

# Restructuring and insolvency in Italy

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# Italy

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The legal framework for insolvency and liquidation is set out in:

- Articles 2272 to 2283, Articles 2308 to 2312 and Articles 2484 to 2496 of the Civil Code, as amended by the Company Law Reform Act (6/2003), on the liquidation of partnerships and companies;
- Article 2221 of the Civil Code, on insolvency of commercial traders;
- the Bankruptcy Act (Royal Decree 267/1942), recently amended by Decree-Law 35/2005 (ratified by Law 80/2005) with respect to claw-back actions, composition with creditors and debt restructuring; and
- Decree-Law 270/1999 on the extraordinary administration of large insolvent companies, as amended by the Marzano Law (Decree-Law 347/2003, ratified by Law 39/2004, and subsequent amendments).

No official English translations are available.

The Italian regime provides for several different types of insolvency proceedings:

- Bankruptcy and compulsory administrative liquidation proceedings are aimed at the liquidation of insolvent companies and their removal from the market;
- Controlled administration and composition with creditors aim to prevent a troubled company from being declared bankrupt; and
- Extraordinary administration aims to facilitate the financial restructuring of a troubled company.

These procedures are available for commercial traders, partnerships and companies.

Bankruptcy involves the cessation of business activities and takes place if there is no hope of rescuing the business. A court-appointed trustee assumes responsibility for managing the business in such a way as maximises the return for creditors. The creditors are then paid in order of ranking.

As the Italian insolvency regime prioritises the recovery of value from the debtor's business or assets, it is generally considered to favour creditors over debtors. However, since there are usually few unencumbered assets left by the time a company is declared insolvent, the bankruptcy procedure affords little real protection for the interests of unsecured creditors.

Nonetheless, certain procedures are available that aim to save troubled companies by preserving the business as a going concern. In extraordinary

administration, in particular, financial recovery may be achieved through:

- the transfer of business units on the basis of a plan to continue business operations for a period not exceeding one year (a sale plan); or
- the restructuring of the business on the basis of a recovery plan for a period not exceeding two years (a restructuring plan).

In practice, however, bankruptcy is the most common insolvency proceeding in Italy. In most cases, controlled administration and composition with creditors fail to prevent the debtor from going bankrupt. The number of restructuring procedures opened in Italy is relatively small. However, in recent months the extraordinary administration procedure has been increasingly availed of by leading Italian corporate groups (eg, Cirio, Giacomelli, Parmalat and Volare). Moreover, Law 80/2005 has significantly amended the composition with creditors procedure, which may now also be availed of by smaller businesses.

Major problems arising from the existing regime include the following:

- New funding enjoys no priority (for further details see section 7.1).
- As statutory priority is given to secured creditors, unsecured creditors usually do not recover their claims.
- The high costs and expenses of insolvency procedures use up a substantial proportion of the assets.
- The proceedings can be excessively lengthy (up to seven to eight years).
- In many cases, controlled administration and composition with creditors do not prevent the company from going bankrupt – the end result is an extension of the overall length of the proceedings.
- The regime lacks a flexible legal procedure for restructuring insolvent companies.
- Some rules of the Bankruptcy Act are outdated.

In the wake of the recent financial crisis that hit some of Italy's leading corporate groups, the Marzano Law partially amended and supplemented the extraordinary administration procedure set out in Decree-Law 270/1999. According to the new provisions, insolvent companies meeting certain requirements may apply to the minister of productive activities for immediate admission to the extraordinary administration procedure and for the appointment of an extraordinary administrator. The previous requirements for admission to the extraordinary administration procedure (ie, at least 1,000 employees in the preceding year and total debts of at least €1 billion) were amended by Decree-Law 281/2004 (ratified without amendment by Law 6/2005), in order to broaden the scope of application of the relevant provisions. The Marzano Law now applies to insolvent companies that satisfy the following criteria, either individually or as a whole (with reference to a company group established in the preceding year):

- at least 500 employees in the preceding year; and
- total debts, including those arising from the issuance of guarantees, of at least €300 million.

Despite its *ad hoc* development in response to the Parmalat collapse, the Marzano Law represents the first real step towards rehabilitative insolvency solutions for distressed companies. Although some scholars and legal practitioners have criticised some of its provisions, the law appears to herald a new approach that focuses on corporate reorganisation/restructuring rather than liquidation of the debtor's assets.

In particular, the possibility to provide for arrangements through composition is to be welcomed. This improvement brings the Italian legislation further into line with the most advanced insolvency regimes. Composition allows for the swift satisfaction of creditors' claims without any need for a lengthy insolvency procedure, which is always detrimental to the debtor's business, its value on the market and the creditors' interests.

The extraordinary administration procedure established by the Marzano Law thus appears to be a significant step forward in the reform of the Italian insolvency regime, as well as a benchmark for the forthcoming overhaul of the relevant legislation.

Recent events underline the need to press for a systematic redrafting of the rules governing insolvency procedures. A comprehensive reform of the legislation is required, rather than isolated and limited legislative adjustments. However, the debate over a single set of rules governing crisis situations and ensuring the uniform applicability of insolvency law principles is ongoing; so far, it has led to the issuance of Law 80/2005.

## **I The legal framework and the effectiveness of court processes/legal remedies**

### **1.1 Describe the nature and the effectiveness of the following:**

#### **(a) Debt recovery remedies where the creditor has no security**

An unsecured creditor may commence individual enforcement proceedings to recover its claim before the debtor is declared bankrupt by the court (or any other insolvency procedure is opened). Enforcement proceedings are usually lengthy, but in certain cases a creditor may request an interim injunction which is immediately enforceable, as well as an attachment order over the debtor's assets. However, once a declaration of insolvency has been issued, an unsecured creditor may protect its rights only by lodging its claim in the insolvency proceedings. In other words, once an insolvency procedure has commenced, unsecured creditors cannot initiate or continue any enforcement proceedings against the debtor (Article 51 of the Bankruptcy Act).

#### **(b) The enforcement of security**

Security may be based on immovable property

(mortgage) or movable assets (pledge). In some cases, the law establishes a lien on immovable property or movable assets. In case of default by the debtor, a secured creditor may enforce its claim by way of a sale of the encumbered assets (or, in certain cases, by having title to the assets transferred in lieu of payment), provided that all legal requirements for the creation of the security have been met. However, once a declaration of insolvency has been issued, a secured creditor may protect its rights only by lodging its claim in the insolvency procedure. In insolvency situations, secured claims have priority during the distribution of the proceeds of sale to creditors (see section 7.2). The debtor's assets are usually realised by public auction, and in some cases by private sale, subject to court authorisation.

#### **(c) Corporate bankruptcy/liquidation processes**

A bankruptcy petition may be filed by the debtor, a creditor or the prosecutor. The debtor can also be declared bankrupt *ex officio*. The bankruptcy procedure is available to commercial traders (except for small commercial traders), partnerships and companies.

Compulsory administrative liquidation applies only to insolvent companies operating in specific areas (ie, banks and insurance companies). The procedure is usually opened on the request of any creditor or the competent regulatory authority.

Although liquidation is a winding-up procedure, it does not necessarily involve an insolvency situation. Partnerships or companies may also enter into liquidation on the basis of a shareholders' resolution or for other reasons (eg, the company has achieved its corporate purpose, the shareholders' meeting is deadlocked or the share capital has fallen below the statutory minimum). Where a company is to be liquidated, an extraordinary shareholders' meeting must be convened. One or more liquidators will then be appointed. The liquidators replace the company directors and are obliged to:

- manage the company's assets and perform any acts required by the winding-up process;
- draw up the company's annual and final liquidation balance sheets and relevant reports; and
- pay creditors (Articles 2484 and following of the Civil Code, as amended by the Company Law Reform Act).

#### **(d) Formal corporate rescue processes**

**Composition with creditors:** This procedure was recently amended and supplemented by Law 80/2005, and now appears swifter and more flexible. Previously, a debtor could file a petition for composition as long as it could guarantee payment of 100 per cent of the claims of secured creditors and at least 40 per cent of the claims of unsecured creditors within six months of approval of the composition by the court. The debtor could also transfer all its assets to creditors where the same percentages of claims were expected to be paid.

Under the new provisions, a debtor that wishes to enter into composition must propose a plan to creditors providing for:

- the restructuring of debts and satisfaction of creditors' claims through any technical or legal means, including the assumption of debts, mergers or other corporate transactions (in particular, the composition can allow for the allocation to creditors or classes of creditors, or companies in which they have holdings, of stock/shareholdings, quotas or bonds, including bonds convertible into shares, or other financial instruments and debt instruments);
- the transfer of the assets of all companies involved in the proposed composition to a contracting party (*'assuntore'*);
- the division of creditors into classes, according to their legal position and uniform economic interests; and
- the different treatment of creditors belonging to different classes.

The creditors will then vote on the composition proposal. Secured creditors do not participate in the vote because they are expected to be paid in full. Prior to the issuance of Law 80/2005, any debt restructuring had to be approved by a majority of unsecured creditors representing at least two-thirds in value of the total unsecured claims. Under the new provisions, the composition will be approved if it is passed by creditors representing a majority of claims admitted to vote. If there are various classes of creditors, the composition will be approved where it is passed by a majority of creditors admitted in each class. Where the creditors vote in favour of composition, the court will approve the composition proposal. If there are various classes of creditors, the court may approve the composition proposal even if a majority of creditors in one or more classes does not vote in its favour, provided that:

- the majority of classes have approved the proposal; and
- the court believes that the creditors in the dissenting classes will be no worse off under the composition than they would be in case of any other viable alternative (similar to the 'cram-down' provisions in Chapter 11 of the US Bankruptcy Code).

If the court does not approve the composition, the debtor is declared bankrupt.

For the first time in Italian law, Law 80/2005 now allows for debt restructuring agreements to be concluded within the framework of a composition with creditors, provided that:

- the agreement is entered into by the debtor and creditors representing at least 60 per cent of all claims; and
- an expert report on the feasibility of the agreement is submitted to the bankruptcy court.

The agreements must be published in the Companies Register and approved by the bankruptcy court. As an incentive, Law 80/2005

provides that any act, payment or guarantee performed in order to execute such agreements cannot be set aside (see section 7.1(a)).

**Controlled administration:** A debtor may file a petition for controlled administration where it is not formally insolvent but merely experiencing temporary financial difficulties that prevent it from performing its obligations. Controlled administration allows the debtor to carry on its business activities under the supervision of the court and the court-appointed receiver. A two-year moratorium period is granted during which any enforcement proceedings against the debtor are suspended. If financial recovery is not achieved within this period, the debtor will be declared bankrupt, unless it files a petition for composition with creditors and the relevant legal requirements are met.

**Extraordinary administration:** This is an administrative-driven restructuring procedure that aims to satisfy creditors' claims on the one hand, while safeguarding the business and employees' rights on the other. It is implemented through a debt restructuring plan with a maximum duration of two years, or through a plan for sale of the business as a going concern with a maximum duration of one year.

The Marzano Law amended and partially superseded Decree-Law 270/1999 with reference to large insolvent companies that meet certain requirements. There is thus a distinction between the extraordinary administration procedure set out in Decree-Law 270/1999 and the extraordinary administration procedure set out in the Marzano Law. In particular, the former applies to companies with at least 200 employees and debts equalling at least two-thirds of the total balance-sheet assets and revenues in the preceding financial year; while the latter applies only to companies with, individually or as a whole (with reference to a corporate group established in the preceding year), at least 500 employees in the preceding year and total debts – including those arising from the issuance of guarantees – of at least €300 million.

The extraordinary administration procedure under the Marzano Law introduces the following innovations:

- The debtor must apply to the minister of productive activities for immediate admission to the procedure, while at the same time filing a petition with the bankruptcy court in order to confirm its insolvency status. It is the minister, rather than the bankruptcy court, that has chief responsibility for supervising the procedure; the bankruptcy court is requested only to confirm the company's insolvency status and to verify the lawfulness of the proceeding with respect to the verification of claims.
- If the debtor is admitted to the procedure, other insolvent companies in the same corporate group may also participate, even if they do not satisfy the relevant requirements.
- The procedure is focused on corporate reorganisation rather than on liquidation of the debtor's assets. It is based on the implementation of a two-year reorganisation plan which aims to restructure the debtor and which is subject to the minister's approval. The restructuring plan may be converted into a sale plan – and/or into a bankruptcy proceeding – if the minister does not authorise implementation of the restructuring plan.
- The restructuring plan can provide for the satisfaction of creditors' claims through a composition, which must specify any conditions to its implementation and provide for possible guarantees. The composition can provide for:
  - the restructuring of debts and satisfaction of creditors' claims through any technical or legal means, including the assumption of debts, mergers and other corporate transactions (in particular, the composition can allow for the allocation to creditors or classes of creditors, or companies in which they have holdings, of stock/shareholdings, quotas or bonds, including bonds convertible into shares, or other financial instruments and debt instruments);

- the transfer of the assets of all companies involved in the proposed composition to a contracting party;
  - the division of creditors into classes, according to their legal position and uniform economic interests;
  - the different treatment of creditors belonging to different classes; and
  - the transfer of claw-back actions to a contracting party.
- The procedure also allows the extraordinary administrator to introduce claw-back actions for the benefit of creditors during implementation of a restructuring plan. In contrast, in case of extraordinary administration under Decree-Law 270/1999, claw-back actions are possible only where a sale plan is established.

#### **(e) Informal corporate rescue processes**

Due to the problems arising from the existing insolvency regime, outlined above, major creditors (ie, banks) usually enter into private discussions with the debtor outside the insolvency framework. In some cases, major creditors may obtain full repayment or improved security in exchange for helping a troubled company. In 2000 the Italian Banking Association issued a voluntary code of conduct based on the London Approach. Although the code is not binding, it is an important instrument in informal restructuring processes; its provisions are aimed at the recovery of value and the rescue of troubled companies.

#### **1.2 What are the formal processes to effect a liquidation of the company's assets?**

In bankruptcy situations the trustee is entitled to manage the realisation of the debtor's assets, subject to the supervision of the court and in some cases the (non-binding) opinion of the creditors' committee. The assets are usually realised by public auction and sometimes – subject to court authorisation – by private sale.

#### **1.3 What is the effect on debt collection and the enforcement of security of:**

##### **(a) An adjudication of corporate bankruptcy/liquidation?**

Once an adjudication of bankruptcy has been issued, both secured and unsecured creditors are precluded from initiating or continuing any enforcement proceedings (automatic stay). Claims will be settled according to the ranking set out in the Bankruptcy Act (see section 7.2).

##### **(b) The commencement of a formal corporate rescue process?**

The commencement of controlled administration, composition with creditors and extraordinary administration procedures has the same effect as a declaration of bankruptcy.

##### **(c) The initiation of an informal corporate rescue process?**

In an informal corporate rescue process, banks and major suppliers of the troubled company usually enter into private agreements aimed at suspending existing or new legal actions during the negotiations.

#### **1.4 Are insolvency procedures started in another jurisdiction in respect of a corporation incorporated in your jurisdiction recognised?**

A Chapter 11 proceeding in the United States will not trigger an automatic stay and will not prevent creditors from seizing the debtor's assets in Italy. The debtor would also have to open an insolvency procedure in Italy in order to obtain such protection. Similarly, the opening of a Chapter 11 proceeding would provide no protection for the management or assets of an Italian subsidiary.

As Italy is a member state of the European Union, the EU Insolvency Regulation has direct

application. A judgment on the commencement of main insolvency proceedings in another EU member state will thus be recognised immediately by the Italian courts. Secondary proceedings may be opened in Italy in parallel to the main proceedings if the debtor has an establishment within the Italian territory, but these must be exclusively focused on winding-up and are limited to those assets located in the Italian territory.

**1.5 In what circumstances would the directors or officers of a company in financial difficulties face potential personal liability for continuing to trade?**

In case of an event of dissolution, the company directors will continue to manage the company for the sole purpose of preserving the integrity and value of its assets. The directors are personally and jointly liable for any damages to the company, the shareholders or third parties that result from any act or omission in breach of this rule (Article 2486 of the Civil Code, as amended by the Company Law Reform Act).

**2 What are the advantages and disadvantages of triggering a formal procedure?**

There are few advantages of triggering the formal procedures, due to their excessive length and the other problems with the existing regime. The main advantage is that actions of both secured and unsecured creditors are automatically stayed (see section 1.3). Although the directors remain in charge during controlled administration or composition with creditors, the most important decisions are subject to the approval of both the receiver and the court. Further, in case of composition with creditors the guarantors usually demand some form of control over the company's activities.

**3 What are the practical options for out-of-court restructuring?**

Informal, out-of-court restructurings may be attempted at the onset of financial difficulties, in order to avoid the disadvantages arising from formal insolvency proceedings. Increasingly, restructuring professionals are invited to participate in order to evaluate the proposed rescue plan and mediate between the parties. Such assistance is particularly useful where several banks are involved, as there is no tradition in Italy of a 'house bank' leading the proceedings on behalf of all secured creditors. Inter bank disputes are thus a frequent occurrence and the practice of selling debts between banks has developed as a result.

The Italian Banking Association's voluntary code of conduct aims to support informal rescues and encourages banks to cooperate in order to save troubled companies.

**4 What is the effect on the management of a company of:**

**(a) An adjudication of corporate bankruptcy/liquidation?**

An adjudication of bankruptcy prevents the debtor from managing and disposing of its assets (Article 42 of the Bankruptcy Act). This rule aims to ensure that creditors' claims are satisfied and all creditors of the same ranking are treated equally. In a bankruptcy situation, the debtor's management is replaced by a court-appointed trustee.

**(b) The commencement of a formal corporate rescue process?**

In case of controlled administration or composition with creditors, the debtor's management remains in control. However, management is assisted and supervised by the court-appointed receiver.

In extraordinary administration (under both Decree-Law 270/1999 and the Marzano Law), the

management is replaced by the extraordinary administrator.

**(c) The initiation of an informal corporate rescue process?**

In an informal rescue process, management usually remains in office. However, the participants (ie, banks and main suppliers) may require changes in management as a condition of supporting the rescue.

**5 Parties in interest/key players**

**5.1 Who is responsible for the 'case management' control and administration of:**

**(a) A corporate bankruptcy/liquidation?**

In case of bankruptcy, responsibility for 'case management' control and administration rests with the court-appointed trustee. The debtor's management is divested of the power to manage the company. The judge oversees the procedure and has control over the trustee's actions.

In voluntary (solvent) liquidations, the liquidator appointed by the shareholders acts to liquidate company assets and settle its liabilities, and is responsible for case management control and administration.

**(b) A formal rescue?**

In controlled administration, the debtor's management retains its powers of administration. However, the court may decide to appoint someone to oversee the management's actions, especially if the debtor has not set up a dedicated restructuring team.

**(c) An informal rescue?**

In informal rescues, restructuring professionals appointed by the debtor play a key role. They generally collaborate with the debtor's management in the case management control and administration of the business.

**5.2 Who is responsible for preparing the restructuring plan in a formal or informal rescue?**

In an informal rescue, the debtor's management is responsible for preparing the restructuring plan. While external advisers usually provide support in this respect, overall responsibility for the plan rests with the management. In exceptional cases, the creditors may draw up an alternative plan, in which case the final plan will be the result of negotiations between the parties.

In formal rescue procedures, the court-appointed administrator will be responsible for drawing up a rescue plan if the management has not already prepared one.

Law 80/2005 introduced the possibility for the debtor to submit to court a debt restructuring proposal agreed with creditors representing at least 60 per cent of the total claims. An expert report on the feasibility of the restructuring plan must be attached to the proposal.

**5.3 Who are the key players? What are their roles and responsibilities?**

**Secured creditors:** Employees are the first-ranking secured creditors and as such do not usually take a proactive role in insolvencies. In some cases, such as the restructuring of large companies, trade union representatives play a key role in the negotiations. Other high-ranking secured creditors include government authorities for outstanding taxes and social contributions.

Once the claims of these creditors have been satisfied, claims secured by pledge or special lien on specific assets have priority in the distribution of proceeds of realisation of these assets.

**Credit institutions:** Italian companies usually work with several different banks. However, in the event of bankruptcy no single bank will act as lead manager, so each bank will act on its own behalf in the rescue planning and negotiation. The extent of a bank's

influence is heavily dependent on the strength of its security interest and the degree of exposure.

**Insolvency practitioners:** The insolvency practitioner can be a lawyer or, more commonly, an accountant, and is normally a specialist in corporate rescues. He will have day-to-day control over the company during a formal insolvency process.

**Accountants:** In an informal restructuring, professional advisers typically include a restructuring specialist, often from a firm of accountants, and a specialist lawyer. The advisers can be drawn from anywhere in Italy, but must be specialists in corporate rescues and perhaps have some industry expertise. In informal rescue processes, the advisers usually collaborate with the debtor's management to carry out the restructuring process.

**Lawyers:** It is usual to appoint a local lawyer to act as an informal communication channel with the court. He will also be responsible for submitting the petition if a formal process is subsequently initiated.

## **6 What financial information is available to creditors?**

Italian companies must prepare a financial statement at the end of each fiscal year. The statement is prepared by the board of directors and approved by the shareholders' meeting in the four months after the end of the year (or, under certain circumstances, six months after the end of the year). The financial statements include:

- the accounts (balance-sheet and profit and loss and cash-flow statements);
- the company report;
- the directors' report; and
- the auditors' report.

If a company is listed, a quarterly financial statement is also due. The board of directors, the shareholders and the statutory auditors are responsible for preparation of the financial

statements; therefore, in case of bankruptcy, they will be liable if these documents, or parts thereof, are not available.

Depending on its size, management culture and so on, an Italian company may produce internal management accounts, reports on specific areas, budgets and – less commonly – three to five-year business plans. These documents are for internal use only, but in case of corporate rescues some will be used to prepare and support the restructuring plan that is proposed to the creditors.

## **7 Common questions**

### **7.1 Funding and the priority given to new money**

#### **(a) If an insolvent corporation requires urgent working capital funding, what difficulties are likely to be encountered in the provision of such funding?**

If a troubled company requires urgent working capital funding and has not yet been declared insolvent, lenders providing new money will require security – usually on the company's immovable property. However, if the company is subsequently declared bankrupt, a problem may arise if the trustee initiates claw-back actions in order to revoke certain acts of the debtor performed in the period prior to the commencement of insolvency proceedings that were detrimental to the creditors' interests (see section 7.3).

However, Law 80/2005 makes some important exceptions to this general rule. In particular, the following transactions concluded by the debtor prior to the declaration of insolvency can no longer be set aside:

- payments for goods and services performed in the course of ordinary business activities under the usual terms;
- remittances on bank accounts, provided that these do not significantly and permanently reduce the claim owed to the bank;

- the sale of real estate assets as housing at a fair price, provided that these are used as the residence of the purchaser or his relatives;
- acts, payments and guarantees performed in order to implement a plan aimed at debt reorganisation and financial recovery, as long as an expert report has confirmed the feasibility of the plan;
- acts, payments and guarantees performed in order to execute a composition with creditors or a reorganisation proceeding, as well as of out-of-court agreements with creditors approved by the bankruptcy court;
- payment of consideration for services performed by employees or consultants of the debtor; and
- payment of debts due and outstanding performed in order to obtain services needed to open a reorganisation proceeding or a composition with creditors.

**(b) Are lenders providing new money, or debtor-in-possession financing, given any statutory priority?**

Lenders providing new money, or debtor-in-possession financing, have statutory priority and their claims will be settled on a priority basis in the distribution of proceeds, as long such claims:

- relate to acts performed after the declaration of bankruptcy; and
- qualify as costs and expenses incurred in the continuation of business activities and the management of the debtor's assets (*'crediti prededucibili'*).

Otherwise, such lenders have no priority.

**7.2 Ranking of creditors**

**In what order are creditors paid in a corporate bankruptcy/liquidation?**

Italian insolvency law provides for three classes of claims:

- claims arising from any costs and expenses incurred in the continuation of business activities and the management of the insolvency procedure;
- secured claims, which are protected by legitimate security interests or preferred rights (mortgages, pledges and liens), including employees' claims; and
- unsecured claims (any other claims).

Claims are satisfied in the following order:

- costs and expenses incurred in the management of the insolvency procedure;
- secured claims; and
- unsecured claims, which are settled on a *pro rata* basis from the remaining assets.

Each class must be satisfied in full before claims in the subsequent class are settled. Therefore, in most cases unsecured creditors recover little, if any, of their respective claims.

**7.3 Avoidance of antecedent transactions**

**Are there any legal provisions that might operate to invalidate the creation of security, the disposal of an asset or the payment of a creditor by a company in financial difficulties?**

According to a general rule of Italian law, any act of the debtor can be revoked and declared null and void with respect to the bankruptcy estate if:

- the debtor (and, in case of high-value acts, the counterparty) was aware that the act would harm creditors' interests; or
- the act was fraudulently performed (Article 2901 of the Civil Code).

In insolvency situations, the right to bring a claw-back action is strengthened to protect the *pari passu* principle, which guarantees the equal treatment of creditors. The trustee can request the bankruptcy court to declare null and void, with respect to the bankruptcy estate, certain

transactions performed in the 'suspect period' prior to the declaration of insolvency. Law 80/2005 has significantly amended the rules on claw-back actions with respect to insolvency proceedings opened after March 17 2005. In particular, the suspect period has been halved (ie, reduced from two years to one year and from one year to six months).

The trustee is thus entitled to start a claw-back action with respect to the following acts and transactions that took place during the suspect period, unless the counterparty can prove that it was unaware of the debtor's insolvency:

- transactions in which services rendered or obligations undertaken by the debtor exceeded by more than one-quarter the consideration it received (eg, payment of consideration for services at substantially more than the current market price);
- payments by the debtor that were not made in cash or another usual means of payment (eg, payments performed through the sale of receivables);
- the execution of guarantees (eg, mortgages, pledges) on the debtor's assets in order to secure debts that were not due as of the date of the guarantee; and
- the execution of guarantees (eg, mortgages, pledges) on the debtor's assets in order to secure debts already due as of the date of the guarantee.

In the first three cases above, the suspect period is one year. In the final case, the suspect period is six months.

The trustee is further entitled to start a claw-back action with respect to the following acts and transactions that took place during the suspect period if the trustee can prove that the counterparty was aware of the debtor's insolvency:

- the payment of due debts;
- transactions carried out under current market conditions (eg, payment of market-price consideration); and
- the execution of guarantees (eg, mortgages, pledges) on the debtor's assets granted simultaneously with the relevant debt.

#### **7.4 'Cram-downs'**

##### **What is the position of both unsecured and secured creditors that vote against, do not agree with or do not consent to either a formal or informal rescue plan?**

In a composition with creditors, the secured creditors do not vote, since their claims are satisfied in full. As far as unsecured creditors are concerned, if the requisite majority approves the proposal, both dissenting and non-voting creditors will be bound by its provisions.

In an extraordinary administration under the Marzano Law (and, in light of the provisions of Law 80/2005, also in a composition with creditors), the composition will be approved if it is supported by creditors representing a majority of claims admitted to vote. If there are various classes of creditors, the composition will be approved if it is passed by a majority of creditors admitted in each class. Creditors that do not vote will be deemed to have voted in favour of the composition proposal.

Where there are several classes of creditors, the court may approve a composition proposal even if a majority in one or more classes of creditors has voted against the composition, as long as:

- the majority of classes approved the composition proposal; and
- the court believes that the creditors belonging to the dissenting classes will be no worse off under the composition than they would be in case of any other viable alternative (similar to the US Chapter 11 cram-down provisions).

The law provides no specific rules on informal rescues. However, an informal plan usually requires the agreement of all major creditors. If some of the remaining smaller creditors do not agree to the terms

of the restructuring plan, they will usually enter into separate agreements aimed at ensuring the implementation of the restructuring plan.

### **7.5 Creditor protection**

***What actions can creditors take if they are not satisfied with the conduct of either a formal rescue procedure or a corporate bankruptcy/liquidation?***

If a creditor is not satisfied with the conduct of the liquidator or trustee (or other officer in charge

of the insolvency procedure, such as a receiver or extraordinary administrator), it may file a complaint with the court. The liquidator or trustee is liable for any breach of his duties and may be replaced by the court.

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#### **Firm profile**

With almost 300 professionals, Gianni, Origoni, Grippo & Partners is Italy's largest commercial law firm, combining domestic capability with global expertise.

In 2004, in recognition of its strong domestic and international practice, it scooped two prestigious awards: both Chambers Global and IFLR named it Italian Law Firm of the Year.

Its dedicated Restructuring and Insolvency Group comprises lawyers with the depth of expertise and market experience to assist debtors and creditors in reorganisation cases, as well as other matters and transactions arising out of insolvency procedures.

The firm also represents investment funds and other investors in acquisition and turnaround transactions of financially troubled companies.

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