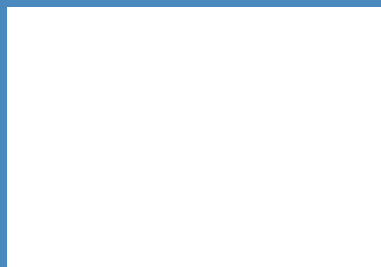


# Debt Restructuring: an alternative to insolvency proceedings

*Debt Restructuring: an alternative to insolvency proceedings* is the essential reference guide for financial institutions, legal professionals and investors. Covering 20 major jurisdictions worldwide, it provides a clear overview of the law and regulation governing debt restructuring in each one, and is structured to allow easy comparisons between jurisdictions.

- Offers a well-organised starting point for international reference
- Covers the law in 20 major jurisdictions
- Includes contributions from leading local practitioners who are experts in the field
- Uses a reader-friendly Q&A format that enables quick and easy cross-jurisdictional comparisons
- Addresses the key questions of multinational organisations
- Provides straightforward, practical commentary on each jurisdiction and the respective legal systems



FIRST  
EDITION  
2015

Debt Restructuring  
an alternative to insolvency proceedings

General Editors: Ole Borch & Lars Lindencrone Petersen, Bech-Bruun  
& Alessandro Varrenti, CBA Studio Legale e Tributario  
Founding Editor: Jacques Henrot, De Pardieu Brocas Maffei

THE EUROPEAN LAWYER  
REFERENCE

# Debt Restructuring

## an alternative to insolvency proceedings

**Jurisdictional comparisons**

**First edition 2015**

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# Italy

## CBA Studio Legale e Tributario

Alessandro Varrenti & Daniela Sorgato

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### 1. WHAT COURT-MONITORED RESTRUCTURING PRE-INSOLVENCY PROCEEDINGS OR SCHEMES HAVE BEEN DEvised BY THE LAW OF YOUR COUNTRY TO LIMIT VALUE DESTRUCTION FOR FAILING BUSINESS ENTITIES?

In order to avoid bankruptcy, business enterprises which meet certain requirements, such as being in a difficult financial situation, are eligible to resort to the following pre-insolvency proceedings, regulated by Law Decree No. 267/1942 (the Bankruptcy Law) (unless otherwise indicated herein, any reference to an article of law shall be understood as a reference to the Bankruptcy Law):

- the arrangement with creditors' proceedings (*concordato preventivo*) (Articles 160–86);
- the debt restructuring agreement proceedings (*accordo di ristrutturazione dei debiti*) (Article 182 *bis*);
- the arrangement of a certified recovery plan (Article 67(3)d).

Based on Article 2221 of the Italian Civil Code and Article 1 of the Bankruptcy Law, in order to initiate one of the above-mentioned proceedings, a business entity:

- shall exercise a 'business activity' (eg production of goods and services or transportation); and
- shall not fall within the following thresholds:
  - (i) total value of assets not higher than EUR 300,000.00;
  - (ii) annual gross turnover not higher than EUR 200,000.00 ((i) and (ii) must be determined in relation to the last three financial years prior to the filing of the petition); and
  - (iii) total indebtedness not higher than EUR 500,000.00.

In order to help enable an enterprise to solve its financial crisis by resorting to non-judicial or private solutions, the Bankruptcy Law sets up relevant advantages in case the debtor chooses one of the above-mentioned pre-insolvency proceedings.

First of all, Article 168, concerning the arrangement with creditors' proceedings, and Article 182 *bis*(3), on the debt restructuring agreement proceedings, prohibit the creditors from executing enforcement or interim measures following the publication of the petition or the agreement, respectively. The creditors are also prohibited from acquiring new privileges, unless agreed upon with the debtor.

Secondly, Article 67(3)d) and e) excludes the exercise of clawback actions in relation to deeds, payments and guarantees:

- (i) executed according to a certified recovery plan;
- (ii) executed according to an approved debt restructuring agreement;
- (iii) executed according to an approved arrangement with creditors; or
- (iv) executed following the deposit of the petition pursuant to Article 161 (see section 1.4 below).

Another important and favourable provision (Article 217 *bis*) was set out in relation to all three of the above-mentioned proceedings in order to safeguard the debtor and creditors from the risk of running into criminal liability in relation to operations executed with the objective of saving the business from bankruptcy. This provision considers Article 216 and 217, which determine the penalties in relation to the crimes connected to the bankruptcy (eg fraudulent bankruptcy), respectively, inapplicable in relation to those operations executed pursuant to an arrangement with creditors, a debt restructuring agreement or a certified recovery plan.

## **Arrangement with creditors**

### **1.1 What is the objective of the proceedings?**

Based on the latest amendments of the Bankruptcy Law, the arrangement with creditors' procedure (*concordato preventivo*) is intended to pursue the objective of the satisfaction of the creditors by means of a settlement measure that seeks to avoid bankruptcy. This main objective can be obtained either by (i) winding up the entire company or (ii) seeking to guarantee the recovery of the company through measures aimed at the prosecution of the business activity by the same entrepreneur or by third parties.

### **1.2 Do all kinds of businesses qualify?**

The requirements set out by the Bankruptcy Law are those indicated in section 1 above.

By the arrangement proceedings decree, the competent court appoints an agent who, pursuant to Article 165, is considered a public official and is subject to Articles 36–39, which apply to the receiver in a bankruptcy proceedings (Article 163).

Public entities, companies exercising agricultural activities (indicated in Article 2135 of the Italian Civil Code) and artisan enterprises do not qualify in relation to this proceedings.

### **1.3 What are the necessary approvals?**

The arrangement with creditors' procedure is initiated through the filing of a petition/proposal, which can be deposited only by the debtor and not by the creditors or any public authority.

In relation to partnerships, such petition must be approved by the partners representing more than 50 per cent of the ownership, while in the business corporations the board of directors must approve the petition.

The articles of association and the by-laws may provide otherwise.

The decision to file the petition must be adopted before a notary public and recorded in the Register of Companies.

## 1.4 What is the procedure?

The arrangement with creditors' procedure must be initiated through a petition, signed by the debtor and deposited at the court of the place where the filing company has its registered office (Article 161(1)).

The focal content of such petition, based on Article 161(1) and (2), is the settlement proposal and the relevant plan, including an estimate of the time and manner in which the suggested proposal will be realised.

The petition must also be accompanied by the following additional documents:

- an updated report on the financial standing of the company;
- an estimate of the assets of and a list of the creditors, the amount of their respective credits and any pre-emption rights;
- a list of holders of any land right or personal right over assets owned or possessed by the debtor; and
- the value of goods and list of the creditors of each shareholder with unlimited liability.

An advisor appointed by the debtor must verify the feasibility of the arrangement proposed in the petition and the truthfulness of the attached documents (Article 161(3)). The advisor shall meet several requirements of independence and professional qualification. The advisor bears criminal liability if the information provided is untrue or relevant information is omitted (Article 236 *bis*).

An officer of the competent court publishes the petition in the Register of Companies.

Pursuant to Article 161(6), the debtor is also granted the possibility of filing the petition, together with the balance sheets and a list of creditors and of their respective credits, within a deadline set up by the judge (between 60 and 120 days), to either:

- deposit the settlement proposal, the relevant plan and all other required documentation; or
- request the approval of a debt restructuring agreement pursuant to Article 182 *bis* (in detail below).

The court evaluates whether the requirements set out for the deposit of the petition and of the relevant documents are met and consequently issues a decree which either:

- rejects the petition (opposition to the decree is not allowed and, in the case of rejection, either a creditor or the court prosecutor can file the request for a declaration of bankruptcy of the company); or
- declares the opening of the arrangement procedure (opposition to the decree is not allowed).

In the latter case, the court appoints the judicial authorities that are competent in relation to the specific arrangement procedure (delegated judge and court-appointed agent).

The court orders the summoning of all creditors within 30 days following the issue of the decree and determines a deadline for the communication to each creditor of the same decree. The court-appointed agent must verify the correctness of the list of creditors and communicate to each of them the date

on which they shall be present, the debtor's petition and the decree issued by the court by which the procedure was initiated. Such a communication can be made by registered email, registered mail or by fax.

The court also orders the deposit by the debtor of a percentage of the entire sum necessary to carry out the procedure (usually 50 per cent; not less than 20 per cent).

A specific hearing is held for the approval of the settlement proposal by the creditors. Article 177 requires that such approval must be given by the majority of all creditors (meaning more than 50 per cent) or the majority of the classes in which the creditors may be divided. The creditors may also indicate their vote by mail, telegram or email within 20 days from the closing of the voting memorandum. If no vote is expressed by a creditor, such creditor is deemed to have approved the proposal.

The proceedings ends with the approval by the court.

### **1.5 Is there recourse against the opening judgment?**

The decree of the court determining the opening of the procedure is not subject to opposition since the existence of the requirements of the arrangement procedure is verified later at the stage of approval by the court.

At that stage, opposition can be filed by the debtor, by the court-appointed agent, by dissenting creditors or by any other interested party. The opposition may concern, for example, the feasibility of the arrangement, the requirements set out by the law, any purported fraudulent act by the debtor or the criteria based on which classes of creditors were determined.

### **1.6 What are the substantive tests/definitions?**

The concept of insolvency is intended as an extensive notion and it mainly refers to the inability of the debtor to regularly fulfil its obligations. The notion of insolvency shall be intended not only as a patrimonial notion, but also as a financial concept.

However, the arrangement with creditors' proceedings does not apply exclusively in cases of insolvency, but also in situations of a mere financial and economic crisis of the debtor, including a temporary difficulty to pay overdue debts, insolvency risk, indebtedness or a reduction of the company's net assets to below the legal minimum.

### **1.7 What is the role of a court-appointed agent?**

The court-appointed agent is responsible for the inventory of the debtor's assets and must carry out an evaluation of the causes of the insolvency, of the debtor's conduct, of the suggested arrangement and of guarantees offered to the creditors. The agent drafts a report on these matters and explains its conclusions during the creditors' meeting (Article 172).

The court-appointed agent has a fundamental role in relation to information to creditors and interested parties. The agent is also responsible for the supervision over the management of the debtor's assets during the

procedure and over the execution of the arrangement following the court's approval (Article 167(1)).

The agent must also inform the delegated judge of any irregular transaction carried out by the debtor (eg the concealment of a part of the assets), which may cause the judge to revoke the opening decree and, if the conditions subsist, to declare the debtor bankrupt (Article 173).

### **1.8 What protection is there from creditors?**

Further to the publication in the Register of Companies and until the approval of the decree issued by the court, the creditors are prohibited from exercising any attachment or interim measure, which would, in any case, be void, and from acquiring any pre-emption right, unless authorised by the delegated judge. Moreover, mortgages on any of the debtor's assets are ineffective towards creditors if registered within 90 days prior to the publication of the petition.

During the creditors' meeting, the creditors are authorised to object against the opening of the arrangement procedure and challenge other credits. At the same time, the debtor may reply to creditors' arguments and object to the existence or the amount of the listed credits.

Unlike in bankruptcy proceedings, any verification of the existence and amount of credits is only carried out in order to determine if the majority required for the approval of the settlement proposal is reached. Any further verification can only be requested by a creditor by filing a separate claim, which therefore gives rise to an ordinary trial.

### **1.9 What is the usual duration of the restructuring process?**

Article 181 of the Bankruptcy Law provides a deadline of six months, starting from the deposit of the petition, for the issuance of the decree of approval. This deadline can be postponed only once, for an additional 60 days.

### **1.10 Who prepares the restructuring agreement and what are the available tools?**

The settlement proposal and the relevant execution plan are prepared directly by the debtor (and generally by his advisors).

Article 160 of the Bankruptcy Law indicates the contents of the arrangement proposed by the debtor:

- debt restructuring and payment to the creditors, also by means of the transfer of assets, quotas, shares or other financial instruments, assumption of debt or other types of non-ordinary transactions (this last solution is not frequent);
- the assignment of the business activity to a third party (the so-called *assuntore*); and
- the determination of classes of creditors and of the possible different treatments of creditors who belong to the different classes.

The reorganisation plan submitted to the creditors must be approved by the majority of creditors who have the right to vote. All creditors without

pre-emption rights have the right to vote, while privileged creditors can only vote if the plan provides only partial satisfaction of their credits and exclusively in relation to the residual unpaid amount.

If different classes of creditors are formed, the proposal must be approved by the majority of creditors within the majority of classes.

In the event that the settlement proposal requires disposal of assets, the delegated judge appoints one or more liquidators and a committee of three or five creditors, which shall assist to the relevant operations.

### **1.11 Are subordination agreements necessarily given full effect?**

Privileged creditors must always be paid in full, but only within the limits of the value of the assets subject to the guarantee (Article 160(2)). The estimated value which must be reserved to the payment of privileged creditors shall be assessed by an expert.

The debtor can determine classes of creditors in the petition. Such determination must be verified by the court-appointed agent. The determination of classes of creditors cannot alter the preference awarded to the privileged creditors.

A different treatment is allowed by the law only among creditors that belong to different classes.

### **1.12 How is exit managed?**

The arrangement with creditors' procedure ends with the issue of the decree of approval by the court, which must verify the compliance to any applicable law requirement and the feasibility of the plan.

In this case, an opposition (Article 180(3) and (4)) can be filed by the debtor, by the court-appointed agent, by the dissenting creditors or by any other interested party. The opposition may concern, for example, the feasibility of the arrangement, the requirements set out by the law, any purported fraudulent act by the debtor or the criteria based on which classes of creditors were formed.

### **1.13 Who are the necessary parties?**

The only necessary party to the procedure is the debtor.

The other parties in the procedure of approval are the court-appointed agent, the dissenting creditors and any other interested party (meaning, for example and without limitation, the shareholders bearing unlimited liability, guarantors or other third parties involved in the transactions contemplated in the arrangement with creditors).

The competent judge examines all objections and either issues a decree of approval or rejects the request for approval.

Following the approval, the settlement proposal becomes binding for all creditors, both consenting and dissenting, and it must be executed under the supervision of the court-appointed agent. Article 186 of the Bankruptcy Law allows the creditors to request the termination of the arrangement procedure in case of any failure to comply with the arrangement. Such failure must be material to cause the termination.



If the delegated judge does not issue the decree of approval, bankruptcy of the debtor can be declared if the conditions subsist.

The decree of approval can be challenged before the court of appeal pursuant to Article 183.

## **Debt restructuring agreements**

### **1.1 What is the objective of the proceedings?**

The debt restructuring agreements, governed by Article 182 *bis*, were introduced in the Italian Bankruptcy Law as a measure to favour the non-judicial settlement of situations of insolvency and financial crisis of enterprises. The conclusion of this kind of agreement is subject to the autonomy of the parties involved (the debtor and the creditors).

### **1.2 Do all kinds of businesses qualify?**

The same requirements as set forth in section 1 above apply to the debt restructuring agreements. However, from 2011, such agreements can also be concluded by agricultural companies.

No court-appointed agent is involved in this procedure.

### **1.3 What are the necessary approvals?**

The debtor initiates the debt restructuring agreement proceedings by filing a petition with the competent offices of the court of the place where the filing company has its registered office, requesting the approval of the agreement entered into with the creditors representing at least 60 per cent of all the credits *vis-à-vis* the debtor. If the debtor is a company, the petition must be filed following a resolution of the board of directors.

The proceedings can be initiated only by the debtor and not by the creditors or any public authority.

### **1.4 What is the procedure?**

The petition is accompanied by the agreement entered into with the creditors and the relevant plan, indicating the time and the manner of execution of the agreement.

Article 182 *bis* of the Bankruptcy Law also requires the debtor to file, together with the petition, the following documents:

- an updated report on the financial standing of the company;
- an estimate of the assets of and a list of the creditors, the amount of their respective credits and any pre-emption rights;
- a list of the holders of any land right or personal right over the assets owned or possessed by the debtor; and
- the value of goods and a list of creditors of each shareholder with unlimited liability.

An advisor appointed by the debtor must verify the feasibility of the arrangement provided in the petition and the truthfulness of the attached documents. The advisor must meet several requirements of independence and professionalism. As in the arrangement with creditors' proceedings,

Article 236 *bis* applies in this case, providing criminal liability of the advisor for providing false or incomplete information.

### **1.5 Is there recourse against the opening judgment?**

Within 30 days from the publication of the agreement in the Register of Companies, the creditors and other interested parties can file an objection concerning the fulfilment of all legal requirements or the feasibility of the agreement.

### **1.6 What are the substantive tests/definitions?**

Debt restructuring agreements are available to companies in a 'state of crisis' (Article 182 *bis*). The notion of crisis is basically financial.

### **1.7 What is the role of a court-appointed agent?**

No court-appointed agent is involved in this procedure.

### **1.8 What protection is there from creditors?**

For a period of 60 days following the publication of the agreement, creditors are prohibited from exercising enforcement or interim measures on the debtor's assets. They are also prohibited from acquiring new privileges in relation to their credits.

The debtor may request the court to extend such a protection also to the phase of negotiation of the agreement with creditors, which takes place prior to the signing of the agreement.

This protection aims at maintaining the stability of the value of the debtor's assets until the approval of the agreement, in order to ensure a full and successful performance of the agreement.

### **1.9 What is the usual duration of the restructuring process?**

Within 30 days from the publication of the agreement and the execution plan in the Register of Companies, the creditors and the other parties who have a relevant interest may file an objection to the court. After examining the objections, if any, the court issues (or rejects the issuance of) a decree of approval.

### **1.10 Who prepares the restructuring agreement and what are the available tools?**

The debt restructuring agreement has the particular nature of a private contract entered into between the debtor and its creditors, but it also has a public relevance, which justifies the control of the court by means of the procedure of approval.

The debtor and the creditors can determine freely the contents of the agreement, since no limitation whatsoever is provided for by the Bankruptcy Law.

The agreement must be entered into with creditors who represent at least 60 per cent of the credits *vis-à-vis* the debtor.

The agreement is binding only for the creditors who are a party thereto. The other creditors preserve the right to be satisfied in full.

### **1.11 Are subordination agreements necessarily given full effect?**

As mentioned above, the agreement is binding only for the creditors who are a party thereto. The other creditors are entitled to request full payment of their credits:

- after 120 days from the issuance of the decree of approval; or
- after 120 day from the expiration of their credits, if not yet expired.

### **1.12 How is exit managed?**

The court examines any objection filed against the debtor's petition and issues a decree, deciding on the request for approval of the debt restructuring agreement.

The competent judge must verify both the fulfilment of all requirements set out by law and the feasibility of the agreement, in particular in relation to the possibility of settlement of the credits of those creditors who did not enter into the agreement.

The proceedings of approval is governed by the provisions regarding the arrangement with creditors' procedure, if applicable.

Pursuant to Article 183 of the Bankruptcy Law, the decree which is issued by the competent court following the approval of the agreement can be challenged before the court of appeal by the debtor, by the creditors and by any other third party which participated in the proceedings, within 15 days from the publication of the decree in the Register of Companies.

Creditors who entered into the agreement may also resort to the contractual remedies provided for by the Italian Civil Code, such as, without limitation, the request for termination, annulment or declaration of nullity of the agreement.

### **1.13 Who are the necessary parties?**

Parties are the debtor and the dissenting creditors, if any.

### **Certified recovery plan**

Bankruptcy Law also contemplates the possibility for the debtor to issue a recovery plan, with the objective of saving the business. This measure does not entail any monitoring by the court.

Article 67(3)d) protects from the clawback action any deeds, payments or guarantees executed on the basis of a recovery plan which allows the recovery of the debtor's indebtedness and the rebalancing of its financial trend.

An independent advisor, appointed by the debtor, verifies and assesses the truthfulness of the business data and of the feasibility of the recovery plan. Also in this case Article 236 *bis*, on the criminal liability of the advisor, applies.

### **1.1 What is the objective of the proceedings?**

The objective of the provisions on the certified recovery plan is to allow the debtor to avoid the risk of insolvency procedures. The purpose of the plan is to guarantee the continuation of the business activity, eg through new financings, the involvement in the business of strategic creditors or revision of the company's current business model. As mentioned above, the Bankruptcy Law protects the creditors from clawback actions in relation to the transactions realised on the basis of the plan.

### **1.2 Do all kinds of businesses qualify?**

The same requirements as set forth in section 1 above apply.

No court-appointed agent is necessary, as the court is not involved in the preparation and execution of the recovery plan.

### **1.3 What are the necessary approvals?**

The debtor prepares the recovery plan unilaterally (generally, with its financial counsel), with the approval of the board of directors.

Pursuant to Article 67(3)d) of the Bankruptcy Law, the recovery plan shall be certified and approved by an independent advisor appointed by the same debtor. In particular, the advisor must assess the truthfulness of the business data and of the feasibility of the recovery plan.

The advisor who certifies the recovery plan shall satisfy the same requirements as the receiver in a bankruptcy proceedings and as the member of a board of statutory auditors.

The law does not require the approval of the plan by the creditors, but normally the advisor assesses whether there is a sufficient consensus by the creditors in relation to the plan as a requirement for its actual feasibility.

### **1.4 What is the procedure?**

Neither the court nor the creditors are involved in this procedure.

The law does not impose the publication of the certified recovery plan or its communication to the other parties, but, if required by the debtor, it may be recorded in the Register of Companies.

### **1.5 Is there recourse against the opening judgment?**

In this case, the court is not involved.

### **1.6 What are the substantive tests/definitions?**

The verification of a situation of insolvency is not required by the law. Therefore, any business entity may present a recovery plan. Clearly, as it is a precautionary measure, the debtor will resort to the certified recovery plan when he is in financial difficulty but not yet in a state of non-reversible insolvency.

### **1.7 What is the role of a court-appointed agent?**

No court-appointed agent is involved.

### **1.8 What protection is there from creditors?**

The creditors are not prohibited from executing enforcement or interim measures.

As mentioned above, the plan is based only on the debtor's data, the truthfulness of which is verified by the appointed advisor. In the case of disagreement about the existence and type of a specific credit, both the debtor and the creditor may start an ordinary judicial proceedings.

### **1.9 What is the usual duration of the restructuring process?**

The recovery plan must indicate the period of time for the execution of the transactions necessary for the rebalancing of the company's financial situation. This period must be determined based on the specific situation of the business and on its indebtedness. No minimum or maximum period is set forth by the law.

### **1.10 Who prepares the restructuring agreement and what are the available tools?**

As indicated above, the recovery plan is a non-judicial deed drafted unilaterally by the debtor, approved by its board of directors and certified by an independent advisor appointed by the debtor.

### **1.11 Are subordination agreements necessarily given full effect?**

The contents of the recovery plan can be freely negotiated between the debtor and its creditors.

### **1.12 How is exit managed?**

N/A.

### **1.13 Who are the necessary parties?**

N/A.

## **2. POST-INSOLVENCY PROCEEDINGS**

The most common post-insolvency proceedings is the bankruptcy proceedings, which is regulated by Articles 5–159 of the Bankruptcy Law.

The Bankruptcy Law also contemplates another compulsory winding up proceedings (*liquidazione coatta amministrativa*, regulated by Articles 194–215). This specific proceedings is reserved only for certain types of companies, such as banks, insurance companies and trust companies.

Furthermore, Law No. 95 of 3 April 1979 and Law No. 347 of 23 December 2003 introduced two proceedings concerning the management of large enterprises in a state of insolvency by the agents appointed by the Ministry of Economics. These proceedings apply to companies which meet certain requirements as to the dimensions and nature of their indebtedness. The main objective of these proceedings is to preserve the value of the enterprise, unlike the bankruptcy and the compulsory winding up proceedings, which aim exclusively at winding up of the insolvent company.

As the bankruptcy proceedings are by far the most common post-insolvency proceedings, and in consideration of the limited extent of this chapter, only such proceedings are described further below.

## **Bankruptcy proceedings**

### **2.1 What is the objective of the proceedings?**

The bankruptcy proceedings is an enforcement proceedings that is intended to safeguard the debtor's assets and to liquidate them in order to satisfy the debtor's creditors with the sales proceeds.

In this type of proceedings, saving the insolvent company and guaranteeing its continuity does not constitute a relevant objective.

A bankruptcy proceedings can also be initiated in the case of failure of one of the pre-insolvency proceedings contemplated above.

### **2.2 Do all kinds of business entities qualify?**

The same requirements as set forth in sections 1.1 above apply to bankruptcy proceedings. However, public entities, companies exercising agricultural activities (indicated in Article 2135 of the Italian Civil Code) and artisan enterprises cannot be subject to bankruptcy.

### **2.3 What are the necessary approvals?**

The insolvent debtor, one or more creditors and the public prosecutor are entitled to file a petition for bankruptcy of an insolvent company (Article 6). If the debtor is a company, the petition is normally filed by the board of directors, without the need for prior authorisation by the shareholders' meeting.

### **2.4 Is it valid and binding to agree that such proceedings be a default/termination event?**

Under Article 72(6) of the Bankruptcy Law, contractual clauses providing for the termination of an agreement in the case of a declaration of bankruptcy of one of the parties are not effective.

### **2.5 What is the procedure?**

The petition for bankruptcy shall be filed at the offices of the court where the defaulting company has its registered office (Article 9).

A judge in charge appointed by the court shall set up, by a decree, a bankruptcy hearing which shall take place no later than 45 days following the filing of the petition. The same decree must also set up a deadline of no more than seven days prior to the hearing for the parties to file their statements of defence, documents and technical reports. In particular, within the same term, the debtor shall file the balance sheets of the last three financial years and a detailed and updated documentation regarding its financial situation.

Following the process of verification of the subsistence of the requirements, the court can (i) accept or (ii) reject the claim for bankruptcy,

or (iii) terminate the proceedings if the claim for bankruptcy is withdrawn by the creditor who was satisfied.

If the claim for bankruptcy is accepted, the bankruptcy proceedings starts and the court:

- appoints the judge and the receiver in charge for the prosecution of the bankruptcy procedure;
- if not yet provided, orders to the debtor to deposit the balance sheets, accounting and tax documents within three days;
- determines the date of the hearing for the assessment of the credits (*esame dello stato passivo*) within 120 days from the deposit of the decision; and
- grants a deadline of 30 days from publication of the decision, to allow the creditors and the third parties to file their claims (Article 16).

The court's decision is notified to the debtor and communicated to the receiver, the public prosecutor and the party who filed the claim for bankruptcy, then recorded in the Register of Companies.

The court may allow the temporary and monitored management of the bankrupt company and the continuation of its activity.

From the date of the declaration of bankruptcy, the debtor is no longer entitled to manage or dispose of its assets, which are managed by the receiver, under the supervision of the judge in charge and of the committee of creditors.

Once the assessment of the credits is completed, an inventory of the debtor's assets is prepared. Thereafter, the receiver drafts a plan indicating the operations and the timing for the winding up of the debtor's company (Article 140 *ter*), which shall be approved by the committee of creditors.

The receiver then carries out the sale of the assets, either as a whole (transfer of the company or of a branch) or individually.

The proceeds obtained from the sale are distributed among the creditors every four months, based on a distribution plan (Article 110) which must take into account their priority ranking.

The bankruptcy proceedings usually ends with the execution of the final distribution.

## **2.6 Please provide information about voluntary filings**

### **Are creditors invited to participate in the initial hearing? If so, how are they notified?**

If the petition for bankruptcy is filed by the debtor, the creditors are not invited to the first hearing. They are informed of the opening of the proceedings once the relevant decree has been issued.

### **Supporting documentation to be filed**

The debtor must deposit the balance sheets of the last three financial years and a detailed and updated documentation regarding his financial situation.

**Main restructuring principles/are proposals to be term sheeted at entry? If so, is an expert opinion or report on the feasibility of the contemplated plan needed?**

No restructuring principal applies to the bankruptcy proceedings, since its only objective is the winding up of the debtor. Only a temporary management of the bankrupt company is allowed.

**Publicity: how is the opening judgement rendered public? When and how are creditors deemed aware of the proceedings?**

The court's declaration of bankruptcy is communicated to the creditors by the receiver and recorded in the Register of Companies.

**2.7 How are creditors' representatives chosen?**

Based on Article 40, a committee of creditors is appointed by the judge in charge within 30 days from the issuance of the decree of opening of the bankruptcy proceedings. The committee is composed of three or five creditors representing equally each class of credits.

The committee must monitor the activity of the receiver and in certain cases it must authorise the receiver's deeds and provide advice.

The committee also has the power to examine the accounting and other documents, and to request clarifications or information from the debtor and the receiver.

The committee's members can be replaced by the judge.

**2.8 Is there recourse against the opening judgment?**

The debtor and any other party who has a relevant interest can challenge the court's decision in front of the competent court of appeal within 30 days following its notification or, if no notification was executed, within six months from its publication in the Register of Companies (Article 18). Upon request by one of the parties or by the receiver, the court of appeal is entitled to suspend the liquidation of the assets of the bankrupt company (Article 19).

Within the same deadline, the filing creditor and the public prosecutor can challenge the decision of rejection of the initial claim for bankruptcy in front of the court of appeal (Article 22).

**2.9 What are the roles and powers of committees?**

For the compositions and the functions of the Committee of creditors, see section 2.8 above.

The Committee votes by the majority of its members.

**2.10 What are the consequences of opening judgments for creditors?**

**Stay?**

Following the issuance of the decree of opening of the bankruptcy proceedings, the creditors are not entitled to enforce their credits individually.



**Forbidden payments?**

Following the issuance of the decree of opening of the bankruptcy proceedings, all payments made and received by the debtor are ineffective *vis-à-vis* the debtor's creditors (Article 44).

**Interests accruing during period: paid at contractual payment dates? Deferred and paid after the plan is adopted? Capitalised? Is the rate necessarily the contract rate?**

Pursuant to Article 55, the accruing of interest is suspended as of the date of the decree of opening of the bankruptcy proceedings.

Privileged creditors maintain their right to the interest accrued after the opening of the proceedings, but only for a limited period of time.

**Is the opening judgment a valid draw stop?**

The opening judgment determines a definitive draw stop.

**Necessity to file proof of claim: are all creditors required to file proof of claim? Are secured creditors necessarily notified? Are there any time limits? Are non-resident creditors treated differently? What are the consequences if a creditor time-barred? Is the debtor discharged?**

All creditors must prove their individual claims and credits, by means of a specific petition.

Such petition is necessary in order to set forth a claim regarding the credit or another right *vis-à-vis* the debtor and it must describe, *inter alia*, the factual and legal arguments supporting the claim.

The petition shall be filed within 30 days prior to the hearing scheduled for the assessment of the credits.

The receiver examines all the petitions and drafts a report of verification (*progetto di stato passivo*) (Article 95), containing the list of all creditors and holders of rights over the debtor's assets. The report must be deposited at least 15 days prior to the hearing.

The creditors may file, within five days prior to the hearing, written observations and new documentation.

At the hearing, the judge in charge decides by a decree whether to accept, in whole or in part, or reject the creditors' claims.

The above-mentioned decree can be challenged by a creditor, another party claiming rights *vis-à-vis* the debtor or the receiver (Article 98).

The claims submitted to the court after the expiration of the deadline are admitted if set forth within one year from the issuance of the decree of the final assessment of the credits. If a claim is filed following the expiration of the one year deadline, such claim will be accepted only if the claimant proves that the delay was not due to its own fault (Article 101).

**2.11 What is the duration of the restructuring process?**

The duration of the entire bankruptcy proceedings is not determined by the law and it cannot be estimated in advance.

## 2.12 How do creditors vote?

In a bankruptcy proceedings, the approval of the creditors is not required by the law.

## 2.13 What are the rules on clawback/voidability?

Deeds	Relevant period of execution	Requirements for the exercise of the claim	Type of claim	Exemptions
Deeds free of charge	2 years prior to the bankruptcy		judicial action, which can be set forth to obtain declaration of ineffectiveness (Article 64) without time limitations	
Payments of non-expired credits	2 years prior to the bankruptcy		judicial action, which can be set forth to obtain declaration of ineffectiveness (Article 65) without time limitations	
<ul style="list-style-type: none"> <li>Deeds in which the debtor's obligation has a total value higher by a quarter than that of the counterparty</li> <li>Payment of expired credits by non-ordinary means (in particular, different from cash)</li> </ul>	1 year prior to the bankruptcy  1 year prior to the bankruptcy	knowledge, by the counterparty, of the debtor's state of insolvency; such condition is presumed, unless contrary evidence is provided by the counterparty	clawback action pursuant to Article 67(1), to be set forth within 3 years from the opening judgment or 5 years from the execution of the deed	<ul style="list-style-type: none"> <li>usual payments for the ongoing of the business;</li> <li>deposits in bank accounts not consisting in a payment in favour of the bank;</li> </ul>

<ul style="list-style-type: none"> <li>• Non-judicial pledges and mortgages over existing and non-expired credits</li> <li>• Judicial and non-judicial pledges and mortgages over expired credits</li> </ul>	<p>1 year prior to the bankruptcy</p> <p>6 months prior to the bankruptcy</p>			<ul style="list-style-type: none"> <li>• certain registered sales and preliminary sales contracts;</li> <li>• deeds, payments and guarantees executed based on a certified recovery plan;</li> </ul>
<ul style="list-style-type: none"> <li>• Payment of expired credits</li> <li>• Deeds executed against a performance or a service by the counterparty</li> <li>• Establishment of a guarantee in relation to a contextual assumption of a debt</li> </ul>	<p>6 months prior to the bankruptcy</p>	<p>the receiver must prove that the counterparty had knowledge of the debtor's state of insolvency</p>	<p>clawback action pursuant to Article 67(2), to be set forth within 3 years from the opening judgment or 5 years from the execution of the deed</p>	<ul style="list-style-type: none"> <li>• deeds, payments and guarantees executed pursuant to Article 182 <i>bis</i> (debt restructuring agreements) or in relation to an arrangement with creditors' proceedings;</li> <li>• payments of worker's or collaborator's salaries;</li> <li>• payments of expired debts, when necessary to enter into an arrangement with creditors' proceedings</li> </ul>
<p>Deeds, which cause damages to creditors</p>		<p>the receiver must prove that the deed damages the creditors and that the counterparty had knowledge of the debtor's insolvency</p>	<p>ordinary clawback action pursuant to Article 2901 of the Italian Civil Code, to be set forth within 5 years from execution of the deed</p>	

The creditors who, as a consequence of the clawback actions, had to return the amount obtained, can set forth a claim against the bankruptcy to compete with the other creditors in obtaining satisfaction over the debtor's assets.

### **2.14 What are the rules on set-off/netting?**

Article 56 allows the creditors to set off their debts towards the bankruptcy with their respective credits, even if the latter have not yet expired prior to the opening judgment.

However, in relation to non-expired credits, no set-off shall operate in the event that the credit was assigned to the creditor following the declaration of bankruptcy or within one year prior to such a declaration.

### **2.15 How is exit managed?**

As indicated above, the bankruptcy proceedings normally ends with the execution of the final distribution. It can also finish before, if all the creditors have been paid in full or if the proceedings does not allow the creditors to be satisfied even in part.

The bankruptcy proceedings may also end as a consequence of the initiation of an arrangement with creditors within the bankruptcy proceedings under Articles 124–54.

### **2.16 Are 'prepackaged' plans, arrangements or agreements permissible?**

Prepackaged plans or agreements are not allowed.

### **2.17 Is a public authority involved?**

The public authorities involved are the public prosecutor, the court and the judge in charge.

### **Powers?**

Article 7 allows the public prosecutor to file a petition requesting the opening of a bankruptcy proceedings if he has become aware of the insolvency during a criminal trial or due to the information provided by a civil court during a civil trial.

Section 2.5 above presents details in relation to the role of the court and of the judge in charge.

### **Does it have to rule on the debtor's eligibility to the court protection?**

As indicated in section 2.5 above, the court examines all evidence, directly requests whatever further evidence or information is required and verifies the requirements for the opening of a bankruptcy proceedings.

The judge in charge monitors the activity of the receiver and authorises his actions.

## **2.18 What is the treatment of claims arising after filing/admission?**

These claims are paid with priority.

## **2.19 Are there ongoing contracts?**

The execution of ongoing contracts is suspended in the event of bankruptcy of one of the contractual parties. The receiver, upon authorisation of the committee of creditors, can decide to replace the debtor in the contractual relationship (Article 72(1)).

Upon the request of the counterparty, a contract is automatically terminated if the receiver does not enter into it within the deadline assigned by the judge in charge (no longer than 60 days).

In case of termination of a contract, the contractual party can set forth a claim against the bankruptcy, requesting the payment of its credits arising from the contract.

## **2.20 Are consolidated proceedings for members of a corporate family/group possible?**

Bankruptcy of a group of companies is not contemplated by the Italian law. Therefore, in a bankruptcy proceedings, each company must be considered as autonomous.

If there are shareholders with unlimited liability, the declaration of bankruptcy of the company also determines the bankruptcy of such shareholders.

## **2.21 What are the charges, fees and other costs?**

The receiver's fees, determined by the judge in charge, and the costs of the proceedings are deducted from the proceeds of the sale of the debtor's assets (Article 109).

# **3. LIABILITY ISSUES**

## **3.1 What is the liability of managers/directors *vis-à-vis* creditors?**

The directors of a company are jointly liable towards the company for damages caused by breaching their duties. Pursuant to Article 2392 of the Italian Civil Code, the liability is excluded only for those directors who did not act negligently and communicated their dissent in a timely manner. A liability action against the directors can also be initiated by a relevant minority of shareholders or by the company's creditors.

In the case of insolvency proceedings, the liability action can be exercised by the receiver, the liquidator or the agent, as the case may be, which represents the insolvent company, its shareholders and the creditors (Article 2394 *bis* of the Italian Civil Code).

The Bankruptcy Law contains a number of specific provisions governing the criminal liability of the directors (Articles 216–37).

### **3.2 Lender's liability**

A qualified lender may incur liabilities by maintaining a credit line in favour of an enterprise in financial difficulty and, in particular, in the case of a risk of bankruptcy.

The appearance of solvency deriving from an unjustified maintenance of the credit line by a qualified lender may give rise to a request for damages by other creditors. In Italy, case law has confirmed that a bank can be deemed liable *vis-à-vis* the other creditors of the same debtor for maintaining an unjustified appearance of solvency of the latter.

When filing such a claim against the lender, the plaintiff must prove:

- the actual fault and negligence of the lender in creating the situation of appearance;
- the damage suffered by the plaintiff; and
- the fact that the damage was directly caused by the appearance of solvency.

The lender may also incur criminal liability, eg in the following cases:

- when, by maintaining a credit line, the lender allows the debtor to delay the opening of a bankruptcy proceedings (ordinary bankruptcy); or
- when the lender simulates the existence of privileges, pledges, mortgages or other priority rights (eg a repurchase option) over certain credits (preferential bankruptcy).