THE GLOBAL ITALIAN "RORDORF REFORM" (LAW OCTOBER 19TH 2017, N. 155): THE CURRENT SITUATION[⊗]

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1. - At present, while almost all the European Union countries have adopted new insolvency laws, the Italian Law - in its general structure – dates back to 1942.

The Law concerning the business crisis should be completely reformed in the near future (see §§ 6 ff.).

It is now a widespread opinion that in Italy a complete reform of the entire Insolvency Law is necessary, not only for substantial reasons but also for the country's image.

Moreover, the frequent reforms which have occurred in the past, have created significant difficulties in the application of the

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Law because - in a civil law legal system - the continuous modification of the rules hinders the creation of an established and uniform case-law.

Today, ailing companies have the opportunity to choose among a wide variety of procedures to liquidate or turn around their business.

These include:

- Out of Court Compositions with Creditors;

- Attested Plans for Restructuring;

- Agreements for the Restructuring of Debts;

- Agreements for Restructuring of Debts Involving Financial Entities;

- Agreements with Tax Authorities (Tax Settlements);

- Arrangements with Creditors: in both its model: based on Liquidation and with Business Continuity;

- Extraordinary Administrations for large Undertakings in State of Insolvency;

- Bankruptcy;

- Enforced Judicial Liquidations.

Some of these procedures can be considered formal insolvency procedures, according to the definition adopted by the European Union.

2. – Presently, the most important and widely used procedures are Bankruptcy (i.e. *fallimento*) and Arrangement with Creditors (i.e. *concordato preventivo*).

Both Bankruptcy and Arrangement with Creditors are judicial procedures that are provided for by the Court, which outlines the general structure of the process and controls its evolution.

It is necessary to point out that the judicial authority, when carrying out this function, is not acting, as usual in civil jurisdiction, to solve a contrast between two opposite parties.

Instead this is a function of a managerial character in a proceeding focused on its specific goals.

3. – The term Bankruptcy describes a liquidation proceeding, which can be used by a large number of creditors, including companies.

Bankruptcies can be commenced by both individuals and companies (*rectius*: natural persons, legal persons or other entities which may be subject to bankruptcy while carrying out commercial activity) even if it is acknowledged that in other jurisdictions the term "Bankruptcy" only refers to liquidation proceedings that involve individuals.

The goal of Bankruptcy under Italian Law is only the liquidation of the assets of the company (*rectius*: Bankruptcy is a liquidation and a compulsory winding-up procedure).

The main objective of Bankruptcy is to grant protection to the rights of the creditors and to maximize their return, especially when compared to the ordinary individual enforcement.

4. – The primary goal of the Arrangement with Creditors is instead the preservation of the company or its business, even if liquidation remains a legitimate outcome of this procedure.

The Arrangement with Creditors is a very important proceeding; as mentioned before, the goals of the arrangement with creditors – a satisfactory and preservation procedure - can be either the restructuring or the liquidation of the company or its business; and these two objectives / goals can be pursued within the same procedure.

During this procedure – unlike what happens in the Bankruptcy – the debtor remains in possession of his / her assets and continues the activity of the enterprise under the control of the court–appointed receiver.

The goals pursued by the Law are in this case carried out without depriving the debtor of the management of his / her assets and the management of the enterprise.

5. - To facilitate the preservation of viable but distressed companies or businesses, the Italian Legislator introduced in 2012 the procedure called Arrangement with Creditors on a Going Concern Basis.

The model of this procedure is the discipline of the Arrangement with Creditors described above, but this type (*sub*-model) of arrangement is less frequently used than the liquidating arrangement.

The goal of this special procedure is to maintain the business operation while searching for a buyer, or for the approval of an internal restructuring plan.

6. - It is now a general opinion that in Italy a complete reform of the entire Insolvency Law is necessary, not only for substantial reasons but also for the country's image.

The act of the Parliament that delegated the Government to reform the Insolvency Law is the Law October 19th 2017, n. 155.

If the Government will implement the guidelines included in the recently "Rordorf Reform", the Law concerning the business crisis will be completely reformed in the near future.

Moreover, the frequent reforms, which have occurred recently, have created significant difficulties in the application of the Law because - in a civil law legal system - the continuous modification of the rules hinders the creation of an established and uniform case-law.

Considering these aspects, according to the Reports on the Bill n. 3671, presented by the Minister of Justice to the Chamber of Deputies on March 11th, 2016, the need was «from all the scholars and the operators, to adopt an approach to reform which is no longer episodic and directed only to deal with the emergency, but (an approach to reform which is) systematic and organic, in order to shed clarity on a system that has become too confused».

In this process, the Italian Legislator will have to take into account the European Union legislation and in particular:

(*a*) the Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20th, 2015 on insolvency proceedings;

(*b*) the Commission Recommendation of March 12th, 2014 on a new approach to business failure and insolvency.

The Italian Legislator will also have to consider the model law on insolvency elaborated by the United Nations Commission on International Trade Law.

7. - Among the general principles indicated in the "Rordorf Reform", it is worth mentioning some lexical terminological innovations, such as:

(*a*) the replacement of the term "Bankruptcy" with "Judicial Winding-Up Procedure" in accordance with a trend already observed in other European civil law countries (France, Germany and Spain). This change is justified by the need to avoid the negative and disparaging meaning that is traditionally associated with the word "Bankruptcy". In fact, as any business activity implies a certain degree of risk and uncertainty, the unfortunate outcome (failure) may not be dependent on the entrepreneur's ability. As a result, the use of the word "Bankruptcy" can be inappropriate;

(*b*) to distinguish the concepts of crisis and insolvency, and to identify the crisis as a probability of future insolvency.

Furthermore, from the general point of view, the upcoming legislation:

(*a*) will give priority to the proposals that intend to overcome the crisis and ensure the business continuity, even by means of a different entrepreneur, as long as these proposals ensure the best satisfaction for the creditors;

(*b*) will consider the Judicial Winding-Up (which should replace the actual "Bankruptcy" procedure) as a last resort mechanism;

(*c*) will ensure the specialization of the judges involved in insolvency procedures and the improvement of their skills;

(*d*) will introduce specific procedures of alert and assisted resolution of the crisis aiming at facilitating the negotiation between the debtor and the creditors on a confidential basis; a specific body established in each Chamber of Commerce will be in charge of these procedures.

8. - It is obviously not possible to analyse more thoroughly the general aspects of the reform, but it must be pointed out that great importance is given to the necessity to establish rules on the crisis of the groups of companies that today are outside the scope of the Italian insolvency legislation.

As a matter of fact, it is obvious that in this situation the crisis and / or the insolvency have features that are specific.

In an effort to address this issue, the European legislation introduced some provisions in the above-mentioned EU Regulation 2015/848 on cross-border insolvency.

Therefore, the upcoming Law should provide not only rules to allow a unitary procedure for the insolvency of the companies which are part of the same group, but also rules to establish reciprocal information duties in case of separate procedure taking place before different courts.

In particular, with reference to the unitary procedure of the group's Arrangement with Creditors:

(*a*) it should be provided that a single court will handle the procedure and that a single receiver must be appointed by the court;

(*b*) the presentation of a unitary proposal for the recovery of the "group crisis" will regulate intra-group operations and transactions to preserve the business continuity, and to guarantee the protection of the shareholders and of the creditors of each company part of the group.

Also with regard to the unitary procedure of the Judicial Winding-Up of the Group, the Law is expected to identify only one competent judicial authority and court-appointed administrator.

The Government, among other things, will also have:

(*a*) to identify the criteria to proportionally allocate the costs of the proceeding among the companies part of the group;

(*b*) to grant to the court-appointed administrator certain powers to be exercised in respect also to the non-insolvent companies.

9. - Regarding the Judicial Winding-Up procedure which is supposed to replace the current Bankruptcy procedure, it should be based on the following fundamental new principles:

(*a*) first of all, the increase of the powers of the court-appointed administrator, who will acquire a leading role in the Judicial Winding-Up procedure, and whose action will be more effective and trustworthy through a series of measures including:

- (*a1*) a more stringent regulation of incompatibilities of offices in the event of subsequent insolvency proceedings;

- (*a2*) the definition by law of the minimum content of the liquidation plan;

- (*a3*) the possibility for the court-appointed administrator to file or continue specific lawsuits if they can have beneficial effects on the insolvent estate;

(*b*) the limitation of the grounds for avoidance actions that aims at invalidating the debtor's acts carried out before the beginning of the procedure;

(*c*) regarding the examination of claims, innovations should be introduced to ensure that this phase is governed according to the criteria of promptness and concentration. These criteria consist in:

- (*c1*) facilitating the presentation of the creditors' claim application online, and restricting the possibility to submit late claims;

- (*c2*) examining each credit to be off-set within the insolvency procedure;

(*d*) regarding the liquidation of the assets, the Law is intended to introduce procedures inspired by the maximum transparency and efficiency to be pursued also through the use of the most modern technologies.

The entire administration of the liquidation is supposed to ensure the utmost surveillance, transparency and disclosure also through the use of the system so called "Common", which is based on three fundamental principles:

- the introduction of a unified national online market for the assets to be sold;

- the possibility accorded to creditors to purchase such assets if specifically authorized;

- the establishment of one or more funds to manage the unsold assets.

10. – The Law also introduces some modifications with regard to the Release of the Debtor Procedure.

The most significant innovations seem to be:

(*a*) to extend the discharge of debt to companies - and therefore not only to natural persons as in the present provisions - if it is demonstrated that the directors or (in case of partnership) the partners are worthy;

(*b*) to provide types of automatic discharge of the debtor in small value insolvency cases, unless the creditors express their opposition.

11. - Regarding the reform of the Arrangement with Creditors, the future Legislator seems, in general, willing:

(*a*) to allow the arrangements with creditors to have only a liquidation purpose:

- (*a1*) when there are external resources that considerably increasing the creditors' satisfaction;

- (*a2*) when the payment of at least 20% of the total amount of unsecured claims is guaranteed;

(*b*) to redefine the method to verify the reliability of the company data reported in the proposal and its feasibility, by identifying the powers of the court to this regard;

(*c*) to eliminate the assembly of the creditors by providing online procedures to allow creditors to discuss the proposals and to express their vote;

(*d*) to review the current rules of executory contracts, with reference to their possible stay and dissolution, the role of the receiver appointed by the court, and the competence to determine the indemnity;

(*e*) to provide detailed rules on the implementation of the plan, including the possibility for the court to entrust the implementation of the proposal to a third party.

12. - To integrate the provisions regarding the Arrangement with Creditors having the aim of the business continuity, the "Rordorf Reform" provides that rules will apply:

(*a*) even when there is an on-going business lease; as well as

(*b*) when the Arrangement with Creditors provides, beside the business continuity, also the liquidation of the assets that are non-functional to the enterprise.

In case the enterprise subject to the arrangement with creditors is a company, the Legislator shall also consider:

(*a*) to set rules to require upon the bodies of the company the obligation to promptly implement the proposal once it has been

endorsed by the court; such rules should also provide that in the event of dilatory or obstructive behaviour, the implementation of the proposal may be entrusted to a provisional administrator;

(*b*) to coordinate the rules of the arrangement with creditors regarding the companies with the rules on transformation, merger and division.

13. - The global reform intervenes realistically not only on the insolvency discipline but also on the discipline contained in the civil code that concerns, directly or indirectly, the crisis of companies.

Among these, it is fundamental to highlight the important provision that obliges the future Legislator to set rules regarding organizational systems directed to promptly discover and take action in case of a crisis situation, in order to avoid the loss of continuity of the business.

According to this new rule, the individual entrepreneur or the board of directors will have to rapidly adopt the instruments indicated in the "Rordorf Reform" in order to resolve the crisis and recover the business continuity.

These principles, which are probably already implicit in the current Italian Company Law, will be expressly codified in the near future. Therefore, they will become mandatory both for the individual entrepreneur and for the organ of the company, so they will impact all types of entities.

In conclusion, the works on this Reform are still in progress.