OVERVIEW OF CORPORATE INSOLVENCY IN ITALY

INTRODUCTION

This note provides an overview of the Italian legislative framework in relation to corporate insolvencies and looks briefly at its essential features on the basis of the new legislative decree 9 January 2006 n. 5 which will mainly enter into full force and effect in relation to insolvency procedures from 16 July 2006 ("**Insolvency Law**").

Generally, insolvency procedures in Italy (as elsewhere) are either aimed at rescuing the company or breaking it up, if rescue is impossible. We consider first the mechanism of liquidation which may also be called into play in certain specific (non-insolvency related) circumstances to "discontinue" the company. Liquidation occurs, inter alia, when losses exceed the corporate capital of a company. Liquidation does not, necessarily, trigger insolvency. As we will see, insolvency is mainly a cash related concept, whilst liquidation could also be an asset related concept. However a company in liquidation, unable to pay its debts, may be declared insolvent.

An insolvent company may be liquidated; such liquidation is governed by the rules of Insolvency Law, whilst the liquidation of a company is governed by the rules of the Italian Civil Code ("**ICC**"). In order to point out such difference we will first deal with liquidation under ICC to move, then to Insolvency Law..

LIQUIDATION

Liquidation is a process whereby a liquidator is appointed by company's shareholders for the purpose of collecting in and realising the company's assets, applying the proceeds to satisfy its liabilities and distributing any surplus to its shareholders.

According to Article 2484 of the ICC a company must enter liquidation if:

(a) the company's duration indicated in the by-laws has expired;

(b) it has achieved its corporate purpose or it has become impossible to achieve it;

(c) the shareholders' meeting cannot operate or has become inactive;

(d) on the withdrawal by a shareholder, the company is not able to repay the withdrawing shareholder his interest in the company;

(e) a resolution to this effect adopted by the shareholders;

(f) any other event occurs which is contemplated by the by-laws to trigger liquidation.

Liquidation due to losses

In addition, a company must be liquidated if it fails to maintain the minimum level of capital. Under Articles 2446 and 2447 ICC, if losses exceeds 1/3 of company's nominal capital (after losses having eroded all reserves of the company) at any point during a financial year, then its directors must convene, without delay, a shareholders' meeting to consider the position and the adoption of appropriate resolutions. Such loss can be carried forward until the approval of the next balance sheet. If by then the loss has not been reduced to an amount above 1/3 of the corporate capital (by means, for instance, of profits generated in the next year, or contribution made by shareholders), the shareholders meeting can resolve to reduce the corporate capital of an amount equal to the losses.

If such losses have reduced the capital below the legally required minimum, the shareholders' meeting convened by the directors may resolve either (i) to inject new funds into the company, or (ii) to liquidate the company (and, upon completion of the liquidation procedure) dissolve it.

The general principle behind this rule is that a company which lacks the minimum capital provided for by law (i.e Euro 120,000 for a "*Società per azioni*" and Euro 10,000 for a "*Società a responsabilità limitata*") is not in a position to carry on its business properly, and must be placed into liquidation.

Effects of liquidation

Except for the cases in which the liquidation of a company is resolved upon its shareholders, as soon as the directors become aware of any of the events leading to liquidation, they must cause the company to cease carrying on its business save for those

steps necessary for its liquidation. Failure to do so will cause them to be considered personally liable for the consequences flowing from any continued or such new business. At the same time as resolving upon the grounds for liquidation, the directors must call an extraordinary shareholders' meeting so that shareholders may resolve to proceed with the liquidation or to adopt a different solution preventing the company's liquidation (for example, an amendment to the by-laws where the grounds fall under (a) and (b) above, the covering of losses and the increase, subscription and payment of at least the minimum corporate capital). The directors are responsible for the preservation of company assets until these are delivered to the liquidators.

Duties and powers of liquidator(s)

At the extraordinary shareholders' meeting, one or more liquidators are appointed and entrusted with the powers to realise the company's business, a portion of its business or assets distributing the resulting proceeds. Liquidators are prevented from entering into any transaction other than those aimed at winding up the company.

The liquidators then take possession of the company's property and documents, and, if the company is not insolvent, they prepare a financial statement evidencing the assets and liabilities of the company. Insolvency might appear during the liquidation process, if the funds available to the liquidator are insufficient to meet the company's liabilities. The liquidators can demand payment from the shareholders of amounts still due on their respective shares, but within the limits of each shareholder's liability as a member of a company. Nothing prevents the shareholders from making voluntary payments allowing to the company to complete the liquidation without being declared insolvent.

Once the company's assets have been realised and payment of the proceeds made to satisfy the claims of creditors, the liquidators can allocate the company's property among the shareholders.

Cancellation of the company

Once the liquidation process is complete, the liquidators must draw up the final accounts, indicating the extent (if any) to which each share is entitled to participate in the final distribution of the assets.

No later than three months following the registration of the final accounts, each shareholder may present his objections thereto before the Court. If the three month period has elapsed and no objections have been filed, the final accounts are deemed to be approved and cancellation of the company from the relevant register may be requested.

Following the cancellation of the company, those creditors whose claims have not been satisfied may enforce their claims against the shareholders to the extent of the sums collected by the latter on the basis of such final accounts, and against the liquidators, if non-payment was due to their fault.

GENERAL PRINCIPLES OF ITALIAN INSOLVENCY LAW

Royal Decree No. 267 of 16 March 1942 n. 267 ("**Royal Decree**") the principal legal framework for Italian insolvency procedures, has been recently amended by Law Decree No. 35 of 14 March 2005 as converted by Law No. 80 dated 14 May 2005 ("**Law 80/2005**") in relation to claw back actions and composition with creditors then the Royal Decree has been fully reviewed by the Legislative Decree 9 January 2006 n. 5 ("**Insolvency Law**").

Provisions of Law 80/2005 have all entered into force. With the exception of few provisions, the provision of Insolvency Law will apply starting from 16 July 2005. For the sake of completeness, we will indicate, hereto the material differences between the current regime and the Insolvency Law.

In addition to Insolvency Law there are other two pieces of legislation applicable to large companies. The procedures which are set out in the Legislative Decree No. 270 of 8 July 1999 (the so called "**Prodi-bis Law**") and Law Decree No. 347 of 23 December 2003 as subsequently converted and amended (the so called "**Marzano Law**") are mainly oriented towards rescue of the company. In particular, the Marzano Law, enacted in response to the Parmalat insolvency departs from the common approach of a cash payment to creditors by

the commissioner of the insolvency procedure and provides for an arrangement with creditors with, *inter alia*, a debt equity swap whereby previous creditors become shareholders of the new entity and take over the assets of the insolvent company. Such approach has been extended by the Law 80/2005 to Insolvency Law.

Insolvency

Under Italian law a company is insolvent if it is not able to meet its debts when due. Insolvency is mainly a cash related concept: a company might be insolvent if assets exceed liabilities if it is not able to meet its obligations when debts due. However, liabilities exceeding the minimum corporate capital of a company may trigger its liquidation (see above).

Claw back actions and turn around plan ("*piano di risanamento*")

In relation to insolvent companies, first of all Law 80/2005 has reduced the “look back” period as set out in the first column overleaf: where the “look back” period was two years under the old regime, it is now one year; where it was one year, it is now six months. In addition the transactions at risk have in some cases been more narrowly defined.

Look back period: if a transaction took place in this period it is at risk of claw back	**Transactions**	**Comment/Burden of proof**
2 year before the opening of the insolvency procedure	Gratuitous transactions	Automatic inefficacy
	Payments due on the day of insolvency declaration or thereafter if such payment is made at any time during the 2 years before insolvency declaration	Automatic inefficacy
	1. Transactions in which the value of obligations owed by the insolvent company are greater than a quarter of the value of the obligation owed by the	

1 year before the opening of the insolvency procedure	counterparty	Clawed back unless creditor can show it had no knowledge of the company's insolvent state
	2. Payments of debts, due and enforceable on the date of insolvency declaration, not performed with money or other normal payment systems	
	3. Giving of security for a debt not due	
6 months the before opening of the insolvency procedure	1. Giving of security for a debt due and enforceable	As above
	2. Payment of a debt due and enforceable	Clawed back if the liquidator can show that the creditor had knowledge of the company's insolvent state
	3. Transaction for a value	
	4. Giving of security for debt originating at the same time as security	

Another important change introduced by Law 80/2005 is a list of transactions which are exempt from claw back actions:

(a) payments for goods or services made in carrying on the ordinary business of the company in accordance with commercial custom;

(b) banking remittances, except those that substantially and in a sustained manner reduced the indebtedness of the company to the bank;

(c) sales, at market value, of real estate which is used as the purchaser's home, or that of his relatives to the third degree.

(d) acts, payments and security over the debtor's assets provided that these have been entered pursuant to a plan which appeared to be capable of turning around the company from its liabilities and ensuring the rebalancing of its financial situation and on which a "reasonableness" opinion was given by an expert;

(e) acts, payments and security entered into or given pursuant to a composition with creditors (including a pre-insolvency composition), or pursuant to a controlled

administration (*Amministrazione Controllata* - this is another pre-insolvency procedure which has not been amended by the Law 80/2005 but which has been cancelled by the Insolvency Law as from 16 July 2005);

(f) payment of salaries to employees and fees to consultants;

(g) payments of due and enforceable debts made in order to obtain services necessary to accede to the composition with creditors and controlled administration procedure.

It is worth pointing out that the "exemption" regime applies only to insolvency procedures commencing after the entry into force of Law 80/2005 (that is 14 March 2005). This means that the exemptions do not apply, for instance, to payments made by Parmalat, Cirio or Volare whose insolvency procedures were already pending at that date.

Turn around plan and other protections

The exemptions under (d), (e) and (g) represent, without doubt, an encouragement to try to rescue companies in somehow financial difficulties. In particular the exemption under (d) is of a paramount importance since it introduces the concept that turn around plan on the debt side which is new under Italian law. Under the previous regime turn around could take place by means of an equity transaction (which could not be unravelled or clawed back), it now appears possible to achieve such result by means of a debt transaction which is not at risk of claw back provided that the acts, payments or securities entered by the debtor in relation to the turn around plan are supported by a reasonableness opinion to be provided by an auditor or an auditing firm. Only the debtor can promote a turn around plan. No specific requirements are set fort as for the financial conditions of the debtor. The turn around plan can be kept confidential since no disclosure whatsoever (e.g. to the courts or the Register of Companies) is required, save for listed companies.

Along the same line is the exemption (e) which does not makes subject to claw back actions acts, payments and securities made under pursuant to a composition with creditors (including a pre-insolvency composition), or pursuant to a controlled administration (*Amministrazione Controllata* see above).

Priority of claims

The ICC and the Insolvency Law specify the priority of claims. Claims of Italian and foreign creditors rank pari passu. The expenses of the insolvency procedure rank first, than secured claims have priority over unsecured claims. A secured claim is a receivable guaranteed by a pledge, mortgage ("i*poteca*") or *privilegi*. In particular, a lien may arise by statute, inter alia, for employment compensation, consideration paid to professionals advising the company twelve months prior to the bankruptcy declaration, taxes, etc. Among secured creditors those just mentioned rank first on claim assisted by a pledge or a mortgage. These claims have priority on the proceeds of their securities. If the amount of the claims exceed the relevant proceeds, the exciding part will be treated as unsecured claims.

COMPOSITION WITH CREDITORS

One of the main purposes of Law 80/2005 is to try to help any company in financial difficulties (and not just a large company with over 500 employees for example) to recover from the crisis by finding an arrangement with its creditors on a much more flexible basis (such as the debt equity swap proposed in the Parmalat "*concordato*"). Law 80/2005 reflects, to a certain extent, features of the US Chapter 11 regime on this subject.

Under the previous regime, a composition with creditors was available only to a company which was already "insolvent". Following Law 80/2005 which is currently in force, both a company insolvent and a company which is "merely" in crisis may enter into a composition with creditors. Therefore, this tool will arguably be used more frequently than in the past, before the "crisis" becomes a full-blown insolvency.

Law 80/2005 has also lowered the "approval" requirements for all compositions with creditors (for both companies in crisis as well as those which are insolvent). Indeed previously a company could be admitted to a composition with its creditors if it could prove not only that it was insolvent but also that the company would be capable of paying 40% (by value) of unsecured creditors and 100% of secured creditors. Whilst this latter condition remains, it is no longer necessary that the 40% hurdle be satisfied in relation to unsecured creditors.

(Only) The debtor (and not its creditors), after having resolved at board and at a shareholders level the plan for a composition with creditors, will file it with the Court of the place where the company has its registered offices. The plan can provide for:

(a) debt restructuring and satisfaction of creditors' claims by any means, also by way of transfer of assets, assumption of liabilities, or other transactions, including the allocation to creditors or a company controlled by creditors of shares, quotas or bonds, even convertible, issued by that company or of other financial instruments or debentures;

(b) transfer of some or all of the assets of the company to an "*assuntore*" (*assumptor*). Creditors or even companies controlled by creditors may act as assumptors, whose shares are allocated to creditors as a result of the composition;

(c) the division of creditors into classes according their legal status and similar economical claims;

(d) different treatment between creditors of different classes;

The plan must be completed by the following documents (i) updated balance sheet and profit and loss accounts; (ii) an analytic list and an estimate of the assets with a nominal list of creditors and the relevant indication of their claims and priority, if any; (iii) a list of subjects having priority on the debtors assets different from its creditors; (iv) the value of the assets and creditors of unlimited shareholders, if any. Furthermore a (v) report of an independent expert assessing the truthfulness of the figures and the feasibility of the plan must be attached to the plan. The Court then will assess the completeness and the regularity of the documents filed [1]. If the assessment is positive the Court will issue a decree admitting the company to the composition with creditors and appointing a judge and a commissioner ordering the calling of the debtors within 30 days from the order and ordering the payment of the expected expenses of the procedure. The reject of the plan by the Court will cause the bankruptcy of the debtor.

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[1] According to the recent case law such assessment is to be extended on the truthfulness of the figures and the feasibility of the plan.

Once the Court has approved the plan, the creditors with claims prior to the decree's date must suspend their actions until the final approval of the Court following the vote of the creditors approving the plan ("*omologazione*"). The company maintains control over its business but is subject to surveillance by the judicial officer and to the direction of the delegated judge.

The composition with creditors must be approved, on a vote, by creditors representing the majority by value of all “admitted” claims (the list of the claims "admitted" to vote is drafted by the judicial officer based on the accounting documentation of the company). Subsequently, the composition is in any event subject to final approval by the Court ("*omologazione*") which will assess compliance with all legal requirements[2].

When there are more classes of creditors, all such classes must express their vote separately and each of them shall approve the composition by majority. The composition with creditors can be approved by the Court even if one or more classes of creditors has voted against, provided that the creditors belonging to those classes which have rejected the arrangement cannot be satisfied in a better way ("*cram down*").

The Court will finally approve the composition within 6 months from the filing of the application. Additional 60 days can be allowed.

It is worth noting a newly introduced provision extending the composition with creditors also to tax liabilities.

RESTRUCTURING AGREEMENT ("*ACCORDO DI RISTRUTTURAZIONE*")

Also, a pre-agreed composition with creditors is now possible. (Only) the company (whether in crisis or insolvent) may file a restructuring agreement with the approval of creditors representing 60% by value of claims, together with an expert’s report on the feasibility of the restructuring agreement and, in particular, its ability to satisfy the regular payment of those creditors which have not signed the restructuring agreement. Following its publication in the Register of Companies such agreement is subject to challenge by creditors and any other interested party for a period of 30 days. If no challenge has materialised, the Court will then approve the restructuring. Considering this, it seems possible that the company and the creditors may provide

that the agreement is subject to the two-fold condition that no challenges have occurred and the Court has approved the same, although this is not expressly provided by the law. The restructuring agreement does not suspend legal proceedings against debtor.

CONTROLLED ADMINISTRATION ("*AMMINISTRAZIONE CONTROLLATA*")

(Only) a company (and not its creditors) which has temporary difficulty in meeting its obligations with a well founded possibility of rescuing its business may apply for a controlled administration resulting in a moratoria, for a maximum of two years, on claims for payment arising prior to the decree admitting the company to controlled administration.

As far as procedural step the controlled administration and the composition with creditors are similar. The main difference lies in lack of final approval by the Court ("*omologazione*").

The company maintains control over its business but is subject to the surveillance of the judicial officer and the direction of the delegated judge. The Court can entrust the judicial officer with the power to manage the company's business, or a portion of it or of its assets. In particular, the judicial officer is required to report every two months to the delegated judge on the management of the company. A creditors' committee ("*comitato dei creditori*") is appointed by the delegated judge with the view to giving its opinion to the judicial officer. It is the delegated judge who authorises any extraordinary activities proposed by the judicial officer.

If within a two year period the company is once again able to meet its obligations as they fall due, it may request the cessation of the controlled administration; conversely if at any time during such two years' period it can be proved that the controlled administration cannot be usefully continued or if at the end of the two year period the company is not so able to meet its obligations, the court can declare the company bankrupt without prejudicing its right to apply for a formal arrangement with creditors.

Insolvency Law has cancelled the controlled administration procedure starting from 16 July 2006, however same effect can be reached under the composition with creditors as reshaped by Law 80/2005.

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[2] According to the recent case law even in this circumstance the Court must assess the truthfulness of the figures and the feasibility of the plan.

INSOLVENCY ("*FALLIMENTO*")

As said above, Law 80/2005 entered into force on 14 March 2005 when a law decree having broadly the same content of the Law 80/2005 was published in the Official Gazette. Therefore arrangement with creditors (including restructuring agreements) and claw back actions of insolvency procedures opened on and after that date follow the above described regime. It was not the case to set out here above the previous regime (namely, the Royal Decree) given the fact that it is now no longer applicable to procedures started on or before 14 March 2005.

As far as Insolvency Law is concerned, the situation is different. Insolvency Law will become in full force and effect on 16 July 2006 applying to insolvency procedures opened on that date or thereafter. It is then convenient to set out the current regime which dates back to the Royal Decree pointing out, in relation to certain broad topics, the major changes in the Insolvency regime.

Starting of the insolvency procedure is under Insolvency Law better phased out

Under both the Royal Decree and Insolvency Law, the parties entitled to file an application for insolvency are creditors, the debtor itself, the Public Prosecutor, and the Court (through the Public Prosecutor under the Insolvency Law).

A hearing is required, at which the applicant and the company may appear, unless the application is filed by the company. If at such hearing the company proves not to be insolvent the Court may refuse to declare the company insolvent.

The declaration of insolvency results in a stay of any pending enforcement action against the insolvent company (apart from actions to sell real estate properties started by creditors having a mortgage *–ipoteca-* on the property which will be continued by the receiver) and no new enforcement actions can be commenced against the insolvent company.

The judgement declaring the insolvency can be appealed before the Ordinary Court (Court of Appel, under Insolvency Law). The appeal does not stay the insolvency procedure. However, Insolvency Law has provided that the liquidation of the assets may be stayed pending the appeal.

Creditors' committee and receiver are under Insolvency Law bodies who can be appointed by the creditors

Under the current regime the creditors' committee is appointed by the delegated judge within 10 days from the decree approving the list of liabilities. The creditors' committee express opinions (which are not binding), if so provided by the law or when requested by the Court or the delegated judge.

The receiver, who cannot be in conflict of interest with the insolvency procedure, is appointed by the Court declaring the insolvency of the company and it cannot be removed by the creditors. As a result of the declaration of insolvency, the company cannot manage its business or sell its assets which, after having been identified by the receiver along with liabilities, will be managed and sold by such receiver He is subject to the surveillance of the delegated judge who authorises extraordinary activities.

Under the Insolvency Law, the creditor committees is appointed by the delegated judge within 30 days from the judgement declaring the insolvency of the debtor upon consultation with the receiver and creditors that have expressed their willingness to become members of the committee when filing their claims. The receiver is appointed by the Court with the judgement declaring the insolvency of the debtor. A receiver has to satisfy some professional requirements. A receiver can be a lawyer, an accountant, a person who has acted as financial officer or controller, as well as law firms and accounting firms.

At the hearing for the assessment of the liabilities, the creditors representing the majority of creditors admitted in the decree approving the list of liabilities of the insolvency procedure can appoint new members of the creditors' committee as well as requesting the delegated judge with the replacement of the receiver pointing out to the reasons of the request and a new candidate. The creditors' committee is composed of three or five members chosen among creditors, in order to fairly represent quantity and quality of creditors and considering the possibility of satisfaction of the same claim.

The assets of the insolvent company are managed by the receiver under the supervision of the deputy judge and the committee of creditors. Creditors committee (and no longer

the deputy judge who, nonetheless, needs to be notified) shall authorise extraordinary transactions.

A more transparent route for the assessment of the liabilities under Insolvency Law

Under the current regime the receiver notifies creditors of the deadline within which they must notify their claims to the Court. These claims must be filed in Italian, at the hearing fixed for their assessment. Under Insolvency Law the claim must be filed at least 30 days before the hearing, while documents can be filed at least 15 days before the hearing.

Under Insolvency Law there is an additional step before the hearing for the examination of the liabilities. Given the fact that all the claims must be filed 30 days before the hearing, the receiver on the basis of these claims prepares a preliminary list of liabilities which is notified to the creditors seven days before the hearing. Such list of liabilities can be commented by creditors until two days before the hearing.

At the hearing fixed in the judgement ascertaining insolvency, the deputy judge must either admit or reject the claims. Once the analysis of all claims is completed, the judge will fix the list of liabilities by issuing a decree to this effect. Creditors which were not admitted or were admitted subject to a condition may challenge such rejection or partial admission. In addition any creditor may challenge the admission of any claim.

Late claims (those filed after the judge's decree) may be admitted but these creditors may not recover from any funds that have already been allocated. Under Insolvency Law, late claims can be filed until one year after the decree fixing the list of liabilities.

Higher protection of goodwill under Insolvency Law

Under the Insolvency Law it is now clearly stated that "Clauses providing for the termination of an agreement in case of insolvency are not effective". Such a provision is not expressly provided in the context of Composition with creditors. Therefore, under this angle, the protection of goodwill seems higher in the Insolvency than in the Composition with creditors.

In both regimes the Court may order the temporary continuance of the business of the insolvent company's business if serious damage might derive from its interruption. Expenses related to the company's temporary management (together with the fees of the receiver himself) have priority in the liquidation. Under Insolvency Law the temporary continuance of the business of the insolvent company, if not provided in the judgement ascertaining the insolvency of the debtor, can be authorised by the delegated judge, if proposed by the receiver upon creditors' committee's consent. If the creditors' committee does not deem convenient the temporary continuance, the delegated judge orders its termination.

Insolvency Law now provides that a lease of the going concern cannot be terminated because of the insolvency. Furthermore upon proposal of the receiver approved by the creditors' committee, the delegated judge authorises the lease of the going concern or of a part of if when the lease appears convenient in light of a better realisation of the going concern of a part of it. The lessee will be identified by means of an auction.

Under Insolvency Law the liquidation of the assets occurs under control of the creditor's committee

Under the current regime the assets to be realised are those which have been identified by the receiver together with the proceeds of any successful claw back actions and other actions which may be commenced by the receiver. The payment of creditors is made following the priority of claims illustrated above.

Theoretically the insolvency may close if no creditors file their claims or if all claims have been paid. More often the procedure reaches completion with a partial payment of claims or when it is useless to proceed further due to a lack of assets.

Whilst the current regime is focussed on the liquidation of the assets, under the Insolvency Law the receiver must prepare, upon consent of the creditors' committee, within 60 days from the fixing of his seals on the assets of the insolvent entity (which occurs soon after the judgment ascertaining the insolvency of the debtor) a liquidation plan to be authorised by the delegated judge. This plan will address (i) whether to request the authorisation of the temporary continuance of the business of the insolvency company

or of the lease of the going concern of part of it; (ii) whether there are insolvency settlement proposals (see below) and their content; (iii) damage and claw back actions to be started; (iv) the possibility to transfer the going concern or part of it; (v) terms and conditions of the sale of single asset.

The creditors' committee can propose the receiver amendments to the liquidation plan. In case of unforeseeable circumstances, the receiver can file a supplement to the liquidation plan. Furthermore the receiver, authorised by the committee of creditors, cannot liquidate one or more assets if the liquidation appears not to be convenient. In this circumstance creditors can start enforcement actions on these assets. The delegated judge upon request of the receiver, the committee of creditors any other interested party can suspend the sale or prevent its completion if the price is lower that that currently negotiated in the market.

Under Insolvency Law a detailed provision on the sale of going concern allows a partial transfer of personnel and a renegotiation of the employment agreements of the personnel to be transferred to the purchaser within the limits provided by the law. The sale of the going concern may occur through its contribution in kind (or the contribution in kind of some of its assets) into a new or existing company. The price may be paid trough an undertaking by the purchaser to pay liabilities of the insolvency procedure.

Under Insolvency law the settlement is an option in the hands of the creditors

Under the current regime the insolvency may also close with a settlement allowing the company to close the insolvency procedure after having discharged a large percentage of unsecured claims. Indeed in the settlement proposal the insolvent company guarantees the payment of all secured claims and a percentage of unsecured claims (about 25%) or a rescheduling of the unsecured credits or both, fixing a deadline within which all claims will be so paid.

This guarantee of payment may be offered by a third party, the so called assumptor ("*assuntore*") which may be jointly liable with the insolvent company or may release the insolvent company from liability altogether. The assumptor will also take over assets of

the insolvent company and claw back actions proposed by the receiver may be transferred to the assumptor.

If the proposal is considered as being in the creditors' interests, the delegated judge orders the receiver to notify the settlement proposal to the petitioners. Unsecured creditors are admitted to vote and the proposal will be accepted if approved by the majority of creditors representing at least 2/3 of unsecured claims. If the settlement is approved the deputy judge starts the procedure for final approval by the Court; if the settlement is not approved, the deputy judge formally rejects the proposal. The Court will review the legitimacy of the procedure along its merits. Once the Court has approved the settlement, it is binding on all the creditors, even those who have not filed their claims arising prior to the declaration of insolvency.

Under the Insolvency Law the settlement proposal can be made by a creditor or a third party even before the decree approving the final list of creditors provided that the receiver has enough information to draw a provisional list of liabilities.

Greater flexibility is provided in the proposal which can contemplate (i) the division of creditors into classes according their legal status and similar economical claims; (ii) different treatment between creditors of different classes; (iii) debt restructuring and satisfaction of creditors' claims by any means, also by way of transfer of assets, assumption of liabilities, or other transactions, including the allocation to creditors or a company controlled by creditors of shares, quotas or bonds, even convertible, issued by that company or of other financial instruments or debentures. More important secured creditors cannot be paid in full if they are satisfied with an amount at least equal to the proceeds obtained from the liquidation of their security,

The third party will also take over assets of the insolvent company and claw back actions proposed by the receiver may be transferred to the assumptor.

The proposal is assessed by the delegated judge if it does not contemplate classes, otherwise will be assessed by the Court. The positive assessment of the judicial bodies is subject to the favourable opinion of the receiver, then the proposal will be submitted to creditors. Unsecured creditors will not vote if they will be satisfied in full. They can vote if

they renounce to the security or part of if. In this case they will vote in relation to the unsecured part of their claim.

Under the Insolvency Law the threshold for the approval of the settlement has been reduced. The settlement is approved, on a vote, by creditors representing the majority by value of all admitted claims. When there are more classes of creditors, all such classes must express their vote separately and each of them shall approve the composition by majority. The composition with creditors can be approved by the Court even if one or more classes of creditors has voted against, provided that the creditors belonging to those classes which have rejected the arrangement cannot be satisfied in a better way ("*cram down*").

If the settlement is approved the deputy judge informs the debtor and the dissenting creditors fixing a deadline within which they can file their objections. If no objections have been filed, the Court will review the legitimacy of the procedure and of the outcome of the vote issuing a decree finally approving the settlement. If objections will be filed, the decree will be issued but subject to the outcome of the objections.

COMPULSORY ADMINISTRATIVE LIQUIDATION ("*LIQUIDAZIONE COATTA AMMINISTRATIVA*")

The compulsory administrative liquidation applies to companies subject to supervision by a public regulatory authority such as banks, insurance companies, financial institutions and cooperatives. Specific legislation applicable to these entities may provide that the relevant supervisory authority has the power to commence a procedure leading to the declaration of the insolvency of a company subject to its control.

Certain of these entities are only subject to compulsory administrative liquidation and not to general insolvency procedures. As a result, once the Tribunal acknowledges the company's insolvency in response to a petition filed by a creditor (or, under Insolvency Law the public regulatory authority or the debtor itself), the relevant judgment is delivered to the competent authority which shall order the compulsory administrative liquidation.

Other companies are subject to both the compulsory administrative liquidation and to general insolvency procedures. The former procedure applies not only in the case of insolvency, but also when a breach of regulation occurs. Therefore, if a company subject to the compulsory administrative liquidation by reason of a regulatory breach becomes insolvent, its commissioner or the Public Prosecutor will ask the Tribunal to declare insolvency. However, the procedure for compulsory administrative liquidation prevails over the insolvency procedure the former commenced first. On the contrary if the insolvency was already been declared when a breach of regulation occurs, then the insolvency prevails over the compulsory administrative liquidation.

The compulsory administrative liquidation procedure and insolvency have similar effects. The officials involved are different: a commissioner is appointed by the authority exercising surveillance over the company as part of the decree declaring the compulsory administrative liquidation. The powers of the commissioner are similar to those of the receiver but the former draws his authority from the regulatory body whilst the latter is authorised by the delegated judge.

The commissioner notifies each claim to the creditors who can file their comments. The commissioner then prepares the list of admitted and rejected claims. The creditors who are rejected, or admitted subject to condition, may challenge their rejection or partial admission with the President of the Tribunal. In addition any creditor may challenge the admission of any claim.

The compulsory administrative liquidation may end with the payment of the proceeds obtained from the realization of the assets or with a settlement which must guarantee the full payment, at least, of secured claims.

EXTRAORDINARY ADMINISTRATION ("*AMMINISTRAZIONE STRAORDINARIA*")

This procedure, established under Prodi Bis Law is aimed at rescuing large insolvent companies with real prospects of recovery. Candidate companies must have employed at least 200 employees during the last year and have liabilities exceeding 2/3 of the value of both their assets and of revenues.

The procedure may be commenced by the company, one or more creditors, the Public Prosecutor or the competent Court. Before ascertaining the above requirements the Court invites the Minister of Industry ("**Minister**") to designate a representative. If insolvency is declared, the Court will appoint the delegated judge and one or three commissioners who may be entrusted with the management of the business. The Court will also order the filing of the accounting records fix a deadline for the filing of claims and schedule the next hearing.

Within 30 days from the judgment of the Court the commissioner(s) must file a report on reasons for the insolvency and whether there are real prospects for recovery of the company or its business. In the following thirty days, after having obtained the Minister's opinion, the Tribunal evaluates the company's chances of recovery. If satisfied of their existence, the Court issues a decree opening the extraordinary administration procedure, if not the Court must declare the company insolvent. Within five days of the opening of the procedure, the Minister will appoint one or three extraordinary commissioners who are entrusted with the management of the company and will require authorisation from the Minister to sell or leasing business or to sell a lease real estate or movables goods or to enter in to other transactions whose value exceeds 51.645,68 Euro. Alongside the extraordinary commissioner there is the surveillance committee which opines if so requested by the law or the Minister.

Once the extraordinary administration has been decreed all enforcement actions against the company must be suspended and filed in the list of liabilities of the extraordinary administration. Claims originating from the temporary administration of the company have priority. Within 60 days from the date in which the decree opening the extraordinary administration was issued, the extraordinary commissioner must file a program which must either provide for a transfer as a going concern ("*programma di cessione dei complessi aziendali*") which cannot take more than a year or for a restructuring ("*programma di ristrutturazione*") which cannot take more than two years. Within the following 30 days the Minister, having taken the surveillance committee, may authorise the program.

Claw back actions can be brought only in case of a transfer of a going concern program (and brought against the companies of the group of the insolvent entity for a transaction that occurred up to five years before the acknowledgement of the insolvency status).

In the case of the acquisition of a business or part of a business, the purchaser must undertake to continue the activity for at least two years and to maintain, for the same period, the number of employees provided in for the asset purchase agreement.

If the extraordinary administration procedure cannot be usefully continued, the Court will declare the company insolvent. However the procedure may be closed successfully if, in the case of a transfer of a business, the creditors have been (even partially) paid and if, in case of restructuring, the company is able to, as they fall due, meet its obligations. A company is extraordinary administration may propose an insolvency settlement. In this case the procedure is successfully completed with the judgement authorising the insolvency settlement.

Marzano Law

In order to cope with the Parmalat insolvency the Italian Government adopted a law decree amending the extraordinary administration procedure under Prodi-bis Law and creating a new stand alone procedure, which differs from original one in three respects: (i) the requirements which need to be satisfied by the insolvent company in order to access the procedure: (ii) the detailed provisions as to the arrangement with creditors; (iii) the programme applicable is only restructuring ("*programma di ristrutturazione*") while the transfer as a going concern ("*programma di cessione dei complessi aziendali*") is not available.

For any matter not covered under Marzano law, provisions of Prodi-bis Law are applicable to the extent there is compatibility.

A company having at least 500 employees during the last 12 months and indebtedness (including that deriving from guarantees) amounting at least Euro 300,000,000 may request the Court to ascertain its insolvency and the Minister to grant access to this procedure appointing a commissioner. Within 120 days from his appointment the

commissioner must file a restructuring plan ("*programma di ristrutturazione*"), a report on the causes of insolvency, a list of assets and a list of claims with their respective priorities.

The restructuring plan may include an arrangement with creditors (which may in turn provide for different classes of creditors, different treatment for creditors belonging to different classes, the restructuring of the debt by means, inter alia, of a debt equity swap, and provision for an entity to acquire the assets of the insolvent company). The filing of the arrangement proposal interrupts the assessment of liabilities.

Within the next 60 days from the publication of the restructuring plan the delegated judge draws up the list of admitted and excluded claims, and those which are admitted but subject to conditions, taking into consideration comments made by the creditors on the basis of the first list published with the proposal of the restructuring plan. The list prepared by the delegated judge may be appealed within 15 days by creditors residing in Italy and within 30 days by creditors residing abroad.

Together with the above list the delegated judge notifies the terms and conditions within which admitted creditors are invited to vote. The arrangement with creditors approved by the majority of creditors representing the majority of claims in numbers admitted to vote.

Under Marzano Law claw backs actions are available if for the benefit of creditors.