The Italian legislation provided for the Parmalat case under a critic point of view

By Prof. Avv. Lucio Ghia

The Parmalat Case is one of the most important bankruptcy case in Italy, with a bankruptcy liabilities amounting to many billions of Euros and thousands of creditors. This case has received much criticism by many law experts (Italian and not). The Charges made to the Italian law can be summarized in the following 3 points.

For first, the creditors have been deprived of their rights of credits. In fact they have not an effective role for participating at the extraordinary administration of the company. Secondarily, there is a specific law named LAW 39/ 2004 that has been enacted expressly for the Parmalat Case. The above-mentioned law provides the extraordinary commissioner of an unconditional power, dispossessing the Board of Creditors of the authority normally recognized.

As a third matter, the modus operandi as provided by law is too bureaucratic, too complex and expensive for the creditors (with specific regard to foreign people). It should be considered that the Governmental action in private companies has been provided in the general principles of the Italian Constitution (as reported in section 41). For instance, the right of the creditors is recognized as fundamental although a bit degraded compared to the right-duty of the State to intervene for defending the enterprise even if this one is insolvent.

Indeed, the company represents a social and economic value, and it is appreciated for its capacity to create employment, social solidity and even to contribute to the national wealth. The public intervention will not and must not alter the rules related to competition (as provided in the Rome Treatment of 1957). The European Community is very focused on avoiding "State aids", mainly because they alter the free competition between companies. For instance, in the procedure of companies' reorganization, European Community does not allow avoidance actions for that reason.

It is useful to add that, under the law 39/2004 the reorganization program is not voted by creditors, while in the other bankruptcy proceedings there is the clear necessity for the creditors to vote.

In this respect, it could seem likely that the minister replaced his role with the one held by creditors. Another example of the diminished role under law 39/204 concerns the approval of the composition proposal. In fact the simple majority obtained among different classes of creditors (as provided in the section 4 of the law) will be considered as "Adequate".

On the contrary, section 128 of the Italian Bankruptcy Law underlines that the composition in bankruptcy must be approved. It also requires two types of majorities: the simple majority with regard to the number of creditors. The two thirds of majority with regard to the total amount of the credits. At this point it is clear that Law 39/2004 favors the proceeding itself, as it makes the reorganization of the company faster through an easier discharge of the debts. For the first time, the Italian Legislator, with this measure, distinguishes the creditors in classes, in accordance with homogeneous economic interests as defined by the Commissioner. It also gives the possibility to create independent classes for bond-holders who are in possession of bonds granted or guaranteed by the company in extraordinary administration.

It is useful to notice that the intervention of the extraordinary commissioner appointed by the Ministry for the Industry is headed to the use of all the financial and economic instruments suitable for the re-start of the productivity. The commissioner presents its own plan and works under the control and supervision of the Ministry and of the board of creditors elected by the Ministry himself.

On request of the Commissioner, the Board issues "unbinding" advices on different matters. In case of extraordinary activities, the request of advice is binding, though the advice given by the board of creditors is not. With respect to this primary objective, (i.e. the reorganization of the

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company which could absorb all the resources at disposal), the creditors' interests are destined to go down. The right of the creditors to be informed about the effective activity held by the Commissioner is recognized although limited by the necessity of the reorganization. With respect to the second charge: it is necessary to underline that the law in object has to be included in the tradition of laws that disciplined the governmental intervention for the case of company's default. In the same perspective we should remember the Law N. 26/1979 named "Prodi" and the Law N. 270/1999 named "Prodi bis".

The Law N. 39/2004 is applicable to the insolvent companies whose employees are more than one thousand - 1 year before since the insolvency has been declared - and debts amount nor less than 1 Billion Euros. The modifications introduced by the law cannot be intended against the creditor' interests because these modifications concern, first of all, the reduction of procedural time occurring for the proceedings.

It is possible to get over this difficulty:

1) by selling the non strategic assets through private companies which will make a profit on the quantity of assets sold, without the necessity of bureaucratic and judicial steps and control.

2) by selling, on behalf of the extraordinary commissioner judicial, actions for creditors to be recovered and for avoidance actions to be filed

3) by verifying the credits to be admitted to the bankruptcy estate in just one mandatory time as provided at section 4-*ter* of the law 39/2004.

4) by extending, in a very simple way to other insolvent subsidiaries belonging to the same group, the procedure for the extraordinary administration.

This extension is obtained on simple request of the Commissioner, even though the subsidiary does not have either the above mentioned one thousand employees or debts for 1 billion Euros.

The above-mentioned Modifications also include the realization of a simple composition with creditors, in the terms that the Commissioner could anticipate in the reorganization plan and the acceleration and simplification of some check control of the bankruptcy estate.

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