Italy

Daniela Andreatta
Orrick, Herrington & Sutcliffe

www.practicallaw.com/8-501-9255

FORMS OF SECURITY

1. What are the most common forms of security granted over immovable and movable property? Are there formalities that the security documents, the secured creditor or the debtor must comply with? What is the effect of non-compliance with these formalities?

Immovable property

The most common forms of security over immovable property are:

- **Mortgage (*ipoteca immobiliare*).** Creditors often use a mortgage to secure rights over immovable property. A mortgage is by far the most common form of security taken over immovable property.
- **Special lien (*privilegio speciale*).** Special liens arise automatically by operation of law over certain claims. Claims over immovable property which benefit from special liens include:
  - claims for expenses incurred in foreclosing an asset;
  - claims for expenses incurred in conserving an asset;
  - tax claims on the asset; and
  - claims for non-performance of a property sale agreement.

  This means that, for example, a person who incurs costs in conserving an immovable asset has a claim secured by special lien over the asset itself. A special lien gives the creditor a right of preference in relation to the proceeds of sale of the asset. If the debtor defaults, the creditor can foreclose the asset and be paid with preference.

Movable property

The most common forms of security over movable property are:

- **Pledge (*pegno*).** Creditors often use a pledge to secure their rights over movable property. Pledges are the most common form of security over movable property.
- **Mortgage over registered movable goods (*ipoteca su beni mobili registrati*).** A creditor can use a mortgage to secure registered movable property (for example, ships, aircraft and motor vehicles).
- **General lien (*privilegio generale*).** A general lien differs from a special lien because it must apply to all of the debtor's assets and can only apply to movable property. The following claims are among those which are automatically protected by a general lien:
  - employee salary claims;
  - social security claims; and
  - certain tax claims.
- **Special lien (*privilegio speciale*).** A special lien can only cover a specific movable asset. It arises by law, as with a special lien over immovable property (*see above, Immovable property: Special lien (privilegio speciale)*). Claims over movable property which benefit from special liens include:
  - claims for expenses incurred in foreclosing an asset;
  - claims for expenses incurred in conserving an asset;
  - rent claims (the lien applies to assets located at the leased property, for example, the goods on sale at a leased shop); and
  - claims for the price of a car (the special lien applies to the car).

Formalities

The formalities required depend on the type of security:

- **Mortgage.** A mortgage must be filed with the registry where the relevant (movable or immovable) assets are registered. For example, a mortgage over real estate must be filed with the real estate register where the property is located. Filing creates a right of preference for the mortgagee, which renders the mortgage enforceable against third parties, including purchasers of the asset or creditors attaching to it. If more than one mortgage is registered against an asset, the priority of the mortgages is ranked according to filing dates.
- **Pledge.** A pledgor perfects a pledge by delivering the relevant asset to the creditor. If the value of the pledged claim exceeds EUR2.58 (as at 1 February 2011, US$1 was about EUR0.7), the pledge must:
  - be in writing; and
  - have a certified date. The most common way of obtaining a certified date is to execute the relevant document before a notary public, or to execute it by exchanging the originals via registered mail.

  Additional formalities apply to pledges over certain assets such as receivables, intellectual property rights and securities.
- **Lien.** Liens cannot be created contractually. Instead, certain claims benefit automatically from a special or general lien (*see above, Immovable property* and *Movable property*). As liens arise automatically, no formalities are required.

CREDITOR AND SHAREHOLDER RANKING

2. Where do creditors and shareholders rank on a company's insolvency?

The following priority of payments applies during insolvency proceedings (*Article 111, Royal Decree Number 267 of 16 March 1942 (Bankruptcy Law)*):

- **Preferential claims.** These are necessary costs and expenses that the trustee and the court incur during insolvency proceedings. They include professional fees and other debts incurred after the debtor files its bankruptcy petition, including debts incurred in connection with the trustee continuing its business.

  Due to a recent change in the Bankruptcy Law (introduced by Law 122 of 30 July 2010), preferential claims also include:

  - money owed to financial institutions or shareholders in connection with loans granted to the debtor during a settlement with creditors (*concordato preventivo*) or a debt restructuring agreement (*accordo di ristrutturazione dei debiti*) (*see Question 6, Settlement with creditors* and *Debt restructuring agreement*), if certain procedure-related requirements are met. In relation to shareholders' loans, the preference is limited to 80% of the relevant claim;
  - fees due to the expert who validated the plan underlying the settlement with creditors or the debt restructuring agreement.

- **Secured claims.** These are claims which are secured by mortgages, pledges or liens (*see Question 1*). If the proceeds from the sale of the asset which is secured by a mortgage, pledge or lien are not sufficient to repay the creditor, the creditor is ranked as an unsecured creditor for the unpaid part of the claim (*see below, General unsecured claims*).

- **General unsecured claims.** These are claims which creditors incurred before the bankruptcy petition was filed, over which they do not hold perfected security. Unsecured creditors typically receive a pro rata share of the distributed funds and rights, after all senior claims have been satisfied.

- **Subordinated unsecured claims.** These are claims which have been subordinated by a pre-bankruptcy agreement or a court order, under the principles of equitable subordination. Unless shareholders' loans are granted in the context of a settlement with creditors or a debt restructuring agreement (*see above, Preferential claims*), shareholders' loans are subordinated if they are extended during a period in which the company:

  - showed a material financial imbalance; or
  - would have needed equity rather than debt due to its financial difficulties.

  Repayments of shareholders' loans made in the year before bankruptcy must be returned to the trustee in bankruptcy, provided they qualified as subordinated shareholders' loans.

- **Shareholders.** Shareholders do not typically receive a distribution from an insolvent estate. If funds are available for shareholders, holders of preferred shares typically take priority over ordinary shareholders.

See also, *Question 6, Insolvency proceedings (fallimento).*

UNPAID DEBTS AND RECOVERY

3. Do trade creditors use any mechanisms to secure unpaid debts?

In addition to mortgages, liens and pledges (*see Question 1*), trade creditors usually use the following mechanisms to secure unpaid debts:

- **Claim assignment (*cessione dei crediti*).** The debtor assigns one or more of its claims to the creditor, with or without consideration, either instead of payment or as security for its payment obligations. A debtor can assign any claim other than those which:

  - are strictly personal; or
  - cannot legally be transferred (for example, alimony claims, claims for salaries of public sector employees, and claims for family support).

  After the assignment, the creditor owns the claim and all relevant attachments such as security interests.

  An assignment is valid even if the third party debtor is not notified of it. However, this notification must take place for the assignment to be enforceable in relation to third parties (including the third party debtor and the trustee in bankruptcy). Special rules apply to the assignment of:

  - tax claims; and
  - claims relating to public entities.

- **Credit risk insurance (*contratto di assicurazione*).** Under a credit risk agreement, the creditor is insured against the debtor's default. The debtor is the policyholder.

- **Guarantee (*fidejussione*).** A third party guarantees the performance of the debtor's obligations, by becoming jointly bound with the debtor in relation to the creditor. A guarantee is only valid if:

  - the underlying obligation is valid;
  - it does not guarantee more than the amount that the creditor owes the debtor; and
  - it is granted with conditions that are no less onerous than those of the underlying obligation.

  Public entities and financial institutions can use a special financial guarantee (*garanzia finanziaria*), which gives the creditor special foreclosure powers.

- **Retention of title (*contratto di vendita con riserva della proprietà*).** If a retention of title clause is in place, title to the goods only passes to the buyer once it has paid the purchase price in full. A retention of title agreement is enforceable against third parties if it:
  - is in writing; and
  - has a certified date (*see Question 1, Formalities: Pledge*).

  If the retention of title clause covers machinery with a price of over EUR15.49, it must be filed with the relevant local registry.

4. Can creditors invoke any procedures (other than the formal rescue or insolvency procedures described in *Question 6*) to recover their debt? Is there a mandatory set-off of mutual debts on insolvency?

As long as insolvency or other rescue proceedings have not started (*see Question 6*), a creditor can bring the following civil actions against a debtor:

- **Debt collection proceedings (*processo monitorio*).** These are quick proceedings which creditors can use if their claim is based on written evidence. The proceedings end with the court issuing a payment order, which allows the creditor to foreclose the debtor's assets (subject to certain court formalities). Generally, the court issues a payment order within about three months. If the debtor objects to the payment order, these proceedings automatically turn into ordinary proceedings (*see below, Ordinary proceedings*).
- **Ordinary proceedings.** Creditors can use ordinary proceedings to obtain a legal assessment of the amounts owed. They generally last from two to four years, so creditors only tend to use them when other remedies are unavailable.
- **Special proceedings to execute unpaid pledges and mortgages (*procedura esecutiva su beni ipotecati o pignorati*).** Creditors can use special proceedings to enforce mortgages or pledges over assets. The court sells the relevant assets by public tender or a private sale process. The creditor cannot take possession of the assets directly, but it can credit bid (that is, use its secured claim against a debtor as currency in an auction of its collateral) during a public tender, provided that:
  - no other creditors took part in the foreclosure proceedings; and
  - no bids were submitted to the court during the sale process.
- **Special proceedings to enforce a financial guarantee (*procedura esecutiva su beni oggetto di garanzia finanziaria*).** Creditors can use special proceedings to enforce an unpaid claim which is secured by a financial guarantee (*see Question 3, Guarantee (fidejussione)*). The proceedings allow creditors to sell the secured asset directly, or require the debtor to assign it to them at a reasonable value.

STATE SUPPORT

5. Is state support for distressed businesses available?

In response to the financial crisis, in 2009 the government launched an EUR80 billion financial relief programme for families, businesses and banks (*pacchetto anti crisi*). This included a variety of financial aids from tax benefits to discounted interest rates on loans. In addition, in February 2011 the government streamlined the existing state support programmes by setting up one single fund (*fondo unico per gli incentivi alle imprese*) aimed at financially supporting business activities. A portion of the fund will be allocated to specific economic sectors and another portion to large companies wishing to commence a restructuring proceeding.

RESCUE AND INSOLVENCY PROCEDURES

6. In relation to each available rescue and insolvency procedure:

- **What is its objective and, where relevant, what are the prospects for recovery?**
- **How is it initiated, when, by whom and which companies can it be applied to?**
- **Can the company obtain any protection from its creditors during the procedure?**
- **What substantive tests apply?**
- **How long does it take?**
- **What consents and approvals are required?**
- **Who supervises the procedure and controls the company's affairs (for example, an independent accountant or the court)?**
- **How does it affect the company, shareholders, employees, trading partners and creditors?**
- **How is the procedure formally concluded and what happens to the company on conclusion?**

Insolvency proceedings (*fallimento*)

Objective. Insolvency proceedings are the main restructuring procedure set out in the Bankruptcy Law, which all other types of rescue proceedings derive from. The aim is to satisfy creditors by realising the debtor's assets and distributing the proceeds to creditors.

Initiation. Insolvency proceedings (bankruptcy) can be initiated by one of the following parties filing a petition with the clerk of the Bankruptcy Court:

- A creditor.
- The debtor.
- The public prosecutor, if he acquires knowledge of the debtor's insolvency, for example, from a report by a civil judge who learns of the insolvency during civil proceedings.

The Bankruptcy Court is the local court situated where the company has its registered office. Courts located in big cities have separate bankruptcy divisions, but in most cases, Bankruptcy Courts are not separate from other courts.

Company directors must file promptly for insolvency when a company becomes insolvent (*see below, Substantive tests* and *Question 8*).

Insolvency proceedings are available for any insolvent undertaking (*impresa*), including corporations, limited liability companies and partnerships, provided that any of the following applies:

- The total annual value of its assets in the three financial years before filing the petition (or from its date of incorporation, if this was less than three years ago) exceeds EUR300,000.
- The total annual value of its gross revenues in the three financial years before filing the petition (or from its date of incorporation, if this was less than three years ago) exceeds EUR200,000.
- The total value of its liabilities (including debts not yet due) exceeds EUR500,000.

The following entities are not eligible for insolvency proceedings:

- Individuals.
- Commercial farms.
- Public entities.
- Insurance companies, fiduciary companies and banking and financial institutions (these entities are subject to insolvency schemes governed by relevant supervisory authorities).
- In most cases, co-operatives and joint ventures (these entities are typically subject to separate insolvency schemes). For example, purely contractual joint ventures, and co-operatives that do not run a business activity (such as co-operatives between farmers or artisans), are not eligible.

Insolvency proceedings can apply to companies which have their registered office or centre of main interests in Italy.

Protection from creditors. On the opening of insolvency proceedings, an automatic stay prevents creditors from both:

- Creating new security interests to secure their claims.
- Taking further action against the debtor or its assets to enforce their security or collect their debt.

In addition, there is a freeze on creditors' claims from the date of the opening of insolvency proceedings (other than claims for interest on secured claims, which continue to accrue during the proceedings).

Creditors cannot commence enforcement actions against the insolvent company.

Substantive tests. The debtor must be insolvent (that is, unable to pay its debts as they become due).

Length of procedure. There is no set time limit, other than a 60-day limit within which the bankruptcy trustee must deliver the proposed liquidation programme (*see below, Effect*). Insolvency proceedings typically last from four to six years.

Consents and approvals. The trustee can generally run insolvency proceedings under court supervision. However, it needs the consent of the creditors' committee for certain actions, including:

- Requesting the court to carry on running the business (*see Question 10, Bankruptcy*).
- Reductions of claims and settlements.
- Waivers of litigated claims and acknowledgments of third party rights.
- Cancellations of mortgages.
- Relinquishments of pledges.
- Donations.
- Extraordinary transactions (that is, transactions which can cause the decrease or dispersal of the estate's assets).

Creditors are represented by a creditors' committee, which has between three and five members. The creditors' committee's resolutions are passed by affirmative vote of the majority of its members. A liquidation programme must be approved by a majority vote (*see below, Effect*).

Supervision and control. The trustee runs insolvency proceedings under court supervision (*see above, Consents and approvals*). This procedure does not allow for debtor-in-possession management.

Effect. Insolvency proceedings have the following effects:

- The court appoints a bankruptcy trustee. The trustee is a public officer (*pubblico ufficiale*) and is personally liable if he does not discharge his duties diligently and in the creditors' best interests. The trustee controls the company and its assets, and acts as a representative of the estate.
- The court sets a date for a proof of claims hearing. Creditors must file their claims with the court at least 30 days before the hearing date. If they miss this deadline, they can still file their claims within 12 months of the court approving the final schedule of liabilities (*stato passivo*).
- The trustee submits a proposed liquidation programme to a creditors' committee. This programme details the actions which the trustee plans to take (for example, the sale of certain assets or the company as a going concern, and claw-back actions).
- The court appoints a creditors' committee, which is composed of between three and five members selected from among the creditors. The committee approves certain transactions and the liquidation programme (*see above, Consents and approvals*). Once the creditors' committee has approved the liquidation programme by a majority vote, it submits the plan to court.
- An automatic stay prevents creditors from pursuing claims outside the court, foreclosing collateral or taking enforcement actions. The only exceptions apply to certain banking mortgage creditors and to holders of financial guarantees (*see Question 4, Special proceedings to enforce a financial guarantee (procedura esecutiva su beni oggetto di garanzia finanziaria)*).

- Creditors' claims freeze on the filing date, other than claims for interest on secured claims, which continue to accrue during the proceedings.
- The company's directors, officers and statutory auditors are exposed to the risk of civil or criminal charges relating to the insolvency (*see Question 8*).
- The trustee can claw back certain transactions (*see Question 9, Bankruptcy*).
- The trustee can continue to run the business, although this rarely happens (*see Question 10, Bankruptcy*).

Conclusion. The proceedings end when either:

- The trustee has liquidated (or abandoned as worthless) all the debtor's assets and distributed the proceeds to creditors.
- There is a buyout of the bankrupt estate (*concordato fallimentare*) by a third party or (subject to certain timing restrictions) by the debtor itself. The debtor can only file this type of proposal within one year after the opening of insolvency proceedings, and within two years from the date on which the schedule of liabilities has become final.

Settlement with creditors

Objective. A settlement with creditors is a court procedure that allows a company with financial difficulties to carry out a plan to restructure its debts. The relevant legislation is the Bankruptcy Law.

Initiation. The debtor initiates a settlement with creditors by filing all of the following with the Bankruptcy Court:

- A petition.
- The proposed plan.
- An expert opinion confirming the feasibility of the plan and the truthfulness of the accounting data.
- A valuation report which confirms that the payments that secured creditors will receive are not lower than the value of their collateral, if applicable (*see below, Consents and approvals*).
- Certain information about its creditors and assets. This includes:
  - a list of the holders of personal or *in rem* rights owned or held by the debtor;
  - a list of all creditors, including all possible security interests;
  - the value of the debtor's assets; and
  - the debtor's financial statements.

The company's directors must approve the decision to file a petition (except in the case of a partnership, where shareholder approval is required instead).

Companies that can apply for settlements with creditors are the same as those that can apply for bankruptcy, subject to the same eligibility thresholds (*see above, Insolvency proceedings (fallimento): Initiation*).

Protection from creditors. Once a plan has been confirmed, an automatic stay prevents creditors from creating new security interests to secure their claims, or taking further action against the debtor or its assets to enforce their security or collect their debts. In addition, creditors' claims freeze on the filing date, other than claims for interest on secured claims, which continue to accrue during the proceedings.

Substantive test. A company can apply for a settlement with creditors if it is subject to a financial crisis (*situazione di crisi*), that is, its temporary financial difficulties worsen and reach insolvency. There is no definition of financial crisis, either in legislation or case law, particularly as the procedure for settlement with creditors was reformed in 2006. A financial crisis can range from temporary financial difficulties to final insolvency (*see above, Insolvency proceedings (fallimento): Substantive tests*).

Length of procedure. The proceedings cannot last for more than six months from the date of filing the petition (*Bankruptcy Law*). A court can extend this period for an additional two months. These time periods do not bind the courts, but courts tend to complete the procedure within the time frame under the Bankruptcy Law.

Consents and approvals. A debtor can only file for a settlement with creditors if both:

- An expert has certified the plan as feasible.
- Payments offered to secured creditors under the plan are not worth less than the market value of their collateral. The company must confirm this in a valuation report (*see above, Initiation*).

Once a debtor initiates a settlement with creditors, creditors are divided by law into secured creditors and unsecured creditors. Only unsecured creditors can vote on the plan. Secured creditors that will not be repaid in full because their collateral value is insufficient are deemed to be unsecured creditors (to the extent of their unpaid claim). The plan can only proceed if 51% (in value rather than number) of creditors allowed to vote on it approve the plan. The plan can create classes of creditors in addition to those created by law. In that case 51% of the classes must approve the plan, by a vote of the majority of all the claims included in each class.

Supervision and control. During the proceedings, the company is run by its management under the supervision of the commissioner(s). Certain extraordinary transactions require court approval.

Effect. Under the proposed plan, the company can offer any kind of settlement to its creditors, including payments in cash, bonds or debt/equity swaps. The plan has the following effects:

- Once the plan has been confirmed (*see above, Consents and approvals*), it binds the debtor and all creditors, including those who did not vote on or accept it.
- An automatic stay on creditor actions (*see above, Protection from creditors*).
- If the company later becomes bankrupt (*see above, Insolvency proceedings (fallimento)*):
  - any payments, actions and guarantees that the company makes under the plan are exempt from clawback; and

  - directors, officers and statutory auditors are exempt from certain potential criminal charges linked to the insolvency (for example, charges in connection with preferential payments).

- The company's business can carry on running, depending on the terms of the plan (*see Question 10, Settlement with creditors*).

Conclusion. Once the relevant percentage of creditors have approved the plan (*see above, Consents and approvals*), the court approves or rejects the plan. Dissenting creditors and interested third parties can challenge a plan, for reasons other than its mere inconvenience. As long as the court does not uphold any challenges, it issues an order confirming the plan. The confirmation order can be appealed up to the Supreme Court of Cassation (*Corte di Cassazione*). Once the confirmation order is final, the case closes and the plan proceeds.

Debt restructuring agreement

Objective. A debt restructuring agreement aims to allow a company with financial difficulties to restructure its debts. Debt restructuring agreements are regulated by Article 182 *bis* of the Bankruptcy Law, and are often referred to as Article 182 *bis* agreements.

Initiation. The debtor and its creditors negotiate and execute a debt restructuring agreement without court involvement (this can take the form of one or more agreements). The debtor then files with the Bankruptcy Court and the Register of Companies both the:

- Executed agreement.

- Opinion of an expert which confirms that the proposed debt restructuring allows the company to pay in full any creditors who did not originally comply with the agreement and whose claims have become due since the agreement was concluded.

Companies that can apply for debt restructuring agreements are the same as those that can apply for bankruptcy, subject to the same eligibility thresholds (*see above, Insolvency proceedings (fallimento): Initiation*).

Protection from creditors. Starting from the filing date of the agreement with the Register of Companies, an automatic 60-day stay prevents creditors from taking further action against the debtor or its assets to enforce security or collect their debts. In certain circumstances, this 60-day stay can start from the opening of negotiations with creditors.

Substantive tests. The test is the same as that which applies to a settlement with creditors (*see above, Settlement with creditors: Substantive tests*).

Length of procedure. There is no set time limit for proceedings. As the proceedings are initiated out-of-court, their length largely depends on the negotiations with creditors. Usually, the in-court phase lasts for two or three months.

Consents and approvals. A debtor can apply for court approval of a debt restructuring agreement if 60% (in value) of its creditors approve the agreement (regardless of whether they are secured or unsecured).

Supervision and control. The debtor is responsible for the negotiation, execution and implementation of the debt restructuring agreement, with no supervision by either the court or a court-appointed receiver. On filing of the debt restructuring agreement, the court checks that the agreement meets the requirements set by law and then issues a confirmation order.

Effect. A debt restructuring agreement has the following effects:

- A 60-day stay on creditor actions (*see above, Protection from creditors*).

- Within the restructuring plan, the company can propose a tax settlement to restructure its tax claims, using a procedure involving the tax authorities. This process is regulated by section 182 *ter* of the Bankruptcy Law and is known as a section 182 *ter* procedure.

- If the company later becomes bankrupt (*see above, Insolvency proceedings (fallimento)*):

  - any payments, actions and guarantees that the company makes under the plan are exempt from clawback; and

  - directors, officers and statutory auditors are exempt from certain potential criminal charges linked to the insolvency (for example, charges in connection with preferential payments).

Conclusion. Any dissenting creditor or interested third party can challenge a debt restructuring agreement within 30 days of the debtor filing it with the Register of Companies. As long as the court does not uphold any challenges, it issues an order confirming the plan. The confirmation order can be appealed up to the Supreme Court of Cassation. Once the confirmation order is final, the case closes and the plan proceeds.

Certified recovery plan (*piano attestato di risanamento*)

Objective. A certified recovery plan is an out-of-court restructuring plan. It can consist of an internal reorganisation, such as a merger or capital increase, or involve restructuring agreements with creditors. Certified recovery plans are regulated by Article 67 of the Bankruptcy Law, so are often referred to as Article 67 plans.

Initiation. The debtor starts the proceeding by negotiating with its creditors and reorganising its business accordingly. The companies that can initiate a certified recovery plan are the same as those that can apply for bankruptcy, subject to the same eligibility thresholds (*see above, Insolvency proceedings (fallimento): Initiation*).

Protection from creditors. A certified recovery plan does not trigger any stay on creditors' actions during the proceedings. The creditors are bound only by the actual agreement they have executed with the debtor, which usually contains a temporary standstill clause.

Substantive tests. A certified recovery plan is available to a company which has financial difficulties and therefore is not already insolvent (this procedure cannot be used for pure liquidation purposes). The plan must be both:

- Capable of improving and balancing the debtor's financial position.

- Certified in writing by an expert as reasonable.

Length of procedure. A certified recovery plan is an out-of-court process, so there is no set time limit.

Consents and approvals. The Bankruptcy Law does not require a minimum percentage of creditors to consent to the plan. However, a certified recovery plan must be executed by the number of creditors required to enable the company to balance its financial position.

Supervision and control. A certified recovery plan is not supervised or controlled by either the court or a court-appointed receiver. The debtor and the creditors are responsible for monitoring the proper execution of the debt restructuring agreement.

Effect. Actions that the company carries out during the plan, such as payments or guarantees made to creditors, are exempt from clawback if the company subsequently goes insolvent (*see below, Bankruptcy*). Unlike the clawback exemption that applies during debt restructuring plans, if the company does become bankrupt, the court will scrutinise the enforceability of the exemption.

There is no standstill and the company cannot benefit from tax claim restructuring proceedings, unlike during a debt restructuring (*see above, Debt restructuring agreement: Effect*).

Conclusion. The process ends when the plan and the expert opinion have been finalised, and the plan has been carried out.

Extraordinary administration for large insolvent companies (*amministrazione straordinaria delle grandi imprese in stato di insolvenza*)

Objective. The objective of an extraordinary administration is to restructure a large insolvent company. There are two types of extraordinary administration proceedings:

- ***Prodibis* proceedings.** These proceedings were introduced in 1999 under Legislative Decree number 270/99.
- ***Marzano* proceedings.** These proceedings were introduced in 2003 by Legislative Decree number 347/2003.

Marzano proceedings are quicker, more efficient and more flexible than *Prodibis* proceedings.

Initiation. *Prodibis* proceedings can be started by:

- A creditor.
- The debtor.
- The public prosecutor.
- The court.

Only the debtor can initiate *Marzano* proceedings.

A debtor can be subject to *Prodibis* proceedings if all of the following apply:

- It is eligible for insolvency proceedings (*see above, Insolvency proceedings (fallimento): Initiation*).
- It has employed at least 200 employees for at least one calendar year preceding the administration.
- The value of its liabilities has been two-thirds greater than the value of its assets and revenues during the fiscal year preceding the administration.
- There is potential to recover its value, through asset sales or a restructuring.

A debtor can apply for *Marzano* proceedings if all of the following apply (to it or its group, with all companies taken together):

- It is eligible for insolvency proceedings (*see above, Insolvency proceedings (fallimento): Initiation*).
- It has employed at least 500 employees for at least one calendar year preceding the administration.
- It has liabilities (including guarantees) which are worth no less than EUR300 million.

Once the proceedings begin, the court can extend them to other insolvent companies in the debtor's group, regardless of whether they meet the eligibility requirements, provided that either:

- These companies show potential for recovery.
- Extending the proceedings facilitates the restructuring of the entire group.

Protection from creditors. An automatic stay prevents creditors from taking further action against the debtor and its assets to enforce security or collect their debts.

Substantive tests. The debtor must be insolvent (that is, unable to pay its debts as they become due).

Length of procedure. Extraordinary administration proceedings cannot last longer than:

- One year, in the case of a liquidation programme.
- Two years, in the case of a restructuring programme.

If, at the end of these terms, the plan has only been partly executed, due to the complexity of the proceedings or the need to define employment issues, the Ministry of Economic Development can allow a 12-month extension. If the conditions persist at the end of this time period, it can grant a further 12-month extension.

Consents and approvals. The Ministry must approve the proposed liquidation or restructuring programme (*see below, Effect*). Creditors cannot vote on or challenge the plan. Creditors are represented by a creditors' committee, but the committee's opinions are not binding on the commissioner, the court or the Ministry.

During *Marzano* proceedings, the commissioner can propose a settlement to creditors which, if accepted, concludes the proceedings (*see below, Conclusion*). This is the only time that creditor consent is required. In this case, majority consent from the creditors is required.

Supervision and control. The process is managed by the Ministry of Productive Activities (*Ministero delle Attività Produttive*) (Ministry) and supervised by the Bankruptcy Court. The Ministry appoints a commissioner to control the company.

Effect. Extraordinary administration proceedings have the following effects:

- The Ministry appoints a commissioner to control the company and act as the representative of the insolvent estate. During *Prodibis* proceedings, there can be up to three commissioners.

- The commissioner draws up a plan to repay the debtor's creditors. This takes the form of a liquidation programme or a restructuring programme. The commissioner can convert a liquidation programme into a restructuring programme and vice versa, provided that the Ministry approves this change within one year of having approved the initial plan.
- An automatic stay prevents creditors from taking further action against the debtor and its assets to enforce security or collect their debts.
- Creditors must file claims by a date set by the court.
- The company's directors, officers and statutory auditors are exposed to the risk of civil or criminal charges relating to the insolvency (*see Question 8*).
- The trustee can claw back certain transactions (*see Question 9, Extraordinary administration*).
- During *Prodibis* proceedings, the debtor typically carries on running the business before being dispossessed of its assets (*see Question 10, Extraordinary administration*).

Conclusion. The proceedings end when the commissioner completes the liquidation or restructuring programme. During *Marzano* proceedings, the proceedings can conclude earlier, if creditors accept a settlement proposed by the commissioner (*see above, Consents and approvals*). If the programme does not succeed, extraordinary administration proceedings can be converted into insolvency proceedings (*see above, Insolvency proceedings (fallimento)*).

STAKEHOLDERS' ROLES

7. Which stakeholders have the most significant role in the outcome of a restructuring or insolvency procedure?

Extraordinary proceedings were introduced with the aim of protecting employees, so they are often started under pressure by trade unions or employees. Therefore, employees typically play a key role in this type of procedure.

The significant stakeholders vary for other types of procedure. Typically, banks which hold the bulk of a company's debt wield a lot of influence.

LIABILITY

8. Can a director, parent company (domestic or foreign) or other party be held liable for an insolvent company's debts?

When a company is subject to rescue or insolvency proceedings (*see Question 6*), its directors, officers and statutory auditors can be held liable for any actions which contributed to the company's insolvency, on a civil or criminal basis. For example, the following actions or omissions can trigger criminal or civil liability:

- Delay in filing for insolvency. Company directors must file promptly for insolvency whenever the company becomes insolvent (*see Question 6, Insolvency proceedings (fallimento)*).
- Disclosing non-existent liabilities with the aim of causing detriment to creditors.
- Destroying, hiding or misappropriating the insolvent estate's assets, including accounting books.
- Failure to follow the statutory priority of payments (*see Question 2*).
- Corporate crimes committed before insolvency.

If, during court proceedings, the bankruptcy trustee or the court discovers that the debtor's management has taken negligent or fraudulent actions that incur criminal liability, it must report these to the public prosecutor.

A sole shareholder is fully liable for the debts of its company, unless the directors deposit for registration in the register of companies a statement which indicates the shareholder's:

- Surname and name, or denomination.
- Date and place of birth, or state of incorporation.
- Domicile, or legal address and citizenship.

If a company has more than one shareholder, they will not be held fully liable.

In addition, in extreme cases, a parent company can be liable for damages to creditors or minority shareholders which were caused by the mismanagement of its subsidiary.

Following a recent change in the Bankruptcy Law, debtors (directors, in the case of a company) are exempt from the liability associated with certain bankruptcy-related crimes relating to payments made or guarantees granted to creditors under (*Law 122 of 30 July 2010*):

- Settlements with creditors.
- Debt restructuring agreements.
- Certified recovery plans.

SETTING ASIDE TRANSACTIONS

9. Can an insolvent company's pre-insolvency transactions be set aside? If so:

- **Who can challenge these transactions, when and in what circumstances?**
- **Are third parties' rights affected?**

Bankruptcy

Invalid transactions. Once insolvency proceedings begin, the following transactions executed by the debtor are automatically invalid:

- Transactions executed for no consideration during the two years preceding insolvency.
- Payments made by the debtor during the two years preceding insolvency to repay debts which only fall due after insolvency proceedings open.

- Any payments for no consideration to spouses of the debtor (if the debtor is an individual entrepreneur) made while the debtor was running the business, unless the spouse was unaware of the debtor's insolvency.
- Payments to spouses of the debtor (if the debtor is an individual entrepreneur) during the two years preceding insolvency, unless the spouse was unaware of the debtor's insolvency.

Clawback. In addition, during insolvency proceedings, a bankruptcy trustee can claw back a transaction provided that all of the following conditions are met:

- The third party to the transaction was aware of the debtor's insolvency.
- The transaction took place within the clawback period (*see below*).
- No exemption applies (*see below*).

The clawback period begins 12 months before the insolvency order for the following transactions (among others):

- Transactions which require the debtor to perform or undertake obligations the value of which exceeds, by more than 25%, the value of payments that the creditor has made or promised to the debtor.
- Any payment that the debtor made that was not in cash or another common payment method.
- Pledges or mortgages granted in connection with pre-existing debts that are not yet due.

The clawback period begins six months before the insolvency order for the following transactions (among others):

- Payments of outstanding due debts.
- Any conveyance other than those made for no consideration.
- Guarantees which the debtor granted at the same time as incurring debt.
- Pledges or mortgages granted in connection with pre-existing due debts.

The bankruptcy trustee cannot claw back the following transactions:

- Payments for goods and services made during the ordinary course of business.
- Payments made and guarantees granted by the debtor as part of a settlement with creditors, a debt restructuring agreement or certified recovery plan.
- Payments to employees.
- Payments of fees due in connection with filing a settlement with creditors.
- Overdraft repayments (unless these repayments have materially reduced the debtor's exposure to a bank).

See *Question 6*.

Extraordinary administration

A commissioner can also clawback transactions during extraordinary administration proceedings, as follows:

- ***Marzano* proceedings.** The commissioner's clawback powers are the same as those of a bankruptcy trustee during insolvency proceedings.
- ***Prodibis* proceedings.** The commissioner can only clawback transactions as part of a Ministry-approved liquidation programme, and not if there is a restructuring plan in place.

The clawback periods for *Marzano* and *Prodibis* proceedings are the same as for insolvency proceedings (*see above, Bankruptcy: Clawback*). An extended clawback period applies in relation to intercompany transactions, in the event that the extraordinary administration involves a whole corporate group.

See *Question 6, Extraordinary administration for large insolvent companies (amministrazione straordinaria delle grandi imprese in stato di insolvenza)*.

CARRYING ON BUSINESS DURING INSOLVENCY

10. In what circumstances can a company continue to carry on business during insolvency or rescue proceedings? In particular:

- **Who has the authority to supervise or carry on the company's business?**
- **What restrictions apply?**

Bankruptcy

During insolvency proceedings, the debtor is always dispossessed of its assets and cannot continue running the business. The bankruptcy trustee can carry on running the whole or part of the business, provided that all of the following apply (*Article 104, Bankruptcy Law*):

- Interrupting the business would give rise to material damage, that is, damage that:
  - is definite and material; and
  - affects a whole class of interested parties, such as employees, suppliers or creditors.
- Continuing the business does not create a detriment for creditors.
- The court authorises the continuation of the business, either:
  - when opening insolvency proceedings; or
  - after a later request by the trustee, which the creditors' committee has approved.

In practice, the bankruptcy trustee rarely continues running the business. If he does, he must:

- Report to the creditors' committee on a quarterly basis.

- Keep accounts.
- Cease running the business on a date set by the court, or earlier if he or the creditors' committee decide that continuing the business is no longer necessary.

See *Question 6, Insolvency proceedings (fallimento)*.

Settlement with creditors

During a settlement with creditors, the debtor can continue to run its business. In this case, the existing management typically runs the company under the supervision of a court-appointed commissioner. The court must approve extraordinary transactions, such as the company incurring new debt.

See *Question 6, Settlement with creditors*.

Extraordinary administration

During *Prodibis* proceedings, there is a due diligence phase before the commissioner can dispossess the debtor of its assets. During this time, the debtor typically carries on running the business. During *Marzano* proceedings, the debtor is immediately dispossessed of its business.

See *Question 6, Extraordinary administration for large insolvent companies (amministrazione straordinaria delle grandi imprese in stato di insolvenza)*.

ADDITIONAL FINANCE

11. Can a company that is subject to insolvency proceedings obtain additional finance (for example, debtor-in-possession financing or equivalent)? Is special priority given to the repayment of this finance?

The Bankruptcy Law does not limit the granting of additional finance to a company subject to insolvency proceedings. Under a recent change in the Bankruptcy Law (introduced by Law 122 of 30 July 2010), claims in connection with "new money" (that is, additional finance) extended to a distressed company are deemed super-senior, provided that the "new money" was granted in the context of one of the following:

- A settlement with creditors, to the extent that the:
  - "new money" was approved by the court on commencement of the proceedings; or
  - settlement with creditors was confirmed by the court.
- A debt restructuring agreement, to the extent it was confirmed by the court.

Apart from this recent change, additional finance granted in the context of a bankruptcy or extraordinary administration proceedings is deemed super-senior under the Bankruptcy Law, to the extent that the "new money" was approved by the court.

MULTINATIONAL CASES

12. In relation to multinational cases:

- **Do local courts recognise insolvency and rescue procedures in other jurisdictions, and court judgments made during these procedures? Is recognition given under specific legislation or under case law (for example, principles of comity)?**
- **Do courts co-operate where there are concurrent proceedings in other jurisdictions?**
- **Is your jurisdiction party to any international treaties, model laws or EU legislation (if applicable)?**
- **Are there any special procedures that foreign creditors must comply with when submitting claims in local insolvency proceedings?**

Recognition

Italian courts automatically recognise insolvency orders made in other EU member states. Non-EU insolvency orders must be submitted to the Court of Appeal for recognition. The Court of Appeal will grant this recognition if:

- The judge who made the order had authority to do so, based on Italian principles of jurisdiction.
- The defendant was notified of the writ of summons in accordance with the law of the foreign jurisdiction.
- The parties had the right to defend themselves before the foreign court in question, according to the law of the foreign jurisdiction.
- The judgment was made in accordance with the law of the foreign jurisdiction and does not breach Italian mandatory law.
- The same case is not pending before an Italian court.

Concurrent proceedings

Italy recognises concurrent proceedings in another EU jurisdiction. In these circumstances, there will be a main proceeding, and one or more secondary proceedings. The main proceeding must be located in the territory of the debtor's centre of main interests, and the secondary proceeding relates to the debtor's assets located in another jurisdiction.

International treaties

Italy is a signatory to:

- Regulation (EC) 1346/2000 on insolvency proceedings.
- Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- The UNCITRAL Model Law on Cross-Border Insolvency 1997.

Italy is not a party to any international treaties with non-EU countries concerning insolvency proceedings.

Procedures for foreign creditors

There are no special procedures that apply to foreign creditors.

REFORM

13. Are there any proposals for reform?

The Bankruptcy Law was reformed in 2005. Since then, there have been further amendments aimed at promoting the use of court and out-of-court restructuring agreements. The most recent amendment, of 30 July 2010, is aimed at:

- Supporting the extension of additional finance in restructuring scenarios (*see Question 2, Preferential claims*).
- Facilitating the completion of restructuring proceedings by exempting directors, officers and statutory auditors of the debtor from the potential criminal liability associated with payments made, and guarantees granted, in the context of restructuring proceedings.

There are no current proposals for further reform of Italian bankruptcy law.

CONTRIBUTOR DETAILS

DANIELA ANDREATTA
Orrick, Herrington & Sutcliffe
T +39 02 4541 3800
F +39 02 4541 3802
E *dandreatta@orrick.com*
W *www.orrick.com*

Qualified. Milan, Italy, 1996

Areas of practice. Bankruptcy and debt restructuring; mergers and acquisitions; workouts, foreclosures and receiverships.

Recent transactions

- **Nuova Pansac.** Assisted Nuova Pansac, Europe's leader in blown polyethylene (PE) film extrusion technology, in the restructuring of its EUR300 million bank exposure through a debt restructuring agreement.
- **ACER.** Assisted ACER in the context of the debt restructuring agreement of Olidata, an Italian listed company operating in the IT business.
- **Miss Sixty.** Assisted a US hedge fund in the attempted restructuring and acquisition of the Miss Sixty group, an Italian fashion group.
- **SEAT Pagine Gialle.** Assisted a foreign investment bank in the legal analysis of the capital structure of SEAT Pagine Gialle, the Italian leader of the yellow pages business, and of the implications of a possible insolvency of the Italian group on the bank's investments.