The Italian Bankruptcy Law Reform—
Act III

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I. The Old System

The past Italian bankruptcy law had been enacted March 16, 1942, in the middle of the Second World War. It can be astonishing that, in the middle of that struggle, people were thinking to change the bankruptcy law, yet the fascist Italian government approved the new civil code, which was subsequently amended many times and is still in force today. This was the result of a great legislative work over almost 20 years. Thus the Italian civil law scholars were able to say, after the Fascist government fall, that the core of those acts was not fascist and could be helpful for a new democratic Italy.

If the 1942 bankruptcy act was not fascist—in my opinion, this is not completely right, as I will point out in the next paragraphs—it became obsolete after the 1990s. In 1978, the U.S. introduced in their legislation Chapter 11, and distressed enterprise’s reorganisation became possible. Within a few decades, many other countries undertook similar reforms of their laws. After the beginning of the new century, most industrialised countries had a law enabling some form of restructuring. However, in Italy, the old 1942 Act still contemplated the stigma against the entrepreneur declared bankrupt. An entrepreneur in insolvency could not obtain a discharge and found himself unable, after the procedure’s closing, to initiate a new activity. Without rehabilitation, accorded only after five years of good behaviour or the payment of 25% of the debt, the debtor—after the procedure’s end—could not operate as a lawyer, public accountant, a company’s director, public notary, and so on. For five years after having being declared bankrupt, the debtor was deprived of voting rights and could not be elected as a representative in the parliament.

The European court of Human Rights in Strasburg adjudicated these rules to be against the European Convention on Human Rights. These judgments occurred after Italy had already changed legislation, but the government was conscious of the necessity of change.

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Luciano Panzani is a Justice of the Corte Suprema di Cassazione of Italy. Copyright © 2008 by Luciano Panzani. Printed, with permission. This text was written for my induction as fellow of the American College of Bankruptcy, March 15, 2008, in Washington D.C. and has now been updated.
The old law was obsolete in many other ways, too. The main bankruptcy proceeding was the “fallimento,” a liquidation procedure. The purpose was to satisfy the creditors’ rights and to remove the insolvent enterprise from the market. To be subject to these proceedings, the debtor should be a company or individual whose main activity consisted of the production or trade of goods and services. Small traders, as defined in the Italian civil code, were exempt.

This was the aim of the 1942 legislation, very common in those times; to eliminate the insolvent entrepreneur from the market to avoid the opportunity for the tainted apple to damage the others fruits in the basket and to admonish the entrepreneurs to act fairly and safely to avoid bankruptcy and stigma. Over the years, the Italian legislature was able to understand that this was not a way to rescue enterprise and that many important resources could be missed. However, in the 1970s, the government mainly focused on saving the jobs of workers, and the solution was public intervention in the economy. Many distressed enterprises were saved by public intervention, according to a tradition going back in Italian economical history for 30 years. Two of the biggest Italian enterprises—the I.R.I. and the E.N.I.—were the result of the public intervention in the economy.

In the 1980s, almost 50% of the Italian industry was in public hands as a result of this process. Of course, it was a choice of political economy rejected by the government in the name of privatization and not only the result of the rescue of distressed enterprises, but part of the public ownership of private enterprises (i.e. organised as private enterprises) stemmed from such rescue.

In 1979, the government enacted the Prodi Act. This Act introduced into Italian bankruptcy law the extraordinary administration of the largest enterprises. This procedure still exists after the reform, if amended. Particular attention must be drawn to it. Extraordinary administration is aimed at saving those undertakings belonging to the industrial sector which were in crisis, that is, which fell into financial and operational difficulty considered as temporary and surmountable. On an organizational level, these instruments provide levels of rearrangement and reconversion suitable for proving the real and concrete possibility of recovery of the enterprise through restructuring, separations, and mergers. On a procedural level, the institution has an administrative nature and, in particular, is aimed to remove a declaration of bankruptcy of enterprises, which operate in strategic sectors of the economy in an evident or ascertained state of insolvency. In this perspective, the protection of the par condicio creditorum, which is the ratio of each kind of bankruptcy procedure, is extended to the public interest for the prevention of relevant crisis phenomena which can create distrust in the market and therefore in the entire economy.
Until 1999, when it was amended, the Prodi Act was used to rescue distressed enterprises with state financial aid. According to the first version of the law and the instructions that the Industry's Ministry gave to the extraordinary administrators who were appointed, the enterprise's activity had always to go on in order to keep the workers' jobs. It was possible because the Act provided state financial help through the guarantee of the enterprise's financing by the banks. The extraordinary administrators were used to prosecute the activity not looking to the losses and to the real possibility to sell the assets or to restructure the enterprise. Politicians, mayors, and the unions were always asking to go on. In this way a lot of money was lost. Most enterprises admitted to the extraordinary administration were liquidated after many years and were not able to pay their creditors. All the wealth was used to perpetuate the activity.

This process came to a stop when the European Community decided that the financing of the enterprise's rescue by the state was contrary to the defense of public aids to the enterprises according to Article 87 of the European Community Treaty. So the law was amended, and now the extraordinary administration is a modern proceeding aimed to the rescue of the biggest enterprises through the selling of the assets on the market as a going concern or through the restructuring only when it is feasible. Otherwise, the procedure must turn to liquidation.

In the 1942 law, there were two procedural alternatives to liquidation (the so-called minor bankruptcy procedures) that could be used to rescue a distressed enterprise. Both could be commenced only by the debtor filing a petition in court. Controlled administration was a judicial procedure with a protective nature. Its specific supposition was reflected in the temporary difficulty of the debtor to fulfill his obligations. It was an instrument granted to the debtor in temporary difficulty in order to prevent insolvency, and therefore the declaration of bankruptcy, when there were evidenced possibilities of saving the undertaking. The purpose of controlled administration was to re-establish the good functionality of the enterprise through a moratorium, in a circumscribed period of time, while the activity continued under the debtor's management, controlled by a commissioner, and directed by the court.

This procedure was really ineffective. The moratorium and the debtor in possession, and also the possibility to file the petition when the enterprise was not yet insolvent, were theoretically useful to permit the enterprise's reorganization. The law provided that the debtor should present to the court a reorganization plan to demonstrate that there were serious possibilities to recover the enterprise. Both the court and the majority of the creditors should agree with the plan, but there were no provisions permit-

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ting the financing of the reorganization or to reach an agreement with creditors to reduce the debt and to liberate resources to reorganize the enterprise.

The main defect of the procedure, in any case, was not in the law but in the practice. Courts used to admit the debtor to the procedure when it was too late for the enterprise's rescue, when the crisis had really become a case of insolvency. As in the extraordinary administration, the pressure of local politicians and of the unions prompted the courts into very liberal interpretations of the procedural boundaries. The entrepreneur was often able to file the petition for the opening of the proceeding only when it was too late. In practice, the filing of the petition had the result to cut the credit to the enterprise both by the banks and by the suppliers and to suggest to the best employees to look around to find another job. Nobody was really thinking that an enterprise could be rescued through the controlled administration.

Preventive Creditors' Settlement Procedure (concordato preventivo) was an instrument for the satisfaction of the rights of creditors that furthermore allowed the debtor to avoid the declaration of bankruptcy and all the resulting consequences of a patrimonial and personal character. When the requirements provided by the law were met, the insolvent debtor could avoid liquidation, paying a percentage of the claims in respect of the par condicio creditorum. Creditors had the right to participate in the creditors' meeting, and for the composition to be agreed, a double majority vote of at least 2/3 of the voting creditors by value and of the simple majority of creditors was required. Without it, the court rejected the proposal.

The limit of this procedure was that it had been conceived by the 1942 legislature as a premium to the "unfortunate but honest" debtor, so he had to satisfy a lot of requirements regarding good and fair behavior before the proceeding, such as the absence of condemnations for crimes and the existence of appropriate accounting records. The procedure was aimed to limit the time and cost inconveniences for the creditors with respect to the bankruptcy procedure and to support the insolvent entrepreneur who could demonstrate his trustworthiness and diligence, freeing him of a part of his liabilities and leaving him with the availability of his assets. The debtor should be able to pay entirely the secured creditors, even when they, in case of bankruptcy, should not be completely satisfied through the sale of the assets, and to pay 40% to other creditors—a very high percentage, or the highest percentage promised. The debtor's proposal should be more convenient than the liquidation through the bankruptcy. In the practice it was really difficult for the debtor to satisfy all these requirements. So most petitions were rejected by the courts. Even when there was a court order for opening the procedure and the creditors' favorable vote, at the end, most procedures failed.
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In any event, this procedure was not aimed at rescuing the enterprise but only to pay the creditors. Thus typically the final result was liquidation, in ways no more different from those of bankruptcy except that the liquidator appointed by the court was freer in the selling of the goods than a receiver who would have been obliged to accomplish the same with the formalities provided by the law. The length of the procedure was no different from bankruptcy. It was normal that a concordato preventivo would be able to pay creditors after five or more years.

In practice, many debtors were trying to survive the difficulties of a system where they were not given an instrument to restructure the distressed enterprise, using both the procedures of controlled administration and concordato preventivo. As stated above, the limit of the controlled administration lay in the fact that the debtor was allowed to suspend the creditor's payments for not more than two years. There was no other provision to recover the enterprise. Generally, at the end of the proceeding, the debtor was not able to pay the previous credits.

Many times, the debtor tried to find an agreement with the creditors to pay them only percentages of their credits. To reach this aim, he used a minor procedure, the preventive creditors' settlement procedure (concordato preventivo) that would permit a reduction of the creditors' claims and to postpone the payment of the reduced claims. In this way, the creditors' settlement procedure could work as an indirect measure of re-organization.

In this way, the 1942 Act was used in a very different way from the original purpose of the legislature. There were still great problems to solve. The concordato preventivo procedure asked to pay the secured creditors entirely and to give to the unsecured creditors 40% of their credits, too much in many cases; creditor classes were not provided; there was no possibility for the debtor to access the procedure if his previous behavior had not been completely correct or if his accounts were not in order. Thus new management of a company could not save the enterprise if ownership had changed. Transforming the debt in equity share was not enhanced. The common judicial opinion was that the courts had to protect the creditors against themselves. Many times, the creditors had approved debtor's proposals that were not well founded, thinking that anything was better than bankruptcy, and the final result confirmed the opinion of experts that the proposal could not work. In the courts' opinion, bankruptcy saved the principle of parity of treatment of creditors and a debtor's petition for controlled administration or "concordato preventivo" that was not satisfying had to be stopped, even when the creditors were in favor. Many times the debtor had to dispute a double struggle against the creditors and against the court. When the petition was filed, there was bargaining between the
debtor and the court. Only when the court was satisfied could the petition go on and creditors be called to vote. Furthermore, the proceeding was structured in two phases: after the creditors’ vote, the agreement had to be ratified by the court, also when creditors’ opposition had been not filed. In this way the procedure lasted too long to recover the distressed enterprise.

I have observed that the courts were persuaded that they had to protect the creditors and to preserve the parity of treatment of them. This was the first rule expressed by the old 1942 law. At those times, the Fascist government thought that there should be a vigorous government watch on the economy and that there should be public control over the settling of enterprise’s crises. It was matter of public interest. The court’s duty was to control the principles of creditors’ parity of treatment and that only the “unfortunate but honest” debtor could avoid bankruptcy. At the same time, special provisions permitted the saving of big enterprises, creating the grounds for a large public ownership of the industrial economy.

All these principles had become obsolete in the modern economy, but the courts were still thinking that they had to defend the public interest. Of course, judges could understand that there had been many changes since 1942, but they were thinking—and they still do—that in many cases the debtor reorganization’s proposal is a means to avoid the consequences of the previous fraud against creditors or a means to pay to creditors only a limited sum of money, maintaining a good part of the personal patrimony. This opinion was not only the stubborn opposition to the concept that reorganization is the means not to waste the wealth still existing in the enterprise and to maintain the enterprise as a going concern; that it is better for creditors to have the possibility to trade with the reorganized enterprise in the future and to renounce part of their previous credit; that the enterprise’s risk is normal in a market-oriented economy; and that the other aspect of this issue is that enterprise’s fault is also normal.

Italian judges must deal with a system where most companies are owned by a family, where the managers are not independent from the property. Judges must deal with a country where three regions (Sicily, Calabria, Puglia) have big problems with organized criminality, which also means economic criminality. Judges must deal with an economy where investors in distressed enterprises only now begin to look around as to whether they can operate as in other industrialized countries. So judges were thinking, and a part of them still think, that their primary duty is to assure the public interest fighting against the possible fraud, to defend the creditor’s rights even when creditors are favorable to the debtor’s proposal, and to assure that the creditors’ parity will be preserved.
II. The Old Liquidation Procedure

We must add to the picture of the old bankruptcy law system that the liquidation procedure was also ineffective. The “fallimento” (i.e. bankruptcy) was thought of as a procedure in Italy, just as in France, from where the procedure had been copied in the first part of the 19th century. The enforcement of the creditors’ claims could be realized through the individual execution or, in case of insolvency, through bankruptcy. Automatic stay was one of the consequences of the opening of the proceeding. In this way, the public procedure, in the creditors’ interest but directed by a trustee appointed by the court, substituted the single creditor’s claim enforcement.

The system was very severe against the debtor. The debtor’s civil capacity was reduced far more than the liquidation’s necessities. Liquidation rules were very formal, asking for the public judicial auction to sell all the real estate and the court’s authorization to sell all other assets after all the claims had been verified in a public proceeding in the court. Furthermore, Italy had one of the most severe legislations regarding the avoidance of transfers. The trustee could petition the court to avoid the abnormal transfers done in the last two years before the procedure’s opening when the creditor was not able to demonstrate he had not known of the debtor’s insolvency. The ordinary transfers could be avoided if done in the last year before the bankruptcy opening when the trustee could demonstrate that the creditor knew of the insolvency situation. Also, payments done in the last year could be avoided in the same period of time and at like conditions. This last rule had as a result that financing the rescue of the distressed enterprise was almost impossible. Scholars were writing of the “sanitary cordon” created by the law around the enterprise. Other scholars were emphasizing the risk for a bank who accepted participation in a reorganization to be involved in bankruptcy crimes by consenting to the entrepreneur’s preferential paying of some creditors or damaging the creditors giving credit in conditions in which more credit should not be allowed.

The banking financing system operates in Italy through the so-called “credit opening on the account.” The bank establishes the level of credit that the debtor is allowed to reach. Until this level the debtor can operate freely using his credit and restoring it by depositing his money again, as well as through payments made by his clients. According to the jurisprudence, each time that the bank permitted the debtor to surmount the established level of credit, there was a new financing, so that when the debtor was able to pay that back, reestablishing the agreed credit’s level, there was an avoidable transfer. The Italian enterprises operate generally without a sufficient risk capital, and this is particularly
true for the distressed enterprises. So it was normal that those enterprises operated by continuously surpassing and falling below the established credit level. All the payments done in this way were avoidable transfers, and the trustee was able to recall a great deal of money, much more than the bank had never thought to grant to the enterprise.

According to the banks, this jurisprudence had the result to increase the credit's cost for all the enterprises of one point. The petitions filed by the trustees were numerous, increasing the difficulty level of the cases because the banks were using all of the legal skill of their lawyers to avoid paying too much money. The trustees, paid on the amount of the procedure's estate, never renounced the petition filings, even when the result could signify not more than .5 or 1% to the unsecured creditors after many years of litigation.

These bankruptcy procedure difficulties were increased by the general crisis of the civil process. It is well known that, in Italy, civil suits last more than the five years allowed by the European Strasbourg court to comply with the European Convention of Human Rights. Completion of any bankruptcy procedures had to wait until the end of any civil suits filed by the trustee or by the creditors against the debtor. The final result was a length of eight years and a payment of the unsecured creditors, on average, of 15%. It is very easy to understand why scholars were speaking of the default of the bankruptcy procedure.

The reform was urgent also to guarantee the competitiveness of the Italian economy among the other industrialized countries.

III. The Main Purposes of the Reform

When the Italian government decided to engage in reform, the main purposes were:

(a) To increase the possibilities of an agreement between the entrepreneur and creditors to restructure the enterprise or also to settle the insolvency.

(b) To facilitate access to the court and encourage an agreement among creditors. The aim was to remove all the difficulties to such agreement according to the old law. As previously mentioned, it was recognized that the banks were not inclined to finance the enterprise restructuring because the payments on their loans could be recovered in case of bankruptcy like avoidable transfers. The banks were also exposed to suits for damages from other creditors because the financing could be considered unfair in prolonging the enterprise's life according to the insolvency situation. Also the suppliers were not inclined to supply the restructuring enterprise because the payments could be recovered in case of bankruptcy like avoidable transfers.

(c) To create procedures for restructuring through a composition with creditors to settle insolvency in the creditors' interest.
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The previous system was intended to admit the entrepreneur to the agreement procedures only when his conduct had been fair. Because of this, many times it was not possible to save the enterprise even when an agreement could be useful for the creditors.

(d) To reduce the judge’s power in the procedure and to increase the creditors’ powers. The slogan was “more power to the market and less power to the judge.” As previously noted, the bargaining between the debtor and the court on the content of the reorganisation’s plan could mean the loss of precious time that could be used to save the enterprise. Also, in liquidation, the general opinion was that removing in part the judge’s power could signify less bureaucracy.

(e) To reduce the number of bankruptcy cases, reserving the procedure to serious insolvency cases, and to avoid the excessive length of proceedings and the resulting lower distribution to creditors.

(f) To eliminate the debtor’s civil incapacity after the procedure’s end and to accord him the discharge if he was a physical person.

(g) To revise the bankruptcy crimes discipline according to the new principles established by the reform.

The parliamentary procedures of the reform were not easy. The government had to deal with different opinions in the majority. The lobbies did their work (the judges’ association did not like the court’s power reduction; the banking association pointed out that the avoidable transfers discipline had to be corrected first). The result was that a lot of time was lost, and the end of the legislature was coming. So the government decided to enact a first decree with the more urgent provisions; then an act was promulgated by Parliament confirming the decree (as a governmental act, it had to be approved definitively by Parliament) and giving to the government the authorization to enact a second decree. Then, after one year, the new government (there was the new majority of Mr. Prodi) enacted a third decree to correct part of the law.

The first part of the reform was enacted by the decree of March 14, 2005, confirmed by the Act of May 14, 2005. The second part was accomplished by the government decree of January 9, 2006, and took force July 16, 2006. The third part was enacted with the decree of September 12, 2007, and has been in force since January 1, 2008.

The reform first phase was referred only to the discipline of the pre-insolvency procedures. The “concordato preventivo” (composition with creditors) was completely revised, and new procedures providing restructuring agreement with creditors were introduced. Also the avoidable transfers discipline was reformed.
The second phase was aimed to revise the liquidation proceeding (fallimento). The third phase did a better tuning of all the reform after one year of experience, seeking to draw up a better legislative text and to deal with the biggest problems arising after one year of practice.

All the changes were introduced in the old text of the 1942 Insolvency Act that were not amended and still in force.

IV. An Outline of the Reform

The next paragraphs will contain a general overview on the main topics of the reform, starting from the procedures grounded on the creditors' agreement.

The concordato preventivo procedure maintains only the name of the procedure provided by the 1942 Act. The legislature maintained also the traditional Italian approach that reserves all insolvency procedures to entrepreneurs.

The entrepreneur may file a petition to the court to be admitted once he is insolvent and also when only in a crisis situation and technically not yet insolvent. The law does not say when there is a crisis situation, but generally we can say that this situation occurs when there are financial or economical difficulties in the enterprise management which have not yet reached insolvency. It has been said by commentators that crisis implies the insolvency's danger where insolvency is not yet reached. That means that is possible to ask to be admitted to the procedure when it is still possible to reorganise the enterprise and reach an agreement with creditors.

Only the debtor may file the petition. In this situation, creditors are not allowed to ask to open the procedure. However, if insolvency is already reached, they can file a petition asking for the "fallimento." If the court opens this procedure, then immediately creditors and interested third persons can file a petition proposing to the creditors a "concordato fallimentare," that is, offering to the creditors a payment on percentage of their claims in exchange for all of the debtor's assets. So the debtor has motivation to himself propose to the creditors the concordato preventivo to avoid losing control of the enterprise.

The law does not require that the entrepreneur's previous conduct was fair, but he must present a turn-around plan providing for the debt's restructuring and the creditors' payment grounded on a sincere exposition of the enterprise situation. It must be underlined that the procedure does not necessary require the enterprise's rescue; the debtor may also provide only for the debt's settlement.

The plan's content is free. The debtor may provide for payment to creditors in all the ways he thinks profitable, also offering to the creditors stock options, changing their debt capital into risk
capital. Generally, in this case, the assets are transferred to a different company, and those stocks will be assigned to the creditors.

Creditors may be divided in classes, and according to the legal and economic nature of the debt, classes may then be given different treatment. Secured creditors (in Italy there are more secured creditors than in the U.S.) must be totally paid. Only when the secured creditors cannot recover all that they are owed from the enterprise’s liquidation may the debtor offer them a payment on percentage, which cannot be less than what they should receive from the liquidation.

The entrepreneur must always present an expert opinion on the feasibility of the plan. The expert’s appointment is done by the debtor, but he must choose a person who has the requirements to be appointed as trustee (generally a lawyer or a public accountant).

In the first version of the law, the court did not have the power to examine if the debtor's plan was well founded. The court could only check if the procedure had been fulfilled according the law and if the classes were well formed respecting the priority and the nature of the debt. In the first few months of experience, this rule of law has been differently interpreted by the courts.

Some courts decided that they had the power to control the feasibility of the plan, struggling against the clearly different provision of the law. Many courts decided that they had the power to control if the creditors had sufficient information about the feasibility of the plan and if the expert report provided correct information to creditors to vote. Now the law has been amended. It is evident that the legislature decided to reserve more inquiry power to the court, but the limits of this power are not well defined. It is too early to register the court’s decisions. In this author's opinion, the law confirms the interpretation of the majority of the courts dating from when the first version of the law was in force. When the debtor's petition is filed, the judge must only verify that correct information is provided to creditors. However, the opinion that the court may control the plan’s feasibility could also be correct. On this topic we are forced to wait that the jurisprudence will be consolidated.

The possibility for the judge to verify, before the creditors are called to vote, if the plan is feasible or if the debtor proposal is, as we say in Italy, “a dream's book” is a very controversial topic. The Italian bankruptcy judge does not like to play the arbiter's role. He thinks that is dangerous to waste time calling the creditors to decide in cases when the debtor's proposal is not serious and is aimed at avoiding the liquidation proceeding. According to the Italian system, only when the liquidation proceeding is open will the public attorney proceed with bankruptcy crimes. This is a good reason for the debtor to delay the liquidation opening.
It must be pointed out that the full court’s control over the debtor’s proposal is reserved by the law to the last phase of the procedure, after the creditors’ vote, if dissenting creditors file a petition opposing to the approval of the debtor’s proposal. To admit a control in the procedure’s first phase means to maintain the bargaining between the court and the debtor on the plan’s content that, in this author’s opinion, was one of the deficiencies of the 1942 Act. The law’s provision that the court may assign the debtor a short period of time in order to modify the proposal could be used to reaffirm the court’s power to discuss the plan’s merits.

The judgment on the debtor’s proposal is reserved to the creditors who vote on the plan. Only the unsecured creditors may vote. The secured creditors do not vote because their credits must be completely paid. They are admitted to vote only when the guarantee is not sufficient and the debtor’s proposal provides a percentage payment of the nonsecured portion of the credit.

The debtor’s proposal must be approved by the simple majority of the creditors by value. If the proposal divides the creditors in classes, there must be approval by the majority of classes and the simple majority by value of all the creditors. In this case, a creditor of a dissenting class may file a petition asking to the court to apply the cramdown if his treatment is looking less favourable than he could obtain with liquidation.  

Automatic stay is provided after the petition’s filing. The debtor is in possession, but the enterprise’s administration is controlled by a judicial administrator (commissario giudiziale) appointed by the court. The primary duty of this administrator is to report to the creditors on the plan before their vote. So the creditors have to choose between two different opinions: the debtor’s expert advice who certified the plan’s feasibility and the judicial administrator’s report on the same plan.

After the favourable creditors’ vote, the court must approve the agreement. Creditors and third persons who could be affected by the agreement may file a petition asking to the court to reject it. As previously observed, the creditors of the dissenting classes may file a petition asking the court to apply cramdown to verify that their treatment would not be less than they could receive in case of liquidation.

The law provides that the procedure must last not more than six months. The court can prolong this term for 60 days.

Other relevant question raised by the bankruptcy law reform was to decide the destiny of the enterprise after the debtor’s proposal had been rejected by the creditors or by the court. In some

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1 The law uses the expression “what could be obtained looking to a concrete alternative solution.” Generally, the only alternative solution is liquidation.
courts the judge had the power to verify ex officio if there were
the conditions to open a liquidation proceeding; for other courts
the judge did not have this power and had to wait that a creditor
or the public attorney filed a petition. The new act requires that
the court waits for a creditor's petition. In the Italian situation
this could be a problem because the debtor will try to reach an
agreement with the creditors or some of the creditors outside of
court. The opening of the liquidation will be delayed. In the
meantime the possibilities for the trustee to sell the enterprise on
the market as a going concern may be reduced and the avoidable
transfers' actions damaged. Before the reform these actions could
avoid the debtor's disposals made in the entire year before the
liquidation's opening. Now this period has been reduced to six
months. If the liquidation's opening is delayed, the largest part of
the debtor's disposals will be outside of the six months, and it
will not be possible to recover the goods and payments made by
the debtor, thereby damaging the creditors.

The most serious problem raised by the new procedure is that,
in the last two years, the period in which the reform's first part
was in force, only a small number of petitions were filed. The
obvious explanation is linked to the difficulty of dealing with a
new law but also may be due to so many different opinions in the
courts. It is somewhat disappointing to see that the provision of a
procedure which should be focused on consent in order to manage
insolvency as a restructuring tool, as well as asking for a detailed
pre-planning stage, and which also does not put emphasis on
guilt or wrong-doing of directors and officers is not well received
by practitioners. We must also consider who these practitioners
are. The advisors, the administrators, and trustees appointed by
the courts as well as judges are the same people who were ac­
customed to deal with the old law, and they must change their
mindset as the law changes. This is not easy and will require
more time.

It must be noted that practitioners have observed that there
currently is not a financial market for the enterprise's restruc­
turing in Italy. After the reform, some foreign investors are
interested to see if the possibilities of earning money by financing
the restructurings were increased. However, it has been observed
that the possibilities to receive security on the enterprise's assets
for the new financing still have not increased. There is not a tool
like the floating charge in Italy. Generally, when creditors are
asked to finance the restructuring, no other types of securities
are possible, so it could be important to have the possibility of
creating something like a floating charge on the enterprise's assets.\(^2\)

Still the concordato preventivo new discipline has been criticized in that the debtor does not have the power to terminate any contracts not essential for the enterprise's restructuring. In the liquidation procedure (fallimento), the trustee has this power. The absence of this power reduces the possibilities of restructuring the enterprise. It is a serious limit to the efficiency of the new system.

V. Consensual Restructuring Agreement

The Reform introduced other procedures to settle an enterprise's crisis and to avoid liquidation. The Consensual Restructuring Agreement ( Accordi di ristrutturazione dei debiti) is only partially a judicial proceeding. The debtor must reach this Agreement with creditors without the legal protections against enforcement of the creditors' claims, but when the Agreement is fulfilled, the debtor may ask the court to approve it. The only consequence of the court's approval is to exempt the payments made according to the Agreement from the avoidable transfers' discipline.

Through the Agreement the debtor can offer different conditions to each creditor. He is not obliged to respect the creditors' classes and the parity of treatment principle.

The Consensual Restructuring Agreement must be approved by not less than 60% of creditors by value of claims. The debtor must present an expert opinion on its ability to pay the remaining claims when due, on the terms provided by the original contract. These claims are not affected by the Agreement. For this reason the creditors who did not approve the Agreement may challenge it before the court by requiring verification that their claims may be normally paid. Only if this condition is accomplished may the court grant the exemption from the avoidable transfer's discipline.

The law says that the Consensual Restructuring Agreement is enforceable when it is published in the Register of Companies, before the court's approval. So the Agreement should remain enforceable for those creditors who gave their approval even if the court rejects it, thereby not granting the avoidable transfer discipline exemption. For this reason, creditors will probably sign the Agreement only conditioned on the court's approval.

This part of the Reform has been in force for more than two years, and in this period the number of Agreement fulfilled is very small. The main reason is the lack of rules about the treat-

\(^{2}\)Anyway, the law provides that the financing creditors should be prepaid during the liquidation if the concordato preventivo fails and bankruptcy has been declared.
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The ITAment of taxes in Agreements. Currently, the new Act tries to implement the new procedure providing an automatic stay of 60 days to help to fulfil the Agreement. This is a break in the original project of the new procedure. The idea was to give to the debtor the possibility to reach an agreement with only some of the creditors, outside of court, provided that he was able to pay the other creditors according to the contract law. The court’s role was only to verify that the agreement was real and with the creditor's majority and to decide the opposition of the creditors not affected by the agreement. Those creditors not affected had the right to be paid at the original expiring of their credits, not after. The stay will affect these creditors who will not receive any utilities from the Agreement.

The stay is provided after the Agreement has been published in the Companies Register. It has been observed that at that time the debtor must already have the agreement of the 60% of creditors, so probably the stay could help to fulfil the agreement but not so much as it had been provided when the debtor begins to contact the creditors. But it is true that a debtor would prefer to maintain the secret nature of the content of his discussion with creditors until the Agreement is reached.

The new act also increased the possibility to reach an Agreement with the state about tax credits. This is also progress. Many times when the crisis begins the debtor decides not to pay its taxes. The public administration in Italy is very slow in the recovery of unpaid taxes, so it is possible to not pay for a while in the hopes of having the time to restore the enterprise before having to discuss the issue with the Finance Ministry. So to include also the taxes as credits that can be potentially be the object of the agreement is a good result.

VI. The Turn-Around Plan

The Turn-Around Plan (Piani attestati) is also not a judicial procedure; it is a creditors’ agreement founded on the consensual restructuring of the enterprise, without a moratorium provided by the law. The agreement may provide for the enterprise’s reorganization or liquidation or an insolvency or crisis settlement.

Also in this case if the debtor provides an expert opinion on the “reasonableness” of the plan, the law accords the exemption from the claw back of payments made if bankruptcy is declared.

The expert is appointed by the debtor. In the first version of the law the appointment should be done by the court if the debtor was a corporation or was quoted in the stock exchange market. Currently, the new act provides that the expert is always ap-
pointed by the debtor. According to some financial advisors' opinions, many banks would prefer that the expert be appointed by the judge and not by the debtor.

After two years in force, it is difficult to understand if the Turn-Around Plan is working well. It is reached in a very private way and generally the entrepreneur does not like to inform the public of such agreement. Banking experts think that there should be a serious number of Turn-Around Plans between debtors and banks, but at the moment there is no good research on this subject to verify if this part of the law is working. The inquiry is difficult also because it is too early to have bankruptcies declared after the failing of a Turn-Around Plan and avoidable transfer actions challenged by the trustee against creditors paid in the plan's execution.

One of the questions posed by scholars after the reform's approval was why create two different procedures, the Consensual Restructuring Agreement and the Turn-Around Plan, founded on the creditors' agreement and granting only the same exemption from the avoidable transfer discipline? The reasons behind a debtor's choice between the concordato preventivo and the other two procedures is clear. The first is public, under the court's control, obliges to respect the parity of creditors' principle or to form the classes, but grants to the debtor the automatic stay and, if approved by the creditors' majority, is binding for all creditors. Both the Consensual Restructuring Agreement and the Turn-Around Plan are private. There is either no automatic stay or it is granted only for a short period of time. The creditors' treatment may provide different conditions, for secured as well as unsecured creditors. So why two different procedures? Why would a debtor choose the Consensual Restructuring Agreement when he can profit from the total privacy of the Turn-Around Plan?

The answer could be that the first procedure is not really convenient, and this could be the reason explaining why, until now, the number of these procedures was so limited. But I prefer to think that the failure of the Consensual Restructuring Agreement depends more on the failure to include taxes. At this moment there is not in our law a provision providing that the amount of credits renounced by the creditors must not be taxed as capital gains as it is established for the concordato preventivo.

This failure will probably corrected in the future. So why two different procedures with more or less the same content? In my opinion the Consensual Restructuring Agreement requires more formalities but permits to the debtor and creditors to be sure of the avoidable transfer exemption through the court's control of the agreement content and the plan's feasibility. The court's ap-

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3This is the most reasonable lecture of the new act.
proval and also the agreement's publication on the Companies Register may convince creditors that the debtor must act fairly and may contribute to the proposal's success.

The Turn-Around Plan is a completely private agreement. The court's control will be remote and only in the case of default. The Plan must be executed with the expert's opinion to be kept in a drawer and taken out only if bankruptcy will be declared. This is a good solution when the number of creditors is limited and privacy is really important. In this way the debtor can reach the agreement with few creditors and the banks and avoid rumours in the public on the crisis. However, creditors will only know if the conditions to be exempted from the avoidable transfers' actions actually existed when challenged before the court by the trustee.

VII. Insolvency Procedure After Reform

The Reform also changed the insolvency procedure (fallimento). It is always a proceeding founded on the enterprise's insolvency. Italy does not know an insolvency procedure outside the enterprise law. As in the past, bankruptcy is reserved to commercial enterprises. Farmers are exempted. Among commercial law experts nobody understands the reason for this exemption. In Italy there has always been a policy of farmer sustenance, and Parliament did not change this traditional exemption. In the legislation, the stigma against the debtor disappeared, but in the people's opinion, it still exists. This is the only possible explanation of this anachronistic rule.

Opening the procedure always requires a finding of insolvency, and as said before, the proceeding's opening is required to prosecute the bankruptcy crimes.

As previously noted, the data on the number of procedures and on their length was very discouraging. The proceedings were too long with a modest result for the creditors. So the Reform tried to reduce the number of the bankruptcy procedures by:

(a) Requiring that the debtor was an enterprise with investments for more than 200,000 Euro in capital or had gross earnings in the last three years of more than 300,000 Euro for each year;
(b) Requiring that a creditor filed a bankruptcy petition stating that all the creditors' claims were not less than 25,000 Euro;
(c) Establishing that the court could decide not to verify the creditors' claims after the bankruptcy procedure opening when there were not assets to pay any of the creditors, except for the procedure's expenses.

This part of the law took effect in July 2006, and the result was a very serious reduction of the number of proceedings. The most
well-known Italian financial newspaper did an inquiry. The result was that, generally, the number of liquidation proceedings had diminished by 50%, but the data was very different from court to court. If in the Naples court the reduction was in the order of 80%, in Milan in the industrial North, the hearth of the country, the proceedings diminished only by 30%. Also the number of creditors’ liquidation petitions filled to the court was reduced. According to the Milan bankruptcy court president’s opinion, the number of petitions filled by a debtor itself was greatly increased.

It is difficult to comment on this data, because the courts gave very different interpretations of the new law, and a part of the difference between court and court depended on the different jurisprudence. It is clear that the legislature accomplished its task to reduce the number of proceedings. But many people, and—most importantly—the politicians, thought that this diminution had been too high.

So the new act changed the rules. To avoid liquidation, the debtor must satisfy both requirements: to have assets for not more than 300,000 Euro in the three last financial years and to have not had gross earnings for more than 200,000 Euro in the same period. Also, the total amount of debts must not be more than 500,000 Euro. In this way it will be much more difficult to avoid the liquidation proceeding.

Probably it was necessary to correct the law. Italy’s industry is made of middle-sized and small enterprises. So it was necessary to tune the general discipline of insolvency in accordance with the economy of Italy.

VIII. Discharge

The Reform introduced the discharge to the Italian bankruptcy law, reserved for physical persons. Legal entities may not receive this benefit.

The discharge is admitted only when the debtor, after the bankruptcy procedure, has paid part of his debts. The law does not establish a minimum percentage of payments to creditors, but it is necessary that creditors receive at least some payment. Further, a discharge is a benefit, so it is not allowed for debtors who were prosecuted for criminal offences against bankruptcy laws or who

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5The Italian word is attivo patrimoniale. The meaning is the total amount of enterprise assets.
6Some courts have decided that all creditors must be paid. According to this opinion, secured creditors should be paid within the limits of the money recovered from the selling of the goods covered by the security and the chirographical creditors should receive a minimum percentage of their credits. Other courts think that is sufficient that some creditors have been paid accord-
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did not cooperate with the trustee and other organs of the procedure. The discharge is admitted only for the debtor and not for the guarantors’ obligations.

As previously noted, bankruptcy in Italy is reserved to the commercial entrepreneur. There is no insolvency procedure for the civil debtor. So the discharge is not admitted for consumer debts or for the civil debtor also if insolvency is linked to an enterprise crisis, like in the case of the securities offered by the owners of the company.

It is now clear that it is impossible to give to the debtor the possibility of discharge and to negate such benefit only because the debtor's dimensions do not admit the opening of a liquidation proceeding or because the debtor is not a entrepreneur. The debate on this subject is very heated. The Reform did not solve this problem, but the Ministry of Justice is already working to a draft focused on consumer debt. This could be the occasion to complete the reform on this topic.

IX. Concordato Fallimentare

In order to induce the debtor to reach a creditors’ agreement before insolvency, after the bankruptcy procedure opening, the debtor is not allowed for one year to propose an agreement to his creditors (concordato fallimentare). In the meantime each creditor and other interested people can propose an agreement to creditors in this way:

- Shortly after declaration of insolvency a compromise can be proposed by creditors and third parties
- Secured creditors must be offered an amount resulting from the proceeds of the “secured” assets
- No voting rights are admitted for secured creditors, except for their debts’ part in exceeding the secured assets' value
- The agreement must be approved by the majority by value of unsecured creditors
- The creditors’ division into classes and cram down are provided
- Benefit of avoidable transfers actions may be transferred to a third party

In this way the enterprise may go on with another entrepreneur. The debtor is thus encouraged to avoid bankruptcy by reaching a reasonable agreement with the creditors, because otherwise the creditors or a third party could decide that a different crisis solution could be obtained through the compromise proposal after the bankruptcy declaration. In the meantime this compromise could be better for creditors than liquidation by the

ing to the par condicio rule. If the first opinion prevails, the discharge will be limited to a small number of proceedings.
trustee that generally is not able to save the real value of the assets.

X. Judicial and Creditor Power

As said before, the Reform decided to reduce the court’s power and to enhance the creditors’ power. Before the reform, a judge had complete control of the procedure. The trustee was required to seek authorisation from the court to sell the goods. Also, the legal actions that the trustee was allowed to propose had to be authorised in advance by the judge. In some cases the judge who authorised the trustee to file the action was the same asked to decide the case.

After the bankruptcy opening, the procedure is ruled by three organs: the court, the trustee, and the creditors’ committee. These organs were already provided by the 1942 law, but the reform changed the influence of each of them. The court’s power is still important but not like in the past. The creditors’ committee now plays a very essential role, and the trustee is more autonomous in the frame of general provisions allowed by the creditors’ committee.

The new law has reduced the judge’s power, hoping to accelerate the proceeding’s conclusion. The court still appoints the trustee, but the creditors’ majority may ask for a different trustee. The creditors’ committee is appointed by the court, but in this case, the creditors’ majority can vote for different members.

All the authorisation powers are now in the hands of the creditors’ committee. The committee must approve the liquidation plan, prepared by the trustee, which contains the main provision referring to the assets’ liquidation. After the 2006 Act, it was discussed if the joint approval of the court and of the creditors’ committee was to occur. After the 2007 Act, it is clear that the court does not have such power, but the trustee must demand that the court verify each act of the plan’s execution. This rule is the result of a compromise between people who wanted to maintain the greatest balance of power for judges and people favourable to the enhancement of the creditors’ committee powers. The result is not brilliant. The trustee is not freer than with the 1942 law. Before it depended on the court for each act of his work; now he needs the general agreement of the creditors’ committee on the liquidation plan and the court’s authorisation for the plan’s implementation.

The creditors’ committee has many other relevant powers. It decides if the enterprise’s activity may prosecute, if the assets can be rented, and if the trustee can terminate the contracts. Furthermore, the committee authorizes the trustee’s suits to recover the debtor’s credits and to file the avoidable transfers’ actions.
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As in the past, the determination of creditors' claims is still made by the court.

There is currently great discussion in Italy about this reduction of the court’s power. As previously mentioned, one purpose of the reform was to have “more market and less judge,” with the opinion that a judge is too far from the market and that, many times, requirement of a judge’s authorisation may slow the liquidation of assets. But in the history of Italian law the creditors’ committee never has been an effective body. In the most cases, creditors were not interested in serving as part of the committee, and this organ was not able to fulfil the creditors’ interest.

Other scholars suggest that only the great creditors, such as the banks, would be interested in sitting on the committee in order to obtain full attention by the trustee to their interests and to avoid actions within the procedure against them, like avoidable transfer suits and damages suits according to the credit policy used with the debtor.

The law provides a very limited fee for the members of the creditors’ committee and only when such fee is voted by the creditors’ majority. On the other hand, the committee members are liable for their activities and also for control of the trustee’s acts. The 2007 Act diminished the committee members’ responsibility, but frequently people still do not agree to be committee members. Also, the banks are not interested in participating because the liability for the control on the trustee is considered too dangerous and to be a committee member is not profitable.

So it is possible that the committee will not operate for the lack of members. In such a case, according to the law, the judge will substitute himself for the committee. This provision of the law permits that the procedure can prosecute, but frequent application of the clause will mean that an important part of the reform had failed.

A positive topic of the new law is that the trustee has been given much more power than in the past. As previously noted, the trustee must have the authorisation of the creditors’ committee, but according with the liquidation program provisions, the trustee can sell the debtor’s assets with great freedom.

In the past, the trustee could not sell real estate directly to a buyer. An auction by the judge was required. The judge’s authorisation was also necessary for the selling of other goods. Now the trustee can sell all goods, provided that there is a fair value by an expert, advertisement, and competition between all interested buyers. However, each of these acts must be checked by the court to verify that it complies with the liquidation program. A general provision is that the trustee, if possible, must sell the assets as a going concern. The trustee may also rent the assets, but he must choose the renter in accordance with the fee-
sibility of the business plan presented by him, including the number of employees maintained. Saving jobs should not be a trustee's task but rather a government's duty, something quite far from the creditors' interest. However, it is correct to observe that this rule is an exception and that the new law generally respects creditors' rights more than the extraordinary administration Act did in the 80s and 90s.

XI. Avoidable Transfers

I observed above that one of the main tasks of the reform was to reduce the impact of the avoidable transfers discipline on enterprises. The great number of exemptions introduced by the law and also the limitation of the avoidance to the debtor's acts done in the six months before the bankruptcy opening (12 months for extraordinary acts) means that this discipline now is much less threatening to creditors.

The new exemptions deal with the debtor's payments made within the usual terms while the enterprise was still operating, with the payments made to the banks, and generally with the transfers related to a bank's contracts. They also deal with the building's transfers to purchase a buyer's first house, with all the transfers and payments in execution of concordato preventivo, and of the Consensual Restructuring Agreement and Turn-Around Plan. In this last case, the exemption is accorded only if the procedure has been approved by the court or, in the case of a Turn-Around Plan, if the court rejects the trustee's petition, deciding that the plan and the expert's information were correct.

Therefore, the reform decided to protect the certainty of transfers instead of the equal treatment of creditors. Many scholars do not like this choice and think that the government decided to give a gift to the banks. In any case, the choice is now clear, and we must hope that in the future there will be benefits such as the reduction of the cost of bank financing and also the reduction of difficulties for the banking system to solve financial and economic crises.

XII. Extraordinary Administration

The bankruptcy procedure is not the only procedure provided by the law in insolvency case. For the biggest enterprises, like in the Parmalat case, the law provides for extraordinary administration. This procedure has not been changed by the reform, but it has been recently amended by the government's

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"The discipline is more detailed, but it is not possible within the limits of this article to expose all of the technicalities of this topic."
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decree of August 28, 2008,⁸ to deal with Alitalia's crisis. I will
limit this exposure to a general overview.

There are two different types of extraordinary administration,
rules by the Acts of 1999 (the Act 270/1999) and of 2003 (the Act
347/2003). In both cases, the court has limited powers, and the
procedure is administered by an extraordinary administrator ap­
pointed by the government.

In the first proceeding, the court may open the procedure on
demand by the debtor or by the creditors, when the enterprise is
insolvent and when there are at least 200 employees and the
indebtedness is at least equal to 2/3 of the assets and to 2/3 of
turnover. In the second case, the procedure (extraordinary re­
structuring) is opened by the Industry Ministry (the correct name
is Productive Activities Ministry) on demand of the debtor. The
court has the power to stop the proceeding if insolvency does not
exist. The requirements are at least 500 employees and indebted­
ness not less than 300 million Euros.

The object of an extraordinary administration (the first proce­
dure) is either a restructuring plan or a plan for disposal of a go­ing concern. The object of the extraordinary restructuring is only
the restructuring. In this case, it is also possible to have a com­
promise with creditors providing for the division of creditors into
classes and cram down. In the Parmalat case, the extraordinary
administrator proposed a creditors' agreement assuring the as­
sets' transfer to a new company whose stocks were distributed to
the creditors in payment of their claims. The 2008 decree
amended the extraordinary restructuring. Now also in this proce­
dure is it possible to sell the assets as a going concern.

In an extraordinary administration, an insolvency compromise

⁸This decree must still be approved by the Parliament, who must provide
within sixty days from the enactment. Likely the new law, approved by the
government to give legislative support to the selling of Alitalia's assets to a
newco formed by a group of Italian entrepreneurs, will be modified by Parlia­
ment. It is too early to give a judgment on the new law. The decree is reserved
to the big enterprises that operate in the public utilities services (servizi pub­
lici essenziali) to recover totally or partially their value, not only through
the restructuring but also through the assets' selling as a going concern. The notion
of group's companies who can be affected by the procedure is extended to the
companies who have contractual relationships with the holding, providing ser­
vices in a rather exclusive way. It is also established that the extraordinary
administrator has the power, under the Ministry of Industry survey, to im­
mediately sell the assets with great freedom, also without competition between
potential buyers, provided that the price is not less that the market's price as
valued by a primary financial institution. The impression is that the govern­
ment is not respecting the principles of transparency with which insolvency's
procedure should generally deal. The law establishes also that Alitalia's past
administrators should not be responsible for the acts done in the last year to
prosecute the activity. This provision is probably not allowed by the general
principles of civil responsibility for damages provided by Italian law.

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with creditors is also available. An important difference between the two procedures is that, in the extraordinary administration, the claw back actions are available only in the plan for disposal of assets as a going concern; in the extraordinary restructuring, the claw back actions are always available, including if the enterprise goes on with the restructuring plan. The constitutional court, invested by the Parma court in the Parmalat case, decided recently that claw back actions may go on only if the result is reserved to satisfy creditors and not for an enterprise restructuring. The reason of this different discipline and of the constitutional court's decision was that the avoidable transfer's actions should be reserved to restore the creditors' guarantee represented by the debtor's patrimony in the event of bankruptcy. When the assets are sold through the extraordinary administration, the enterprise can go on, but the selling is done in the creditors' interest. When restructuring is provided, the avoidable transfers' result could be used not to pay creditors but to finance the enterprise's activity. This is not the scope of the avoidable transfers' actions. Furthermore, the European Union treaty prohibits measures that could affect competition between enterprises. If the avoidable transfers' proceeds are used to finance the enterprise's activity, there could be a infringement of the law of competition. So the 1999 Extraordinary Administration Act prohibited the avoidable transfer's actions if the assets are not sold and the extraordinary administrator is trying to restructure the enterprise; but the 2003 Act provided differently, allowing the avoidable transfers actions in any case. The constitutional court decided that also in this case the avoidable transfer's proceeds should be reserved to creditors and not used to finance the restructuring.

In both types of extraordinary administration the court plays a limited role. The judge decides the actions for recognition of the claims and the avoidable transfers' actions, but the procedure direction is reserved to the extraordinary administrator and to the Ministry. That does not mean that there is not any possibility to challenge the decisions done by the extraordinary administrator or by the Ministry in court, but the competence is of a different court, the administrative court as in all situations where a public authority decision is contested.

Extraordinary administration is possible only when the enterprise's restructuring or the enterprise's sale as a going concern is viable. The law provides than when it is clear that the restructuring or the selling are not possible, the procedure must be transformed in bankruptcy. So the legislature tried to avoid that the procedure will be continued like in the past, with the 1979 Extraordinary Administration Act when all the assets were sold not to pay the creditors but to prosecute the activity only to save jobs.
To avoid the opening of a procedure where the enterprise's rescue is not possible, the 1999 Act provides that the court must appoint a trustee for an observation period to decide at the end if the conditions are present for a profitable restructuring or selling of assets as going concern. In the *Parmalat* case it was immediately clear that it was necessary to make immediate decisions and handle very difficult choices. The observation period was not compatible with this issue. So the 2003 law was enacted. It was the source of the second type of proceeding, completed with the amendments to the 2003 Act.

As previously noted, the two extraordinary administration procedures have different requirements. The 2003 Act requires bigger dimensions than the 1999 Act. Both extraordinary administration's procedures are reserved for the biggest enterprises. For the others there are only the procedures founded on creditors' agreements and bankruptcy. So the discipline of an enterprise's insolvency in Italy is different according to the dimensions of the debtor. For small enterprise, the insolvency procedure is not allowed. For middle-sized enterprises, the procedure provided by the law is bankruptcy, a liquidation procedure whose topics were affected by the Reform. For the biggest enterprises, insolvency is settled through government intervention with a limited power reserved to the court. Of course all enterprises, including the biggest, may access the three procedures founded on creditors' agreements.

Scholars do not agree with the choices made by the legislature. They think that extraordinary administration has no reason to exist, but politicians disagree. In their opinion, when the enterprise's dimensions are big and the insolvency affects the national economy, it is important that the procedure's control is reserved to the government and not to the judge. To give complete information, it must be added that, since 1942, the bankruptcy law provided a special procedure, the administrative liquidation, reserved for some types of enterprises (i.e. insurance companies and cooperative companies). This procedure involves the appointment of a liquidator by the competent Ministry with the direction held by the Ministry. Also in this case the liquidator could be challenged before the court only for the claims recognition and the avoidable transfers actions or before the administrative court to contest the decisions of the procedure's organs. A similar special administrative procedure is also provided for banks' insolvency.

We can say that when the public interest is involved the procedure's direction is held by the government and not by the court. In my opinion the greatest part of these special procedures are not reasonable. When the crisis is too big to be managed by the court, the need for special rules can be understood, as in the
Parmalat case, but generally there are no good reason to avoid the normal path.

So in the future one of the main tasks to be accomplished in a hypothetical fourth Act of the Reform should be to revise the discipline of the extraordinary administration in order to abolish it or to reduce the number of exceptions to the general discipline.

XIII. Outlook to Future Reforms

There are other topics to discuss in a possible next reform of the discipline. As noted above, the reform was done with different acts dealing with the urgency connected to the legislature's end. So some parts of the reform were derelict, and there are some failures in the discipline.

I observed before that no insolvency procedure is provided for the smaller enterprises, for consumers' debts, and generally for civil debtors. This gap was less important when the 1942 Act was enacted. People were happy not to have to deal with bankruptcy and the stigma. But now that stigma does not exist anymore. The insolvency proceeding permits the debtor a fresh start, and the consumers' debt needs an answer. The discharge cannot be limited to the commercial entrepreneurs.

Also the courts continue to ask for freedom from the excessive number of petitions filed by single creditors for enforcement of decisions.

The second field where the reform did not prove adequate is the discipline of companies' groups. It is necessary to establish rules to bring all the companies of a group under the jurisdiction of the same court and to appoint the same trustee. There are different patrimonies, but in most situations there is either only one enterprise or the different activities are sufficiently linked together. So only by having common rules on the competence and a common program can creditors be best satisfied. Also the enterprise's rescue needs an overview on the entire group.

In Italy only within the extraordinary administration are such rules provided. There is no good reason not to extend this discipline also to the other insolvency procedures. I know that generally in the European countries the insolvency groups' discipline is not well developed, but this is not a good reason not to do better when we can.

There is still the necessity to reform the bankruptcy crimes law. For this part the old 1942 Act is still in force. As I observed before the values affirmed by the 1942 law were quite different from the values of the contemporary legislature. So there is the risk that in some cases the behaviours prosecuted by the law are still linked with the stigma provided by the old law. Also the necessity that the debtor explains fairly the enterprise's situation when he propose an agreement to creditors must be better
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protected by the criminal law than it does now. Of course these are only examples: all of the criminal bankruptcy law must be revised.

Then there is also international insolvency law. Italy is a member of the European Community. Cross-border insolvencies are thus directed by the 1346/2000 European Regulation. It could be useful to provide some rules coordinating European and internal insolvency law. Primarily Italy could apply the Model Law to the insolvencies where the center of main interests (COMI) is in a non-European country, recognising the competence of a foreign judge as U.S. did with their Chapter 15.

There is a great legislative work to do. We hope that it will be possible to reach this goal in the near future.
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