

Bankruptcy and a fresh start: stigma on failure and legal consequences of bankruptcy

ITALY

TITLE 1. INTRODUCTION

In Italy the rules which govern the insolvency status of an entrepreneur, awaiting for the approval of the much needed reform, are essentially provided for by the Royal Decree of March 16, 1942, n. 267 titled *‘Disciplina del fallimento, del concordato preventivo, dell’amministrazione controllata e della liquidazione coatta amministrativa’* (“Discipline of the bankruptcy, of the preventive creditors’ settlement procedure, of the controlled administration procedure and of the compulsory administrative liquidation procedure”) (even known as “Bankruptcy Act” and hereinafter referred to as R.D. 267/1942).

The exam of said law provision clearly evidences that the main scope of the various procedures contemplated and disciplined therein is the protection of the interests of the creditors of the insolvent entrepreneur, pursuant to the principle of economical liability according to which the insolvent debtor is liable for the fulfilment of the obligations assumed with all his assets.

Consequently, all the above mentioned procedures, with some specific exceptions that will be addressed hereinafter, are mainly aimed to the liquidation of the insolvent enterprise and to its elimination from the market. The Italian legislator has chosen to exclude the entrepreneur from the productive system when he resulted incapable to adequately manage his activity.

As correctly evidenced by the most recent critics presented by law scholars and, in general, law professionals who are requesting since a long time to the legislator a systematic redrafting of the rules governing bankruptcy procedures, the discipline presently in force evidences a lack of sensibility to the social and economical effects that the winding-up of an entrepreneurial activity might trigger (i.e. risks of propagation of the bankruptcy in the financial system, negative impacts on connected enterprises, social problems originated by the employees lay-off, etc.).

The preference given by the Italian legislator to creditors is also confirmed by the personal sanctions and measures that are imposed to the entrepreneur during the procedure.

The above highlighted characteristics are well present in the bankruptcy procedure (articles 1 – 59 of R.D. 267/1942) which is triggered by the *insolvency* (i.e. the permanent impossibility to adequately fulfil the obligations undertaken) of the entrepreneur in general, with the specific exception of so called *small* entrepreneurs, agricultural entrepreneurs and public entities. The bankruptcy procedure requires the recognition by the competent Bankruptcy Court of the insolvency status of the entrepreneur. The Court adjudicating the entrepreneur bankrupt appoints a receiver to whom is entrusted the management, under the surveillance of the designated Bankruptcy Judge, of all the entrepreneur's assets. The receiver having ascertained the entrepreneur liabilities and having acquired all the assets pertaining to the bankruptcy procedure, including those apparently sold by the entrepreneur and those sold in fraud to the creditors, proceeds with the liquidation of the assets and complying with the principle of the "*par condicio creditorum*" takes care of distributing among the creditors the amount realized through the liquidation.

The compulsory administrative liquidation procedure is another procedure finalised to the elimination of an enterprise in crisis from the market (articles 194 – 215 R. D. 267/1942, and subsequent amendments and integrations, among which it has to be mentioned the Act of August 1st, 1986, n.430 "*Norme urgenti sulla liquidazione coatta amministrativa delle società fiduciarie e di revisione e disposizioni sugli enti di gestione fiduciaria*" - "Urgent provisions on the compulsory administrative liquidation procedure on fiduciary and auditing companies and provisions on fiduciary management entities"). Said procedure is provided for the insolvency of entities that, due to the nature of the activity performed, are subject to the control of the Public Administration (i.e. banks, insurance companies, cooperatives). The law, according to the type of the enterprise, provides for the adoption of an administrative liquidation procedure, which can be alternative or exclusive, depending to the specific rules applicable, to the bankruptcy procedure. The procedure provides that, after the recognition by the judicial authority (who is competent also to decide over possible disputes concerning the formation of the liabilities report and /or the distribution plan

among the creditors) of the insolvency status, the competent administrative authority shall cause the termination of activity of the company whose management resulted irregular or not successful, proceeding with the liquidation of the assets and the payment of the creditors *pari passu*.

The possibility of re-organizing the enterprise in crisis has been considered by the legislator who, besides the bankruptcy procedure, has contemplated the controlled administration procedure (articles 187 – 193 R. D. 267/1942). Such procedure consists in the possibility for the entrepreneur to postpone the payment of the debts to the creditors for a period of maximum two years. The admission to such benefit is awarded by the Court upon the entrepreneur's request who, being in a situation of temporary financial crisis to meet his obligations, demonstrates the possibility to re-organize his enterprise. The proved trustworthiness of the entrepreneur in debt and the approval by the majority of the unsecured creditors are the prerequisites requested for the authorization by the judicial authority. Simultaneously with the admission to the procedure, the Court appoints a Judicial Commissioner who shall supervise on the entrepreneur's activity and shall assist him, if necessary, in the administration of the business.

The scope of the bankruptcy creditors' settlement procedure (articles 124 – 141 R. D. 267/1942) and of the preventive creditors' settlement procedure (articles 160 – 186 R. D. 267/1942) are different from the ones aimed by the controlled administration procedure. Both said procedures require the approval of the majority of unsecured creditors and the positive evaluation of the Bankruptcy Court (that is expressed respectively after and before the adjudication in bankruptcy constituting the main difference between the two procedures) and they result in a reduction of the creditors' claims and in the postponement of the payment of the reduced claims. They are different from the controlled administration due to the fact that they are not a direct measure of re-organizing the enterprise. The two procedures under analysis tend to limit the time and cost inconveniences for the creditors with respect to the bankruptcy procedure and to favour the insolvent entrepreneur, who can demonstrate his trustworthiness and diligence, freeing him of a part of his liabilities and leaving him with the availability of his assets. However it should be noted that the creditors' settlement procedures, preventive as well as bankruptcy, may be considered an indirect

measure of re-organization of an enterprise that can result in maintaining, even if partially, an enterprise in the market.

The Italian legislator until now has demonstrated more sensibility only on the re-organization for major productive entities by introducing a special procedure in order to try to maintain such entities, if possible, on the market (Legislative Decree of July 8th, 1999, n. 270 “*Nuova disciplina dell’amministrazione straordinaria delle grandi imprese in stato di insolvenza, a norma dell’art. 1 della legge 30 luglio 1998, n. 274*” – “New discipline if the extraordinary administration of the major companies in insolvency status pursuant to article 1 of law July 30, 1998, n. 274”, hereinafter indicated as D. Lgs. 270/1999). The regime provides for the possibility for companies employing a minimum number of employees (at present at least 200 persons) in the event of an amount of debts indicating the possibility of a possible insolvency status to be managed by an Extraordinary Commissioner under the supervision of the Ministry of Industry and Commerce for a maximum period of five years. The activity of the Extraordinary Commissioner is finalized to the re-organization of the enterprise through a re-organization plan. In the event that the re-organization plan cannot be completed, the entity shall be wound-up.

TITLE 2. DEFINITIONS AND TERMINOLOGY

Attivo fallimentare = bankruptcy assets

CONSOB = Stock and Change Commission

Creditore chirografario = unsecured creditor

Creditore privilegiato = secured creditor

Decreto Legislativo 8 luglio 1999, n. 270 “*Nuova disciplina dell’amministrazione straordinaria delle grandi imprese in stato di insolvenza, a norma dell’art. 1 della legge 30 luglio 1998, n. 274*” = Legislative Decree July 8th., 1999, n. 270: “New discipline if the extraordinary administration of the major companies in insolvency status pursuant to article 1 of law July 30, 1998, n. 274”

Imprenditore – imprenditore commerciale = (commercial) entrepreneur

ISVAP = administrative authority supervising the insurance companies

Legge Fallimentare = Bankruptcy Act

Liquidazione (dei beni) = winding – up; liquidation (of the assets)

Ministero dell'Industria = Industry and Trade Ministry
Ministero di Grazia e Giustizia = Minister of Justice
Principio di parità di trattamento = *pari passu* treatment
Procedura concorsuale = bankruptcy proceedings
Procedimento giudiziale = judicial procedure
Regio decreto 16 marzo 1942 n. 267 = Royal Decree n. 267 of March 16th., 1942
revisore contabile = certified accountant
S.A.P.A. = limited partnership by shares
Sindaco = statutory auditor
Società di revisione = auditing firm
S.P.A. = joint stock company
S.R.L. = limited liability company;
Tribunale Fallimentare = Bankruptcy Court
Fallimento = liquidation bankruptcy procedure
 Fallito = bankrupt (debtor)
 Istanza di fallimento = petition of bankruptcy
 Accertamento dello stato di insolvenza = insolvency recognition
 Concordato = creditors' settlement procedure
 C. preventivo = preventive creditors' settlement procedure
 C. successivo or *concordato fallimentare* = bankruptcy creditors' settlement procedure
 Curatore fallimentare = Bankruptcy Trustee
 Giudice delegato = Delegated Judge
 Comitato o assemblea dei creditori = Creditors' Committee
 Pubblico Registro dei Falliti = Public Bankrupts' Register
Amministrazione controllata = controlled administration procedure
 Commissario giudiziale = Judicial Commissioner
Liquidazione coatta amministrativa = compulsory administrative liquidation
 Commissario Liquidatore = Liquidating Commissioner

Amministrazione straordinaria (delle grandi imprese in crisi) = extraordinary administration (major enterprises)

Commissario straordinario = Extraordinary Commissioner

Piano di risanamento = re-organization plan

Comitato di Sorveglianza = Surveillance Committee

TITLE 3. WARNING LIGHTS AND PREVENTION OF INSOLVENCY

Under the Italian law there are not procedures specifically aimed to detect companies with financial difficulties; however there are rules applicable to certain corporate entities that may detect companies with financial difficulties and trigger either a re-capitalization and re-organization procedure or the institution of a winding-up or bankruptcy procedure.

Beforehand it should be noted that the rules described hereinafter are applicable only to enterprises carried out under the form of corporate entities (S.R.L. – limited liability company; S.P.A. – joint stock companies; and S.A.P.A. – limited partnership by shares) and not to individual enterprises or to enterprises in the form of partnership.

A. General capital requirements.

The general principles are provided for by articles 2446, 2447 and 2448 of the Italian Civil Code.

Pursuant to article 2446 of the Civil Code, when it appears that the company's capital diminished by more than one third as a result of losses, the directors shall call a shareholders' meeting without delay to take appropriate action. A report on the financial situation of the company, together with the remarks of the board of statutory auditors, shall be submitted to the shareholders' meeting.

In the event that, by reason of the loss of over one third of the company's capital, the capital falls below the minimum provided by the law (i.e. € 10,000 for S.R.L. and € 100,000 for S.P.A.) the directors shall without delay call a shareholders' meeting in order to resolve upon the reduction of the capital and the concurrent increase thereof to an amount not less than the minimum provided by the law or upon the re-organization of the company.

B. Board of statutory auditors.

SPAs and in certain cases SRLs (i.e. if the SRL share capital is equal or higher than € 100,000 or in the event that for two years the company does not provide for to the duly publication of the balance sheets required by law) are supervised by a board of internal auditors. This board has the task to control the management of the company in order to safeguard the interests of the shareholders and of the creditors of the company. The board, constituted by professionals registered with the Roll of Certified Accountants and appointed by the shareholders, shall supervise the management of the company, the compliance by the others corporate bodies with applicable legal and statutory rules and it controls that the company's accounts are regularly kept, that the balance sheet reflects the situation resulting from the company's accountancy books and that the rules established for the evaluation of the company's assets are complied with. In performing their task, the statutory auditors have to follow the rules established by the Italian Civil Code and should also follow the principles for statutory auditors drafted and approved by the "*Consiglio Nazionale dei dottori commercialisti e dei ragionieri*" (the national board of accountants and economic experts).

The board, in particular, shall verify, at least quarterly, the financial situation of the company, and in particular the situation concerning the bank accounts, the cash accounts and the securities owned by the company. It shall evaluate the functioning of the internal auditing system, if existing, the organization of the company's account system, the company's financial situation and it shall verify the existence of the conditions to continue the company's activity.

According to the Principles for statutory auditors (rule 2.8 of the Principles) the activity consisting in the control of the situation of the company and in the verification of the existence of the economic conditions to continue the activity should be carried out through analysing and checking the following aspects:

- financial area, requesting information to directors and administrative/financial officers of the company;
- cash accounts, bank accounts and utilization of credit lines and financing facilities in general;
- transactions concerning the company's own capital;

- financial situation of the company through the analysis of the structural indexes (sources, investments and margins), long and short term liquidity and investments;
- guarantees rendered in favour of third.

Statutory auditors shall evaluate if the financial situation does not create any problem to the company's financial stability and to the continuation of the activity of the company. In the event that the board detects a situation of financial difficulty, it shall evaluate if the programs elaborated by the company's directors guarantee the overcome of the company's financial difficulties.

It should also be evidenced that the law provides in certain specific cases that the board of statutory auditors can substitute itself to the board of directors and to the shareholders. In particular the board of statutory auditors, pursuant to article 2406 of the Italian Civil Code, may call the shareholders' meeting, substituting the company's directors in the event of their omission to proceed in some situations provided for by the law among which the cases contemplated by articles 2446 and 2447 of the Civil Code. In the event that the shareholders' meeting convened pursuant to article 2447 of the Civil Code does not take any action, the board of statutory auditors shall request to the competent court the appointment of the liquidators, pursuant to article 2450 of the Civil Code.

With regard to joint stock companies whose shares are listed on the stock exchange, it should be noted that, pursuant to article 149 of D. Lgs. 58/1998, the control over the company's accounts does not fall within the tasks of the board of statutory auditors, since that it is assigned to external auditors, and that, pursuant to article 152, 2nd paragraph of D.Lgs. 58/98, the board of statutory auditors shall denounce to the court any material violation committed by the directors and, pursuant to article 149, 3rd paragraph of D.Lgs. 58/98, it shall inform without delay *CONSOB* of any irregularity discovered in its surveillance activity.

The activity entrusted to the board of statutory auditors should theoretically put the companies in a better situation to avoid the risk of bankruptcy; however the independency of the board, who is appointed by the shareholders' meeting and whose fees are paid by the company, is not always assured. Accordingly, many times the intervention of the board is not punctual or it does not avoid the bankruptcy.

3. External audit.

The control over the company's accounts for companies whose shares are listed in the stock exchange (and in some other cases specifically provided for by the law) is entrusted to an external accounting firm, registered in a special roll kept by *CONSOB*.

The external auditing firm shall, pursuant to article 155 of D. Lgs. 58/98, verify that:

a) during the financial year, the accounts of the companies are kept properly and their transactions reported correctly in the accounting records;

b) the annual accounts and the consolidated accounts of the companies correspond to the results of the accounting records and tests performed and that they comply with the relevant statutory and regulatory provisions.

Auditing firms may obtain documents and information serving to carry out the audit from the company's directors and may carry out examinations, inspections and controls; they shall inform *CONSOB* and the board of statutory auditors without delay of any fact deemed to be censurable. Auditing firms shall record information on their activity in a special book kept at the registered office of the companies that engaged them, according to the criteria and procedures laid down by *CONSOB* in a regulation.

Auditing firms shall render an opinion on companies' annual accounts and consolidated accounts in special reports. The reports must be signed by the person responsible for the audit, who must be a partner or director of the auditing firm and entered in the register of auditors kept at the Ministry of Justice.

Auditing firms shall render an unqualified opinion where the company's annual accounts and consolidated accounts comply with the statutory and regulatory provisions governing their preparation. Auditing firms may render a qualified opinion, an adverse opinion or a disclaimer. In such cases the firm shall detail the reasons for its decision in its reports. Where an auditing firm renders an adverse opinion or a disclaimer, it shall immediately inform *CONSOB*.

4. Special situations.

Pursuant to article 5 of D.Lgs. 58/98 financial intermediaries firms are subject to the supervision of *CONSOB* and of the Bank of Italy in order to ensure transparent and proper conduct and the sound and prudent management of authorized entities, having regard to the protection of investors and the stability, competitiveness and proper functioning of the financial system. In particular the Bank of Italy shall have authority for matters regarding the limitation of risks and the financial stability of the entity; for

this purpose it has issued specific regulation on, among others, capital adequacy, the limitation of risks in its various forms, permissible shareholdings, administrative and accounting procedures and internal control mechanism. In the event of breach of such rules, or if serious capital losses are expected, the competent supervisory entity may adopt the measure provided for by the law in order to safeguard the interests of the market and of the investors.

Banks and insurance companies are subject to similar surveillance – the former by the Bank of Italy and the latter by *ISVAP* - and have specific rules on capital adequacy and accounting procedures.

The timely intervention of the supervisory entities has drastically reduced the recourse to the compulsory administration liquidation procedure and has permitted many successful rescue-operations for the benefit of the investors and the financial market itself.

TITLE 4. LEGAL POSSIBILITIES TO CONTINUE ECONOMIC ACTIVITIES

Chapter 4.1 The controlled administration procedure.

§ 1. Comprehensive description of the regime as well as its underlying philosophy.

1.1 Description.

It is a procedure accessible to the entrepreneur who has a temporary difficulty in meeting his obligations (article 187 R.D. 267/1942).

During the procedure, that has a maximum duration of two years, the entrepreneur submits the management of his enterprise and the administration of his assets to the surveillance of the Court (article 187 R.D. 267/1942)

Creditors having a title or a cause prior to the decree of admission to the procedure, cannot start or continue enforcement and attachment procedures on the debtor's assets. The breach of such rule is sanctioned by the nullity of the action performed in violation. (articles 168 and 188 R.D. 267/1942).

At the end of the procedure the entrepreneur shall be capable to regularly meet his obligations. (article 193 R.D. 267/1942)

1.2 Critical analysis.

The controlled administration procedure is seldom utilized due to the fact that it is:
- an expensive procedure for the justice costs;

- it does not stop the maturity of interests on debts;
- it cannot be extended to possible subjects who are jointly liable with the entrepreneur or guarantors of the entrepreneur (it is not suitable for a group structure);
- the conditions for the termination of the procedure, represented by the existence of a liquidity sufficient to pay all expired debts, cannot in practice be realized.

§ 2. Classification of the procedure among branches of law, competent jurisdictions, overview of the procedure followed before these jurisdictions, implications of international private law.

2.1. Description.

The controlled administration procedure may be classified among bankruptcy procedures entrusted to the exclusive competence of the Bankruptcy Section of the Civil Court. The procedure is considered among bankruptcy procedure having special jurisdiction (R.D. 267/42)

2.2. Critical analysis.

There are no special remarks on this point. The controlled administration procedure is organically inserted in the bankruptcy system and the fact that it is entrusted to specialized judges meets the criteria of technical and professional capacity necessary to appropriately manage such procedure.

§ 3. Criteria to benefit for the regime.

3.1. Description.

The requisites for the admission to the procedure are formal as well as substantial and they are both provided for by bankruptcy law (articles 160 and 187 R.D. 267/42).

The formal criteria are the followings:

- the entrepreneur shall have been registered with the Companies' Register for at least two years or, if shorter, from the moment of the beginning of the activity and it shall have regularly kept for the same time the accountancy books of the business;
- in the prior five years, the entrepreneur shall not have been adjudicated bankrupt or benefited of a judicial creditors composition procedure;

- it has not been found guilty of a bankruptcy offence or of a crime against property, the public faith, the public economy, the industry or the commerce.

Under a substantial aspect, the possibility to rescue the enterprise shall be proved.

At the end of the procedure, the entrepreneur shall regularly meet his obligations.

3.2. Critical analysis.

As already observed under previous point 1.2, the conditions for a favourable closure of the procedure do not easily materialize.

§ 4. Specification of the possible initiators of the procedure.

4.1. Description.

Only the entrepreneur has the right to apply for the benefit of the controlled administration procedure (article 187 R.D. 267/42).

4.2. Critical analysis.

There are no critical remarks on this point, taking into consideration the fact that the controlled administration procedure requires for its favourable outcome a timely perception of the no liquidity situation that only the entrepreneur may have.

§ 5. Administration of the procedure (who manages the assets of the individual or the company, the role of the different actors in the proceedings: creditors, debtor, State, appointed manager, court, etc).

5.1. Description.

The re-organization plan of the enterprise:

- is filed by the entrepreneur generally with the assistance of specialised advisors;
- is briefly valued by the Judge during the preliminary phase that leads to the admission to the procedure (article 188 R.D. 267/1942);
- is valued by the Judicial Commissioner appointed with the decree of admission to the procedure (articles 172 and 188 R.D. 267/1942);
- is approved at the Creditors' Committee with a qualified majority (the majority of the creditors which represents the majority of the credits, with the exclusion of secured creditors) (article 189 R.D. 267/1942);

- is controlled during its performance by the Judicial Commissioner and by the Creditors' Committee;
- the Judicial Commissioner reports to the Court every two months.
- the Court has the power to request the adjudication in bankruptcy in any moment (articles 103 and 192 R.D. 267/1942).

5.2. Critical analysis.

The date contained in the re-organization plan should be certified by specialized advisors.

§ 6. Restructuring plan (if applicable, who must file it, how, where, must it be voted by creditors, is there a court intervention, etc.).

6.1. Description.

The management of the enterprise's assets remains with the entrepreneur. There is the possibility that the management is entrusted directly to the Judicial Commissioner, but in practice it is utilized (article 191, 1st paragraph R.D. 267/1942)

The Judicial Commissioner appointed by the Court supervise the procedure and the Court itself, through the Delegated Judge, gives the direction for the execution of the plan.

The Creditors' Committee assists the Commissioner in his activity and it is composed by three or five members (article 190, 1st paragraph R.D. 267/1942).

The actions falling within the definition of extraordinary administration undertaken without the authorization of the Delegated Judge are unenforceable against the creditors prior to the procedure (articles 167 and 188 R.D. 267/1942).

The decrees of the Delegated Judge are appealable before the Court, whose decision is unchallengeable.

6.2. Critical analysis.

In practice the system has established its own rules, leaving in almost all cases the management to the entrepreneur and not to the professional (accountant or attorney-at-law) appointed as Judicial Commissioner.

§ 7. The degree of protection of the actors implied in the procedure: public investors, creditors (secured and unsecured, preferential or not), shareholders, stakeholders..., as well as the way to carry out this protection.

7.1. Description.

In the event of favourable outcome of the procedure, secured and unsecured creditors are fully satisfied. They are only touched in financial terms since they cannot be satisfied during the procedure.

Shareholders maintain the title over the company's assets that cannot be attacked by creditors during the procedure.

All subjects who mature a credit during the procedure are paid preferentially (i.e. they have the right to be paid before the creditors existing prior to the procedure).

The protection of the assets value is guaranteed by the supervision activity of the Judicial Commissioner and by the consequent intervention of the Court.

§ 8. Termination of the procedure.

8.1. Description.

The procedure ends or by the recovery of the entrepreneur who has recovered his capacity to regularly meet his obligations, or by the adjudication in bankruptcy by the Court in the event that the admission requisites disappear.

However in the event that the controlled administration procedure is terminated by the Court, the debtor has the right to apply to the creditors composition procedure.

Articles 160 and followings of R.D. 267/1942. regulate the creditors composition procedure.

8.2. Critical analysis.

As already mentioned the main problem is constituted by the difficulties to meet the conditions required for the recovery.

In many cases the favourable outcome of the procedure is reached through extra-judicial settlement agreements with some creditors or some categories of creditors under which the creditors accept to re-finance their credits or to waive part of their credits.

§ 9. Degree of information on the development of the procedure towards creditors (e.g. access to (court) files, etc.).

9.1. Description.

Creditors control the procedure through the committee representing them. Single creditors may have access to the procedure files kept by the Court, if duly authorized by the Delegated Judge, having heard the Judicial Commissioner opinion.

9.2. Critical analysis.

The only difficulty for creditors in getting information on the procedure consists in the fact that they can obtain said information only through the Court. It would be advisable to have other means (i.e. internet).

§ 10. Costs related to the procedure, if applicable (e.g. fees trustee, receiver, etc).

10.1. Description.

The costs of the procedure are constituted by the fees for professional assistance, not compulsory but necessary, the Judicial Commissioner fees and the fees and costs of the experts, if appointed, for the evaluation of the main company's assets.

The justice costs amounts from a minimum of € 20,658,00 to a maximum of € 227,241,00.

Attorney's fees for the assistance rendered to the entrepreneur in the controlled administration procedure are calculated in percentage (from 0,5% up to 5%) on the global amount of the recognized liabilities.

Accountants and auditors fees for the same assistance are calculated on a decreasing percentage on the recognized liabilities. The minimum tariffs vary from 1,5% to 0,5% of the liabilities and the maximum tariffs vary from 3,4% to 0,6% of the recognized liabilities.

10.2. Critical analysis.

As previously noted, the amount of the costs is a crucial point.

§ 11. Competence, knowledge and functioning of insolvency courts.

11.1. Description.

As already pointed out, the Delegated Judge is competent for the direction of the procedure and the decision concerning the possible termination of the procedure is taken by the Bankruptcy Court, who is also the second instance judge competent to decide over the appeals against the decree rendered by the Delegated Judge.

11.2. Critical analysis.

The fact that the function of directing the procedure and the function of supervising over such direction are assigned to the same specialised section of the court (the Bankruptcy Court) does not guarantee an effective and complete autonomy of judgment of the appeal judge.

§ 12. Publicity conditions, if applicable (e.g. newspaper, official gazette).

12.1. Description.

Notice of the admission to the controlled administration procedure is given to all creditors by registered letter sent by the Judicial Commissioner.

The decree of admission to the procedure is filed with the Court and registered with the Register of Enterprises. In the event that the entrepreneur owns real estate properties or registered movables, the decree of admission is notified by the Judicial Commissioner to the competent offices for the due registration.

If the procedure is converted into a bankruptcy, the decree is subject to the same publicity conditions provided for by the decision that adjudicates the bankrupt entrepreneur.

12.2. Critical analysis.

The use of more modern communication systems, not compulsory by law, is limited to the largest and most important procedures that concern a large number of creditors which is difficult to easily attain.

TITLE 5. LEGAL CONSEQUENCES OF BANKRUPTCY AND POSSIBILITIES FOR A FRESH START

Chapter 5.1. Bankruptcy procedure.

Under Italian law there are substantially three the procedures which can be applied to a commercial entrepreneur who is in an insolvency situation: *liquidation bankruptcy*,

compulsory administrative liquidation and, in certain situation, *extraordinary administration*.

Furthermore, the existence of a so called minor procedure, the *preventive creditors' settlement procedure*, shall also be mentioned.

1. Liquidation bankruptcy procedure.

The requisites to trigger the application of this procedure are:

- the entrepreneurial nature of the debtor: he must be a private entrepreneur with a substantial business organization in terms of capital, working force and equipment. Accordingly public entities, agricultural entrepreneur and, in most cases, individual entrepreneurs are excluded from the application of said measure;
- the existence of the insolvency status which consists in a situation of non transitory "functional impotence" that does not enable the entrepreneur to meet his obligations regularly and through normal means, due to the lack of liquidity and credit necessary for carrying out the activity.

The liquidation bankruptcy procedure may be defined as a special enforcement procedure that start with the adjudication in bankruptcy, and that develops in a subsequent series of steps: the taking of possession and the management of all the property of the bankrupt, the recognition of all bankrupt's creditors, the liquidation of the property, the distribution of the liquidation proceeds among the creditors and the declaration of the closure of the procedure.

The Bankruptcy Court where the enterprise's main office is located is competent to declare the adjudication in bankruptcy. The procedure may be started on the debtor's request, on the request of one or more creditors, on the request of the public prosecutor office or directly by the Court. After instituting the procedure, the Court shall convene the debtor and hear him, in the presence of the requesting creditors, and it shall ascertain the existence of the requisites for the adjudication in bankruptcy, particularly the existence of the insolvency status.

The Court shall then render a judgment adjudicating the debtor bankrupt, appointing the procedure bodies (i.e. the Delegated Judge and the Bankruptcy Trustee) and ordering to the bankrupt entrepreneur to file with the Court the balance sheets and the accounting books of the company. The Court shall also fix the first hearing for the recognition of the credits.

The creditors of the bankrupt shall file with Court a request for the recognition of their credits in the procedure. After the verification by the Bankruptcy Trustee, the requests of recognition are accepted or dismissed by the Delegated Judge.

The bankrupt and any other subject who may have an interest can appeal against the judgment that declared the adjudication in bankruptcy within 15 days.

Creditors who did not timely file their credit recognition request may file a late recognition petition until the moment when the Delegated Judge approves and renders enforceable the final distribution plan of the bankrupt's assets.

The bankruptcy creditors' settlement procedure is a particular possibility for ending a liquidation bankruptcy procedure. Through said procedure the bankrupt offers the full payment of secured creditors and a pro-quota payment to unsecured creditors. The bankrupt offer shall be approved by the majority of the creditors and by the Bankruptcy Court. Upon payment, the procedure is closed and the debtor discharged.

The procedure bodies cease their activity and the effects of the adjudication in bankruptcy on the debtor's assets are discharged with the decree officially ending the procedure. The debtor resumes the possession and the management of his assets, if any, remaining from the liquidation and his legal capacity to sue or to be sued.

It should however be noted that personal incapacities of the bankrupt provided for the law are not discharged and they survive until the moment when he is cancelled from the Public Bankrupt Register.

Bankrupt's creditors resume any and all right against the debtor and may freely exercise any individual legal action in order to recover the part of their credits not entirely satisfied during the procedure.

It should be pointed out that bankruptcy liquidation procedures have a too long time duration, also due to the quantities of connected legal disputes .

2. Compulsory administrative liquidation.

As already briefly mentioned, the compulsory administrative liquidation is a procedure provided for certain categories of enterprises, owned partially by the State or subject to the control of administrative authorities, whose crisis can have a material general impact. Banks, insurance companies, financial entities and cooperatives are some of the entities that may be subjected to said procedure.

Some of said entities may also be subjected to the liquidation bankruptcy procedure, if the relevant applicable special law contemplates such possibility. When both procedures are contemplated, the starting of the compulsory administrative liquidation procedure prevents the opening of the bankruptcy liquidation procedure and vice versa. The various applicable special laws provide for several objective requisites for the admission to the procedure, among which, besides the insolvency status, there is the violation of legal and/or administrative regulations, and important irregularities in the management of the company.

The declaration of admission to the procedure is declared by the competent administrative authority which, in declaring it, uses its discretionary power in evaluating the existence of a situation triggering the admission to the procedure and of the requisites provided by the applicable provisions of law. The issuance of the administrative decree of admission to the procedure constitutes, in other words, a judgment on the opportunity to eliminate the enterprise from the market.

The admission to the procedure implies the substitution of a public administrative body – not judicial as in the liquidation bankruptcy procedure – to the entrepreneur in the possession and in the management of the assets. The procedure has mainly an administrative character. The decree of admission is issued by the competent administrative authority that designates also the Liquidating Commissioner, who is entrusted with powers similar to the ones of the Bankruptcy Trustee. The same administrative authority has the same powers and functions of the Bankruptcy Court in the Liquidation Bankruptcy procedure.

The intervention of the Court is however contemplated in some crucial moment of the procedure in order to protect the rights of creditors and third parties, and in particular it takes place in the following situations:

- recognition of the insolvency status of the company;
- decisions on the opposition procedures and on the appeals concerning the formation of the liabilities report of the procedure;
- decisions on the appeal against the Liquidating Commissioner's Report and the distribution plan;
- decisions on the creditors' settlement proposal.

3. Extraordinary administration.

The extraordinary administration is a special procedure provided for major enterprises in difficulties, and in any event for enterprises that have at least the following requisites:

- at least 200 employees ;
- liabilities for an amount of at least two thirds, of the total assets of the company as well as of the sales and services profits of the last financial year.

The rules governing the procedure have been recently re-written. Presently the procedure is characterized by two stages, the first one compulsory and the second one only possible.

The first stage starts with the recognition by the competent Bankruptcy Court of the existence of the insolvency status upon request filed by the entrepreneur himself, by the creditors, the public prosecutor office or the Court itself. With the decision on the insolvency, the Court adopts other actions such as the appointment of the Judicial Commissioner and the decision to entrust the management of the enterprise to the Judicial Commissioner or to the entrepreneur himself.

In the following two months, the Court supervises the enterprise in order to decide whether to start a procedure of extraordinary administration – that will lead to the re-organization of the enterprise – or to open a liquidation bankruptcy procedure. The court shall evaluate in other words the real possibilities of re-organization of the enterprise taking into account its situations and its prospective in continuing its business.

During such period the management of the company continues as usual, but some effects typical of bankruptcy procedures materialize, such as the invalidity of the payments made for debts prior to the admission without the authorization of the Delegated Judge.

The second stage is not compulsory but only possible since that it is strictly connected with the evaluation of the chances to re-organize the enterprise. In the event that such second stage takes place, the procedure assumes an *administrative character*. The procedure is in fact carried out under the supervision of the Industry and Trade Ministry who appoints one or more Extraordinary Commissioners who substitute the commissioner appointed by the Bankruptcy Court and the Surveillance Committee. The Extraordinary Commissioner is entrusted with the management of the enterprise and

the preparation of the re-organization plan that shall be submitted to the approval of the Ministry. Once approved the plan, the Extraordinary Commissioner shall carry out all the necessary action for its completion.

During the procedure the creditors cannot start or continue any enforcement procedure on the assets of the enterprise and the Commissioner has the right to institute suit for the declaration of inefficacy of certain acts.

If the situation requires it, in any moment the procedure may be converted into a liquidation bankruptcy procedure by simple decree issued by the competent Bankruptcy Court.

If the reorganization plan is not completed within the established deadline, the procedure is converted into a liquidation bankruptcy procedure.

The intention of the legislator with the issuance of the new law on the extraordinary administration is to limit the application of the liquidation bankruptcy procedure to minor enterprises or to enterprises that do not have any chance to recover.

It should be observed that due to the recent concentration trend among enterprises the application of extraordinary administration procedure is bound to be wider than expected.

4. Preventive creditors' settlement procedure.

It is a minor procedure that can be started by the entrepreneur having the same requisites provided for the admission to the controlled administration in order to avoid the patrimonial and personal consequences triggered by the adjudication in bankruptcy and to partially satisfy the creditors.

In order to be admitted to the procedure the entrepreneur shall offer guarantees of his capability to pay entirely the secured creditors and the unsecured creditors for a percentage of at least 40%. Said guarantee may be offered also through the sale of the debtors assets provided that, at a preventive evaluation of the entrepreneur assets, through such sale the above payment criteria are met.

The settlement proposal shall be approved by the majority of creditors and by the Bankruptcy Court.

Before such proposals are approved, all creditors' individual enforcement actions are suspended and the entrepreneur maintains the management of his assets under the

surveillance of a commissioner appointed by the Bankruptcy Court and the direction of the Delegated Judge.

In the event that the settlement proposal is not approved by the creditors or by the Court, or if the procedure is terminated before its completion, the enterprise is subjected to the liquidation bankruptcy procedure.

Chapter 5.2. Legal effects of the initiation of bankruptcy procedures.

The initiation of bankruptcy procedure implies the fact that the entrepreneur loses the control over his business, and that the management of the enterprise is subjected to the supervision of the external authorities, judicial as well as administrative, who govern the procedures.

One of the main effects of initiation of a bankruptcy procedure is the application of the principle of the *pari passu* satisfaction of the creditors. In fact all the creditors have the right to participate to the distribution of the result of the liquidation of the debtor's assets *pari passu*, with some exceptions, on the grounds of their respective credits resulting at the moment of the initiation of the procedure (adjudication in bankruptcy, admission to the creditors' settlement procedure, etc.) In order to guarantee the application of the *pari passu* rule, the law establishes that all the entrepreneur's debts shall be considered expired by law at the moment of initiation of the procedure.

Furthermore the accruing of interests on the debts is suspended until the end of the procedure.

The creditors' recovery shall take place in compliance with the *par condicio creditorum* rule (except for certain privileges of some secured creditors) according to which all the individual creditors' enforcement actions on the debtor's assets are barred.

A general exception to the *par condicio creditorum* rule is constituted by the recognised right of the creditors to set off their liabilities against the bankrupt debtor with their credits.

As a final remark it should be noted that the liquidation bankruptcy procedure has been conceived as an instrument to trigger the patrimonial liability of the entrepreneur in order to protect the creditors which is realizable through the elimination of the enterprise from the market.

Chapter 5.3. Legal effects of bankruptcy as such.

The initiation of a bankruptcy procedure triggers certain effects on the individual entrepreneur declared bankrupt, some having a patrimonial nature other having a personal character.

Patrimonial effects.

From the date of the decision that adjudicates the entrepreneur bankrupt, he cannot manage and dispose, judicially and materially, of all his assets existing at such date.

All bankrupt's assets and in general all the positions having a positive economic impact are subject to such provision, with the only exception for the strictly personal assets of the entrepreneur, alimonies, wages and pensions, and any bankrupt's income within the limit of all that is necessary for his own maintenance and for the maintenance of his family, and for the assets that according to the law cannot be attached. The spoliation of the bankrupt's assets covers also the assets that the bankrupt may have acquired during the procedure, deducted the costs incurred for the acquisition of said assets and for their maintenance.

Strictly connected with the problem of the assets spoliation, is the possibility for the bankrupt entrepreneur to exercise a new enterprise. Even though no specific rule exists on this point prohibiting the entrepreneur to exercise a new enterprise, the majority of the case law and the law scholars believe that such prohibition may be inferred from an interpretation of article 44 of R.D. 267/1942 which provides for the inefficacy with regards to creditors of all the acts undertaken by the entrepreneur and of all the payment received.

With regard to the juridical and contractual relationships existing at the moment of the adjudication in bankruptcy, some of them are automatically terminated and some survive; the Bankruptcy Trustee shall have the right to terminate them or to continue with them.

Judicial effects.

Transferring the possession of the bankrupt assets, the judicial rights concerning said transferred assets are also transferred to the Bankruptcy Trustee. Consequently the Trustee substitute the entrepreneur in all pending law suits regarding patrimonial rights.

The bankrupt debtor maintains however his judicial capacity to sue or to be sued concerning personal relationships – including any possible criminal liability connected with the bankruptcy .

Personal effects.

The judicial decision of adjudication in bankruptcy has a direct impact on two civil rights of the entrepreneur protected by the Italian Constitution: the right of freedom and secrecy to his mail (article 15), and the right of free circulation and domicile (article 16).

Due to the bankruptcy, the mail addressed to the bankrupt entrepreneur is delivered to the Trustee who is entitled to keep the correspondence relating to patrimonial aspects and shall deliver to the bankrupt all the personal mail and the bankrupt cannot abandon his domicile without the permission of the Delegated Judge to whom he shall report whenever requested.

The bankrupt's name is also registered in the Public Register of Bankrupts kept by the Bankruptcy Court. This fact triggers a series of consequences among which: the loss of the electoral capacity (both active and passive) for all the time of the procedure, with a maximum of five years from the initiation of the procedure; the inability to exercise certain professions (i.e. attorney at law or stockbroker), the impossibility to assume certain charges (trustee, tax collector, director or statutory auditor of a company, and liquidator of a company).

Said incapacities, if not specially provided for, have a specific duration last until when the entrepreneur's name is cancelled from the Public Register of Bankrupts by a discharge decision. They are connected with an old concept of un-trustworthiness for the individual declared bankrupt.

Criminal consequences.

Recognising the existence of an insolvency status and opening a *pari passu* procedure, the bankruptcy adjudication decision triggers the possible application of certain criminal sanctions otherwise inapplicable or applicable on a minor degree.

According to the prevalent opinion the bankruptcy adjudication decision constitutes a requisite with regard to post-bankruptcy crimes and a punishment condition with regard to pre-bankruptcy crimes.

The bankruptcy adjudication decision is an essential element to figure as crimes behaviours that otherwise would not have a criminal sanction.

Chapter 5.4. 'Excusability' following bankruptcy.

Personal incapacities provided for the bankrupt do not automatically fall with the end of the procedure, but a judicial discharge decision is necessary in order to cancel the bankrupt name from the register. The law provides for three cases in which the bankrupt may obtain the cancellation:

- if he has integrally paid the debts;
- if he has regularly fulfilled the obligation assumed with the bankruptcy creditors' settlement procedure;
- if he has effectively and continuously proved his good behaviour for at least five years from the end of the bankruptcy procedure.

The discharge is not granted in the event that the bankrupt has been found guilty of bankruptcy crimes and for crimes against the patrimony, the public faith, the industry and the commerce.

Chapter 5.5. Responsibility of the Company's management in case of bankruptcy of a limited liability company.

In the event that the bankruptcy of a limited liability company is declared since that it is not possible directly attacking the assets of those who have acted for the company, the Delegated Judge frequently requests the Trustee to analyse the conducts of the administrative bodies of the company in order to ascertain whether there are the requisites to institute a claim against them.

Under Italian law directors have specific duties to act in protection of the creditors of the company. The breach of such duties automatically triggers the liability of the directors or, in some cases, their personal liability due to the bankruptcy (i.e. in the event of payments with preference to certain company's creditors.)

The bankruptcy of the company enables the bankruptcy organs to evaluate the conduct of the directors of the company in light of the principle of the maintenance of the assets of the company in the creditors' interests and to assess against the directors of any breach due to negligence, imprudence or technical incompetence of such duty.

The trustee can accordingly exercise against the directors in breach a responsibility claim requesting the damages.

Usually, the claims are founded on the breach of specific positive rules of behaviour established by law (i.e. the duty to convene a shareholders' meeting in the event of losses pursuant to article 2447 of the Civil Code) or of behaviours maintained in violation of specific rules by law (i.e. prohibition of undertaking new operations after the losses of the company have damaged the net assets value over the limits provided by the law).

TITLE 6. PROSPECTS AND RECOMMENDATIONS

The presence in our system of various bankruptcy procedures does not adequately manage the problem of the insolvency of entrepreneurs. We hope that a new order is introduced in the existing system in which there is presently a repetition of procedural phases in many cases not necessary and an unjustified confusion between the scope of the liquidation and the scope of maintaining and re-organizing the enterprise.

The preventive creditors' settlement procedure, grounded of an irreversible insolvency status, disregards any consideration concerning the possibility of recovering the enterprise and privileges the liquidation aspects.

Equally not up-dated is the liquidation bankruptcy procedure, anchored to a situation of irreversible insolvency, that does not consider the possibility to maintain or recover the business activity of the bankrupt entrepreneur and that sanctions directly the entrepreneur who is spoiled of his assets and of his judicial capacity with effects that survive the bankruptcy procedure itself. This procedure has proved an inefficient solution for the safeguard of the creditors' interests since it enables them to receive only a minimum amount of their credits and after a very long waiting time. In some cases the costs of the procedure have an enormous economical impact on the result of the procedure.

Even the new extraordinary administration procedure presents various critical aspects. It is excessively rigid and characterized with administrative and bureaucratic infrastructure that increase the duration of the procedure.

At present there are various project of reform of the system under exam. In October 2000 the government drafted a project according to which the existing four procedure

would have been reduced to two, a *preventive crisis procedure* and an *insolvency procedure*. It should be noted that according to this project the liquidation of the enterprise was considered the last resort, to be applied only in the event that it was not possible to re-organize the enterprise.

The project provided also for the cancellation of all personal civil sanctions for the bankrupt debtor.

However, said project of reform was not approved and presently a new project is being drafted with the aim of rationalizing and increasing the speed of the whole system of bankruptcy procedures. The approval of this new organic reform is expected within the current year.

Also this last project should abandon the sanctioning approach and should emphasize on the possibility of recovering the enterprises through a reorganization plan to be carried out under the supervision of the judicial and/or the administrative authority.

In any event it seems that the legislator is now aware of the necessity to speed up the duration of bankruptcy procedures and to have a unitary set of rules governing the situation of crisis of an enterprise.

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