

Italian Reform's perspectives on Insolvency procedures.

The news that frequently disturb investors' sleeps, outline how the scenarios of the enterprise's crisis still have not found a general rule able to direct them towards new solutions that would protect creditors' rights, enterprise's needs and its value as a national property estate.

This is the reason why Italian lawmakers follow with particular attention the first comments concerning the project of Reform of the new Italian Insolvency Law.

The works of the Commission (formed by 46 experts and strongly appointed two years ago by the Ministry of Justice, Castelli, and the Ministry of Finance, Tremonti) have raised the curtain on the new trends purposely outlined for the clearing of the enterprise's crisis.

From this moment on, the project of legislative reforms experiences a further blossom time, since the new Insolvency Law and the reform concerning the companies' law are accompanied by another reform which concerns the trial law.

Since 1942, when the Italian bankruptcy law came into force, many demands have been made in order to change it (This act is considered a "sturdy law" which has lasted for more than sixty years). It was enacted during the industrial period and integrated through the instrumentality of the Constitutional Court, the Court of Cassation, and the praxis used by the Courts, which have supported and, as mentioned above, integrated it. Today, the old Italian Insolvency law is considered inadequate because it moves from cultural and historical premises, outdated by far. In fact, it is based on a punitive system against the debtor who finds himself subjected to several restrictions weighing heavily over his private sphere. He is condemned to be an "halved" citizen whose belongings are diverted towards the Trustee. Furthermore, the debtor is deprived of his entitlement to vote because considered socially and economically dangerous, a "plague-spreader" who may propagate "particular epidemics" as decoction and bankruptcy. Finally he will be pointed out as "someone to stigmatize", someone with very few chances to come back on the market both as an entrepreneur and as a consumer.

Actually, international experiences privilege less punitive systems able to offer to the honest but "unlucky" entrepreneur, an opportunity to think about his failure and consequently a possibility to start once again.

The Italian Commission for the project of the New Bankruptcy Law, agreed that the entire legal structure needed to be modified. As a matter of fact, it was necessary a different cultural approach in accordance to the new Italian Insolvency Law.

After a two years' working period, the Commission has elaborated two trends that offer different solutions. The Parliament must take the final choice on significant problems such as fraudulent conveyances, or the extension of bankruptcy to whoever had utilized a failed enterprise for his own purpose - cultural differences among the members of the Commission had not allowed to reach an harmonic unitary solution.

Many of the Commission members, in fact, believe that it is not possible to consider revocable all the agreements made by the debtor during the "suspicious period", that is, up to two years before the bankrupt declaration, apart from a tangible damage against the creditors from the stipulation of these contracts.

Today's regulation, until the outcome of the avoidance actions, do not allow these contracts of being considered as "safe and stable"

Also in the second hypothesis, the reasons of the disagreement seemed to be fully justified. In fact, the verification of the occult partner's role as the third extraneous of the bankrupt's company (the reform text uses the term "anyone") should not be transferred to the trustee who is often interested in the assets' implementation which would be increased by the third party's estate (this latter will be considered responsible for the crisis). The aforesaid verification should not be assigned to the Judge's initiative too, on the occasion of a jurisdictional proceeding, rough and a less guarantee if compared to the ordinary judgment.

Moreover, the hypothetical extension of bankruptcy to administrators, partners, and/or third party considered responsible, contrasts with the Company Reform Law, in which the legislator has concentrated his attention on the liability toward those who have damaged the company and/or to all creditors.

- New provisions that significantly modify the previous structure:

First of all, the "*allert proceeding*" (borrowed from French experience but enriched with typical new Italian peculiarities) is established. This proceeding shifts on two levels. On one side, it gives the possibility to the creditors to constantly check on enterprise's difficult condition; on the other side, it imposes specific behaviors to its administrators, mayors and auditors. Two ways structurally settled in order to finally mark a new course.

In the Italian civil code, the article 1186 forces the creditor to supervise his debtor's economical and financial situation. If the situation worsened or if the guarantees decreased, the creditor could immediately demand his credit. This phenomenon is called "*expiry of time benefit*". Therefore, in this

case, the creditor may claim the arranged payment, even though he previously agreed to defer the expiry dates in a much longer period of time.

In order to supervise his rights, the Commission has realized that the cognitive instruments arranged in favor of the creditor, are not numerous, neither efficient. For this reason the banks have the possibility to accede to particular data such as the “Risks’ Center”, which:

- supplies the exact debts’ measure that the debtor has towards the domestic bank system;
 - highlights possible trespassing of the client-debtor as regards to the trusts granted by the single banks;
- The banks may also use an information’s system on the “cheque agreement” so that they may instantaneously learn of eventual protests suffered by their clients, and may actually discharge the unfaithful client, who had taken advantage of the bank relationship, not only from the single bank involved, but from the entire domestic bank system.

On the contrary, today the “common creditor” himself will have to try his hand at expensive researches assigned to economic investigators.

Therefore, the proposed new opportunity is to increase the control and the supervision’s instruments created at the disposal of the creditor and the company’s powerful organs - especially when the enterprise is a complex entity, as a “legal person” – by converting existing institutional bodies into real inspectors who will act successfully in order to satisfy that public service.

The Tax Administration and the National Insurance Institutes will have to be equipped with electronic registers in which inserting the nominatives of those enterprises that have exceeded the tolerance threshold set by the legislator, with regards to the insurance and fiscal debts.

Any creditor may check these registers in order to control his debtor’s situation and perceive whether it will be useful to make other supplies or give more credit. The purposes are evident:

- 1) to control and contain enterprise’s debts.
- 2) to offer the creditors an instrument able to stop immediately any prejudicial activity of the debtor, or a measure suitable for an arrangement, between the creditor and the debtor, or about debtor’s economical position before the situation gets worse.

On the other side, is desirable that the attempt to raise the concrete opportunities so as particular patrimonial balances that appear to be compromised, would be quickly re-established by the enterprise’s internal organs.

So that, auditors, directors, accountants, should not only take the exact initiative in restoring the conditions of governability in respect of both economic and patrimonial needs, and in re-establishing acceptable “ratios”, but they should also urge the Court intervention in order to summon shareholders

and/or directors, and to identify solutions able to restore rapidly the correct management of the company.

Further news, contained in the reformed Insolvency Law, deal with the proceeding provided to overtake the enterprise crisis by mutual consent.

Thus, one of the numerous myths which have accompanied the legal structure of 1942 has forever declined.

The past jurisdiction gambled on the possibility that judges might become the “referees” for lifting the companies out their crisis or should the opposite occur, for guaranteeing a rapid and fair winding up of the company.

This 60-year’s experience has demonstrated that the judges who acted as businessmen did not fulfil their duties neither as judges nor as businessmen.

Today, the companies rates need immediate choices to be taken, while judicial proceedings occur much more time because of the different levels required by law, so that the complete satisfaction to all these necessities cannot exist.

The slowness in judicial proceedings is known almost by everyone.

The data, which show at best the necessity of a substantial change, refers that the average length of bankruptcy proceedings in Italy consists of seven years, and whose number reaches 15,000 cases per year. Moreover, the data show only about 10 points’ percentage of of the assets’ apportionment of the company, compared to the creditors in right to allow a claim in bankruptcy.

The Commission takes note of the necessity to eliminate the obstacles that carry the debtor in declaring the insolvency when there is not any chance of recovering from the crisis.

The reform aims to convince the debtor in declaring the insolvency before the situation takes a turn for the worse and/or and the reorganization of the company becomes unacceptable for the creditors. Another aim of the Reform consists in spurring the creditors to cooperate with the debtor in restructuring the failed company.

The Reform adds several and new effects headed to incentive the advanced resort to the arranged company restructuring plan. These same effects are expected to be added to the consequences characterizing the submission of a claim in a bankruptcy proceeding, and the inhibition for creditors to inact execution proceedings on the debtor’s assets.

The Commission particularly demonstrates to count on the agreement between debtor and creditors that needs to be encouraged the most.

The Reform states that the agreements reached in the restructuring plan (which has to join the claim to open the crisis procedure and to be authorized by the Judge) will remain stable and be resistant to any avoidance action.

In this way the uncertainty will disappear together with the mistrust on the effectiveness of transactions between insolvent debtors and their creditors that nowadays make the negotial solutions more difficult to arrange.

The effectiveness enriches itself with the introduction of one further advantage since the reform provides that the agreements, authorized by the Judge, should avoid the criminal jurisdiction, unless the debtor or his creditors has acted with fraud. Therefore, what has happened in the past must be avoided: agreements hardly reached and become active during the reorganization, and after some time, in case of winding up, estimated by Public Prosecutors as finalized to criminal purposes.

Such agreements, in the Reform perspective, become more stable and definitive.

Referring to the contents of the above mentioned agreements, the Reform has deeply enriched the range.

A fundamental topic, represented by the *par condicio creditorum*, which has its basis on the articles 2740 and 2741 of the Italian Civil Code, could be derogated, if so it is arranged between debtor and his creditors.

Creditors will be free to settle their relations with debtors as they prefer without taking care of the decisions taken by the other creditors belonging to the same class; both secured or unsecured, possessory or not possessory, creditors will be free to evaluate individually the convenience of the agreement on the basis of future perspectives for the restructured company to set new business relations with suppliers, to raise prices of goods produced and to revalue the owned assets.

The making of creditors' classes (to whom the same treatment will be reserved), will be the consequence of the characteristics of those agreements already negotiated by the debtor (or those the debtor knows he will reach with the creditors), of the percentage of payment offered by the single debtor, of the arranged postponement.

There are more information to be analyzed in perspective of the Reform whose first aim is proposing a proceeding, in a simple and adaptable way.^{16/87}

The opening demand concerning with the crisis procedure, or more technically: - the crisis composition, will be accompanied by a Reorganization Plan. The attorneys, to whom the debtor referred, will have to assure the practicability of this plan and the regularity of the enterprise's book-keeping; the plan will also contain a subdivision of the creditors into different classes, as underlined

above, with percentage and time payments, and moreover an industrial project concerning the reorganization of the company and the balancing of accounts.

The agreements with the creditors must be achieved within six months from the filing demand. It is a really short period of time. Neither new improvements on the plan will no delay this term.

In case of vote's increase in each creditor's class, the plan will be homologated wherever the Judge will assure a non prejudicial treatment to those dissentient creditors compared to that received from creditors of the same class.

This framework, outlined in a brief way, could be enriched with new elements, but it is certainly sufficient to highlight how this project of Reform respects both the real value of the enterprise that returns in the market also in crisis management, and the ascription to the Courts of a role of Trustee of the legal procedure, and the role of Judge of contrasts between debtor and creditors, or among these matters.

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