Chapter 15

EIR and Italian Rules Governing the Lodging, Verification and Admission of Claims. Theory and Italian Practice

Giorgio Como

EIR and Italian rules on lodgement, verification and admission of claims: An overview

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Insolvency regulations usually consider national and foreign creditors equally, in accordance with the principle of collectivity, as expressed by the maxim *par est condicio creditorum omnium*. Therefore, both national and foreign creditors are allowed to lodge proof of claim; and a single process of verification takes place, without any distinction between creditors; or between debts governed by national or other foreign laws.

EC Regulation no. 1346/2000, adopted by the EU Council on May 29, 2000 (hereinafter: "EIR") deals with certain aspects of insolvency proceedings. EIR allows every creditor with habitual residence, domicile or registered office in a Member State other than that in which the insolvency proceedings are opened (hereinafter referred to as well as "EU Creditors") - inclusive of tax authorities and social insurance institutions - to lodge his claims in each pending insolvency proceeding relating to the debtor's assets (arts 39 and 32.1 EIR) and confirms the above mentioned principle of equality.

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3. Reference to those criteria, rather than the criteria related to the creditor’s own nationality provisions, is supported by the desire to protect creditors belonging to other States who have their habitual residence, domicile or registered office inside the European Union. In this sense I. Fletcher, “The European Union Regulation on Insolvency Proceedings”, in Grotwald (Ed.), Aktuelle Entwicklungen des europäischen und internationalen Zivilverfahrensrechts, (2002, Gießeking-Verlag, Bielefeld), pp. 297-326.
4. Recital p. 21 to EIR.
EIR entities liquidators in the main and any secondary proceedings to lodge in other insololvency proceedings claims which have already been lodged in the proceedings for which they were appointed, subject to certain conditions (art. 32.2 EIR); and provides specific rules particularly regarding information notices to EU Creditors as well as lodgement of their claims (arts 40 – 42 EIR).

These rules shall prevail over those contained in the law of the Member State within the territory in which insololvency proceedings are opened (hereinafter referred to as the “lex concursus”). Any other aspect which is not covered by the aforementioned rules is governed by the lex concursus, which expressly governs claims which are to be lodged against the debtor’s estate and the treatment of claims arising after the opening of the insololvency proceedings (art. 4.2(g) EIR); as well as the rules governing the lodging, verification and admission of claims (art. 4.2(h) EIR), abovementioned.

Equal treatment among EU Creditors. The risks of a reverse discrimination in favor of EU creditors and the need for amendments to national regulations.

The now said EIR rules aim at ensuring equal treatment and avoiding discrepancies among EU Creditors in accordance with the principle of equitable treatment of creditors, which specifies a general principle of equality to be respected by the Community regulator, and with the principle which forbids any discrimination on the grounds of nationality within its sphere of application.

These principles apply to EU Creditors only. They do not apply to creditors with habitual residence, domicile or registered office located within the state of opening an insololvency proceeding (hereinafter “Member State Creditors”) as well as to those with habitual residence, domicile or registered office in Denmark or in another foreign state (hereinafter referred to as “Non EU Creditors”).

This could lead to a risk of a reverse discrimination - which occurs where the rules referring to creditors' rights contained in national insololvency regulations are more severe compared to the ones of the EIR – in favor of the EU Creditors and against


6. Art. 20(3) EIR specifically ensures the respect of this principle primarily through the equilibration of dividends.


2. V. Jurgilevicius, Comparative law in insolvency proceedings under the auspices of the Council of the European Union dated 8 July 1996, EU Council reference 6560/96/REV, DRS 8 (CFP), a 271 expressly states that “the Convention does not take into consideration creditors from outside the Community to whom the national law of that State in which the proceedings are opened applies.”


Italian rules on lodgement, verification and admission of claims

Italian rules on lodgement, verification and admission of a claim differ based on the type of proceedings opened, as well as on their scope. Specifically, some of the existing proceedings (such as fallimento or liquidazione coatta amministrativa) aim at debtor’s liquidation only; others (such as concordato preventivo and amministrazione straordinaria delle grandi imprese in crisi) aim either at debtor’s liquidation or restructuring. Lodgement, verification and admission of claims in winding up proceedings (such as fallimento or liquidazione coatta amministrativa) – which aim at debtor’s liquidation only – differ from the one in restructuring proceedings (such as concordato preventivo and amministrazione straordinaria delle grandi imprese in crisi) – which aim either at debtor’s liquidation or restructuring.

In the fallimento, as well as in the amministrazione straordinaria delle grandi imprese in crisi, the insololvency proceeding judge verifies and admits claims through a judgment issued upon lodgement of claim. In the concordato preventivo proceeding, as well as in the concordato within the Amministrazione straordinaria delle grandi imprese in crisi (c.d. Marzano decree), and in the liquidazione coatta amministrativa no verification and admission of claims by an insolvent judge occurs, whereas the judicial commissioner only ascertains the claims declared by the creditors for the sole purpose of the vote on the debtor’s proposals.

Italian insolvent regulations on lodgement, verification and admission of claims do not deal specifically with international aspects of insololvency proceedings, apart from the rule set by art. 93(2) legge fallimentare, which is not frequently used. Therefore, any international aspect of lodgement of claims that is not covered by the EIR, shall be dealt with in accordance with the rules of private international law established by the law 31 May 1995 n. 218. This law lacks rules aimed at specifically covering aspects concerning insolvent proceedings. Furthermore, it makes its application difficult and controversial in insolvency proceedings, with respect to the lodgement, verification and admission of claims.

Member State Creditors. In order to solve this risk, Member States may act on their internal rules and make them uniform to EIR rules. They would choose to act so a positive effect would be had on the proper functioning of cross-border insolvent proceedings and, therefore, on the functioning of the internal market, which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.11

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11 Recital 2 to EIR.

12 Art. 93(2) legge fallimentare states that “if a creditor is resident or has a registered office abroad, the information notice may be forwarded to his representative in Italy, if any.”

13 L. Daniele, “La liquidazione dei beni dell'intero, l'apprezzazione di competenza giudiziaria, i rapporti con le autorità giudiziarie straniere, il controllo del fallimento concordato dopo il Regolamento CE n. 1346 del 29.5.2007”, report at the meeting held by the Consiglio Superiore della Magistratura on 3 December 2002 on “La liquidazione dell'attivo fallimentare tra conservazione e disgregazione. Questioni dibattute e proposte.”

Exercise of creditors' rights in insolvency proceedings. Right to lodge

Claims against debtors under insolvency proceedings; right to lodge a claim and related creditors' rights in insolvency proceedings

Creditors may hold claims against debtors under insolvency proceedings which arise either prior to or after the opening of the insolvency proceedings.

Such claims may be lodged against the debtor's estate. The right to lodge a claim includes, in general terms, the right to achieve satisfaction from the proceeds, the exclusive right to recover a credit or demand assets from and/or require restitution by any third parties, and enjoy the beneficial use of such assets. 12

From a procedural point of view, lodgement of claims includes any action taken by a creditor to establish its claim and have it admitted to, or acknowledged in, an insolvency proceedings. Within the context of the EIR, such activity refers both to winding up and restructuring proceedings. Where more proceedings concerning the same debtor are opened in different states – as expressly acknowledged by art. 3 EIR, any creditors as well as liquidators of the different proceedings opened may lodge their claims in the main proceedings, in the secondary proceedings, including territorial proceedings, or simultaneously in any pending insolvency proceedings concerning the same debtor (multiple cross-filing or multiple lodgements).

Creditors may oppose the allowance of the claim of another creditor; file a petition for revocation of a lodged claim; attend creditors' meetings; waive claims made by the Liquidator in a procedure different from the one the liquidator has been designated to, where permitted by the lex concursus rules. 16 Oppression or waivers can be justified by the intention to curb the costs of the Liquidator in addition to translation and verification costs, if applicable laws so provide. 17 Furthermore, they can be justified as creditors want to lodge their own claims and, to this end, do not wish to be represented by the Liquidator in the proceedings where he has already lodged his claim. 18 In the event that the creditor has already succeeded in seizing the assets from the debtor, and is not required to return them pursuant to the proceeding for which he lodged his claim, the creditor would not be able to retain them if he takes part in another proceeding. 19

Oppositions may be lodged pursuant to the law applicable to the insolvency proceedings under which the Liquidator has been appointed. 20 Therefore, if the law applicable to the insolvency proceedings is Italian law, such opposition may be proposed by means of a complaint against the actions of the Liquidator pursuant to art. 36 Italian Bankruptcy Law. Unless the lex concursus confers such power, 21 a liquidator assigned to other proceedings or the court, whoever may be competent, cannot oppose the lodgement of claims. It is not clear whether or not lex concursus regulates both the possibility for creditors to oppose the lodgement and waive such lodgement rights, or whether the right to oppose is governed directly by the EIR and only a relative waiver is subject to the applicable law. 22

EIR relevant provisions.

Law applicable to claims against insolvency proceedings as well as to lodgement of claims.

According to the EIR, the lex concursus specifically governs claims which may be lodged against the debtor’s estate (article 4.2(g), part one), therefore, the effects of the opened proceeding on the value of certain claims, 23 the manner in which they can be turned into a secured or unsecured debt; 24 as well as the treatment of claims arising after the opening of the insolvency proceedings (article 4.2(g), part two), and how to deal with claims lodged after the debtor’s asset situation was examined and subsequent insolvency proceedings were opened. 25

The lex concursus governs lodgement of claims as well. Therefore, it governs the following: subjects entitled to lodge a claim; 26 the procedure by which a claim shall be lodged; 27 payments of certain costs associated with this process; 28 time limits for lodgement as well as penalties for exceeding them; admisibility and foundation of the lodgement and relative claims verification costs; ways in which a claim shall be lodged, and burden of proof to be satisfied; eligibility of an appeal against the decision concerning the lodging; and the capacity of a creditor to contest lodgements of others.

The rules set by the lex concursus apply save as otherwise provided in the EIR. As a result, they shall be overcome by the specific rules set by arts. 40 – 42 of EIR.

Subjects entitled to lodge a claim. General remarks

As already mentioned, the lex concursus governs creditors entitled to lodge a claim

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12 In this sense, G. Ferri, “Creditori e curatori della procedure principale nel regolamento comunitario sulle procedure di strutturazione finanziaria”, in 2006, II, Riv. dir. pec., 700.
17 M. Virgo – E. Schmitz, op. cit., n. 239.
19 L. Danieli, op. cit., 97 – 98.
20 B. Wessels, op. cit., 483.
21 A. Herboth, “Commentary to art. 32”, in K. Pannen (Ed.), op. cit., 469.
22 L. Danieli, op. cit., 97, n. 20.
28 M. Virgo and E. Schmitz, op. cit., n. 267.
under an insolvency proceedings. Art. 39 EIR, specifically, entitles EU Creditors, including tax authorities and social security authorities of Member States, to lodge claims in an insolvency proceedings. In case of opening of a main and one or more secondary proceedings, art. 32 EIR particularly entitles EU Creditors as well as liquidators to lodge their claims both in the main and secondary proceedings.

Artt. 39 and 32 EIR consider the uniqueness of the debtor, despite the opening of more procedures concerning the same debtor, either main or secondary; and allow creditors to lodge their claims against the debtor, in order to obtain the payment, notwithstanding the fact that the debtor's assets are not located on the territory of one Member State only. These provisions aim at improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, as well as avoiding discriminations among creditors on the grounds of different nationalities, within the scope of the treaties establishing the European Economic Community and the European Union.

Article 32 EIR, chiefly, aims at overcoming any restriction provided by lex fori secondarii because of nationality, lex causae governing the claim, or because of any special national characteristics of a claim, involving a preferred right, a secured right, his public-law nature or its association with the establishment. Therefore, art. 32 EIR warrants equal treatment to any creditor.

Subjects entitled to lodge a claim based on their nationality

The lex concursus identifies the circle of creditors entitled to lodge claims in the main or in the secondary proceedings. EIR, however, sets two specific provisions which apply to EU Creditors, and, specifically: (i) art. 39 EIR, which allows EU Creditors to lodge their claims in an insolvency proceeding; and (ii) art. 32.1 EIR, which entitles each EU Creditors to lodge its claim both in the main and in the secondary proceedings. As a result, lodgement of claim made by an EU Creditors cannot be disallowed on the ground that the said creditor is situated in another Member State or that the claim is governed by the public law of another Member State.

Art. 32.1 makes no difference among the place of creditors' habitual residence, domicile or registration. It is therefore, disputed whether this provision applies to EU Creditors only or to Non EU Creditors as well. If art. 32.1 applies to EU Creditors only, in any case, Non EU Creditors shall be empowered to lodge their claims according to the lex concursus.

Subjects entitled to lodge a claim based on the type of claim.

Tax authorities and social security institutions

Among EU Creditors entitled to lodge their claims in an insolvency proceedings, art. 39 EIR specifically includes tax authorities and social security institutions having registered office in the European Union. With regard to tax claims, this rule breaks the one that tax debts owed by the insolvent debtor to any foreign state are not enforceable in the courts, which had jurisdiction in the matter of insolvency, and therefore, are not provable in the state in which the insolvency proceedings are pending (the so called "revenue rule").

Tax Authorities and social security institutions may, even if not expressly mentioned in art. 32.1 EIR, lodge their claims in the main and in any secondary proceedings. Therefore, if in the law in the State where the insolvency proceedings were opened does not recognize pre-emptive rights to their claims, the said authorities and bodies may evaluate the possible requiring of the opening of secondary proceedings in a State which recognizes legitimate pre-emptive rights. Following the opening of the said secondary proceedings, tax authorities and social security institutions will be entitled to lodge their claim in the opened secondary proceedings and obtain recognition of pre-emptive rights acknowledged by the State's lex fori to which the aforementioned authorities and bodies belong.

38 B. Westerl, International Insolvency Law cit., 479. This principle applies to Italian law as an example, with the sole limit of reciprocity according to art. 16 of the rules preliminary to the Italian Civil Code. See L. De Sanctis, Il fallimento nel diritto internazionale privato e processuale, (1987, Cedam, Padova), 65.
39 The legitimacy of the tributary authorities constituted as exception to exclusions formulated by Regulation n. 14/2002 concerning the recognition of the civil and commercial decisions that expressly exclude application of the same to all fiscal and tax matters. G. Moss, T. Smith, "Commentary to art. 32", in G. Moss et al., op. cit., nr. 8.403.
40 Such a rule was generally followed in nearly all nations, and expressed a manifestation of the sovereign authority vested in the state, which makes unacceptable (in the absence of some international treaty or agreement) that one sovereign state should serve as the agent for enforcement or collection of the fiscal imposition of another. On the "revenue rule" in general, see L. Piicli, Insolvency in Private (international Law. Second Edition, 2005, Oxford University Press), 2.64 and 7.146; J. M. Wells, Tax claims in Transnational Insolvencies: A "Revenue Rule" Approach, available at www.flglobal.org, last visited 2010. This topic is extensively covered by B. Westerl, The Claims Lodging and Enforcement in Cross-Border Insolvencies in Europe, 2010, ILR, 131. The revenue rule appears to have already been breached by EU Directive 2001/44/CE on 15 June 2001, on mutual assistance between Member States in the recovery of public-law claims, in particular tax claims, aimed at protecting the financial interests of the Community and the Member States as well as better to safeguard the competitiveness and fiscal solidarity of the internal market by making possible effective recovery of tax claims irrespective of where the debtor may be in the Community. Such directive was enforced in Italy with legislative decree 9 April 2003, n. 69.
41 G. Moss, T. Smith, "Commentary to art. 32", in Moss et al., op. cit., nr. 8.376.
Liquidators (Art. 32.2 EIR). Duty to lodge claims.
Scope and creditors’ interest assessment (Art. 32.2, Part I of the EIR)

Art. 32.2 EIR entitles liquidators in the main and secondary proceedings to lodge claims that have already been lodged in the proceedings over which they preside.45 Furthermore, it aims at reducing strategic courses of action devised to circulate the debtor’s assets from one jurisdiction to another; to increase the powers of the Liquidator in the insolvency proceedings other than those under which he was designated;46 to simplify the exercising of creditor rights, assigning all claims the right to participate in territorial proceedings, respecting the principle of equality among creditors foreseen by Art. 20.2 of the EIR (the so-called ‘hot spot rule’).47

Liquidators have a duty to lodge claims if such lodging is expedient for the majority of creditors, in the interests of creditors or of certain classes of creditors48 of the procedure under which he has been designated.49 The liquidator’s duty shall be assessed taking into account the costs of an additional lodgement:50 the prospective dividends, taking into account the value of the assets to be distributed in other proceedings; the claim’s nature (secured or unsecured); the possibility for unsecured creditors to concur to proceeds’ distribution with unsecured creditors who have lodged claims in the other proceedings.

The liquidator has no duty to lodge a claim on behalf of a creditor who informed him51 and preferred not to lodge his claim individually.52 Moreover, the liquidator has no duty to lodge claims which he contests in his own proceeding or where a dispute arose on the foundation of the lodged claim during the insolvency proceedings under which the liquidator has been appointed.53

The powers of the liquidator are the same as those of individual creditors54 and lie on the faculty recognized to the liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) EIR — to exercise any power conferred on him by the law of the State of the opening of proceedings in another Member State (art. 18.1 EIR). Such powers have to comply with the law of the Member State within the territory in which the liquidator intends to take action (art. 18.3 EIR).55

Liquidators who operate complex multiple cross-filing in different main and secondary insolvency procedures, need to cooperate according to art. 31 EIR.56

When they lodge claims already lodged in the proceeding they are responsible for, liquidators shall operate in accordance with the applicable law, taking into account the nature and characteristics of the claim.57

Rather than in the name and on behalf of the various listed creditors, it is disputed whether the claims of the liquidator will lodge the said claims collectively.58

EIR rules on Information concerning the opening of an insolvency proceeding to EU Creditors.

Scope

Article 40 EIR provides a precise obligation to provide EU Creditors with any information related to lodging of claims. Such information allows recipients to decide whether or not to lodge their claims in insolvency proceedings, taking into account the order of satisfaction (i.e. the ranking) that the law of the proceedings accords to his claim and the importance of the assets that will be distributed.59

Thus, Article 40 EIR aims at protecting individual EU Creditors60 avoiding the possible loss of the opportunity to lodge their claims within the time allowed. Furthermore, it aims at avoiding the disadvantages of cross-border insolvencies,61 caused by delays in communications concerning the opening of insolvency proceedings62 in the absence of an insolvency proceedings community register.

Authors of the information notice

Art. 40 EIR applies to both the main and local insolvency proceedings.63

The obligation to disclose such information rests with the Court, as indicated in Art. 2(d) EIR64 or the Liquidator, as defined in Art. 2(b) EIR,65 and needs to be made
in accordance with the rules set by the lex concursus. In Italy, as an example, the duty of information lies on the liquidator.

If the lex concursus is silent, in adherence to the doctrine of the effetto utile, both the Court and the Liquidator are required to inform creditors.62

Recipients of the communication

The information notice referred to in art. 40 EIR shall be forwarded to any known EU Creditors who are entitled to lodge their claims in insolvency proceedings according to art. 39 of the EIR. The information notice referred to in art. 40 EIR shall not be forwarded to Non EU Creditors or to National Creditors, who will be entitled to receive an information notice made in accordance with the lex concursus.63

Known creditors are those who appear in bookkeeping records or other documentation as received or found by the liquidator.64

The information notice shall be forwarded even if the law in the state in which the insolvency proceedings have been opened does not foresee any obligation to send a communication, in order to avoid unequal treatment among creditors.65

The consequences of any default in receipt,66 as a result of negligence by procedure bodies or the fact that the names of some creditors are not available,67 shall be governed by the lex concursus.

Form and contents of the information notice to EU Creditors

The notice to EU Creditors shall be made68 in writing, as provided by art. 42.1 of the

63 In this sense see S. Riedemann, “Commentary to art. 40,” in K. Pannen (Ed.), op. cit., 530, 4.
65 In this sense see S. Riedemann, “Commentary to art. 40,” in K. Pannen (Ed.), op. cit., 530, 5.
66 B. Wessels, International Insolvency Law cit., no. 10915, with reference to the petition by the Court of Appeal in Orlean on June 9th 2006, that states that art. 40 of the Regulation requires the liquidator to notify creditors in other Member States, in accordance with Art. 42 of the Regulation. Failure by a German creditor to lodge his claim within such deadlines, due to the fact that he received no such information from the liquidator, induced the Court to accept the late lodgement of claim. In this sense see F. Moll, op. cit., 1118.
68 Failure to submit such claims, where foresee by lex concursus determines the responsibility of the liquidator towards creditors and other third parties entitled to real rights as compensation for incurred damages. This responsibility relates to the violation of an obligation imposed by the law in force, notwithstanding the possibility to prove one’s status of insolvency of not being in the position to send such notice. By standard law, failure to send a notice means lack of satisfaction in relation to the credit claim and an increase in costs incurred to validate the lodged claim. In this sense see S. Riedemann, “Commentary to art. 40,” in K. Pannen (Ed.), op. cit., 533, pp. 77 – 18. In Italy see Canadian Court December 7 2007, n. 25034, in 2008, Fallasmon, p. 607. The same case that jurisdictional issues have faced this matter, the theory that the juridical relationship generated by appointing an insolvency liquidator was deemed to be of a “contractual” nature. Therefore, in substantia materia art. 1218 of the Italian Civil Code applies (CC, 11 Feb 2006, n. 1397, in Giur. Civ. Mass., 2006, CC 6 apr 2001, n. 5094, in Giur. Civ. Mass., 2001 where complete party of the report and the assignment contract is confirmed) whereby the debtor (liquidator) who fails to comply with its duties is liable for any related damages.

EIR.69

The notice shall contain information concerning the opening of insolvency proceedings, the need to lodge claims for recognition,70 the authority to which claims shall be lodged, time limits for lodgement, any related penalty as well as any other general formality. As well as the above, with respect to preferential creditors, the notice shall entitle the request to specify whether or not they are required to lodge claims for their claims.71

With respect to information notices sent to EU Creditors, the lex concursus cannot reduce the requirements set by art. 40,72 but it may require additional information further to that required by Art. 40 of the EIR.73 Therefore, the content of the information notice shall be influenced by the type of insolvency proceeding opened as well as by the lex concursus. Furthermore, in order to avoid or limit multiple lodgements, it could be appropriate for the liquidators of the insolvency proceedings concerning the same debtor to send a joint statement, inviting them to lodge just one claim in the proceedings where their rights can be best satisfied.74

Arts 40 and 42.1 EIR and Italian rules on information notices to EU Creditors

Arts 40 and 42.1 of the EIR partially replace lex concursus rules on information notices to creditors of insolvency proceedings opened in Member States, with respect to information notices to be sent to EU Creditors.

Therefore, in regards to insolvency proceedings opened in Italy, information notices sent to EU Creditors shall expressly mention “the penalties laid down in regard to time limits” as well as “the other measures laid down” for lodgement of claims, as required by art. 40, par. 2 of the EIR.

This information shall be added to (and, where a conflict arises, shall substitute) those of the information notice which the liquidator is required to send to the creditors in the fallimento (compulsory winding up) proceeding by art. 92 legge fallimentare,75 as well as those to which the liquidator (commissario straordinario) is required to

69 C. G. Paulus, op. cit., 293, 4.
70 M. Virgo and E. Schmit, op. cit., no. 71.
71 The content of the notice to creditors was the subject of a judgment procedure by the Court of Appeal in Orleans (R. Jang Gredit v. SIPL S.A., Court of Appeal, Orleans 9 June 2005, available at <www.eur-database.com>, last viewed April 2008), in relation to an information notice which did not include specific rules provided by the lex concursus and, specifically, that the lodgement of a claim made by a company required the signing representative to provide the information that he was the legal representative of the said company. The German creditor, after receiving a notice on a redazione giudiciale procedure from a French Liquidator, indicated that the subject that had signed the (lodged) claim had taken on the role of credit representative at a later date, after submitting the claim to a French Company. The French court allowed the lodging, deciding that a foreign debtor should not be confronted with a domestic provision in order to endure obligations derived from the regulation.
72 M. Virgo and E. Schmit, op. cit., no. 272.
73 S. Riedemann, "Commentary to art. 40," in K. Pannen (ed.), op. cit., 530, n. 3.
send to the creditors of a debtor under an amministrazione straordinaria delle grandi imprese in crisi (large insolvent companies' extraordinary administration) proceeding, according to Legislative Decree 270/1999, by art. 22, as integrated according to art. 8.1, lett. (d) of the said Legislative Decree.

Some of the information mentioned in art. 40 EIR shall not be relevant for the information notice sent, according to art. 171 legge fallimentare to EU Creditors in a concordato preventivo proceeding, as no claim verification takes place in this proceeding, but only a due diligence made by the liquidator (commissario giudiziale), based on the information provided by the creditors. A similar conclusion has to be considered for information notices sent to EU Creditors of a liquidazione coatta amministrativa proceeding, as creditors are only required to verify the amount of their claim, which has been stated by the liquidator in its notice, as well as any existing right in rem.

**Formal notice languages (art. 42.1 EIR)**

The information shall be provided in the official language or one of the official languages used in the State of opening of the insolvency proceeding, in compliance with Art. 42.1 of the EIR.

To facilitate the drafting of such information, Art. 42.1 requires the use of a form bearing the heading "Invitation to lodge a claim. Time limits to be observed" in all the official languages of the institutions of the European Union. The information title, therefore, should be made (at least) in the language of the recipient and not necessarily in all other languages of the institutions of the European Union.

In order to help courts and liquidators to comply with these requirements, a form in different EU languages has been drawn up by the European Commission to be used for this purpose or to serve as a model.

**Timing and methods used to forward information to EU Creditors**

The information shall be sent without delay by means of an individual notice.

Art. 40 does not specify how such information should be sent to creditors in other Member States. Therefore, the lex concursus shall apply pursuant to art. 4(h) of the EIR.

If the lex concursus requires a formal notice, such notice shall be made in accordance with EC EIR No 1393/2007 of the European Parliament and Council dated 13 November 2007, on service in the Member States of judicial and extrajudicial documents in civil or commercial matters. Due to the complexity of

these notices and communications, art. 14 of EIR 1393/2007 also endorses the use of means of transmission of legal documents by postal services, registered letter with acknowledgment of receipt or equivalent means.

**EIR procedural rules on lodgement of claims. Form, content and evidence (articles 39, 41 and 42 EIR).**

**Law applicable to lodgement of claims (art. 4.2(h))**

As already mentioned above, under article 4.2(h) EIR, the lex concursus applies, among others, to *lodgement of claims*, unless otherwise stated by other EIR rules, such as the ones set by arts 39, 41 and 42 EIR.

**Written form (Art. 39)**

Art. 39 EIR requires a claim to be lodged in writing.

EU Creditors' national laws may permit claims to be lodged in other forms, more favorable for creditors. This applies to communication by electronic means which provides a durable record of the agreement. Such means shall be equivalent to "writing", as provided for by art. 23(2) of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Any form requirement stricter than the one provided by Article 39 shall not be allowed.

**Language (Art. 42.2 EIR)**

In order to avoid delays and unnecessary costs when lodging claims, art. 42.2 EIR allows claims to be lodged in the language of the State where the creditor has his habitual residence, domicile or registered office. To that extent, however, the title "Lodgement of claim" shall be written in the language of the State opening the proceedings: to guarantee quick and accurate identification of the type of document submitted to the competent authorities. The creditor may also be asked to provide a translation in the official language or one of the official languages in the State where the proceedings were opened. The consequences resulting from failure to provide the required translation are not expressed in the EIR and, therefore, shall be found in

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61 In this sense, making reference to EC Regulation 1348/2000, see S. Riedervann, "Commentary to art. 40", in K. Pannone (ed), op. cit., 534, 9.10 et 11.
62 M. Virgili e E. Schmitz, op. cit., 270.
65 M. Virgili e E. Schmitz, op. cit., 276.

*EIR and Italian Rules Governing the Lodging, Verification and Admission of Claims: Theory and Italian Practice*
The lex fori. The possibility to lodge claims in their national language is granted to EU Creditors and not to Non EU Creditors. The linguistic facilities provided for lodgement of claims may also be limited by the absence of an obligation for the Liquidator to communicate with EU Creditors in their own language. For this reason, where the Liquidator and the EU Creditor speak different languages which do not fall within the scope of common knowledge, it is advisable to use a language which is more commonly used, such as English.

The rule provided for by art. 42.2 EIR derogates the principle of the lex concursus established by Art. 4.2(h). Therefore, if a claim is lodged in an insolvency proceeding pending in Italy, the EU Creditor shall be entitled to lodge the claim according to the rules set by art. 42.2 EIR, which will prevail on those foreseen by Articles 122 and 123 of the Italian Civil Procedure Code that apply to insolvency proceeding as well. This may create a discrimination between EU Creditors and Non EU Creditors, which shall be bound to respect articles 122 and 123 of the Italian Civil Procedure Code.

Failure to comply with this request is not subject to sanctions. Some consider it necessary to disregard applications which are not accompanied by an appropriate translation, while others highlight the fact that in France, failure to submit a translation of the documents does not compromise the lodgement of such claims.

Content of the application (arts 41 and 32.2 EIR)

Art. 41 replaces the rules set by the lex concursus with regard to EU Creditors according to art. 4.2(h); and aims at facilitating the exercising of creditors’ rights within the European Union. Therefore, with respect to lodgement made by EU Creditors, the lex concursus cannot impose conditions on the contents of a claim lodged by EU Creditors which are against those set by art. 41 EIR.

Art. 41 EIR requires the creditor lodging the claim to proof his habitual residence, domicile or registered office in a Member State other than the one where proceedings have been opened, to identify his claim, such as the nature, date on which it arose, the relative amount, whether it refers to preferential, secured in rem or a reservation of title in respect of the claim, what assets are covered by the guarantee he is invoking. A creditor whose claim has been partially satisfied in another proceeding must indicate the same, specifying the residual amount still due.

The liquidator who lodges the claims already lodged in the insolvency proceeding is responsible for filing a certified copy of the original decision appointing him or any other certificate issued by the court which has jurisdiction, according to Art. 19 EIR. Where the right to lodge a claim is disputed, the Liquidator appointed to the same proceeding may lodge such claim in other territorial insolvency proceedings notifying, however, the liquidator of this proceeding of such opposition, in accordance with the said collaboration-based provisions set forth by Art. 31 of the EIR.

In view of facilitating the exercise of foreign creditors’ rights in such proceedings, a form in EU languages has been drawn up by the European Commission to be used for this purpose or to serve as a model for EU Creditors.

Documents to be filed (arts 41 and 32.2 EIR)

Art. 41 EIR requires the lodgement to be accompanied by copies of the supporting documents. It is disputed whether, in case of lodgement according to art. 32.2, the liquidator who lodges claims already lodged in the insolvency proceedings that he is responsible for, is required only to lodge the schedule of claims of the latter, or as well as the above, to file separate lodgement applications, based on the claims lodged by creditors in his proceeding, together with documents related to claims already filed and admitted in his claim.

The court needs to decide according to the applicable lex concursus. When the lex concursus is more severe than EIR, the latter shall prevail. As an example, Italian insolvency regulations require the filing of the original documents. Copies shall have, according to art. 2714 Italian civil code, the same value as the originals, if a public official certifies its conformity to the originals; whereas according to arts 2712 and 2719 Italian civil code, photocopies shall have the same effects as originals, if there is no opposition from the party against whom the documents are filed.

Debt securities or bearer bonds (titoli di credito) holders shall file originals, when lodging a claim based on them. However, art. 93, last paragraph of the Italian insolvency law allows the delegated judge, upon application of the interested party, to allow the court clerk to accept a copy of debt securities or bearer bonds filed, when the creditor is entitled to start an enforcement proceeding against a party which is

Footnotes:
18. L’Indicatore, op. cit., nr. 7.141.
22. F. Melin, op. cit. 116 ss.
24. M. Vigato and E. Soliani, op. cit., n. 273;

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bound to the payment, different from the insolvent debtor. This may create a reverse discrimination between EU Foreign Creditors, who are only required to file copies of the supporting documents; and Italian creditors, who need to follow more rigid rules.

If documents are not fully or partly filed, no further filing shall be admitted once the term for filing has expired unless the lex concursus allows a late filing, the claim shall be assessed iusta alligata et probeta.

**Verification Of Claims**

According to article 4.2 EIR, the lex concursus applies, among others, to verification of claims (Article 4.2(b)). Therefore, even when a claim is subject to another member state law, claim verification shall be governed by the lex concursus.

Thus, verification shall be made by the competent body, according to the rules set by the lex concursus. Consequently, in Italy the competent body as well as the said rules shall be different based on the type of insolvency proceedings. As an example, in a fallimento proceeding, the delegated judge (giudice delegato) shall proceed with verification; whereas in a concordato preventive proceeding, verification shall not be made by a judicial authority, but shall fall within the already mentioned due diligence made by the liquidator (commissario giudiziario).

**Admission Of Claims**

**Categories of admission orders**

When a claim is lodged, the court may issue a judgment, either following a regular proceeding or after the opposition to a judgment made by a competent body, or admit the claim acting in an authenticating capacity. Under to Italian regulations, as an example, lodgement made in proceedings:

a) aiming at winding up of the debtor’s assets, such as fallimento, ends with a summarily motivated decree (which, therefore, could be considered as a summary judgment) issued by the competent delegated judge, which admits or rejects the claim;

b) involving arrangements with creditors, compulsory administrative liquidation and large enterprises extraordinary administration aim at certifying the level of debt of the debtor subject to such procedures. Therefore, no judgment shall be issued after lodgement in one of the latter proceedings.

Law applicable to admission (art. 4.2 (h))

According to article 4.2 EIR, the lex concursus applies, among others, to admission of claims (Article 4.2 (h)).

The lex concursus shall ground the decision on whether a certain subject is entitled to lodge a claim and has the powers required by the law or requires further authorisations; whether a claim may be admitted in an insolvency proceeding; or any appeal made against the lodgement is eligible; and whether a creditor is capable to challenge claims lodged by others.

On the contrary, the lex concursus shall not apply when deciding on the existence as well as on the substantive legitimation for a particular ranking (i.e. order of satisfaction) of a claim, as well as on any other related issue. Ascertaining of these issues shall be based on the rules of private international law applicable in the member state of opening of the insolvency proceeding (“lex causae”). Therefore, if more insolvency proceedings concerning the same debtor have been opened in different member states, claims shall be deemed preferential, in insolvency proceedings opened within jurisdictions that recognize such status; and unsecured in insolvency proceedings opened in jurisdictions that do not recognize the same. Such disparity may be an incentive to request the opening of an insolvency proceeding, with respect to employees or tax claims.

Law applicable to rejection of lodgement. The right to reject liquidator’s lodgement (art. 4.2(h); art. 32.2 EIR)

The right to reject the lodging of a claim is determined by the respective lex concursus (art. 4.2(b) EIR). The same shall apply to opposition to admission of a claim made by an insolvency judge or liquidator.

As well as in the case of lodgement of a claim by a liquidator, the lex concursus shall apply in another insolvency proceeding, as prescribed by art.32.2 EIR.

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Therefore, he will not be entitled to reject the lodging on the basis of a lack of expediency, unless the lex concursus provides so.

Effects of judgments rendered in different insolvency proceedings (arts 32 and 25 EIR)

According to art. 25.1 EIR, judgments which concern the course of the insolvency proceeding shall be recognised with no further formalities, as well as judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16.

The meaning of “judgment which concerns the course of the insolvency proceeding” shall lie on the lex concursus. Therefore, the said judgments shall include judgments which admit a claim lodged in an insolvency proceeding, where a judgment is rendered by a court or a liquidator. As an example, judgments rendered by the delegated judge on claims lodged in a fallimento proceeding, according to art. 96 Italian Insolvency Law, shall fall under art. 25.1 EIR and, therefore, shall be recognized with no further formalities.

Where no judgment on claims lodged is issued, however, the authentication of a claim in an insolvency proceeding opened in a Member State shall not be recognized in another Member State either under art. 25.1 EIR. As a result, the said claim shall fall under the duty to review in another Member State, even if officially recognized in another insolvency proceeding as part of the schedule of creditors’ claims.

Judgments issued in respect of disputed claims

Recognition and enforcement of judgments other than those referred to in Article 25(1) shall be governed by the Brussels I Regulation, “provided that that [Regulation] is applicable” (art. 25.2 EIR). This rule includes judgments issued following: (a) actions concerning the legal validity or the amount of a claim pursuant to general law, or (b) appeals against judgments made upon lodgment of claims, along with the measures pursuant to the acceptance and refusal of lodged claim applications.

As tax claims are excluded from the Brussels I Regulation, it is not clear whether any dispute concerning these claims shall be solved by the courts from which the tax claim originated, as another court generally will not have jurisdiction to decide on public claims.

Where no judgment on claims lodged is issued, however, the authentication of a claim in an insolvency proceeding opened in a Member State shall not be recognized in another Member State under art. 32 et seq. of the Brussels I Regulation, according to art. 25.2 EIR.

Limits to recognition

Recognition of a judgment issued upon lodgment of a claim or in case of opposition according to art. 25.1 or 25.2 binds the liquidator or the court (depending on the lex concursus) different from the one where the judgment was issued with respect to the existence (“un”) as well as on the measure (“quantum”) of the claim itself.

However, a duty to review based on the applicable lex concursus shall lie on the liquidator or the court (depending on the lex concursus) with respect to the priority of the claim or on qualification as an insolvency claim, i.e. whether the claim may be lodged in the insolvency proceeding.

Italian Practice On Lodgement, Verification And Admission Of EU Creditors’ Claims

The general survey. Method adopted. Questionnaires and replies collected

In order to describe Italian practice on lodgement, verification and admission of EU and Non EU Creditors’ claims, the author conducted a survey between January and February 2011 among Italian professionals (mainly lawyers and office holders).

The survey was based on a questionnaire prepared by the author, which has circulated in Italy among 296 professionals who belong to insolvency associations, who regularly assist foreign clients, either because they belong to large so-called international practices, or because their business is orientated to international clients. The questionnaire, as well as being sent also to insolvency professors, has been forwarded to insolvency court judges too.

The replies to the questionnaire have been 38, equal to 12.84% of the total number of questionnaires forwarded. Some of the respondents replied to certain questions only or, provided more detailed replies to the same questions.
The structure of the questionnaire

The said questionnaire is divided in two main areas and, specifically, following some introductory questions, it deals with questions related to:

A. foreign claims, in general terms, such as:
   a. Information sent to foreign creditors related to the opening of insolvency proceedings in Italy
   b. Lodgement of claims from foreign creditors in insolvency proceedings opened in Italy

B. foreign claims lodged in insolvency proceedings (such as fallimenti. concordati preventivi, Amministrazione straordinaria delle grandi imprese in crisi, liquidazione coatta amministrativa) in Italy according to Regulation CE 1346/2000 opened in EU Member States. This area includes questions related to:
   a. Regulation CE 1346/2000 knowledge
   b. Information sent to creditors with habitual residence, domicile or registered office in a member state different from the one of opening of the insolvency proceeding, except for Denmark
   c. Lodgement of claims on behalf of a creditor’s habitual residence, domicile or registered office in a member state different from the one of opening of the insolvency proceeding in Italy, made according to Regulation CE 1346/2000

The replies to the questionnaire

Description of respondents

The majority of respondents:

a) comprised of office holders (operating as datore commercialista or esperto contabile) (24 in number, equal to 63,16%); the others were lawyers (13 in number, equal to 34,21%);122
b) dealt with the insolvency courts of Milan and Menza (29 out of 38, equal to 76,32%). Only few of them deal with the courts of Bologna, Pisa and Rome (9 out of 38, equal to 23,68%);
c) comprised of individuals aged between 36 and 45 years old (39,47%); others between 46 and 55 years old (34,21%); others between 25 and 35 years old (7,90%); others between 56 and 65 years old (5,26%); others above 65 years old (13,16%);

122 Only one insolvency judge among the 10 to whom the questionnaire has been forwarded provided a reply. No replies were received from insolvency law professors.

d) have been practising insolvency law for more than twenty years (equal to 31,58%). Others (equal to 23,69%) between sixteen and twenty years; others (equal to 21,05%) between eleven and fifteen years; others (equal to 18,42%) between five and ten years; others less than five years (equal to 5,26%).

Information notices to EU and Non EU Creditors related to the opening of insolvency proceedings in Italy

The majority of recipients prepared / examined information notices to foreign creditors:

a) which are different from the ones to national creditors (23 out of 36, equal to 60,53%). A minority of them prepared / examined information for foreign creditors which was similar to that sent to Italian creditors (13 out of 36, equal to 34,21%);
b) drafted in English (23, equal to 60,53%). Other information notices were drafted in Italian and in the language of the foreign creditor (3 out of 34, equal to 8,82%); in the language of the foreign creditor (2 out of 34, equal to 5,88%); in Italian (5 out of 34, equal to 14,70%);
c) served through registered letter (28 out of 49, equal to 57,14%); others via e-mail (12 out of 49, equal to 24,49%); others via telefax (6 out of 49, equal to 12,24%); other information notices were made available through web sites (3 out of 49, equal to 2,04%);
d) whose content is the one provided by Italian law (26 out of 27, equal to 96,30%). Only in one case were additional contents provided (1 out of 27, equal to 3,7%).

Lodgement of claim from EU and Non EU Creditors in insolvency proceedings opened in Italy

The majority of respondents prepared / examined lodgement of claims to Non EU and EU Creditors (32 out of 38, equal to 84,21%). The minority that did not (6 out of 38, equal to 15,79%)

Among those respondents who prepared / examined lodgement of claims to Non EU and EU Creditors:

a) Prepared / examined lodgement of claim made in Italian (24 out of 36 replies, equal to 66,67%). Lodgement of claim was made in English in 6 cases out of 36 replies (equal to 16,67%); in the language of the creditor in 4 cases out of 36 replies (equal to 11,1%); in both Italian and the language of the creditor in 2 cases out of 36 replies (equal to 5,6%);
b) Prepared / examined lodgement of claim using the services of a lawyer (26 out of 35 replies, equal to 74,29%). 9 lodgements of claims out of 35 (equal to 25,71%) were directly prepared by the creditor. Among lawyers who prepared the said lodgement of claim, 20 out of 26 (equal to 76,92%) were Italians; 2 out of 26 (equal to 7,69%) belonged to the creditor’s jurisdiction. 4 out of 26 creditors (equal to 15,38%) hired both a foreign and an Italian lawyer. The power of attorney conferred to the lawyer who acted on behalf of the creditor was certified by a lawyer in 10 replies out of 13 (equal to 76,92%). Where conferred with a separate declaration, the power of attorney has been certified by a notary and apostilled (8 out of 13 replies, equal to 61,54%); notary (3 out of 13 replies, equal to 23,08%); a lawyer (2 out of 13 replies, equal to 15,38%).

General questions concerning Regulation CE 1346/2000 (EIR) applicable to insolvency proceedings such opened in EU Member States

The majority of respondents (23 out of 38, equal to 60,526%) are aware of EIR regulations. Among them:

a) All of them are aware of the rules concerning information notices to creditors;

b) The great majority of them (22 out of 23, equal to 95,652%) are aware of the rules concerning lodgement of claims.

Information notices to creditors with habitual residence, domicile or registered office in a member state different from the one of opening of the insolvency proceeding, except for Denmark

a) Use of EIR rules on information notices to EU Creditors together with Italian rules: the majority of respondents (24 out of 38, equal to 63,157%) did not use them; few of them (9 out of 38, equal to 23,684%) did use them; the remaining respondents (5 out of 38, equal to 13,157%) did not remember;

b) Use the information notice form drawn up by the European Commission: the majority of respondents (29 out of 38, equal to 76,315%) did not use them; some who used them (6 out of 38, equal to 15,789%) did not remember; a limited minority of the respondents (3 out of 38, equal to 7,895%) used such form;

c) Service of information notices to EU Creditors: the number of replies to this question has been very limited. Among them, two respondents used the Italian Civil Procedure service rules; two used rules set by Regulation (CE) n. 1393/2007;

d) Examination of information notices made according to the rules set by arts 40 and 42 EIR: the majority of respondents (numbering 27 out of 38, equal to 71,052%) did not use them; some who used them (6 out of 38, equal to 15,789%) did not remember; a limited minority of the respondents (5 out of 38, equal to 13,157%) used such form;

e) Examination of information notices made according to the form drawn up by the European Commission: the majority of respondents (23 out of 38, equal to 60,526%) did not examine any; some of them (12 out of 38, equal to 31,578%) did not remember; a limited minority of the respondents (3 out of 38, equal to 7,894%) had examined such form.

Lodgement of claims on behalf of creditor’s habitual residence, domicile or registered office in a member state different from the one of opening of the insolvency proceeding in Italy, made according to Regulation CE 1346/2000

a) Lodgement of claims according to EIR articles 32, 41 and 42: the majority of respondents (33 out of 38, equal to 86,842%) did not examine any; a limited minority of the respondents (4 out of 38, equal to 10,526%) examined claims lodged according to the referred rules; one of them (equal to 2,631%) did not remember.

b) Lodgement of claims according to the form drawn up by the European Commission: the majority of respondents (25 out of 38, equal to 65,789%) did not examine any; a limited minority of the respondents (1 out of 38, equal to 2,631%) examined claims lodged according to the referred rules; some of them (12 out of 38, equal to 31,571%) did not remember;

c) Language of the lodgement of claim: the number of replies to this question has been very limited. Among them, two respondents declared that lodgement had been made in the creditor’s language; one in Italian.

d) Lodgement of claim service: the number of replies to this question has been very limited. Among them, one respondent used Italian Civil Procedure service rules; one used rules set by Regulation (CE) n. 1393/2007; eight used service by registered letter.

Verification and admission of foreign claims in insolvency proceedings opened in Italy

a) Foreign tax claims: the majority of respondents (29 out of 38, equal to 76,315%) did not examine any; a limited minority of the respondents (1 out of 38, equal to 2,631%) examined claims lodged according to the referred rules; some of them (8 out of 38, equal to 21,052%) did not remember;

b) Foreign social security claims: the majority of respondents (28 out of 38, equal to 73,684%) did not examine any; a limited minority of the respondents (2 out of 38, equal to 5,263%) examined claims lodged according to the referred rules; some of them (8 out of 38, equal to 21,042%) did not remember;
c) Foreign tort claims: the majority of respondents (27 out of 38, equal to 71.052%) did not examine any; a limited minority of the respondents (2 out of 38, equal to 5.263%) examined claims lodged according to the referred rules; some of them (9 out of 38, equal to 23.684%) did not remember;

d) Claims lodged in foreign currency: the majority of respondents (18 out of 38, equal to 47.368%) replied positively; a minority of the respondents (12 out of 38, equal to 31.578%) examined claims lodged according to the referred rules; some of them (8 out of 38, equal to 21.052%) did not remember;

e) Law applicable to the claim: the majority of respondents (16 out of 24, equal to 66.333%) answered that law applicable was the Italian one; a minority of the respondents (4 out of 24, equal to 33.333%) answered that the law of the creditor had been used; a similar minority (4 out of 24, equal to 33.333%) answered that the law applicable was the one chosen by the parties, based on an agreement reached.

Conclusions

The outcomes of the above explained survey highlight that no problems apparently exist with respect to lodgement of claims of EU and non EU creditors in insolvency proceedings opened in Italy; whereas Italian courts and lawyers who deal with insolvency regulations and insolvency practitioners show a limited knowledge of EIR rules as well as to their relevance for EU creditors’ claims.

This could impact on the proper functioning of cross-border insolvency proceedings and, thus, having an impact on the functioning of the internal market, which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

The improvement of knowledge of EIR rules, together with their wider application among Italian courts and practitioners, is therefore relevant and coherent with the modernization of the Italian insolvency regulations which took place in the past twelve years. Such improvement will furthermore increase the similarities of the Italian insolvency regulations with the most advanced foreign insolvency regulations and, subsequently, its competitiveness among legal systems.\textsuperscript{123}


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