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LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest.

We would welcome any comment you might have.

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**NEW AMENDMENTS TO THE  
BANKRUPTCY PROCEEDINGS:  
OVERVIEW OF THE CURRENT  
STATUTORY REGULATIONS IN  
ITALY**

D.L. 14.3.2005 nr. 35

L. 14.5.2005, nr. 80

D.L. 30.12.2005, nr. 373

D.Lgs. 9.1.2006, nr. 5

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**INTRODUCTION**

Through its Legislative Act 14.5.2005, nr. 80, the Italian Parliament conferred to the Government the power to issue within 180 days brand new Statutory Regulations addressing the comprehensive reform of the insolvency proceedings. On 9.1.2006 D. Lgs. 5/2006 was enacted by the Government.

The new legislation, which reforms the bankruptcy proceedings, will enter in force starting from 16.7.2006, save for Articles 48 and 50, which are already in force.

The reform updates domestic legislation to the standards that International agreements require and avoid the risk of sanctions by the European Council.

**BANKRUPTCY DISCHARGE**

Principle of discharging bankrupt debtors from outstanding debt after liquidation of

the debtor's estate and following conclusion of the insolvency proceedings has been eventually adopted.

The goal of such principle of law is to set debtor free from the commitments relating to missing payment of creditors, being aware that it is harsh to believe that he could otherwise set itself free from residual debt after having partially satisfied creditors through the insolvency liquidation of its assets.

Doing so, the bankrupt debtor gets the chance of a fresh start, by carrying on new business, which it would be otherwise prevented.

Discharge from debt is limited to individuals, in cases where debtor actively cooperated during insolvency proceedings and is prevented whenever either before or after those proceedings the bankrupt entrepreneur acted fraudulently, as provisions of Article 142 set forth.

Discharge cannot affect the following obligations that are considered exempt-properties:

- Alimonies, supports and commitments arising from relationship not included within insolvency proceedings, as Article 46 determines
- Compensations for damages arising from non-contractual illicit activities, criminal and administrative sanctions, if not auxiliary to extinguished debt.

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## **EXCLUSION OF THE “SMALL ENTREPRENEURS” FROM THE INSOLVENCY PROCEEDINGS**

The new regulation has maintained the provision upon which just business entrepreneurs may be subjected to insolvency proceedings, provided they are not small entrepreneurs.

According to Article 1 of the new Bankruptcy Act, those entrepreneurs that have either:

- Invested in their business an amount higher than € 300,000.00
- Realized income in a yearly amount higher than € 200,000.00, calculated on the average income of the last three years or from the beginning of their business if shorter than three years

are not considered small entrepreneurs.

## **INSOLVENCY DECLARATION**

The Tribunal has jurisdiction to either issue or receive declarations of insolvency. Petitions are either voluntary or involuntary.

The parties are heard by the Court, including the Prosecutor, whenever he/her took action for the declaration of insolvency.

Parties can file defensive pleadings, offer documentary evidence and plead the Court for admission of an expert opinion.

Anyhow, the Tribunal calls the debtor to present up to date reports about his/her proprietor, economical and financial situation.

Upon motion by a party, the Tribunal can issue preliminary relief aiming at preservation of the integrity of the assets subjected to the proceedings.

Such protective measures last until the Court decision on the adjudication of bankruptcy has been issued.

The Court Decree about the adjudication of bankruptcy must specify the deadline

for the examination of the proofs of claims and for their filing by those creditors and thirds that actually have a claim against the assets of the bankruptcy.

The examination of the proofs of claims shall be concluded within 120 days from the Decree about adjudication of bankruptcy.

Those creditors who did not observe the above deadline in a timely manner for filing their proof of claim, shall file their claim as a delayed claim.

The judgement of adjudication of bankruptcy is enforceable:

- Between the parties since the date of its publication, in accordance with Article 133 cpc
- Towards third parties since the date of its filing with the Companies Registry.

The above difference is not immaterial, because during the time between publication of the judgement and its filing with the Companies' Register, there is no stay against all creditors beginning or continuing to recover claims against the debtor, or creating or enforcing liens against property of the debtor.

## **THE ROLE OF THE JUDGE AND THE BANKRUPTCY TRUSTEE**

According to Article 25, the Judge exercises the powers of supervision and control over the regularity of the procedure.

Broad powers formerly attributed to the Judge have been vested with the Meeting of creditors within the procedure, for instance the power to authorize the Bankruptcy Trustee to avail of experts in his/her action, to authorize this latter to carry on actions out of the ordinary course of business etc.

In addition the Judge authorizes the Bankruptcy Trustee to undertake eventual judicial actions. The Bankruptcy Trustee is responsible for collecting, liquidating and distributing the debtor's estate.

The Trustee must survey, investigate and account for all debtor's property.

He/her acts as a party to the proceedings, examining and, if appropriate, challenging proofs of claims, and making a final report of the administration of the estate.

Powers of the Bankruptcy Trustee are particularly wide in connection with the liquidation of the estate.

The Trustee must draft the liquidation program that, once approved by the Judge and by the Meeting of Creditors becomes binding.

He/She may be also responsible for the provisional management of the business.

In addition, Trustee may lease a branch of the concerned business, if the Meeting of Creditors approves the action.

Moreover, according to Article 107 the Trustee is responsible for the sale of the estate and for the other operations of liquidation accordingly with the liquidation programme and ensuring adequate form of publicity and information about them.

The Trustee may as well set a specific sale offer aside, whenever a subsequent purchase offer in an amount better than 10% of the previous sale offer has been filed.

## **THE MEETING OF CREDITORS**

The Meeting of Creditors is appointed by the Judge within 30 days from the adjudication of bankruptcy, having him/her heard the Bankruptcy Trustee and those creditors who stated their availability to seat in the Meeting in their proof of claim.

The Meeting is constituted by either three or five members chosen among the creditors, as to represent a fair apportionment of the different credits.

Each member of the Creditor Meeting can appoint a proxy, so that the Meeting may be set up of experts appointed by the member creditors.

Any member of the Meeting, who find himself/herself in a position of conflict of interest, shall refrain from voting in the Meeting.

The Meeting of Creditors supervises the actions of the Bankruptcy Trustee, authorizes his/her actions and express opinions whenever either the Law or the Tribunal requires so.

Specifically, the Meeting authorizes or exercises its powers over the following actions by the Bankruptcy Trustee:

- Management actions out of the ordinary course of business
- Liquidation program on which it has to issue its positive evaluation
- Provisional management of the business, issuing its binding evaluations about it
- Lease of a branch of the business where, again, its evaluation is binding
- Pre-emptive rights of the lessee
- Sales preliminary to the approval of the liquidation program
- Withdrawal from purchase of goods, whenever costs are higher than advantages in accordance with article 42
- Assignment of pending contracts put on stay to the Bankruptcy Trustee in accordance with article 72
- Motion to the Judge for substitution of the Bankruptcy Trustee.

## **FILED CLAIMS REPORT**

The filed claims report is drafted by the Bankruptcy Trustee, who carries out a previous assessment about the admissibility of the proofs of claim, and prepares separate listings for creditors and holders of other titles of right,

supporting its conclusions with findings of facts.

Holders of real estate titles must file their proof of claims as well, differently from the previous legislation.

The Bankruptcy Trustee may not allow the filing of a claim, objecting about either the validity or the enforceability of the credit claimed, acting therefore as a party to the insolvency proceedings.

The Bankruptcy Trustee presents the Judge with the filed claims report at least fifteen days before the date set for hearing the parties and examining the report itself.

At the same time he/her informs the creditors, the holders of titles over the assets of the debtor, and the debtor about the availability of the report, advising them about the possibility to file written memoranda until five days from the date of the hearing.

At the hearing, the Judge holds on any claim allowing them entirely or partially or rejecting them.

The Debtor may plead the Judge for being heard, although he/her is not technically a party to these proceedings.

Through its holdings, the Judge may also establish eventual pre-emptive rights.

After examination, and having reviewed the filed claim report, the Judge issues a Decree that makes the filed claim account enforceable.

Creditors and holders of titles may appeal against the Judge Decree before the Tribunal.

The procedure for examination of delayed proofs of claims follows the same rules.

## **DEBTOR AGREEMENTS**

The reform sets forth a general rule stating that the Bankruptcy Trustee is responsible to decide as to whether continuing or setting aside the agreements, whose debtor is a party to, on the date of the beginning of the insolvency proceedings.

Only mandatory requirement is the authorization of the Meeting of Creditors.

Any existing agreement is put on automatic stay until the Trustee adopts his/her decision.

According to Article 72quater, any existing leasing contract is put on stay in case of insolvency of the lessee, unless the bankrupt business is temporarily carried out by the Trustee, in which latter case the leasing contract continues to be in force.

On the other hand, in case of bankruptcy by the lessor the leasing contract is not subject to automatic stay and continues, save the right of the lessee to purchase the estate at the end of the leasing.

Another interesting provision established that bankruptcy does not entitle to withdrawal from a branch of business lease.

However parties to such agreement may agree upon termination of the agreement within sixty days against consideration of equitable compensation.

To be mentioned is that generally speaking, any branch of business lease shall be anyway undertaken or carried on to the purposes of liquidation of the debtor's estate.

## **LIQUIDATION OF ASSETS**

The liquidation programme is the project that the Bankruptcy Trustee must draft and observe in the process of liquidation of the debtor's estate.

The programme must contain provisions, terms and conditions of the liquidation process.

It has to be drafted within 60 days from the drafting of the assets and liabilities report and has to be authorized by the Judge and approved by the Meeting of Creditors.

The programme allows creditors and holders of titles over the debtor's estate not only to have a clear picture about how and through which means the

Trustee is going to manage the liquidation process, but also allows them, as well as eventual damaged third parties and the debtor himself/herself, to enjoy the possibility to challenge the authorization over the programme itself granted by the Judge, fostering eventual claims.

The liquidation programme must explain means and terms of the liquidation of the debtor's estate, including:

- The opportunity to carry on provisional management of business, of branches of business – according to Article 104 – or the opportunity to authorize the lease of business, or of any of its branches to thirds, as Article 104bis sets forth
- The existence of arrangement proposals and their conditions
- The claims of compensation for damages, of repossessing, or of revocation of transactions to be carried out, along with their likelihood of success and the expected timing needed for
- The terms and conditions of sale of single properties.

The Bankruptcy Trustee shall specify as to whether there is any possibility of a single sale concerning all of the assets of the estate, or of its branches, since this type of sales have to be preferred, as the Bankruptcy Act sets forth.

The Meeting of Creditors has not only the power to approve the programme, but also to propose amendments.

According to Bankruptcy Act, Article 36, if the Meeting of Creditors denies approval of the programme, the debtor and any other individual carrying an interest may appeal before the Tribunal within 8 days against the denial for breach of the Law.

Before proceeding with any sale, the value of the asset to be sold must be assessed by an expert.

The Bankruptcy Trustee may delegate the sale operations to specialized entities, like the Judiciary Sale Institute “I.V.G. – Istituto Vendite Giudiziarie”.

As far as the sale of registered aircraft, vessels, or the sale of intellectual property rights is concerned, the Bankruptcy Act sets forth that the relating specific legislation shall govern the subject matter.

According with Article 108, the Judge, upon motion by the Debtor, by the Meeting of Creditors or other claimants, having heard the Meeting of Creditors, may suspend the sale operations whenever serious and grounded reasons exist, for instance in case consideration for the sale is deemed to be well below the market consideration for a sale of that kind.

## **DISTRIBUTION OF THE ESTATE**

After the Trustee has collected all the assets of the debtor's estate, according to Article 110, he/she has to account for all property available and set up a distribution plan within four months from the date that the Filed Claim Report has become enforceable.

Creditors may file objections to the distribution plan within 15 days from the date the plan has been filed with the Tribunal.

Provision of Article 115 sets forth that the Trustee proceeds with distribution of the sums to which creditors are entitled to, in accordance with the distribution plan and by means of delivery that the Judge establishes to ensure evidence of the payment done.

The distribution is effected following ranking priorities, that is to say, secured and unsecured creditors, with or without privileges, timely filed proofs of claims and untimely filed proofs of claims etc.

Claims of the same rank are paid pro rata.

## **BANKRUPTCY ARRANGEMENTS**

The Bankruptcy Arrangement is an agreement between the debtor or a third individual/entity and the creditors aiming

at the closing of the bankruptcy proceedings.

To that extent, the relating proposal may be filed by either the debtor, by the creditors or by a third. Article 129 clarifies that the arrangement proposal may also be filed by the Trustee.

According to Article 127, if the proposal has been brought up before the Court authorization that makes the Filed Claims Report enforceable, those creditors who are enlisted within the provisional list of creditors prepared by the Trustee and approved by the Judge are entitled to vote on the arrangement proposal.

Otherwise, entitled to vote are those creditors enlisted in the Filed Claims Report, as Article 97 sets forth. In this latter case, also those creditors provisionally allowed and with reserve are entitled to vote.

The proposal cannot be filed before six months from the declaration of insolvency and not after two years from the Decree of enforcement of the Filed Claims Report.

The arrangement proposal may include a debt restructuring plan, a satisfaction of claims plan by any mean, even through sales of assets, undertakings or other actions out of the ordinary course of business, attribution of assets, stock shares or convertible bonds or other financial security and debt instruments to the creditors.

Establishing rankings of creditors and differentiating treatments within the same class of creditors is also admissible, providing reasons and motives of that choice, and as long as classes were established between creditors of similar priorities and following homogeneous economic interests.

In order to be valid and enforceable the Bankruptcy Arrangement must be approved by all classes of creditors, unless the Tribunal overrides the objecting vote of one class.

This provision is quite similar to the so called "cram down deal" in U.S.A. Law, where the Judge can accept the arrangement when the arrangement itself was approved by the majority of the classes, and the Judge believes that through the arrangement the creditors that did not approve it may satisfy their credits for an amount that in any case would not lower than in any other concrete alternative solution.

An interesting provision is that the creditors with priorities or with security interest are not entitled to vote, unless they forfeit the security interest over their credit.

When the Bankruptcy Arrangement has been approved, immediate notice has to be served upon the proponent, the debtor and the dissenting creditors, who may object to the approval within the term set by the Judge, which in any case cannot be longer than thirty days.

Same term is set for filing of the conclusive report by the Trustee, which report must be instead filed by the Meeting of Creditors in case the Trustee himself/herself proposed the Bankruptcy Arrangement.

According to the Bankruptcy Act, Article 130, the Bankruptcy Arrangement becomes enforceable:

- Upon expiration of the deadline set for eventual claims against the Arrangement; or
- Upon termination of any of the above claims.

Any Bankruptcy Arrangement can fall short by way of Court Decree.

To that purpose, a judicial motion can be filed by either the Trustee, the Meeting of Creditors, one or more creditors before the Tribunal, and the Tribunal itself can even proceed ex officio on this subject matter.

Upon such occurrence, the same Court Decree reopens the bankruptcy proceedings.