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RIGHTS AND ROLES OF UNSECURED CREDITORS

Rights of Creditors in the Italian Bankruptcy Law

By

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A. RIGHTS, DUTIES AND POWERS OF UNSECURED CREDITORS IN INSOLVENCY PROCEEDINGS		
1.	Does your jurisdiction have an insolvency proceeding that enables an entity to restructure or only an insolvency proceeding that enables a company to liquidate?	<p>Since 2005 – 2007 Italian Bankruptcy Reform there are different proceedings for insolvent or distressed companies to restructure their debts or to liquidate.</p> <p>Restructuring solutions are based on a “companies’ size” approach:</p> <ul style="list-style-type: none">• Insolvent large companies with more than 200 employees (500 employees for the special ‘Parmalat’ procedure) may submit an application for extraordinary administrative procedure (<i>Amministrazione straordinaria</i>).• Pre-bankruptcy restructuring tools are available for distressed companies satisfying threshold requirements (based on assets, revenues and debts’ value) and employing less than 200 employees: i. e. Restructuring Certified Plan (<i>Piano Attestato</i>), Restructuring Agreements

		<p>(Accordo di ristrutturazione), Pre- bankruptcy agreement with creditors (Concordato preventivo).</p> <ul style="list-style-type: none"> ❶ Post- bankruptcy declaration restructuring plan with creditors (Concordato fallimentare) can terminate in advance the bankruptcy procedure. <p>Bankruptcy procedure is the ordinary liquidation procedure for companies.</p> <p>No restructuring proceedings are available for distressed companies falling under the threshold set forth by Article 1 of Italian Bankruptcy Law.</p>
1.a.		<p>The Parmalat case (2003) was a turning point:</p> <ul style="list-style-type: none"> ❶ Before: Italian insolvency law did not allow financial restructuring. The only real option under the existing law was the sale of Parmalat as a going concern. ❷ After: the amendments to the Extraordinary Administration Law has enabled financial restructuring. Parmalat was sold to its creditors by means of a debt- equity swap. ❸ The new instruments used in Parmalat case has been reflected in the ordinary bankruptcy proceedings after the Reform of years 2005 – 2007.
2.	<p>If your jurisdiction has an insolvency proceeding that enables an entity to restructure, does the debtor entity remain in control of its restructuring and/or business operations, or is an independent trustee or administrator appointed for such purposes?</p>	<p>In the Extraordinary Administration one or more receivers are appointed by the Ministry of Economic Development to replace the company's management.</p> <p>In the Bankruptcy procedure the management of the business is carried out by a Court- appointed receiver and the debtor entity is dispossessed of his assets.</p> <p>In the Pre- bankruptcy agreement with creditors the debtor manages the company under the supervision of an officer appointed by the Court.</p> <p>Other restructuring solutions ('<i>Restructuring Certified Plans</i>', '<i>Restructuring Agreements</i>') are not under the Court supervision and are carried out by the debtor.</p>

B. UNSECURED OR GENERAL CREDITORS OFFICIAL ROLE IN INSOLVENCY PROCEEDINGS IN YOUR JURISDICTION		
<p>3.</p>	<p>Do unsecured or general creditors have an official role or any type of responsibilities in insolvency proceedings in your jurisdiction?</p>	<p>Strengthening the role of creditors in insolvency and restructuring proceedings was one of the Reform's pillar:</p> <ul style="list-style-type: none"> ● In bankruptcy proceedings the creditors' committee directly controls the receiver in executing the procedure. The committee is appointed by the deputy judge and may consist of at least three and not more than five creditors as to balance quantity and quality of credits (secured and unsecured); ● In Pre- bankruptcy agreement with creditors the plan is approved by favourable vote of creditors representing the majority of credits entitle to vote. If there are different creditors' classes, the approval of the plan requires the favourable vote of creditors representing the majority of credit admitted to each class and the approval by the majority of classes. Secured creditors are excluded from voting on the plan except to the extent they renounce their security interest. The bankruptcy restructuring plan is effective with respect to all creditors which were creditors prior to the opening of the bankruptcy procedure, including those who have not filed a request of participation to the procedure. ● In Post- bankruptcy restructuring plan with creditors the proposal is approved by favourable vote of creditors representing the majority of credits admitted to vote. If there are different creditors' classes, the approval of the plan requires the favourable vote of creditors representing the majority of credit admitted to each class and the approval by the majority of classes. Secured creditors are excluded from voting on the plan except to the extent they

		<p>renounce their security interest. Transferees or assignees which have purchased claims against bankruptcy entity after the declaration of bankruptcy will not be entitled to vote. The bankruptcy restructuring plan is effective with respect to all creditors which were creditors prior to the opening of the bankruptcy procedure, including those who have not filed a request of participation to the procedure.</p> <ul style="list-style-type: none"> • In Extraordinary Administration procedures the creditors keep just the right to vote on a plan 'take it or leave it'
4.	<p>Generally describe the role played by unsecured or general creditors.</p>	<p>The creditors' committee in bankruptcy procedure directly supervises the receiver and authorizes any significant step taken by the receiver in executing the procedure. E.g. the committee set in:</p> <ul style="list-style-type: none"> - extraordinary administration acts; - liquidation program; - temporary operation of the company - proposal of post- bankruptcy restructuring plan with creditors (<i>Concordato fallimentare</i>) <p>The committee has also the right to receive information about the procedure and the right to examine accountings and document.</p> <p>The member of the committee who has a conflict of interest is not entitled to vote.</p> <p>Committee members has the right of a refund of expenses and may have also a remuneration if it is voted by the majority of creditors.</p> <p>Creditors may replace the receiver for motivated reasons and by majority vote.</p>
5.	<p>Do the responsibilities or roles differ in restructuring proceedings vs. liquidation proceedings?</p>	<p>The role of unsecured creditors is stronger in restructuring proceedings than in a liquidation proceeding, except in the case of extraordinary administration:</p> <ul style="list-style-type: none"> • in Pre- and post bankruptcy agreement with

		<p>creditors only unsecured creditors vote the proposal</p> <ul style="list-style-type: none"> • In Bankruptcy procedure unsecured creditors' claims will be paid on the basis of the remaining asset liquidation value. In Pre- and post bankruptcy agreement with creditors unsecured creditors will be paid according to the terms of the class of creditor they belong. • In Restructuring agreements creditors who have not signed the agreement will be paid for the entire claim.
6.	Are the responsibilities or roles official in that they are set forth in the applicable insolvency statutes or are the responsibilities one of custom and practice?	The role of creditors is set out in the Italian Bankruptcy Law. The relevant statutory guidance is contained in article 40 of the insolvency law (R.D. 267/1942)
C. STRUCTURE OF ROLES OR RESPONSIBILITIES		
7.	If the roles or responsibilities are official, how are they structured?	Please see above answer 3-6
8.	Can unsecured creditors form their own group or committee or does some other person or entity form it?	No, self organization nor regulation is not provided by the law for unsecured creditors. The creditor's committee is appointed by the judge within 30 days from the bankruptcy declaration according to the results of the company's documents and the creditors' claims. The committee can be of at least three and not more than five creditors as to balance quantity and quality of credits (secured and unsecured)
9.	How is the group or committee formed?	Please see above, answer from 3- 8.
10.	If committees are formed, how large or small are the	Please see above, answer from 3- 8.

	committees?	
11.	What is the criterion for serving on a committee?	The main criterion is to provide a balanced representation of all creditors and no conflict of interest.
12.	Can there be more than one committee?	Only one creditors' committee may be formed under the current Law.
13.	What is the attitude of the court to the committee(s)?	The committee may be very helpful for the court during the procedure. However many times there are not creditor available for the role. In this regards there is a pending law amendment proposal in order to introduce a significant remuneration for the members of the committee.
14.	What are the rights of the group or committee?	The committee has general rights to supervise the receiver's activity during the procedure. Committee members do not only support him, but also supervise and authorize his action.
15.	Can the committee or group appear before the court or insolvency tribunal?	The court is entitled to appear in front of the Court when requested by the court.
16.	What are the dues and obligations of the group or committee?	In addition to the above outlined duties, the members of the committee are liable to carry on their obligation with accuracy and expertise. They are also liable for the truthfulness of their declaration and for the privacy of the information they may have on the case.
17.	Are they required to provide information or report to their constituency?	There is not a specific obligation on this regard. The receiver must regularly submit a progress report to the court.
18.	Does the group of committee have any responsibilities or owe any duties to:	The committee members are liable according to the terms of statutory auditors' liability, mentioned above under answer 16.

	<p>(i) the court;</p> <p>(ii) the debtor; and/or</p> <p>(iii) the creditors themselves?</p>	The liability action is filed by the receiver
19.	Does the group act as a fiduciary as that term is used in your jurisdiction?	Please see answer 18 above
20.	Can the group or committee hire counsel or other professional (accountants, investment advisors, etc) to assist it in their insolvency proceeding?	Yes, they can. Each member of the committee may delegate his function to a subject which has the requirements to be appointed as trustee. Insolvency law does not specify who shall pay the expenses to the trustee, even if usually they are a cost of the procedure.
21.	If so, who pays the fees and expenses of such professionals?	Please see answer 20 above
22.	What is the relationship between the group or committee and the trustee and or insolvency administrator?	Please see above.
23.	Can the group or committee negotiate various matters, such as post-filing financing, asset sales, plan terms, use of cash and other operational matters?	<p>The purpose of the committee is to ensure that creditor interests are fully represented.</p> <p>The committee may require the receiver to provide them with complete information concerning the running of the procedure, but there is no specific power to negotiate matters. It may be established a profitable cooperation between the receiver and the creditors' committee but the procedure's activity are managed by the receiver.</p>
	How do the committees operate?	Within 10 day from the appointment of the committee

24.	Do they have leaders, by-laws, structure, etc?	<p>by the court, the committee appoints its president by majority vote.</p> <p>The president call for the meeting of the committee whenever it is necessary or on demand of 1/3 of the members.</p> <p>Each member of the committee has one vote and a resolution is approved by favourable vote of the majority of the members present at the meeting.</p> <p>The committee members which is in conflict of interest is not entitled to vote.</p>
D. RIGHTS, DUTIES AND POWERS OF UNSECURED CREDITORS IN INSOLVENCY PROCEEDINGS		
25.	If there is no statutory creditors' group or committee, do ad hoc groups form seeking to represent the interests of unsecured creditors?	Please see above.
26.	Do insolvency courts or tribunals recognize such ad hoc groups?	Please see above
27.	If there is no official role or responsibilities for unsecured creditors in insolvency proceedings in your jurisdiction, how are the rights of unsecured creditors protected and by whom?	Please see above
28.	What input do unsecured creditors have in a proceeding, if any?	Unsecured creditors have almost no input, unless they are members of the creditors committee.
29.	Can unsecured creditors object to actions being taken by the debtor, trustee or administrator?	Any creditor may claim against the receiver / trustee's acts.

30.	Can unsecured creditors pursue causes of action on behalf of the estate?	The receiver has the power to manage the assets, business and affairs of the company, including the power to bring or defend legal proceedings.
31.	Can unsecured creditors purchase assets from the estate?	Yes. The fact that a unsecured creditor is a member of the creditors' committee does not prevent the creditor from dealing with the receiver (e.g. by buying assets from the company), so long as the transaction is in good faith and profitable for procedure's results.
32.	Can unsecured creditors seek to appoint or remove a trustee or administrator?	Please see above
33.	Can unsecured creditors investigate the management or acts of the debtor, both pre and post filing?	The receiver as an officer of the court has the role to investigate the management and acts of the debtor both pre and post filing.
34.	Do creditors have the right to receive information about the estate from the trustee or administrator?	Every six months the receiver/trustee must send reports to the court, detailing the progress he has made towards implementing the restructuring or liquidation plan and achieving the objectives of the administration. Copy of these reports is sent to the creditor's committee.
35.	Can unsecured creditors propose terms of a plan or restructuring arrangement?	Each creditors may submit to the court a Post – bankruptcy restructuring plan (<i>Concordato fallimentare</i>). The creditor's committee must provide its opinion on the proposal. The proposed plan is approved by favourable vote of the majority of creditors.
36.	Do any of your answers above differ if a proceeding is a cross-border proceedings rather than a	So long as an insolvency proceedings is commenced under Italian law the above described rules apply.

	solely domestic proceeding? If so, how?	
37.	<p>Is it your view that insolvency proceedings in your jurisdiction would be benefited by unsecured creditors having larger and better defined roles and responsibilities or would such participation hinder the insolvency process? Please state reasons for your opinion.</p>	<p>As a matter of experience whereas a creditors' committee is appointed by the court, the insolvency procedure is more efficient as to the satisfaction of the creditors' interests. Currently the creditors committee is composed of secured and unsecured creditors; it is foreseeable that a committee of secured creditors only could strengthen the action/satisfaction for all the creditors. However as seen above it is not frequent in Italy that creditors accept the role in the committee. Usually this role is carried on by the most relevant creditors which are usually secured creditors (e.g. Bank).</p>