agreement is presented by a person who is carrying out a business, the proposal can include a moratorium of up to one year for the payment of secured and preferred creditors, unless the proposal (and plan) is designed to liquidate the assets of the debtor.[106]

6.2.7.1 Moratorium

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

From the time of the debtor's admission to any of the bankruptcy procedures, creditors are not allowed to commence or continue any executory or individual actions against the debtor for the satisfaction of their pre-bankruptcy claims.[107] However, this moratorium does not apply to claims that cannot be foreclosed[108] or to debts contracted after the commencement of these procedures.

The submission of a consumer's plan does not automatically determine the enforceability of a moratorium on executory actions.[109] The court could, however, issue first-day orders that suspend any executory actions against the assets of the debtor if it is proven that the successful outcome of these actions could endanger the feasibility of the plan.

6.2.7.2 Exempt property and preferred claims

As a general rule, secured and preferred creditors have the right to receive no less than what they would receive in a liquidation procedure. Consumer's agreements also have to ensure that all of the claims that cannot be subject to foreclosure[110] are repaid in full. These are:

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

[106] *Idem*, art 8(4).
[107] *Idem*, art 10(2)(c).
[108] The most common example is a former spouse carrying out an executory action for the payment of the money that was awarded by a court as part of a separation or divorce procedure. Only the money that was awarded to ensure the maintenance of the former spouse and the children, will not be subject to the moratorium.
[109] Law no 3/2012, art 12-bis(2).
[110] Civil Procedure Code, art 545.

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

(c) the portion of the debtor's wages and pensions established by the court, in any case for no more than one-fifth for the repayment of taxes and another one-fifth for all other claims;[111]

(d) some of the profits arising from a usufruct over goods owned by the debtor's children;[112]

(e) other goods that cannot be subject to foreclosure by law (for example, a person's wedding band, a set of tables and chairs, some basic pieces of furniture, at least one fridge and one washing machine, etcetera).[113]

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

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

If any goods, assets or money are acquired by the debtor in the four years after the opening of the bankruptcy procedure and do not fall under the exemptions outlined above, those goods, assets or money will be available for distribution to the creditors.[114] The law expressly sets a limit of four years, which means that all assets acquired after that period but while the debtor is still subject to the bankruptcy procedure, will not be available for distribution amongst the creditors.

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

6.2.7.3 Proof of claims by creditors

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

6.2.8 Discharge provisions

The complete execution of a consumer's agreement or consumer's plan results in the discharge of all debts covered in the procedure. However, in the case of liquidation,

[111] The first three exemptions are outlined in art 545 of the Civil Procedure Code.
[112] Civil Code, art 170.
[113] Civil Procedure Code, art 514.
[114] Law no 3/2012, art 14-*undecies*.

the debtor has to apply to court in order to obtain a discharge order. This procedure is governed by article 14-*terdecies* of law 3/2012.

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

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

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

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

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

6.3 Corporate liquidation

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

6.3.1 Eligibility requirements

Corporate liquidation (articles 5-159 of the *legge fallimentare*) is available to all entities that carry out business activity, with the exception of state-owned companies[115] and small companies that do not exceed the following thresholds:

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

[115] *Legge fallimentare*, art1(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;

(c) the company owes debts (even if the debts are not yet due at the time of adjudication) not exceeding EUR 500,000;[116]

(d) the company has overdue (unpaid) debt of less than EUR 30,000.[117]

The applicant has to be in a state of cash-flow or balance-sheet insolvency.[118] Insolvency may be proved if the debtor flees, escapes arrest or shuts down the business premises.[119]

6.3.2 Petition and creditors' claims

The initiative for opening a corporate liquidation procedure is usually taken by either the debtor or by one or more of its creditors.[120] The public prosecutor can also file a corporate liquidation petition in the circumstances outlined in article 6 of the *legge fallimentare*. These circumstances are:

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

The insolvent debtor is under no obligation to file for corporate liquidation but article 217 of the *legge fallimentare* states that a debtor, including the debtor's legal representative, who delays the filing of a petition for bankruptcy commits the crime of "simple bankruptcy" (*bancarotta semplice*) if the delay worsens the debtor's financial distress.[121]

Currently, the petition has to be filed in the court where the debtor has its main place of business (usually, the company's registered office).[122] The petition has to include the documents listed in article 14of the *legge fallimentare*.[123]

If the court is satisfied that the debtor meets the eligibility criteria mentioned above, it will admit the debtor to the procedure. The judgment has immediate effect, starting from the day of the docketing, but it can be appealed within 30 days. The insolvency petition[124] includes the appointment of a delegated judge (with a supervisory role

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116 *Idem*, art 1(2). These figures are updated by the Ministry of Justice every three years.
117 *Idem*, art 15.
118 *Idem*, art 5. For a definition of "insolvency", see para 6.2 above.
119 *Idem*, art 7.
120 *Idem*, art 5.
121 *Idem*, art 217(1)(4).
122 *Idem*, art 9(1). For a discussion of the changes that will be introduced in the near future, see para 4.2 of this text.
123 These are: (i) the mandatory accounting and fiscal books for the three years prior to the filing, or for the entire period of the existence of the company if less than three years; (ii) a description and valuation of the assets; (iii) a list of the creditors and their relevant claims; (iv) an indication of the gross revenue for the three years prior to the filing; and (v) a list of secured creditors and the collateral they hold.
124 *Legge fallimentare*, art 16.

over the procedure)[125] and of a receiver (with the duty of managing the insolvent estate).[126]

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,[127] 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 one year (exceptionally, a year-and-half) after the decree issuing the statement of liabilities, are still considered to be valid. However, late creditors can only share in distributions made after their claims have been admitted.[128]

6.3.3 Receivers and creditors' committees

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

Receivers have to accept the appointment within two days from the judgment opening the corporate liquidation procedure.[129] Receivers act as public officers and are required to perform their duties in person; however, they may be assisted by professional advisers.[130]

The main duties of a receiver include:

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

Shortly after appointment, a receiver has to make an inventory of the debtor's assets and affix his seal on it. He has to draft a liquidation plan within 60 days from the inventory and write progress reports every six months.
In carrying out his duties, a receiver is supported by the creditors' committee[131] which is composed of representatives of the creditor body. These representatives must include a wide variety of creditors. If the creditors are mainly secured and unsecured, the creditors' committee will primarily be made up of secured and unsecured creditors. Preferred creditors cannot hold the majority of votes in the creditors' committee in those circumstances.

The creditors' committee is appointed by the delegated judge dealing with the liquidation within 30 days from the judgment opening the procedure and following

[125] *Idem*, art 23-24.
[126] *Idem*, art 27-39.
[127] *Idem*, art 93.
[128] *Idem*, art 101.
[129] *Idem*, art 29.
[130] *Idem*, art 32.
[131] *Idem*, art 40 to 41.

consultation with the receiver and creditors. A majority (in terms of value of the claims) of the creditors may appoint new members to the creditors' committee at the hearing for the admission of claims. Law decree 59/2016 considers a creditors' committee to be established at the moment of acceptance (including by electronic means) by the nominees.

6.3.4 Consequences of corporate liquidation

From the time of the judgment opening the corporate liquidation procedure, the debtor is dispossessed[132] and may no longer act in court as either plaintiff or defendant in relation to the assets subject to the liquidation procedure.[133] All pending proceedings against the debtor are stayed (with the exception of those of a personal nature) and can only be re-initiated by or against the receiver.

The judgment opening the corporate liquidation procedure determines an automatic stay or moratorium on all judicial actions against the insolvent estate.[134]

By default, the opening of the liquidation procedure determines the cessation of all debtor's activities. However, the court can allow business operations to be continued in cases where ceasing operations will cause "serious harm", provided that the continuation of business does not affect the rights of creditors.[135] It is also possible to lease the business premises to a third party, or to sell the company or part of it as a going concern.[136]

Corporate liquidations are terminated in cases of in-liquidation compositions, or for other reasons outlined in article 118 of the *legge fallimentare*. It is possible to terminate a liquidation procedure if no creditors submit claims, or in cases where all creditors' claims are entirely satisfied. However, termination usually occurs when the receiver has distributed the assets and proceeds according to the rights of creditors in the order of distribution prescribed by law.[137]

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

6.3.5 Treatment of contracts (executory, specific and essential)[138]

The effect of liquidation on existing contracts is regulated by articles 72 to 83-*bis* of the *legge fallimentare*. The general principle applied by article 72(1)of the *legge fallimentare* is that the opening of a liquidation procedure determines the suspension of any ongoing contracts; however, there are exceptions that apply.[139] The receiver has the power to continue to perform in terms of the contract (that is, to assume or reject it). The decision to assume a contract can only be taken with the prior approval of the creditors' committee.

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[132] *Idem*, art 42.
[133] *Idem*, art 43.
[134] *Idem*, art 51.
[135] *Idem*, art 104.
[136] *Idem*, art. 104-*bis*.
[137] *Idem*, art 118(3).
[138] 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).
[139] For instance, pursuant to art 72(8) of the *legge fallimentare*, a receiver cannot suspend or otherwise delay real estate sales if the property is due to become the main home of the buyer or one of his close relatives, or is due to become the headquarters of the purchasing corporate entity.

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

Termination (*ipso facto*) clauses are not enforceable under Italian law.[140] The provision only covers clauses that provide for the termination of the contract due to a filing for corporate liquidation. If termination of the contract is caused by any other event of distress (such as failure to pay the debts when they fall due) or by the opening of another formal insolvency procedure, that clause will be enforceable.

If the contract is not performed and / or terminated, the other party has the right to lodge a claim in the insolvency procedure.[141] The creditor's claim cannot include any damages.[142] 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.[143]

Unlike other jurisdictions, there are no special rules about "essential" contracts. However, the legislator has included several provisions to deal with 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,[144] as well as insurance contracts (in the case of the failure of the insured party).[145] More generally, it applies whenever the court authorises the debtor in a corporate liquidation procedure to continue trading.[146]

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,[147] partnership agreements,[148] bank account and agency contracts,[149] procurement contracts[150] and stock market forward contracts.[151]

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,[152] as well as contracts with retention of title (ROT) clauses.[153]

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140 *Legge fallimentare*, art 72(6).
141 *Idem*, art 72(4).
142 *Ibid*.
143 *Idem*, art 72(7).
144 *Idem*, arts 79 and 80.
145 *Idem*, art 82.
146 *Idem*, art 104(7).
147 *Idem*, art 72-*ter*.
148 *Idem*, art 77.
149 *Idem*, art 78.
150 *Idem*, art 81. Automatic termination does not apply if the personal qualities of the parties have not been fundamental in reaching the agreement.
151 *Idem*, art 76. Examples of these contracts include swap contracts (Court of Florence, 15 January 1998, in (1998) *Fall* 857), domestic currency swaps (Court of Turin, 4 April 1998, in (1998) *Fall* 857), options on futures and options on currency (Court of Turin, 23 January 1998, in (1998) *Fall* 534).
152 *Idem*, art 72-*quarter*.
153 *Idem*, art 73. The law states that the insolvency of the vendor does not affect the validity of the contract. For the rationale behind this choice, see: Court of Rome, 26 January 2007, in (2007) *Fall* 592; C Cass, 22nd December 2005 no 28480.

The law also clarifies the consequences should the receiver decide to perform the contract, such as in the case of long-term supply contracts.[154] In such cases the receiver has to cover any outstanding balance and unpaid obligation before assuming the contract. This applies to any unpaid invoice, irrespective of whether it was for goods delivered or services provided before or after the commencement of the liquidation procedure. The choice of the receiver to be the successor in title of the contract does not necessarily have to be in writing. Assumption of the contract can be tacit and presumed by the conclusive facts, as long as those facts are unequivocal.[155]

Finally, in light of the unique characteristics of some contracts, the legislator introduced *ad hoc* rules that do not follow any of the general approaches described above. This happens with contracts to build new properties,[156] for goods sent but not yet delivered[157] and for publishing contracts.[158]

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.[159]

6.3.6 Netting and set-off

Under Italian law, it is possible for creditors to offset claims against the debtor.[160] Automatic set-off requires the claim to be quantified and certain, but not necessarily due. These claims must exist at the commencement of the corporate liquidation procedure. As a result, it is not possible to apply set-off against a clawback claim by the receiver. Additionally, it is not possible to set off claims that were purchased after the commencement of the procedure, or in the previous year.

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

6.3.7 Avoidance / clawback actions

Creditors have the right to challenge the validity of any transactions carried out by the debtor if they significantly affect the possibility of the creditor being repaid, even in cases where the debtors did not have enough assets to repay their creditors from the outset.[161] This action is known as the *actio Pauliana* and it is regulated by article 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*);

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[154] *Idem*, art 74.
[155] C Cass, 22nd May 1996, no 4715.
[156] *Legge fallimentare*, art 72-*bis*. The *legge fallimentare* provides that the decision on the dissolution or the continuation of the contract is not (only) given to the receiver, but to both parties. The decision of any of them binds the other. On the special nature of this rule, see: Court of Brescia, 23rd May 2014, in (2015) *Fall* 480.
[157] *Idem*, art 75.
[158] *Idem*, art 83.
[159] *Idem*, art 83-*bis*.
[160] *Idem*, art 56.
[161] C Cass no 1366/2017.

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

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

The receiver can challenge deeds executed by the debtor on a gratuitous basis[163] and re-payments of debt that were not due at the time of the opening of the liquidation procedure[164] 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;[165]

(b) the repayment of due debts not effected through cash or ordinary forms of payment;[166] and

(c) pledges, *antichresis* rights[167] and voluntary mortgages granted or set up for pre-existing debts that are not yet due.[168]

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;[169] and (ii) any other transactions in the ordinary course of business.[170] 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*).

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162 *Legge fallimentare*, art 66.
163 *Idem*, art 64.
164 *Idem*, art 65.
165 *Idem*, art 67(1)(1). These are transactions for consideration where the services performed or the obligations undertaken by the debtors exceed of at least 25% of what has been given or promised to them.
166 *Idem*, art 67(1)(2).
167 *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.
168 *Idem*, art 67(1)(3).
169 *Idem*, art 67(1)(4).
170 *Idem*, art 67(2).

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

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

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

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

6.3.8 Directors' liability

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

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

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

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

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

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

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

A significant provision is contained in article 224 of the *legge fallimentare*. This provision extends criminal liability for simple bankruptcy to managers, auditors and officeholders. These persons can be punished with imprisonment of between six months to two years if they unreasonably delayed the commencement of a corporate insolvency procedure, or they have concurred in altering the company's accounting entries. Law 132/2015 provides that all judicial proceedings linked to the liquidation procedure must be dealt with in priority over other (civil) proceedings, in an attempt to reduce the duration of liquidation procedures.[171]

[171] *Idem*, art 43(4).

6.3.9 Small companies and large groups

There are no specific rules for micro, small and medium enterprises (MSMEs) in corporate liquidation. However, for assetless estates, or if there are insufficient assets to cover the costs of the procedure (particularly the receiver's fees), the court can summarily liquidate the company upon notification by the receiver.[172]

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

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

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

6.3.10 Concluding remarks

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

The proposal for an in-liquidation composition can be submitted by the debtor, a creditor or a third party. It cannot be submitted by either the creditors' committee or the receiver.[173] The proposal must be lodged with the delegated judges. The receiver must furnish his opinion regarding the feasibility of the composition and convenience to creditors by assessing the proposal against the likely outcome of a corporate liquidation procedure.

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

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

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[172] *Idem*, art 118(4).
[173] *Idem*, art 124(1).

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

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

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

Finally, it is possible to convert the corporate liquidation procedure into extraordinary administration. These are extremely rare cases. It is much more likely that a corporate rescue procedure (for example, a pre-insolvency composition) will be converted into a liquidation procedure. It is not possible to convert a corporate liquidation into a forced administrative liquidation, as the companies who can file for one of these procedures cannot file for the other one and *vice versa*.[174]

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.

6.5 Corporate rescue – pre-insolvency compositions

6.5.1 General

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

(a) pre-insolvency compositions;

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

(c) forced administrative liquidation; and

(d) extraordinary administration.

In order to keep the length of this text manageable (and because the following are the procedures most commonly used by distressed debtors), this text only focuses on pre-insolvency and restructuring agreements. The choice is also influenced by the nature of the *piani attestati di risanamento* (turnaround plans), which are very similar to out-of-court workouts. In fact, these turnaround plans[175] are not judicial procedures; no automatic stay is granted and no provisions on post-commencement financing and post-adjudication creditors are included in the law. Debtors rely on them in the early stages of a corporate crisis, as their content is extremely flexible

[174] *Idem*, art 2.
[175] *Idem*, art 67(3)(d).

and there is no need to respect the principle of *par condicio creditorum* among the creditors.

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

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

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

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*);[176] (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

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

1,400 per term in the second quarter of 2013.[177] There were concerns that these numbers suggested a strategic, abusive use of pre-insolvency remedies.[178]

There is some evidence of improper use of this procedure in case law. Over the years, the Supreme Court restated on several occasions that courts should not approve pre-insolvency compositions that offered tiny, insignificant percentages of returns to unsecured creditors.[179] Despite that, several courts approved procedures where unsecured creditors obtained little or nothing from the pre-insolvency composition.[180] 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.[181] However, it follows the trend that emerges from case law to penalise and not approve those pre-insolvency compositions where unsecured creditors receive nothing or very little,[182] 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)[183] shares the same attitude towards pre-insolvency compositions that guided the legislator in 2015. In particular, it reasserts the more stringent approach towards the opening and use of pre-insolvency compositions aimed at liquidating the assets and not continuing the business of the distressed debtor.

These more rigorous criteria brought the number of "traditional" petitions[184] down to a figure of 120 per term[185] in the first six months of 2018. This represents a 27% drop over 2017 numbers.[186] Companies now prefer filing for a *concordato in bianco*, with 728 petitions in the first 6 months of 2018.[187] These figures, however, still represent a drop of 16% over the previous year.[188]

Recent regulatory changes probably pushed debtors to either explore alternative composition mechanisms (such as out-of-court workouts) or delay the filing to the

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

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

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

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

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

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

183 See para 9 of this text.

184 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.

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

186 *Idem*, 7.

187 *Ibid*.

188 *Ibid*.

11th hour, when a condition of insolvency has manifested. It is yet to be seen if and to what extent the 2017 reforms will impact on this trend.

6.5.1.2 Pre-insolvency compositions currently

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

(a) the restructuring or discharge of debt in whatever form. Plans can provide for the transfer of assets, the assumption of debts or any other transaction (including the sale of assets to creditors in satisfaction of their claims), the issuance of shares, quotas or bonds (including convertible bonds) and any other financial instruments;

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

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

In an attempt to dissuade strategic filings and better protect the rights of the creditors, law 132/2015 specified that the plan must outline a specific and economically valuable practical benefit (*utilità*) for each of the debtor's creditors.[189]

This plan can be submitted alongside the petition (traditional petitions) or at a later stage (*concordato in bianco*), but in any case between 60 and 120 days[190] from the submission of the original petition. This deadline can be extended to 180 days where there are justifiable reasons for doing so.[191] A petition for a *concordato in bianco* cannot be submitted by a debtor who filed for a pre-insolvency composition in the previous two years and who failed to either be admitted to the procedure or to have the plan approved by the court.[192]

6.5.2 Eligibility requirements

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

The first one is that the debtor is in a state of crisis rather than in a state of insolvency.[193] A state of crisis can, but does not necessarily have to, be a state of insolvency.[194] It is a situation of economic and financial distress that can lead to insolvency. The existence of this condition has to be demonstrated not only when the company is first admitted to the procedure, but also when the court is asked to approve (*omologare*) the agreement reached by the creditors and the debtor.

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

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

[191] *Legge fallimentare*, art 161(6).

[192] *Idem*, art 161(9).

[193] *Idem*, art 160(1).

[194] *Idem*, art 160(3).

A crisis situation is experienced by companies in dire financial or economic distress and which cannot turn around their business by relying on existing out-of-court, contractual remedies. It must be demonstrated that the crisis situation is likely to lead to a condition of insolvency if not properly and timely addressed. In other words, the pre-insolvency composition, whilst being modelled on the US Chapter 11 procedure, has much more stringent eligibility requirements.

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

The second additional requirement – which does not apply to pre-insolvency compositions that contemplate business continuation (*concordato in continuità*)[195] – is that the plan ensures the payment of at least 20% of the unsecured creditors' claims,[196] while preferred and secured creditor cannot be paid less than what they would receive in a corporate liquidation procedure.[197]

In general, there is no obligation to file for any of the corporate rescue mechanisms described in this text.[198]

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.[199] The petition also has to be sent to the public prosecutor.[200]

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

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

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

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

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

These documents must be accompanied by a report by a professional appointed by the debtor. This professional must meet the requirements of independence and professionalism laid out in article 67(3)(d) of the *legge fallimentare*.[201] The report

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195 *Idem*, art 186-*bis*, introduced by law no. 134/2012.
196 *Idem*, art 160(4).
197 *Idem*, art 160(2).
198 Different considerations apply with reference to forced administrative liquidation and extraordinary administration, as these procedures have different entry requirements.
199 *Legge fallimentare*, art 161(1).
200 *Idem*, art 161(5).
201 *Idem*, art 161(3). These are usually (partnerships of) chartered accountants or auditors.

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.[202]

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

6.5.4 Judicial commissioner

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

Nominated judicial commissioners have to accept the appointment within two days from the order that admitted the debtor into the pre-insolvency composition procedure.[203] Judicial commissioners act as public officers[204] and are required to perform their duties in person, but they can be assisted by professional advisers.[205] Their appointment can be revoked under the same circumstances applicable to receivers.[206]

Judicial commissioners have a specific duty to provide relevant information to creditors who want to submit alternative restructuring or liquidation plans[207] and to public prosecutors in cases of criminal behaviour.[208]

Judicial commissioners have to inform the creditors of the date of the creditors' hearing.[209] 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.[210] Judicial commissioners have to write a similarly detailed report with reference to the alternative composition plan submitted by qualified creditors, at least 30 days before the creditors' hearing.[211]

6.5.5 Procedure

The competent court has to check whether the debtor meets the statutory eligibility requirements and that all documents have been submitted. This is a procedural aspect, where the court checks the legal feasibility (*fattibilità giuridica*) of the procedure.[212] If all conditions are met, the court admits the company into the pre-insolvency composition, appoints a delegated judge and a judicial commissioner and

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[202] *Idem*, art 161(5).
[203] *Idem*, art 29.
[204] *Idem*, art 165(1).
[205] These may include an expert appraiser – art 172(3) of the *legge fallimentare*.
[206] *Legge fallimentare*, art 165(2).
[207] *Idem*, art 165(3)-(4).
[208] *Idem*, art 165(5).
[209] *Idem*, art 171.
[210] *Idem*, art 172.
[211] *Idem*, art 172(2).
[212] C Cass, Sez Un, 20 January 2013, no 1521 in (2013) Fall 149.

schedules a creditors' meeting within 120 days from the date of the order (1st order: admission to the procedure).[213] The creditors' meeting is usually held electronically.[214] Upon admission to the procedure, the debtor has to pay the court part of the pre-insolvency composition expenses (between 20% to 50% of the total amount).[215] Such decision is taken by the court.

At the creditors' meeting, the judicial commissioner explains the debtor's composition proposal and those that were eventually submitted by the creditors. Creditors representing 10% or more of the company's debt[216] can file an alternative proposal,[217] unless the debtor's plan guarantees the payment of at least 40% of unsecured creditors' claims (30% in the case of a *concordato in continuità*).[218]

Secured and unimpaired creditors (that is those creditors that will receive the amount originally owed under their claim) do not have the right to vote on the proposal, unless the proposal includes partial or deferred payments of their claims. Secured creditors can receive less than the amount claimed against the debtor if they would not receive better treatment in an alternative liquidation procedure.[219]

The debtor's plan must be approved by the majority of unsecured creditors. This vote is designed to test the economic feasibility (*fattibilità economica*) of the plan.[220] Votes are counted according to the amount of the claims and not the number of claims (*per capita*). Where creditors are divided into classes, each class must vote in favour of the proposal. Law 132/2015 removed tacit assent for the calculation of majorities, making it significantly more difficult for applicants to reach the prescribed majority (this is due to the historic lack of participation of creditors in formal insolvency procedures). The removal of tacit assent is also likely to promote those practices – such as hoarding of delegations – that law 134/2012 tried to tackle by making it easier to secure a qualified majority in favour of the plan.[221]

A significant innovation introduced by law 132/2015 is that currently creditors can submit alternative plans[222] and that a detailed, competitive bidding procedure has to be observed in the case of pre-pack pre-insolvency compositions.[223] The bidding procedure also has to be carried out in respect of any proposal for corporate lease,[224] for the whole or part of the company, given the frequent inclusion in these contracts of a pre-emptive right of the lessee over the lessor's business.

213 *Legge fallimentare*, art 163(2).
214 *Idem*, art 163(2-*bis*), introduced by law decree no 59/2016.
215 *Idem*, art 163(2)(4).
216 This threshold can be reached by the purchase of claims from other creditors after the submission of the pre-insolvency composition petition. The claims held by the debtor's holding company, the companies controlled by the debtor and any company jointly controlled by the debtor and the holding company, may not be included in this percentage.
217 *Legge fallimentare*, art 163(4).
218 *Idem*, art 163(5). This choice has been criticised because one of the key elements of the assessment (ie, the date on which the money will be paid to the creditors) has been entirely ignored. Creditors may not be interested in a promise of full payment in 10 years when they can get 30% of what is owing to them immediately. See: S Ambrosini, *Il nuovo diritto della crisi d'impresa: l. 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016) 31.
219 *Idem*, art 160(2).
220 C Cass, Sez Un, 20 January 2013, no 1521 in (2013) Fall 149.
221 S Ambrosini, *Il nuovo diritto della crisi d'impresa: l. 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016) 21.
222 *Legge fallimentare*, art 163(4)-(8).
223 *Idem*, art 163-*bis*. Absent any guidance from the legislator, some courts decided to require the use of competitive bidding procedures in all cases in which the debtor asked for a pre-pack sale to take place before the pre-insolvency composition's homologation (official approval): Court of Padova, 6 March 2015, in <https://wwww.ilcaso.it>, Sez Giurisprudenza, 12291 (31 December 2018).
224 *Idem*, art 163-*bis*(5).

This choice and similar proposals, however, have been criticised[225] for being in contrast with the principle of freedom of private economic initiative (article 41 of the Constitution). In pre-insolvency compositions the debtor might simply be in a situation of distress and / or crisis and not necessarily insolvent. This means that the debtor should still be solely responsible for corporate decisions, as the company is not managed in the interests of the creditors. Imposing a particular course of action (bidding procedure) against the will of the debtor may breach the debtor's fundamental rights.[226] Unsurprisingly, the recent Rordorf reform suggested that the duty to carry out a bidding procedure should be limited to cases where the debtor is insolvent.

If the plan is approved, creditors representing 20% or more of the company's debt can file an appeal with the delegated judge. The judge can confirm the approved plan (2nd order: homologation (official approval) of the plan) if he is satisfied that the dissenting creditors would not receive better treatment under an alternative formal insolvency procedures (for example, corporate liquidation). In other words, the judge exercises US-style cram-down powers over dissenting creditors.[227]

If the plan includes the transfer or sale of assets, the delegated judge appoints a liquidator to execute the plan. The procedure should last no more than nine months from the date of filing, subject to a 60-day extension. However, these deadlines are not mandatory and are frequently ignored.

6.5.6 Consequences of pre-insolvency compositions

The admission of a company into a pre-insolvency composition resultsin 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 – with the exception of certain secured creditors – to commence or continue any actions (including executory ones) against the assets of the debtor (moratorium or stay).[228]

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

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

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225 L Stanghellini, *Le crisi d'impresa tra diritto ed economia* (Bologna: Il Mulino, 2007) 226 and 240.

226 The Constitutional Court has yet to determine if the choice operated by the legislator in 2015 is compatible with the constitutional principle of freedom of economic initiative.

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

228 *Legge fallimentare*, art 168(1).

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

6.5.7 Treatment of contracts[229]

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

In general, as the debtor continues to run the business in a pre-insolvency composition, contracts are deemed to be unaffected by the opening of these procedures.[230] Therefore, should the debtor breach the contract, the other party is usually entitled to terminate the contract.

There are some exceptions to this general rule. Debtors may seek the judge's authorisation to terminate non-performed or partially performed pending contracts,[231] with some notable exceptions.[232] Should the delegated judge grant the debtor's request, the debtor will have to pay a full indemnification to the counterparty. This indemnification ranks as a pre-filing, unsecured claim.[233]

Unlike the position in a corporate liquidation procedure,[234] the termination of any contracts does not affect the validity of the arbitration clauses included in those contracts.[235]

The debtor may seek a suspension of ongoing contracts for up to 60 days in order to assess the most appropriate course of action. In exceptional circumstances, this period can be extended to 120 days.[236]

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

With reference to the payment of goods and services that are essential for the business, if the independent expert agrees that their payment is crucial for the continuation of the business and for ensuring the best interests of all creditors, the debtor may be authorised to pay pre-filing invoices.[237]

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229 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).

230 *Legge fallimentare*, art 169-*bis*.

231 *Idem*, art 169-*bis*(1).

232 These exceptions are listed in art 169-*bis*(4) of the *legge fallimentare* and include: (i) employment contracts; (ii) real estate contracts where the transferred property is certain to be used as the buyer's (or one of his close relatives) home, or as the company's headquarters; (iii) loans contracted for a specific purpose; and (iv) rental contracts where the debtor in a state of crisis is the owner of the building.

233 *Legge fallimentare*, art 169-bis(2). However, if the creditor supplied goods or services after the submission of the petition, he will be treated as a post-application creditor for that amount, with the right to be preferred over any other claimant.

234 See the paragraph dealing with corporate liquidation above.

235 *Legge fallimentare*, art 169-*bis*(3).

236 *Idem*, art 169-*bis*(1).

237 *Idem*, art 182-*quinquies*(5)-6).

If the pre-insolvency composition contemplates business continuation (*concordato in continuità*), the debtor is entitled to continue performing public procurement contracts as well as to take part in public tenders.[238] In the same procedure, executory contracts cannot be terminated by the other party by reason of the debtor having filed for a pre-insolvency composition. In all other cases of pre-insolvency composition, termination clauses triggered by the filing are enforceable.

6.5.8 Netting and set-off

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

6.5.9 Post-commencement financing

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

Post-commencement lenders are entitled to be treated preferentially as post-adjudication creditors in the repayment of post commencement financing loans. Similarly, claims (including claims for repayment of loans for up to 80% of the amount of shareholder loans) arising in the course of the implementation of the plan – not just after but also before homologation (official approval) – are granted the highest priority and must be paid in full.[239]

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

Subject to the court's approval, debtors can enter into first priority financing agreements to support the plan, even if they had only submitted a petition for a *concordato in bianco*. The delegated judge's authorisation is subject to a certification to be issued by an independent expert that the new finance is instrumental to the satisfaction of the creditors. These loans may be secured by pledge, mortgage or by an assignment of receivables.[240]

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 homologation (official approval) by the delegated judge, the debtor executes the composition plan under the supervision of the judicial commissioner. The judicial commissioner has an obligation to refer to the court any relevant circumstances that may harm the creditors' expectations.[241] If the debtor does not comply with the plan, the court may replace the debtor with the judicial commissioner.[242]

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238 *Idem*, art 186-*bis*.
239 *Idem*, art 182-*quarter*(1)-(3).
240 *Idem*, art 182-*quinquies*.
241 *Idem*, art 185(1).
242 *Idem*, art 185(4).

With the exception of compositions resulting in the transfer of assets to third parties,[243] any creditor can ask for the termination of the composition procedure for breach of the approved plan,[244] unless the breach is not materially relevant.[245] This petition must be submitted within one year of the original termination date of the plan.[246]

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.[247]

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 article 2901 *et seq* of the Civil Code (*actio Pauliana*). Nevertheless, in his preliminary report the judicial commissioner has to report on the actions that a receiver could carry out in a corporate insolvency procedure,[248] to give creditors the information needed to take a reasoned decision regarding the proposed plan.

6.5.12 Directors' liability

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

6.5.13 Small companies and large groups

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

6.5.14 Concluding remarks

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

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[243] *Idem*, art 186(4).
[244] *Idem*, art 186(1).
[245] *Idem*, art 186(2).
[246] *Idem*, art 186(3).
[247] *Idem*, art 167(2).
[248] *Idem*, art 172(1).

Before the recent period of reforms, the rejection of a pre-insolvency composition proposal determined the automatic conversion of that procedure into corporate liquidation.[249] This is no longer possible, unless creditors or the public prosecutor have submitted an insolvency petition against the company.[250] It is never possible to open a corporate insolvency procedure against a company in a pre-insolvency composition.[251]

Should the judicial commissioner realise that any of the eligibility requirements are no longer being met,[252] or the debtor has acted maliciously by hiding assets, declared non-existing debts or acted in an otherwise fraudulent manner, he has 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.[253] However, the debtor can be declared insolvent and admitted to a corporate liquidation procedure only upon request by a creditor or the public prosecutor.[254]

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

6.6 Corporate rescue – restructuring agreements

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

Debtors are never dispossessed under this procedure, not even in the few circumstances foreseen in pre-insolvency compositions. Sometimes, debtors are simply asked to obtain pre-emptive approval from the court before entering into a transaction with a third party. Debtors in a state of crisis need to submit the same documents required for commencing a pre-insolvency composition procedure. These documents must be accompanied by a report from a professional appointed by the debtor. This professional must meet the requirements of independence and professionalism set out in article 67(3)(d) of the *legge fallimentare*.[255]

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

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

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[249] See also: C Cass, Sez Un, 23 January 2013, no 1521 in (2013) Fall 149.
[250] C Cass, Sez Un, 10 April 2019, no 9146.
[251] C Cass, Sez Un, 15 May 2015, no 9935.
[252] *Legge fallimentare*, art 173(3).
[253] *Idem*, art 173(1).
[254] *Idem*, art 173(2).
[255] *Idem*, art 182-*bis*(1). These are usually chartered accountants or auditors.

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

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

The only dissenting creditors that can be bound to the terms and conditions of the restructuring agreement are those banks and other financial institutions that have rights and interests against the debtor similar to those of other banks and financial institutions that have approved the agreement.[256] Extending the effect of the restructuring agreement to these dissenting creditors is only possible if the restructuring agreement is approved by banks and financial institutions representing 75% or more of the financial debts.

In all cases these dissenting creditors:

(a) have the right to be informed of the opening of negotiations with the other banks and financial institutions and to take part into those negotiations;[257]

(b) cannot be forced to provide new finance or maintain existing financial agreements (such as overdraft facilities or loans) beyond the expiry date originally agreed by the parties in their contracts.[258]

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

The agreement (with the support of the required majority of creditors) is published in the companies' register maintained by the Chamber of Commerce and is binding from the date of publication.[259] For 60 days after the date of publication, creditors cannot commence or continue individual actions against the assets of the debtor (automatic stay).[260]

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

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

- a professional (who meets the requirements set out in article 67(3)(d) of the *legge fallimentare*) certifies that if the proposal is accepted, the dissenting and / or non-participating creditors can be fully repaid within the timeframe mentioned above.[261]

Within 30 days from its publication, any creditors or interested party can submit an appeal against the proposed restructuring agreement. The competent court decides

256 *Idem*, art 182-*septies*(2).
257 *Ibid*.
258 *Idem*, art 182-*septies*(7).
259 *Idem*, art 182-*bis*(2).
260 *Idem*, art 182-*bis*(3).
261 *Idem*, art 182-*bis*(6)-(7).

on any appeals and homologates (officially approves) the agreement if the required majorities are met.[262]

It is not clear under what circumstances courts can deny the homologation (official approval) of a restructuring agreement when it has been approved by the statutory majorities. In achieving full implementation of the rescue goals pursued by the legislator with this procedure, the courts should refrain from investigating if the circumstances outlined in the restructuring agreement are likely to occur. Courts should simply check that the formal requirements prescribed by the law are met. However, some courts[263] make use of their discretionary powers to provide public prosecutors with supervisory powers whenever the successful outcome of the restructuring agreement relies on conditions unlikely to occur in the near future.

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

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

Self-Assessment Exercise 3

Question 1

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

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

Question 2

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

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

Question 3

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

262 *Idem*, art 182-*bis*(4).
263 Court of Milan, 10 November 2009.

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

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

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

7. CROSS-BORDER INSOLVENCY LAW

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

Universalism in its purest form promotes an idealistic world in which each legal system and each national court are compelled to enforce the orders issued by a foreign court that has authority over the main (insolvency) proceeding.[264] 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".[265]

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.[266] 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.[267]

Other models have been designed, such as procedural incrementalism,[268] contractualism and co-operative territoriality,[269] as well as the modified versions of the models mentioned in the previous two paragraphs.

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[264] 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.

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

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

[267] 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.

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

[269] 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.

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

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

The 1990 European Convention on Certain Aspects of Bankruptcy (Istanbul Convention) represented a new proposal based on modified universalist ideas. While its content was limited to procedural rules on conflicts of jurisdiction, it was not ratified by a sufficient number of 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 of the 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;[270]
- 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;[271]

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[270] EIR recast, art 1.

[271] *Idem*, recital 10 and art 1.

- they can promote the rescue of economically viable but distressed businesses and provide entrepreneurs with a second chance;[272]

- they provide for a discharge of debt or debt adjustment in relation to consumers and self-employed persons;[273]

- 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.[274]

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

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

Unfortunately, it is more likely than not that turnaround plans do not fall within the EIR recast's remit as they are not subject to the supervision of a court or an insolvency practitioner, there is no dispossession or limitation to the debtor's freedom of entrepreneurial activity and they are entirely confidential.[275] The author of this text supports the conclusion that turnaround plans are excluded by the EIR recast, as recital 13 of the regulation holds that "insolvency proceedings which are confidential should be excluded from the scope of this Regulation".

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

An example of the survival of this territorialist approach is represented by the rules that govern the jurisdiction of insolvency courts in cross-border cases and procedures against foreign-registered companies.

Article 9 of the *legge fallimentare* states that Italian first instance courts have the exclusive power to approve a petition to open formal insolvency proceedings against those companies that operate in their jurisdiction.[276] Additionally, they have the power to open formal insolvency proceedings against those companies who transferred their centre of main interest to a different country in the year before the filing.[277] Finally, Italian courts enjoy wide powers to make orders (including the opening of

[272] *Idem*, Recital 10.
[273] *Ibid*.
[274] *Idem*, art 2(1).
[275] S Ambrosini, *Il nuovo diritto della crisi d'impresa: l. 132/15 e prossima riforma organica* (Bologna: Zanichelli, 2016) 53.
[276] *Legge fallimentare*, art 9(1).
[277] *Idem*, art 9(2).

insolvency proceedings) against Italian-based secondary establishments of foreign companies.[278]

Italian courts, however, cannot grant an insolvency petition against the entrepreneur / company that carried out some business in Italy but without establishing secondary premises in this country.[279] Additionally, it is unclear what the position would be if the foreign company / entrepreneur has more than one secondary seat in Italy. Some authors argue that article 9(3) of the *legge fallimentare* should be linked to article 9(1), which clearly gives priority to the court in which the debtors have their main seat. According to this interpretation, jurisdiction should be recognised by the court of the main secondary establishment of the foreign debtor.

This solution appears incredibly cumbersome and is liable to cause significant litigation among interested parties. The author of this text therefore believes that, in cases of conflict of jurisdiction between Italian courts where the foreign debtor has secondary establishments, the case should be opened and discussed in front of the court that first received the petition from the debtor and / or a third party.[280]

Italian judges interpret these rules with a territorialist mind-frame. For instance, the Supreme Court[281] held that Italian courts have jurisdiction over a petition for corporate insolvency against a limited liability company that transferred its registered office to a different jurisdiction after the emergence of a situation of crisis, even if this occurred before the one-year time limit mentioned in the law.

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

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

In any case, transfer of the registered office to a foreign jurisdiction after a filing for any formal insolvency procedure does not affect the jurisdiction of the Italian court.[282] Finally, the insolvency petition submitted to an Italian court can be based on an unpaid claim that came into existence under foreign, not domestic law (for example, a foreign, executory judgment against the debtor).

If an insolvency petition is submitted in Italy against a foreign company or entrepreneur and the Italian court has jurisdiction in that case, the director or other

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

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

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

[281] C Cass, Sez Un, 15880/2011.

[282] *Legge fallimentare*, art 9(5).

legal representative of the foreign entity have the right to a hearing before the opening of a formal insolvency proceeding.

While these examples show the Italian legislator's preference for a territorialist approach, this *favor* is somehow mitigated by the need to respect European laws and international conventions, as established by article 9(4) of the *legge fallimentare*. However, Italy signed few of these conventions. Apart from the convention with the United Kingdom,[283] which may come under consideration when that country withdraws from the European Union, all other conventions have been agreed with other Member States.[284] These conventions have, therefore, been superseded by the EIR, as amended in 2015.

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

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 40s. 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,[285] any judgment opening insolvency proceedings handed down by a court of a Member State is automatically recognised in Italy.[286] 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.[287]

The situation is more complex with reference to foreign judgments issued in states that are not part of the European Union, or with which Italy does not have any special agreement by means of a bilateral or international treaty. In those cases, article 9 of

[283] Signed in 1964 and enforced by law no. 280/1973.
[284] These are France (convention signed in 1930 and enforced by law no. 45/1932) and Austria (convention signed in 1977 and enforced by law no. 612/1985).
[285] 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.
[286] European regulation on insolvency proceedings (recast), art 19.
[287] *Idem*, art 33.

the *legge fallimentare* does not apply, the result being that recognition is governed by private international law principles.

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

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

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

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

(d) the effects of such recognition or enforcement was not manifestly contrary to Italian public policy.[288]

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.[289]

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[290] and / or the foreign authority had no competence over the subject matter according to Italian private international law principles.[291]

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, generally speaking international and bi-lateral conventions usually exclude from their remit insolvency law issues (and judgments). Therefore, several commentators have argued that article 64 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.[292]

This is not the prevailing opinion at the time of writing. The majority of commentators now believe that article 64 of law 218/1995 applies to insolvency judgments issued

[288] 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.

[289] Law 218/1995. art 65.

[290] *Idem*, art 64(g).

[291] *Idem*, art 64(a).

[292] 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.

by courts outside the European Union.[293] The automatic recognition of insolvency judgments issued outside the European Union was recently established in a case before the Supreme Court.[294]

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[295] and the ability to freely dispose of registered movable and immovable goods belonging to the bankrupt or insolvent company.[296] However, the production of further effects, such as the automatic stay[297] and the inability to use non-registered movable goods,[298] is subject to the court's approval of an order pursuant to article 67 of law 218/1995.

The distinction of the effects arising from the recognition of foreign judgements may lead to unreasonable results. This may be the case where there is an insolvency order against a person who cannot be subject to insolvency proceedings under Italian law (for example, a farmer). A bankruptcy order against a farmer under Chapter 12 of the US Bankruptcy Code can be recognised pursuant to article 64 of law 218/1995. However, if that farmer had assets in Italy, the automatic stay would not apply and local creditors could seize them. 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 the majority of Italian commentators adopt 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.[299] Most recently, the influential Milanese court held that:

> "Extra-European foreign judgments that determine the opening of formal insolvency procedures do not determine automatic effects in Italy as our jurisdiction – pursuant to art. 9(3) *legge fallimentare* – does not follow a universalist, but a territorialist approach to the recognition of foreign judgments."[300]

This judgment represents one of the latest iterations of a consolidated judicial approach.[301] In the wake of regulatory reforms (discussed in the next paragraph), it is

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293 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.

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

295 *Legge fallimentare*, art 43.

296 *Idem*, art 88(2).

297 *Idem*, art 51.

298 *Idem*, art 88(1).

299 M Fabiani, "*Riconoscimento di decisioni dichiarative di fallimento e resistenze giurisprudenziali municipali*" (2008) Int'l Lis 73.

300 Trib Milano, Sez IV civile, 30 October 2014, in (2015)6 *Fall* 693. Translation from Italian by the author of this text.

301 See, among others: Trib Napoli, 10 January 2008m (2008) *Fall* 571.

submitted that applicants will have a hard time recognising and enforcing extra-European foreign insolvency judgments in Italy.

Self-Assessment Exercise 5

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

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

9. INSOLVENCY LAW REFORM

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

The last two decades have been characterised by frequent yet fragmented changes to the existing law. Despite the relevance of some of these reforms,[302] these changes have resulted in a system that lacks coherence and co-ordination between reformed and non-reformed provisions. As a result, litigation increased, the costs of formal insolvency procedures were inflated and the judiciary struggled to develop uniform interpretations of the new provision.

Law 155/2017 was published in the *Gazzetta Ufficiale* on 30 October 2017[303] and entered into force on 14 November 2017.[304]

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.[305] 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,[306] the recommendation on a new approach to business failure and insolvency[307] and more recent European documents.[308] More importantly for the purposes of this

[302] See, among others, legislative decree no 5/2006.
[303] Year 158, No 254.
[304] 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).
[305] 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).
[306] 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.
[307] Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency (2014/135/EU) [2014] OJ L 74/35.
[308] 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

module, the Commission drew inspiration from the principles underpinning the UNCITRAL Model Law on Cross-Border Insolvency[309] to establish simplified procedures for the recognition of qualifying foreign insolvency proceedings.

It can be argued that Italian insolvency law (corporate and personal) already complies with the majority of the recommendations included in the 2014 document drafted by the Commission. However, the recommendation suggests that European countries should allow debtors to enter a process for restructuring their business without the need to formally open court proceedings.[310] It also suggests that the appointment of mediators and supervisors should not be compulsory, especially in restructuring-oriented procedures.[311] Finally, it suggests that measures should be put in place to deal with the insolvency of groups of companies, particularly if a cross-border element is present.[312] The Rordorf reform introduces changes in the law that go in the direction of enforcing these recommendations, as explained below.

Law 155/2017 does not materially change current legislation. It gives 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. Their enactment will determine a change in the applicable law. These reforms have been enacted by means of legislative decree 14/2019, but their entry into force has been postponed until 2021 at the earliest.

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 pleads for the introduction of the notion of a "situation of crisis" alongside "insolvency" and for the adoption of a single procedural model applicable to 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 test is more likely than not in the near future.[313] To promote the prompt handling of these situations, the CCII introduced the alert procedures (see below) and greatly simplified the use of restructuring agreements.[314] 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 new 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*)[315] which, under certain conditions,[316] are binding also on dissenting creditors (cross-class cram-down). It is particularly remarkable that

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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.

309 UN Comm'n on Int'l Trade Law, "UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation", UN Sales No E14V2 (2014), <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> accessed 30 December 2018.

310 2014 Recommendation, art 8.

311 *Idem*, art 9.

312 *Idem*, Recital 11.

313 CCII, art 2.

314 *Idem*, art 57 *et seq*.

315 *Idem*, art 61 *et seq.*

316 *Idem*, art 61(2).

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.[317] 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 recommends the introduction of group proceedings for entities subject to Italian jurisdiction. Should the parties opt for separate proceedings, the CCII prescribes the implementation of co-ordination practices.

Another hallmark is the introduction of an "alert and composition procedure", that is, a partially non-judicial and confidential procedure carried out under the supervision of the Chamber of Commerce. Such a procedure should help dealing with a situation of financial distress as early as possible, as the debtor is assisted by a professional body with the objective of turning around the business and reaching an agreement with creditors. The debtor may also apply to court to obtain some protection, including a stay on executory actions.

However, some elements militate against the preventive use of this proceeding. In particular, the alert and composition procedure can be triggered against the debtor's will by some public entities. Furthermore, should the parties not be able to reach an agreement, this circumstance would be publicly advertised by the Chamber of Commerce, thereby losing any benefits that might arise from its confidential nature. Finally, if an insolvency status is ascertained at the end of the failed procedure, the public prosecutor is obliged to file a liquidation petition.

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,[318] 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.[319]

Significant changes have also been introduced with reference to consumers. The newly enacted article 283 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.

[317] *Idem*, art 60.
[318] *Idem*, arts 78 and 94.
[319] *Idem*, art 8.

As it currently appears, the CCII is by no means perfect. However, it represents a much-needed improvement over the current *status quo*. Unfortunately, law decree 23/2020 – enacted on 8 April 2020 to deal with the immediate and urgent consequences arising from the Sars-Cov-2 pandemic – postponed the entrance into force of the CCII to 1 September 2021. This was done in order to give more time to practitioners and judges to become familiar with the new rules, as well as to allow courts to resume their full operation before the reforms kick in.

Another factor that significantly affected the Italian insolvency law is the Sars-Cov-2 pandemic. As Italy has been one of the worst affected countries in the world, the Italian government introduced a series of timely 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, it postponed the implementation of the CCII and early warning remedies (see above), as well as the rules on recapitalisation in the event of significant reduction of the corporate capital, until 31 December 2020. Therefore, directors are 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. 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.

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

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

More measures were enacted to grant direct, economic and financial support to companies in crisis, but these measures fall beyond the scope of this module.

10. USEFUL INFORMATION

There are not many websites that provide information about Italian insolvency law in English. However, some material can be found on the following websites:

- *OCI - Osservatorio sulle Crisi d'Impresa* for debates on recent proposals for reform and case law (https://www.osservatorio-oci.org/);

- *Rivista Orizzonti del Diritto Commerciale* for journal articles in the area of corporate insolvency law (http://rivistaodc.eu/edizioni/2018/2/);

- *Il Fallimentarista* (http://ilfallimentarista.it/) and *Il Caso* (http://www.ilcaso.it/dirittofallimentare.php) for journal articles and case comments on all areas of insolvency law;

- *Cerved* (https://know.cerved.com/uncategorized/fallimenti-procedure-chiusure-impresa/) for statistical data on Italian insolvency procedures.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

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

Commentary and Feedback on Self-Assessment Exercise 1

- Medieval times – Introduction of rules that governed the insolvency of entrepreneurs and companies only, no personal bankruptcy system;
- XVI-XVII century – People and not simply companies are subject to bankruptcy rules;
- XIX century – Enactment of French-influenced laws resulted in a debtor-friendly approach to insolvency for both corporate entities and individuals. However, procedures were punitive and mainly in the hands of creditors;
- Law no 197/1903 – Changes to corporate liquidation and pre-insolvency composition influenced by a liberal legislator, little involvement of the state;
- Royal decree no 267/1942 – Corporatists view of the economy and the state meant that management of the crisis could no longer be left in the hands of the creditors and debtors. The state had to intervene by empowering its judicial arm to uncover fraudulent and abusive practices;
- Legislative decree 35/2005 – Marked the commencement of a period in which the legislator favoured rescue-oriented solutions such as pre-insolvency compositions to deal with corporate distress.

Self-Assessment Exercise 2

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

Commentary and Feedback on Self-Assessment Exercise 2

Securities:
- Mortgages;
- Consensual liens over registered movable properties, such as vehicles, aircrafts and ships;
- Consensual pledges, usually over equity stock, debt instruments and government bonds, as well as on receivables and bank accounts;
- Securitisation transactions.

Liens can be classified as:
- *Privilegi generali* (general liens) over movable goods belonging to the debtor;
- *Privilegi speciali* (special liens) over both movable and immovable goods belonging to the debtor;
- *Privilegi speciali* (special liens) under article 46 of legislative decree 385/1993.

Guarantees are usually in the form of sureties.

Enforcement:
- Outside insolvency, enforcement can be initiated only if the debt is due and / or the creditor has requested payment and has given proper notice to the debtor. Upon expiry of this notice, the creditors can enforce their claims through court proceedings. No court proceeding is needed to obtain special liens on bank accounts;
- In insolvency, creditors can still seize the assets subject to consensual liens, but the office holder has the power to initiate avoidance / claw-back actions. Enforcement over pledges can occur only after the existence and validity of the claim and of the pledge has been recognised by the court and the competent judge has authorised the sale of the pledged asset. Special rules apply to securities over financial collaterals. Remember that in the case of personal guarantees, the guarantor has the right to claim back what he paid to the debtor (difference between *surrogazione* and *regresso*).

Self-Assessment Exercise 3

Question 1

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

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

Question 2

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

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

Question 3

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

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

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

Commentary and Feedback on Self-Assessment Exercise 3

Question 1

It could be argued that the *legge fallimentare* (royal decree no. 267/1942) represented a unified approach to law drafting and that it was only in recent years that new rules were introduced for specific sectors of the economy (for example, banks and insurance companies) and non-traders. However, some of the rules applicable to insolvency cases have always been found in other statutes, such as the Civil and Criminal Codes.

The real issue here is not to determine whether the rules are included in one or more statutes. The issue is to discuss whether the statutes enacted in recent years adopt a uniform approach to corporate and personal failure. Candidates should highlight that reforms:

- have not been organic, as they addressed the critical issues that emerged from time to time with no long-term vision;
- did not follow a similar drafting approach, with some laws adopting a tailored approach (that is, focus on specific companies and sectors of the economy) and others questioning or reforming the overarching goals and principles underpinning the system;
- share some characteristics, such as the goals to simplify and enhance speed of completion for existing procedures; restrict their use to entrepreneurs and companies in significant crisis; promote rescue over liquidation; facilitate debt restructuring and financial support in insolvency procedures; and give a more active role to debtors and creditors in the management of crises.

Question 2

The eligibility requirement to file for any bankruptcy procedures regulated under Italian insolvency law is set out by article 1 *legge fallimentare* and it is seemingly broad and unambiguous: all debtors that cannot file for any of the other (corporate) insolvency procedures can file for bankruptcy one.

This choice is in itself problematic, as some of the bankruptcy procedures (for example, consumers' plans) are not available to discharge debts made while carrying out business activities. Nevertheless, it may be problematic to distinguish the personal or commercial nature of each debt, particularly for certain categories of debtors (for example, professionals).

There is a lack of clarity with reference to certain categories of applicants (for example, entrepreneurs who have debts for less than EUR 30,000 and public bodies which cannot file for alternative corporate procedures), but statutes and case law have dispelled doubts with reference to other players (unlimited liability shareholders and farmers; see law 221/2012).

The choice to include certain debtors (for example, innovative start-ups) among those entities subject to bankruptcy procedures is as questionable as the different eligibility requirements for each of the three formal bankruptcy procedures. The legislator should probably have offered only one general procedure for all personal bankruptcies, with the possibility of introducing specific changes in light of the circumstances of each case.

Finally, it is not clear why the legislator suggested that applicants should be in a position of over-indebtedness, but in reality described this situation as a condition of cash-flow or balance-sheet insolvency. Should the debtor be in the same distressed condition as a corporate entity to file for personal bankruptcy? Do situations of temporary difficulty in fulfilling payments satisfy the objective eligibility requirement set out by article 6(2)(a) of law no 3/2012?

In general, it can be said that the statement in question is accurate, but there are categories of debtors for which more clarity is needed and some legislative choices in the identification of the entities subject to bankruptcy procedures that are questionable due to their lack of any apparent theoretical justification.

Question 3

It should first be observed that the only person who has *locus standi* in the present situation is the liquidator. The creditors cannot commence any action against the directors of *Navigazione Mediterranea Srl*.

It could be argued that this represents a challenge to the repayment of a debt not due at the time of the opening of the liquidation procedure. If that was the case, the liquidator would be within the two-year time limit to file the claim. Further requirements are that avoidance actions need to be commenced within three years from the opening of the corporate liquidation procedure or five years from the act or transaction to be clawed back, whichever is earlier.

However, it is stated in the problem that *Navigazione Mediterranea* used to pay *Container Rossi* upon issuance of a *pro forma*. As a result, courts are likely to consider this as a transaction that occurred in the ordinary course of business. The liquidator is no longer within the one-year time limit to commence the action and the circumstance that the debtor was insolvent at the time of the payment is irrelevant for the successful outcome of an avoidance action in insolvency. At the same time, the fact that there has been an overpayment may suggest that this is not a transaction in the ordinary course of business.

It might be argued that parties can still rely on the remedy of the *actio Pauliana*. However, while the claimants could prove the first two requirements for this action (*eventus damni* and *Scientia fraudis aut damni*), the last one (participation *fraudis aut damni tertium*) cannot be established on the basis of the information provided in the example.

It is likely that neither the creditors nor the liquidator have any remedy to challenge the validity of the transaction described in this problem.

Self-Assessment Exercise 4

At international and European level, universalist visions of insolvency law have influenced the evolution of cross-border insolvency rules and co-operation. This situation contrasts with the territorialist approach favoured by the Italian legislator in the 40s. By making reference to case law and statutes, assess whether Italian courts have struck a proper balance between the universalist and territorialist approaches.

Commentary and Feedback on Self-Assessment Exercise 4

Italian law clearly adopts a territorialist approach to the handling of cross-border insolvency cases. Article 9 *legge fallimentare* states that Italian first instance courts have the exclusive power to approve a petition to open formal insolvency proceedings against those companies that operate in their jurisdiction. Additionally, they have the power to open formal insolvency proceedings against those companies that have transferred their centre of main interest (COMI) to a different country in the year before the filing. Finally, Italian courts enjoy wide powers to make orders (including the opening of insolvency proceedings) against Italian-based secondary establishments of foreign companies.

These powers are not without limits and a proper answer would discuss the relevance and extent of the exceptions recognised under the current law and cases.

One of the key elements of the answer is to identify the rationale adopted by the courts dealing with cross-border insolvency cases. It could be useful to extensively analyse the decision of the Supreme Court in case no 15880/2011. While the Supreme Court extended the competence of the Italian judges beyond what was reasonable to expect from the letter of the law, it did not do so by embracing a territorialist mind-frame. The Supreme Court held that Italian courts should refer the procedure to foreign authorities only in those cases where the behaviour of the parties suggests a strategic use of insolvency laws capable of harming the debtor's creditors. On all other occasions, Italian courts should refrain from intervening in the insolvency case, thus adopting what is commonly known as a modified universalist approach.

The key element in any good answer is to show that the Italian legislator's preference for territorialist views is mitigated by case law and the need to abide to well-established trends at international and European level. Italian law may look territorialist, but in practice it is not.

Self-Assessment Exercise 5

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

Commentary and Feedback on Self-Assessment Exercise 5

Procedure:

Article 64 of law 218/1995 determines the automatic recognition of any foreign judgments, which meet the criteria originally established for the *exequatur* procedure. Recognition could only be denied if the effects of such recognition would be manifestly in contrast with Italy's public policy (article 64(g)) and / or the foreign authority had no competence over the subject matter according to Italian private international law principles (article 64(a)). Article 67 of the same law outlines a simplified procedure for the enforcement of the foreign judgment, should the Italian party not conform to the foreign judgment.

Universalist view:

Vellani (1996); De Santis (2010); Gottwald (1999); Carmelino (2015); Supreme Court (2001);
Article 64 of law 218/1995 applies to insolvency judgments issued by courts outside the European Union.

Territorialist view:

- Carbone (1998); Campeis and De Pauli (1998); Trib Milano (2014);
- Article 64 of law 218/1995 does not apply to foreign insolvency orders as international and bilateral conventions usually exclude from their remit insolvency law issues (and judgments).

Comment:

- Highlight the legal consequences arising from each of the proposed approaches and discuss why some commentators and courts are reluctant to give automatic recognition to foreign insolvency judgments;
- Discuss the role and powers of the courts under the Italian insolvency system and highlight the consequences that automatic recognition would have on their supervisory and directory powers;
- Is the territorialist approach an example of municipal and localistic enforcement of Italian laws or have similar issues emerged in other countries?

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