

Studio Legale Ghia

Roma - Milano – Udine

More attention in Italy toward the unlucky entrepreneur

by Lucio Ghia

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Among the characteristic truffle scents, with its price, never so unreachable as this year, in a suggested frame in which the sun lights the valley, at the end of November 2003, in Alba town, with the intervention of the under-secretary of Italian Ministry of Justice, Michele Vietti, the curtain on the Reform of the Insolvency Proceedings has raised.

The legal structure proposed by this Reform, which is based on the Italian perspective of enterprise reorganization or of its winding-up proceeding, has been at the center of several qualified attentions. The Alba's Association of Commercial Law studies, has gathered together authoritative commentators who have promoted a deep and passionate debate on this issue.

On the last October, the Italian Commission of the project of Reform on Bankruptcy Proceedings delivered to the Ministry of Justice, Roberto Castelli a decree-proxy bill on arranged procedures which carry the company out of its crisis.

It would be useful to examine closer some relevant items of this Reform.

The actual proceedings (extraordinary administration, composition with creditors, bankruptcy, compulsory winding-up), are replaced by the *allert and precautionary proceeding*; the arranged procedure for carrying out the enterprise's crisis and the winding up proceeding.

Several measures have been introduced in order to push the entrepreneur to declare expressly his own crisis and to set the instruments able to overcome the crisis before irreversible events come to existence.

The Reform aims to guarantee a high protection and simplification on the agreements among creditors and debtors, in order to secure the commercial enterprise's value in the most suitable and rapid possible way.

Crisis proceeding refers to anyone who conducts a commercial or industrial business, therefore, it also refers to the agricultural entrepreneur, apart from his enterprise dimensions and the capital invested in his activity; this proceeding is extended also towards the little entrepreneur only in the event that his indebtedness crosses the minimum threshold; big enterprises too, before coming to the decision for extraordinary administration – a complex proceeding regulated by the legislative decree n.270/99, known as "Prodi bis" -, may ask for the opening crisis state and may try to solve, together with its own creditors, its difficult condition. Company's management remains an entrepreneur's task. There will also be settled particular incentives and "caps" in order to increase the agreements and save the creditors from negative procedures such as avoidance actions of payments or criminal initiatives concerning the acts carried out in accomplishment of the plan.

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The Italian Commission for the project of the New Bankruptcy Law provided a quicken variant of the arranged procedure for carrying the enterprise out of the crisis, inspired on U.S. model of the “pre-packaged reorganization” in which the debtor may begin a demand, when he already stipulated the agreements concerning the reorganization plan, with the majority of his creditors. From this moment on, judge’s examination is very quick and the terms and costs of the proceeding are considerably short and low. But what happens when reorganization does not achieve the desirable aims and the crisis is not solved?

Wherever there are no balancing perspectives, there won’t be any possibility than to enact a winding-up proceeding on the debtor’s assets. The Reform substantially modifies this latter proceeding. Also in this judicial action, as already said on reorganization perspective, the only economical subjects to whom this procedure does not apply are public bodies, enterprises subjected to extraordinary administration, so as banks, insurance companies, companies for the management of the regulated markets and other subjects regulated by special laws through peculiar forms of liquidation.

Regarding to liquidation proceeding, the main principle which characterizes this Reform is the balance between efficiency and guarantees that the legal system must insure not only in the Courts, but mostly in the market.

Thus, creditors’ rights and those of their debtor, will have to be protected according to a market logic (and not in accordance to a winding-up logic), so that the bankrupt’s role, in the reformed winding-up proceeding, is considered in a non-secondary position if compared to the actual.

The Reform redraws in a clear way, the characteristics and the functions of the Trustee. Until today, in fact, this latter worked such as a public officer, moreover as a judge’s helper during bankruptcy procedure, or as an economic bankrupt/third’s successor and at last, more often, as a representative of creditors’ interests. From this moment on, instead, the trustee is given several powers characterized by a deep autonomy in management.

Judge’s control on the acts and on the proceeding trend is much more juridical than economical: he becomes the referee among the contrasts, rather than the author of enterpreneurial choices; moreover, the Reform highlights the important task assigned to the Creditors’ Committee, named Creditors’ Council, and underlines its ability to decide automatically, through trustee’s demand, on the destiny of significant goods and contracts. Creditors’ Council will be called in order to explicate real decisional trends concerning extraordinary administration business rather than give simple consultive opinions as in the past.

In accordance with the project of Reform, the liquidations devoided of assets will be immediately closed, without any further waste of administrative and jurisdictional energies, while, on the other hypothesis, when liquidations is characterized by assets, the trustee will have to prospect, for first, a winding up project on the assets existent, outlining the time necessary for its course and a provision of a future cash flows.

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In any moment, the debtor, his creditors or even thirds interested, may propose an alternative regulation plan on insolvency, different from the winding up one. The purpose for such hypothesis is to prevent a dispersion of those additional values deriving from the functional union of the company's assets. Their potentiality would be in fact lost if the single assets are individually put in the market. For example, if the machineries, part of the assembly line, are deprived of their complex commercial capacity, they might be sold only through a "weight" measure.

The Reform on the liquidation procedure keeps still the principle based on the dispossession of the debtor. Thus, all his assets are transferred to the Trustee who will have their material disponibility, however, the debtor will live in a better condition compared to the bankrupt's actual sfavourite situation. The effects of the winding up proceeding has been deeply modified by the Reform. In fact, the debtor is not subjected anymore to a loss (often "sine die") of the most significant social and economical rights such as the right to vote, or the right to mail and so on.

It is introduced the principle of the "discharge", a sort of economical redeeming which follows creditors' payment of a minimum percentage nearly 20 %; moreover, at the closing of the winding up proceeding, a civil riabilitation will follow, except for those cases in which there is not a co-operation of the debtor, or a pending criminal proceeding for bankrupt crimes or other several relevant hypothesis of fraud.

The Reform deeply simplifies the proceeding through which the credits are examined by the trustee and the Court, in order to be admitted into the liabilities of the bankruptcy estate. This proceeding is divided in two phases, a first one, is treated in front of the Judge, and a second one, which develops in case the judicial measure denies the credit, in front of the Court competent to decide on the proposed opposition; the project of the Reform speeds up both phases; it is necessary to fill only one single opposition, in a unique judgment, against the liabilities of the bankruptcy estate, in order to follow a quick, and simplified judicial logic, mostly documental; it is avoided a sequence of judicial terms as provided in the ordinary judgement, for example, one session for a better specification on demands, another session for exceptions, a third one for the admission on proof instruments, or another session for the deposit of documents and so on.

Further new topics of the Reform are represented by the provision of a final term (nearly two years) within the creditors will have to claim for their rights against the liability; afterwards, the credit will not find any other protection deriving from the proceeding. It is clearly highlighted the acceleration that this structure receives thanks to the introduction of this final term.

With regards to the contractual relations which still hang on at the moment of the opening proceeding, are suspended and the trustee may chose whether or not to continue these relations.

Moreover, the Reform is trying to create Specialized Sections (placed in the Courts) composed by judges extremely prepared on insolvency item, able to disentangle oneself among difficult problems which characterize the enterprise world, its rules and its market.

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It is impossible, of course, to establish these Specialized Sections in all the Courts, (considered the high number of Italian Courts, more than 150) especially in the small ones where are present few judges: therefore, it is announced the possibility to concentrate these insolvency proceedings in the major Courts located in chief town of province. The Reform wants to follow the same principle highlighted by Italian Parliament through which has modified section 111 of the Constitution as already indicated by the Constitutional Court. This section, in order to guarantee judge's impartiality, imposes to distinguish the roles and the functions of the Judge , who authorizes certain judicial demands, from the Judge who has to decide on them.

It is necessary to eliminate those situations in which the Judge, cause of their strict number in the Court, is called to evaluate the feasibility in filing the proceeding and contemporary to decide on those cases authorized by himself. The Reform aims to reach a balance between efficiency and guarantee of the parties.

The project of the Reform, in line with the common European direction which all the other foreign insolvency proceedings are conformed to, gives to the private debtor (or to the little debtor who does not conduct commercial business), through a simplified and cheap proceeding, the possibility to ask to the Court the liquidation of his assets and the distribution, among the creditors, of the amount obtained. The global amount of these debts will have to over cross a threshold (not so low) in the respect of the judicial proceeding costs. In the other cases, the Italian law provides an individual liquidation procedures based on the individual claims of the single creditors.

The eventuality for the private citizen to recognize his own un-success and easily terminate a very sad chapter of his life, must be compared, on the juridical side, to the institute of the “discharge”; on the economical side, it tries to reintroduce the “mislead consumer” in the market; at last, on a human prospect, it is recognized that debtor's un-success must not be converted into a permanent punishment, but the debtor must be considered such as a more experienced entrepreneur.

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