The Evolution of the Italian and U.S. Bankruptcy Systems: a Comparative Analysis

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The Evolution of the Italian and U.S. Bankruptcy Systems—A Comparative Analysis

INTRODUCTION

Until the late 20th century, Italian bankruptcy law remained primarily a punitive system, designed to punish a delinquent debtor rather than facilitate its rehabilitation or reorganization. However, the widely publicized failure of several Italian corporations, such as the collapse of the Parmalat Group and the insolvency of national air carrier Alitalia, highlighted the shortcomings of the Italian bankruptcy laws in dealing with such large corporate bankruptcies, and a subsequent push for reform occurred. Despite certain reforms, the Italian bankruptcy system is not yet an integrated system and remains largely piecemeal without a centralized “bankruptcy code” like the United States’ system.

This Article provides a comparative analysis of the Italian and U.S. bankruptcy systems and provides recommendations for additional reform of the Italian bankruptcy system based on the U.S. experience. Part I sets forth a general introduction to the legal framework of the Italian bankruptcy system along with an overview of its recent reform. Part II provides a general introduction to the legal framework of the U.S. bankruptcy system, and Part III offers a comparative analysis of the Italian and U.S. bankruptcy systems and analyzes the U.S. bankruptcy laws that the Italian bankruptcy system should adopt based on the U.S. experience.
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I. GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK OF THE ITALIAN BANKRUPTCY SYSTEM AND ITS EVOLUTION

A. The Origin of the Italian Bankruptcy System

The origins of modern Italian bankruptcy law date back to 1942, when the Royal Decree No. 267 of March 16, 1942 ("Royal Decree") first introduced the legal framework of the modern Italian bankruptcy system. This legal framework survived substantially unchanged for most of the 20th century, and only over the last decade has it been revised and amended to better suit the needs of a significantly changed Italian economic and industrial environment.

The Royal Decree was premised on a very old concept of bankruptcy, aptly characterized by the word used to describe the bankruptcy proceedings conducted thereunder, "Fallimento," or "failure." The Royal Decree ascribed to bankruptcy a substantially negative social value; an entrepreneur who failed to succeed in business was considered as a social threat. Rather than offering fair and efficient remedies to the troubled entrepreneur for the reorganization of his business, the Royal Decree was enacted primarily as a tool for punishment, aimed at the liquidation of the distressed enterprise. In many instances, the bankrupt debtor was even subject to (i) restriction of certain rights (e.g., voting rights, ability to assume certain managing roles within governmental entities, and to participate in certain professions), and (ii) criminal sanctions and liabilities. This anachronistic concept of bankruptcy survived until 2006, when the structure of the Royal Decree was substantially reformed and amended.

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4. See Vern Countryman, Bankruptcy and the Individual Debtor—and a Modest Proposal to Return to the Seventeenth Century, 32 Cath. U. L. Rev. 809, 810 (1983) (discussing the purpose of early Italian bankruptcy laws as not for the debtor’s relief, “who was treated as an outlaw,” but for the remedy of his creditors).

B. The Ordinary Bankruptcy Proceedings (Fallimento)\(^6\)

The Ordinary Bankruptcy Proceedings, or *Fallimento*, set forth in the Royal Decree are essentially liquidation proceedings. To access the Ordinary Bankruptcy Proceedings, a debtor must be insolvent and meet certain dimensional requirements in terms of number of employees, revenues, and outstanding debt.\(^7\) Ordinary Bankruptcy Proceedings are subject to the exclusive jurisdiction of the Italian bankruptcy courts.\(^8\)

The petition for bankruptcy may be filed by the debtor itself (voluntary bankruptcy) or filed by the creditors of the debtor or by the public prosecutors (involuntary bankruptcy).\(^9\) After the filing of a bankruptcy petition, a debtor loses control over its assets (an Ordinary Bankruptcy Proceeding is a “debtor-not-in-possession” proceeding), and a bankruptcy court-appointed receiver administers the proceeding under the supervision of the bankruptcy court.\(^10\)

A creditors’ committee, generally consisting of three to five creditors, is then appointed by the bankruptcy court.\(^11\) The creditor’s committee is an active constituent in the Ordinary Bankruptcy Proceeding, and a receiver must consult with such committee during the proceeding. The creditor’s committee may also issue recommendations on certain aspects of the Ordinary Bankruptcy Proceeding.

The overall proceeding, however, is primarily administered by the receiver who, among other things: (i) prepares the inventory of the debtor’s assets; (ii) forms the list of creditors according to their respective priorities; (iii) assumes or rejects executory contracts; (iv) initiates any necessary lawsuits (e.g., claw-back actions and damage actions against former directors and auditors); (v) informs the public prosecutors of any potential criminal liability related to the bankruptcy; and, (vi) drafts the liquidation plan, liquidates the assets, and repays creditors in accordance with their respective priorities.\(^12\)

An Ordinary Bankruptcy Proceeding terminates\(^13\) with the distribution to the creditors of the proceeds derived from liquidated bankruptcy estate assets and

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\(^7\) See Riesenfeld, *supra* note 2, at 414.

\(^8\) Id. at 404.

\(^9\) Id. at 414. Before the reforms of the Royal Decree, Ordinary Bankruptcy Proceedings could also be commenced upon a court’s spontaneous initiative. See id.

\(^10\) Id. at 417.

\(^11\) Id. at 405; see also infra Part I.F.5.iv (regarding the new powers of the creditors’ committee).

\(^12\) Riesenfeld, *supra* note 2, at 405 (discussing the *curatore*’s, or receiver’s, role in representing creditors).

\(^13\) See id. at 428 (describing the sale of the debtor’s assets); see also Daniela Andreatta, *Buy-Out of Bankruptcy Estates Under Italian Bankruptcy Law*, BLOOMBERG L. REP.–BANKR. L., 2009, http://www.ostrick.com/
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proceeds from any legal actions, according to the order of priority imposed by law, summarized below:

(i) secured claims (e.g., claims secured by a pledge or mortgage);
(ii) administrative claims (e.g., claims due for the management of the bankruptcy and the continuation of the enterprise);
(iii) priority claims (e.g., claims for salaries, social security contributions and taxes);
(iv) unsecured claims; and,
(v) subordinated claims (e.g., equity and certain intercompany loans).[^14]

In addition to the receiver-conducted liquidation proceeding described above, there is an alternative and more efficient (in terms of costs and timing) method to conclude an Ordinary Bankruptcy Proceeding, recently amended by the Reform: the filing of a “Concordato Fallimentare.”[^15] The Concordato Fallimentare is a post-petition filing of a composition (similar to a plan of liquidation) that is subject to creditors’ vote.

A Concordato Fallimentare may be proposed at any time by any party-in-interest, except for the debtor and its affiliates, who can only propose it one year after the commencement of the Ordinary Bankruptcy Proceeding.[^17] The Royal Decree does not provide any guidance with respect to the content of a Concordato Fallimentare; thus, a Concordato Fallimentare may encompass any kind of transaction to effectuate the liquidation of a debtor (e.g., debt-equity swap, sale of assets, business assignments).[^18] A Concordato Fallimentare must be accepted by (i) the creditors holding the majority of the allowed claims and (ii) the majority in each class of allowed claims.[^19] A non-vote is deemed an accepting vote. Once accepted, the

[^14]: The priority claims order is set forth in Article 111 of the Royal Decree. Legge Fallimentare—Testo a Fronte, http://www.ilcaso.it/fallimenti/la111.php (providing, in Italian, the text of Article 111, which describes the closure of a bankruptcy proceeding).

[^15]: See infra Part I.F.

[^16]: See Riesenfeld, supra note 2, at 409 (discussing the difference between Concordato Fallimentare and Concordato Preventivo in the Italian Bankruptcy Act of 1942); see also Codice Della Legge Fallimentare, http://www.ilcaso.it/fallimenti/indice-lf.php (providing, in Italian, Articles 126–41, which describe the closing of a Concordato Fallimentare).

[^17]: Before the reform brought by Legislative Decree No. 5 of January 9, 2006, the Concordato Fallimentare could be proposed by the debtor only, and no other parties were allowed to make any proposals.

[^18]: See Riesenfeld, supra note 2, at 451 ("All unsecured creditors with allowed claims are entitled to participate.").

[^19]: See id. ("Assent of a majority in number of the qualified creditors representing two-thirds in amount of such claims is required.").
Concordato Fallimentare is binding against all non-accepting creditors (cram-down).

C. Special Liquidation Procedure for Financial Institution and Insurance Companies—Compulsory Administrative Liquidation

In addition to the Ordinary Bankruptcy Proceeding, the Royal Decree also provides for a special liquidation procedure, the Compulsory Administrative Liquidation, which applies to any entities that, due to the nature of the activity they perform, are subject to the control of the Italian public administrations (e.g., banks, insurance companies, sports companies). In addition to the Royal Decree, a Compulsory Administrative Liquidation is subject to any other applicable laws that govern such entities. For instance, the liquidation of insolvent banks and other financial institutions are governed by a specific section of Legislative Decree No. 385 of September 1, 1993.

D. Extraordinary Administration

1. History of the Extraordinary Administration

Reform of the existing Italian bankruptcy system first occurred in the late seventies, when the Prodi Law was enacted to govern the insolvency of large corporations. The Prodi Law introduced a special procedure called Extraordinary Administration, primarily aimed at protecting employment and preserving a distressed company's assets through the continuation, re-establishment, or conversion of its business.
After its enactment, the Prodi Law passed the scrutiny of the Italian Supreme Court, the Constitutional Court, and the European Court of Justice, whose decision led the Italian legislature to replace the Prodi Law with the Prodi-bis Law, which provided a revised version of Extraordinary Administration still in force today.

A few years later, in the last days of 2003, Italy was the scene of the largest European case of financial fraud in history: the collapse of the Parmalat group. Since none of the legal restructuring instruments then in force was deemed adequate to successfully tackle such an unprecedented and complex bankruptcy, the Italian government enacted a further “special” Extraordinary Administration procedure for very large corporations, the Marzano Law.

The Marzano Law was the starting point for the wider reform of the Italian bankruptcy system. For the first time, a bankruptcy proceeding was designed to encourage the recovery of a debtor-company through composition agreements between the debtor and its creditors. The Marzano Law was enacted, at least in principle, to preserve the continuation of the debtor’s business and to prevent a liquidation of the debtor’s business, and it represented a significant break with a historically punitive Italian bankruptcy system.

Subsequently, from time to time, the Marzano Law has been further amended in order to meet the specific needs of the distressed company involved. The most significant amendment was the Alitalia Decree, enacted by the Italian government to tackle the insolvency of the national air carrier Alitalia.

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2. Extraordinary Administration—The Procedures

Similar to Ordinary Bankruptcy Proceedings, the Extraordinary Administration is a debtor not-in-possession proceeding. The bankruptcy petition, however, can only be filed by an insolvent company meeting the specific requirements provided either by Prodi-bis Law or by the Marzano Law.

Once a company, and its affiliates, is declared insolvent and is admitted into Extraordinary Administration, one or more extraordinary commissioners are appointed by the Ministry of Economic Development (“Ministry”) to administer the proceeding and manage the company’s business under the supervision of a designated judge and the Ministry (Extraordinary Administration is both a judicial and administrative proceeding). Certain Royal Decree provisions apply as default provisions to Extraordinary Administrations, unless otherwise stated. The extraordinary commissioners have the same powers and duties as receivers in bankruptcy proceedings.

In an Extraordinary Administration, the extraordinary commissioner must file a reorganization plan to be implemented either through a financial restructuring or an assets sale. The extraordinary commissioner may also propose a composition (similar to a plan of reorganization) with creditors (“Concordato”).

The most notable and progressive feature of the Marzano Law is in its new Concordato procedure. For the first time, creditors are divided into classes, subject to different treatments and to cram-down. The Concordato may expressly contemplate, among other things, mergers, business assignments, debt-equity swap transactions, and issuance of securities for the reorganization of the debtor business. The Concordato must be accepted by creditors representing the majority of allowed claims and, if different classes of creditors exist, by vote of creditors representing the majority of allowed claims in each class. This instrument has been successfully used and modeled upon the Parmalat case for the first time.

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35. See generally COSTA, supra note 24; GALIOTO, supra note 24; PONTI & SPADETTO, supra note 24; FAUCEGLIA & PANZANI, supra note 6.
36. See Azzarà & Manganelli, supra note 1, at 1–2 (discussing the role of the Ministry of Economic Development).
37. Id.
38. See Vincenzo Cariello, The “Compensation” of Damages with Advantages Deriving from Management and Co-ordination Activity (Direzione e Coordinamento) of the Parent Company (Article 2497, Paragraph 1, Italian Civil Code), 3 EUR. COMPANY & FIN. L. REV. 330, 331 (2006) (“In the event of bankruptcy, compulsory liquidation or extraordinary administration of a managed and co-ordinated company, action is undertaken on behalf of the creditors either by the receiver, the liquidator, or the extraordinary commissioner.”).
40. Id.
41. Auricchio, supra note 33, at 30.
42. COMPARISON, supra note 20, at 56.
E. Directors’ Liabilities in Bankruptcy

The declaration of bankruptcy (as well as admission to Extraordinary Administration) triggers the application of the criminal provisions contained in the Royal Decree. The directors of a company that has been declared bankrupt may be (i) held liable for damages caused to the company by their wrongdoing, and (ii) may also be held criminally liable for transactions executed while the company was in the insolvency zone (i.e., when a debtor is unable to repay its debts and perform its obligations when due).

The directors of a bankrupt company may be held criminally liable if it is shown that they committed a “simple bankruptcy crime” (e.g., execution of high-risk transactions during the pre-insolvency period; deepening insolvency either by not filing for insolvency proceedings or by other grossly negligent actions; failure to correctly maintain corporate books and records) or a “fraudulent bankruptcy crime” (e.g., hiding, destroying, or dissimulating the assets of the company to prejudice the creditors; destroying or falsifying corporate books and records; making payments or declaring non-existing securities to favor certain creditors and prejudice others). It is also a bankruptcy crime to seek recourse to, or continue recourse to, credit facilities with the effect of hiding the insolvency. It should be noted, however, that the above-mentioned bankruptcy-related crimes can only be prosecuted if a declaration of bankruptcy has occurred.


44. See Pontani, supra note 43, at 2 (noting the criminal liability of directors and entrepreneurs for wrongful conduct committed prior to bankruptcy).

45. See id. at 21 (discussing the simple bankruptcy crime, bancarotta semplice, pursuant to Article 217); Legge Fallimentare—Testo a Fronte, http://www.ilcaso.it/fallimenti/ifa217.php (providing, in Italian, the text of Article 217); Legge Fallimentare—Testo a Fronte, http://www.ilcaso.it/fallimenti/ifa224.php (providing, in Italian, the text of Article 224, which applies the penalties described in Article 217 to directors and CEOs of bankrupt companies).

46. See Pontani, supra note 43, at 21 (discussing the fraudulent bankruptcy crime, bancarotta fraudolenta, pursuant to Article 216); Legge Fallimentare—Testo a Fronte, http://www.ilcaso.it/fallimenti/ifa216.php (providing, in Italian, the text of Article 216).

47. See Legge Fallimentare—Testo a Fronte, http://www.ilcaso.it/fallimenti/ifa225.php (providing, in Italian, the text of Article 225); http://www.ilcaso.it/fallimenti/ifa226.php (providing, in Italian, the text of Article 226). See generally Pontani, supra note 43, at 21 (discussing the criminal sanctions that result from having made an insolvency worse).
F. The Reform of the Italian Bankruptcy System

The movement for systematic reform of the Ordinary Bankruptcy Proceedings began in the early nineties, but for various reasons such efforts failed. Only in 2005, was the Royal Decree finally amended.

The Marzano Law accelerated the reform of the Ordinary Bankruptcy Proceedings because the inadequacy of the latter was amplified by the contrasting more modern provisions of the Marzano Law. Unfortunately, however, reform of the Ordinary Bankruptcy Proceedings was not as systematic as expected. Three different waves of reforms occurred from 2005 to 2007. The first reform amended only certain provisions regarding claw-back actions and the “Concordato Preventivo” (preliminary composition with creditors). The second, significantly broader reform amended several parts of the Royal Decree, but it contained many inconsistencies, which resulted in numerous opposite constructions and threatened the efficiency of the system. Accordingly, a few months later, a new law, the Legislative Decree No. 169 of September 12, 2007, was enacted in order to correct and refine the previous reforms.

1. The Drivers of the Reform and Its Key Features

The essential aim of the above-mentioned reforms (collectively, the “Reform”) was to update and improve the efficiency of an antiquated Italian bankruptcy system and to make the Italian distressed market more appealing for potential domestic and international investors.

Particularly, the Reform transitioned the Italian bankruptcy system from a punitive system to a system that acknowledges that business failure is an inevitable part of the modern capitalist system; a modern bankruptcy system should provide


50. Azzarà & Manganelli, supra note 1, at 3.

51. See Andreatta, supra note 48 (discussing the new bankruptcy law’s exclusion of claw-backs and Decree No. 35).

52. See id. (discussing Legislative Decree No. 5 of Jan. 9, 2006).

53. See Vietti, supra note 49, at 4 (discussing the enactment of Legislative Decree No. 169 of Sept. 12, 2007).
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the tools for preservation of a debtor’s assets and the successful reorganization of a
debtor’s business for the interests of all parties in interest. The following sub-
sections address the major changes brought by the Reform.

2. Out-of-Court Restructuring Pursuant to Article 67 of the Royal Decree

The Reform introduced certain out-of-court procedures for debt restructuring.
Article 67(3)(d) of the Royal Decree (“Article 67”) was enacted to protect
transactions carried out by a company for the restructuring of its debt. Article 67
promotes out-of-court settlements and agreements with creditors, thus avoiding
costly insolvency proceedings.

Pursuant to Article 67, transactions, payments, and issuances of securities with
respect to a company’s assets are not subject to claw-back actions (in case of
subsequent bankruptcy) if they are carried out in compliance with a plan of
reorganization approved by an independent expert (appointed by the company).
Article 67, however, does not protect a company from any other action, such as
bankruptcy petitions or other claims that creditors or other parties in interest may
file. Generally, an agreement is reached between a company and its financial
creditors only. Employees and trade creditors are usually paid in full. In addition,
given that Article 67 entails private settlements, there are no priority claims
imposed by law.

Since its introduction, Article 67 has been frequently utilized and preferred over
other restructuring procedures brought by the Reform due to the absence of court
scrutiny and because the reorganization can be kept confidential (only listed
companies are required to disclose details of reorganization).

3. Court-Approved Restructuring Pursuant to Article 182bis of the Royal Decree

Article 182bis of the Royal Decree (Article 182bis) was enacted to promote the
restructuring of a company. Under Article 182bis—similar to a prepackaged plan or
reorganization under Chapter 11 of the United States Bankruptcy Code—a

54. See generally Andreatta, supra note 48 (discussing the benefits debtors received as a result of the
Reform). The Reform was inspired by bankruptcy systems of foreign countries and particularly the Chapter 11
proceedings of the United States Bankruptcy Code. See Simona Di Sano, A New Anti-bankruptcy Tool—The
similarities between the Italian law and the United States Bankruptcy Code).

55. Di Sano, supra note 54, at 388.

56. See id. at 389 (discussing immunity to claw-backs under Articles 67 and 182).

57. See Enrica Maria Ghia, How to ‘Turnaround’ in Italy, ABI INT’L COMMITTEE NEWSL. (Am. Bankr. Inst.,
international/volume6/italy.pdf.

58. 11 U.S.C. §§ 1101–74 (2006); see Di Sano, supra note 54, at 389 (discussing the similarities between
Article 182bis and the United States Bankruptcy Code). In the Italian bankruptcy system, the debtor has limited
powers, which are only exercised by receivers in Ordinary Bankruptcy Proceedings and the extraordinary
commissioners in Extraordinary Administrations. See supra Part I.B.
company proposes, negotiates, and executes an out-of-court plan of reorganization with its creditors holding no less than 60% of claims.\(^{59}\) Once a company has reached agreement with its creditors, the plan is filed with the Companies’ Register, published in the relevant Register, and filed with the bankruptcy court. Along with the restructuring agreement, the company must also file with the bankruptcy court a report drafted by an independent expert (appointed by the company) that certifies the feasibility of the agreement and its adequacy with respect to ensuring the regular payment of the creditors who are not party thereto.\(^{60}\)

In practice, Article 182\(\text{bis}\) is generally used by a company that has a small number of creditors holding a significant portion of its debt; the small number of creditors makes it possible to conduct negotiations with each creditor. Article 182\(\text{bis}\) does not determine the content of such a plan, but it does require that such plan ensures payment of the creditors who are not party thereto.\(^{61}\) Similar to Article 67, given the private nature of Article 182\(\text{bis}\), there are no priority claims imposed by law.

As with Article 67, Article 182\(\text{bis}\) prevents claw-back actions against the transactions carried out in pursuance of an approved plan.\(^{62}\) In addition, Article 182\(\text{bis}\) shields a company from any other action, such as creditors’ foreclosure actions or other third-party claims, for as long as 60 days from the date of the filing of the approved plan in the Companies’ Register.\(^{63}\)

After the filing, a court examines the proposed plan, rules upon any challenges filed by any parties in interest, and, if acceptable, approves the plan. Afterwards, the debtor in possession files the approved plan in the Companies’ Register.

Article 182\(\text{bis}\) was initially seldomly utilized but this procedure has recently become more popular.\(^{64}\) It is very likely that the recourse to Article 182\(\text{bis}\) will increase.

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59. See generally Di Sano, supra note 54, at 389 (discussing the restructuring plan as privately negotiated between creditors and debtors).
60. Id.
61. See id. at 391–92 (articulating that creditors who did not sign the restricting agreement still must be paid under their original claims).
62. Id. at 389.
63. See id. (noting the requirement of registration with the Companies’ Register).
64. Andreatta, supra note 48 (noting that 182\(\text{bis}\) proceedings became “pretty popular” in complex restructurings in 2009). For example, when Risanamento S.p.A., an Italian real estate company, was preparing and finalizing its restructuring plan under Article 182\(\text{bis}\), public prosecutors filed an involuntary petition for bankruptcy for the company with the aim of pursuing certain alleged bankruptcy-related crimes. Milan Prosecutor Seeks Risanamento Bankruptcy, REUTERS, July 16, 2009, available at http://www.reuters.com/article/idUSLG41249320090716. Risanamento S.p.A. finalized and filed the Article 182\(\text{bis}\) before the date of the first court hearing on the legitimacy of the involuntary bankruptcy petition. See Giuseppe De Palma et al., The Italian Job: Milan Court’s Restructuring Brings Real Estate Group Within “The Self-Preservation Society”, ASS’N OF CORP. COUNSEL, Nov. 30, 2009, http://www.lexology.com/library/detail.aspx?g=d8ae9973-1b21-447d-aa71-8c1e70f22d1. At the hearing, the court held that the filing of Article 182\(\text{bis}\) does not prevent and/or stop, per se, an involuntary bankruptcy petition, but, at the same time, held that parties must await the outcome of the
4. The New “Concordato Preventivo”

_Concordato Preventivo_, or “preliminary composition with creditors,” is a court-supervised proceeding that contains similar attributes to a Chapter 11 case under the United States Bankruptcy Code. If _Concordato Preventivo_ is normally used by companies where Article 67 and Article 182bis would not be applicable or effective. _Concordato Preventivo_ consists of a court-approved restructuring proposal that, if accepted by the creditors holding the majority of the debt, binds all creditors (including creditors who have not accepted it). This is a procedure that is supervised by a court (any transaction outside of ordinary course of business, any major settlement, and any payment of any pre-petition claim needs the court’s prior authorization), which examines the proposal accompanied by the opinion of an expert and evaluates whether the proposal and the restructuring plan are feasible.

If the court finds that the plan and the proposal are not feasible or not properly drafted and reliable, it may reject the proposal or refuse to approve the _Concordato Preventivo_ even if the creditors accepted the proposal. In these cases, it is highly likely that the company will be declared bankrupt.

Creditors may be divided into different classes on the basis of similar economic interests, and a company may differentiate the economic treatment for each class. The classification of creditors into different classes, however, cannot alter the priority treatment of creditors set by law. The court is charged with ensuring the legality of class classification.

Secured creditors do not vote unless the proposal contemplates a partial payment of the secured liabilities they are owed. In such circumstances, they are allowed to vote for the portion of such liabilities that will not be paid. In addition, it is also possible to propose a settlement of taxes due to the tax authority.

Where different classes of creditors exist, a court may approve the arrangement notwithstanding that the majority in one or more classes of creditors has not voted.

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Article 182bis before proceeding with an involuntary bankruptcy. Id. Accordingly, the court favored, de facto, Article 182bis over Ordinary Bankruptcy Proceedings. See id.

65. See Sen, supra note 3, at 4 (listing _Concordato Preventivo_ as one of the insolvency-related procedures available in Italy). With _Concordato Preventivo_, like Article 67 and Article 182bis, the company does not commence a bankruptcy proceeding and does not have the powers granted to a debtor, such as avoidance powers, right to assume or reject executory contracts, etc., which are fundamental rights granted to debtors under the United States Bankruptcy Code. Cf. Giorgio Cherubino, _The Reform of the Italian Insolvency Law_, EXECUTIVEVIEW.COM, Feb. 1, 2008, http://executiveview.com/knowledge_centre.php/id=1889 (noting that the debtor is not considered bankrupt in a _Concordato Preventivo_).


67. See id. (discussing the Bankruptcy Court’s authority to check feasibility requirements).

68. See id. at 391–92 (specifying that creditors who were not parties to the debt restructuring agreement are still entitled to their claims).

to accept the plan, provided that the majority of the classes vote to accept the plan and the court finds that the dissenting creditors will receive an amount not less than the amount they would receive under “any other practicable alternative.” Once approved by the requested majority and ratified by the court, the plan becomes binding on all creditors (cram-down).

5. Amendments to Ordinary Bankruptcy Proceedings

In addition to the above-mentioned proceedings, the Reform also amended the Ordinary Bankruptcy Proceedings to address the changed Italian economic system, abandoning the former concept of bankruptcy as a punitive measure. It is important to mention the following amendments:

(i) Access to Bankruptcy Proceedings: The threshold for being eligible for bankruptcy has been raised;\(^7\)

(ii) Personal Inabilities: The personal inabilities following a bankruptcy declaration have been abolished;\(^7\)

(iii) Claw-back Actions: The statutory period for claw-back actions has been reduced and now ranges from six months (for regular transactions) to one year (for irregular or fraudulent transactions). Moreover, certain transactions are now exempt from claw-back actions (e.g., payments, guarantees, and security made or granted in the context of a restructuring program under Article 67, Article 182bis, or Concordato Preventivo);\(^7\)

(iv) Creditors’ Committee: The role of the creditors’ committee has been considerably strengthened. The creditors’ committee not only has the duty to supervise the activity of the receiver, but it also has the power to request replacement of the receiver, authorize certain transactions, and provide binding opinions;\(^7\)

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\(^70\) See COMPARISON, supra note 20, at 56–57 (discussing the bankruptcy court’s power to bind a composition over the protests of dissenting creditors).

\(^71\) Id.

\(^72\) Legge Fallimentare, http://www.ilcaso.it/fallimenti/lfa1.php (providing, in Italian, the text of Article 1). Small business debtors, in order to be exempted from bankruptcy proceedings, must demonstrate the concurrence of: (i) a value of assets in the past three fiscal years not exceeding 300,000; (ii) gross incomes not exceeding 200,000 for each of the previous three fiscal years; and (iii) outstanding debts, if not yet due, not exceeding 500,000. Id.

\(^73\) Id.

\(^74\) Legge Fallimentare, http://www.ilcaso.it/fallimenti/lfa142.php (providing, in Italian, the text of Article 142, which discharges liability for indebted companies for individuals who have cooperated in a bankruptcy proceeding); see also Panzani, supra note 48, at 309.

\(^75\) Stefano Crosio & Gherardo Cadore, Recent Amendments to Italian Bankruptcy Law, METROPOLITAN CORP. COUNS., Oct. 1, 2005, http://www.metrocorpconsultants.com/current.php?artType=view&artMonth=October&artYear=2005&EntryNo=3677. Before the Reform, the “suspect period” varied from one year to two years depending on the type of transaction and the way it was executed. Id.
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(v) Concordato Fallimentare: As mentioned previously, the Concordato Fallimentare has been modernized and could now be proposed by any party-in-interest. 76

G. Criticism of the Reform 77

The Reform significantly modernized the Italian bankruptcy system. However, some adjustments and amendments are still needed. The major Reform criticisms, in particular, are summarized in the following subsections.

1. Lack of Coordination with Bankruptcy Criminal Provisions

The lack of coordination between the new reorganization procedures introduced by the Reform and the bankruptcy criminal provisions represents one of the major issues of the new bankruptcy system. Although the Reform considerably amended the existing bankruptcy proceedings and introduced new reorganization procedures, at the same time it did not bring any change to the criminal bankruptcy provisions contained in the Royal Decree. 78 This lack of coordination currently represents an obstacle to the widespread utilization of the new reorganization procedures since the transactions executed pursuant to Article 67 or Article 182bis do not protect a debtor from any possible bankruptcy-related criminal liability in case of subsequent bankruptcy (such as, among others, the preferential payments to selected creditors to the detriment of other creditors under Article 216 of the Royal Decree).

Arguably the risk of criminal liability is lower if a transaction was carried out in furtherance of one of the above-mentioned reorganization procedures. However, it would be prudent to reconcile such procedures with the Royal Decree’s criminal provisions in order to ensure that directors, managers, and other professionals are exempt from such liabilities to encourage the adoption of such procedures.

2. Lack of Coordination Between New Reorganization Procedures and Ordinary Bankruptcy Proceedings

Another shortcoming of the Reform is that an unsuccessful restructuring pursuant to a reorganization procedure will be followed by an Ordinary Bankruptcy Proceeding, without any continuity or any protections for the actions taken pursuant to a reorganization procedure. For example, there are no provisions in the Royal Decree that ensure that there is priority given to any new financing made available to the debtor in the course of an Article 67 or Article 182bis procedure, in

76. See id. (describing the Reform’s effect of granting accessibility to third parties); see also supra Part I.B.
77. See Di Sano, supra note 54, at 390 (discussing criticism of the Reform); see also Panzani, supra note 48, at 326–27.
78. See Pontani, supra note 43, at 1, 22 (discussing criminal consequences in Italian bankruptcy law).
addition to the costs and expenses incurred by the professionals that assist the debtor with its reorganization.\textsuperscript{79} This is an issue that must be addressed because it is a deterrent both for lenders to extend credit to the insolvent debtor and professionals to assist the distressed debtor.

Any unsecured new financing provided to the debtor pursuant to Article 67 or Article 182\textit{bis} procedures is treated as an unsecured claim in a subsequent bankruptcy. Similarly, any fees incurred by professionals who assist the debtors in reorganization would be treated as unsecured claims in case of subsequent bankruptcy.

Furthermore, under Article 67, Article 182\textit{bis}, and \textit{Concordato Preventivo}, a debtor does not have the remedies and powers that are available to the receivers in Ordinary Bankruptcy Proceedings and the extraordinary commissioners in the Extraordinary Administration (particularly, the right to assume or reject executory contracts and unexpired lease agreements), which would better help the debtor to have a fresh financial and operations start.

3. Lack of Coordination with Extraordinary Administration

The Reform amended only the Royal Decree, and no reference is made to the Extraordinary Administration.\textsuperscript{80} To achieve general reform and simplification of the Italian bankruptcy system, the existing Extraordinary Administration should be aligned with the new provisions of the Royal Decree brought about by the Reform.

Moreover, the Extraordinary Administration does not contemplate the possibility of being carried out by the debtor itself as debtor in possession. A reorganization process managed by the debtor under the supervision of a court and the Ministry—absent any fraud or gross negligence—would certainly be more efficient, given that a debtor in possession has a better knowledge of its business operations. The extraordinary commissioners, in fact, generally do not have knowledge of a debtor’s business and spend the first months just getting familiarized with the company’s structure, which has a significant impact on the continuation of the company’s business.

H. Outlook

Today, the various disjointed reforms of the Italian bankruptcy system, as outlined above, have resulted in a confusing system. There are at least four different insolvency proceedings: (i) the Ordinary Bankruptcy Proceedings; (ii) the

\textsuperscript{79} Cf. Codice Della Legge Fallimentare, http://www.ilcaso.it/fallimenti/indice-lf-php (providing, in Italian, the text of the Royal Decree, which does not include provisions for debtor financing or professional fees incurred while the bankruptcy procedure is occurring).

\textsuperscript{80} Giorgio Corno, Recent Reforms Concerning Italian Insolvency Law: An Overview (with Specific Regard to Voidable Transactions) (unpublished manuscript, available at www.laworld.com/attachments/035_Italian_insolvency_law_reforms.doc).
The Italian legislature must (i) simplify and unify the sprawling legal framework for insolvency proceedings and (ii) reform the criminal provisions of the Royal Decree in light of the recently introduced reorganization procedures.

II. GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK OF THE U.S. BANKRUPTCY SYSTEM AND ITS EVOLUTION

A. The U.S. Bankruptcy System

Bankruptcies in the United States are governed by title 11 of the United States Code (the “Bankruptcy Code”). The Bankruptcy Code embodies the fundamental concept that an honest debtor deserves a fresh financial start. Since its enactment, the Bankruptcy Code has been amended several times, but the most extensive amendments occurred in 2005, with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “2005 Bankruptcy Act”). The Federal Rules of Bankruptcy Procedure and the local rules of each district govern bankruptcy procedure.

For the purpose of this Article, the following chapters of the Bankruptcy Code need to be mentioned: Chapter 7, which is a court-supervised liquidation proceeding (similar to Italian Ordinary Bankruptcy Proceedings), Chapter 11, which is a debtor-in-possession proceeding for the reorganization of commercial enterprises and repayment of creditors through a court-approved plan of reorganization, and Chapter 15, which provides the rules for cross-border insolvency proceedings. This Article will generally focus on analysis of Chapter 11 bankruptcies, most commonly used for the reorganization of businesses.

81. See Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (“One of the primary purposes of the bankruptcy act is to ‘relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.’” (quoting Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915))).


B. General Introduction to Chapter 11

Chapter 11 is a court-supervised proceeding that allows companies to reorganize financially and operationally. Chapter 11 is primarily designed to preserve the “going-concern value” of business and allow a debtor to continue its business while restructuring its debt and/or operations. However, banks, other financial institutions, insurance companies, and stockbrokers are not eligible to file for Chapter 11 and are usually liquidated through other federal or state wind-up laws.

In Chapter 11, a debtor remains as a debtor in possession and continues to manage its own business in the ordinary course, provided that, among other things, any transaction made outside of the ordinary course of business, any major settlement, or any payment on a pre-petition claim must be approved by the bankruptcy court. A trustee is generally not appointed. The appointment of a trustee is limited to a very small number of cases and only upon the occurrence of certain circumstances (usually mismanagement or fraud).

From the commencement of the bankruptcy case, and subject to certain limitations, the debtor is entitled to the automatic stay provisions of the Bankruptcy Code. The automatic stay provides a “breathing spell” for the debtor and provides for the stay of all judgments, collection activities, foreclosures, and repossession of property.

At the beginning of a bankruptcy case, a debtor in possession will file certain “first day” motions with the bankruptcy court in order to continue its business in the ordinary course (e.g., continue payment of employee wages and benefits, continuation of customer programs, payment to critical vendors, and continuance of existing cash management systems). In addition, a debtor in possession can

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84. See Christopher W. Frost, Running the Asylum: Governance Problems in Bankruptcy Reorganizations, 34 ARIZ. L. REV. 89, 92 (1992) (“On the assumption that keeping the assets intact will preserve ‘going concern value,’ Chapter 11 provides for a continuation of the business operations and a financial restructuring rather than a liquidation.”).

85. 11 U.S.C. § 109 (2006). Insurance companies, banks, and other financial institutions do not qualify as debtors under Chapter 7, and therefore do not qualify as debtors under Chapter 11. §§ 109(b), (d). Section 109(d) also excludes stockbrokers from participation in Chapter 11. § 109(d).

86. § 363 (allowing trustees to operate debtor’s business in the ordinary course without notice and hearing); see also §§ 1107–08 (assigning a debtor in possession all rights and duties of a trustee, with certain exceptions).

87. § 1104 (providing for appointment of trustee in cases of “fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management”; see also In re Cardinal Indus., Inc., 109 B.R. 755, 765 (Bankr. S.D. Ohio 1990) (“The appointment of a trustee in a Chapter 11 case is an extraordinary remedy.”).)


89. In re The Coldad Group, Inc., 324 B.R. 208, 212 (Bankr. W.D.N.Y. 2005) (“In bankruptcy practice, the phrase ‘first day motions’ refers generally to any of a variety of requests made shortly after the filing of a Chapter 11 petition, for prompt authorizations needed to facilitate the operation of the debtor’s business.”); see also § 105(a) (giving bankruptcy courts authority to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title”).

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request the bankruptcy court to authorize debtor-in-possession financing to pay for its financing needs during its bankruptcy case. Debtor-in-possession financing is generally protected by priority liens on the debtor’s assets, and, in any case, unsecured debtor-in-possession financing benefits from super-priority claim status. The court may even authorize the debtor to grant super-priority liens on already encumbered properties so long as a court deems that the interests of existing lien holders are “adequately protected.” Such provisions ensure that lenders are willing to lend to a debtor in bankruptcy.

The Bankruptcy Code also contains “Safe Harbor Provisions” that exempt the post-petition exercise of certain financial instruments from the automatic stay. For example, a swap participant or financial participant (master netting agreements, swap agreements, and master agreements) is allowed to set-off, net, and execute certain contractual rights of termination under swap agreements. In addition, for these types of agreements, section 560 of the Bankruptcy Code allows a non-defaulting counterparty to enforce ipso facto clauses (e.g., clauses that render insolvency or bankruptcy as termination; such clauses are generally not enforceable in bankruptcy). The underlying reason for such Safe Harbor Provisions is to ensure the liquidity of the financial markets in the event of a bankruptcy of a major financial institution.

C. The Plan of Reorganization

A debtor in possession in Chapter 11 ultimately seeks to confirm a plan of reorganization (the “Plan”), which commonly involves the reduction of the overall amount of debt along with the reorganization of business operations. Generally, once the debtor in possession has obtained first-day relief and stabilized its operations, the debtor in possession prepares, discusses, and negotiates the Plan with its creditors.

A Plan can only be proposed by a debtor during the “Exclusivity Period,” which the 2005 Bankruptcy Act fixed as 120 days after the filing. Only upon termination of the Exclusivity Period are other parties in interest allowed to file alternate Plans.

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90. § 364.
92. § 362(b)(17), (o); see also § 560 (defining contractual rights of swap participants and financial participants).
93. § 560; see also § 365(e)(1); Bryan G. Faubus, Note, Narrowing the Bankruptcy Safe Harbor for Derivatives to Combat Systemic Risk, 59 DUKE L.J. 801, 824–25 (2010).
94. 128 CONG. REC. 15,981 (1982) (statement of Sen. Dole) (“It is essential that stockbrokers and securities clearing agencies be protected from the issuance of a court or administrative agency order which would stay the prompt liquidation of an insolvent’s positions, because market fluctuations in the securities markets create an inordinate risk . . . .”); see Shmuel Vasser, Derivatives in Bankruptcy, 60 BUS. LAW. 1507, 1509–10 (2005).
95. § 1121(b). This exclusivity period can be extended up to 18 months in most cases, and up to 300 days in small business cases, upon court permission. §§ 1121(d)(2)(A), 1121(e).
In connection with the Plan, the debtor in possession is also required to file a disclosure statement with the bankruptcy court. The disclosure statement must contain “adequate information” that would enable a hypothetical reasonable investor and the typical holder of claims or interests of the relevant class to make an informed judgment about the Plan.\(^7\)

After court approval of a disclosure statement, creditors are solicited to vote on the Plan. If creditors have been divided into separate voting classes, each class must accept the Plan by a majority of “two-thirds in amount and more than one-half in number of the allowed claims” in each class.\(^8\) Claims that are not impaired are not required to vote. Where there are impaired classes of claims, the Plan can only be confirmed by the court if it has been accepted by at least one class of impaired claims.\(^9\) The confirmation of a Plan is subject to court approval at a confirmation hearing.

\(\text{D. The Prepackaged Plan of Reorganization}\)

The Bankruptcy Code also allows the potential debtor to adopt a special mechanism to rapidly emerge from Chapter 11 and minimize the impact of a bankruptcy. This mechanism is called a prepackaged plan of reorganization (the “Prepackaged Plan”).\(^{10}\)

In a Prepackaged Plan, a potential debtor proposes, negotiates, and solicits votes on a reorganization plan before the filing of a Chapter 11 petition. When the debtor files its bankruptcy petition, the reorganization plan has already been accepted by the necessary parties. The role of the bankruptcy court is limited to ensuring that all necessary confirmation requirements were met and to confirming such a Prepackaged Plan.\(^{11}\)

The Prepackaged Plan is generally suitable for those debtors who have a smaller number of creditors that are usually sophisticated financial or institutional

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96. § 1121(c).
97. § 1125.
98. § 1126(c).
99. § 1129(a)(10); see § 1124 (defining impaired class).
101. §§ 1128–29; see § 1123 (listing required contents of Prepackaged Plan). The Prepackaged Plan should not be confused with the pre-negotiated plan of reorganization: in the latter case, the debtor reaches a general agreement with creditors regarding the most material terms and conditions of the reorganization plan before filing of the Chapter 11 petition. See Michelle M. Harner, The Corporate Governance and Public Policy Implications of Activist Distressed Debt Investing, 77 FORDHAM L. REV. 703, 739–41 (2008). The solicitation of the votes in connection with the proposed plan takes place after the bankruptcy filing. Id.
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creditors.102 Such counterparties are usually used to dealing with such issues and generally are interested in a successful reorganization of a debtor. In addition, such counterparties usually retain claims that remain relatively constant and do not fluctuate in the period preceding the filing.

A Prepackaged Plan is still subject to confirmation requirements as with an ordinary plan (e.g., disclosure statement, limitations, etc.),103 in addition to certain specific requirements. Pursuant to the recently amended section 1125(g) of the Bankruptcy Code, a debtor may also continue to solicit votes on his Prepackaged Plan after a bankruptcy petition (involuntary) is filed, based on the pre-petition disclosure statement.104 This provision offers the debtor protection against those creditors who aim to stop the reorganization process by filing involuntary bankruptcy petitions during the period in which the debtor is soliciting votes on his Prepackaged Plan.

III. A COMPARATIVE ANALYSIS OF THE ITALIAN AND U.S. BANKRUPTCY SYSTEMS

A. Preliminary Considerations

As stated in the Introduction, the Italian bankruptcy system was originally structured to punish debtors. Such an approach to insolvency has changed only recently pursuant to the Reform, and the various constituents of the Italian bankruptcy system (i.e., courts, advisors, professionals, etc.) still lack experience with the various new restructuring tools provided by the Reform.

By contrast, the modern U.S. bankruptcy system was enacted under opposite principles: to provide debtors with a fresh start, to encourage the successful reorganization of the business, and to protect the value of the enterprise for the benefit of all stakeholders.105

In the following sections, I will focus on the differences between the above-described bankruptcy systems and provide recommendations as to the continued reform of the Italian bankruptcy system.

102. See John D. Ayer et al., Out-of-Court Workouts, Prepacks and Pre-Arranged Cases: A Primer, AM. BANKR. INST. J., Apr. 2005, at 16, 56 (explaining that prepackaged plans are most successful in cases with a small number of creditors and “fairly concentrated” debt).
103. See supra Part II.C.

104. § 1125(g) (“Notwithstanding subsection (b), an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law.”).
105. See Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); In re Continental Airlines, 91 F.3d 553, 565 (3d Cir. 1996) (noting the Bankruptcy Code’s “strong public policy in favor of maximizing debtors’ estates and facilitating successful reorganization”).
B. Restructuring and Reorganization Process in the Two Systems

In the United States, the vast majority of distressed corporations are reorganized through Chapter 11.\(^\text{106}\) In Italy, most of the insolvent large corporations were in the past liquidated through Extraordinary Administration or the Ordinary Bankruptcy Proceedings.\(^\text{107}\) Only after the enactment of the Marzano Law and the Reform did distressed corporations begin to adopt the newly introduced reorganization tools described above. The main differences between the Italian and U.S. legal systems for corporate restructuring are summarized below.

1. Out-of-Court Restructuring

As mentioned above, the reorganization and restructuring process in the United States is usually carried out with Chapter 11 and is, therefore, an in-court process.\(^\text{108}\) The Bankruptcy Code does not provide for any specific statutory protection or acknowledgment of an out-of-court restructuring (with the sole exception for the pre-petition activities in the Prepackaged Plan).\(^\text{109}\)

On the other hand, Article 67 of the recent reform of the Italian bankruptcy system introduced a specific out-of-court restructuring procedure, which is allowed to benefit from certain protections in case of subsequent bankruptcy.\(^\text{110}\)

2. Debtor-in-Possession Financing and Professional Fees

One of the key elements for successful restructuring is debtor-in-possession financing that allows a debtor to obtain credit to continue its operations during bankruptcy. Section 364 of the Bankruptcy Code allows a debtor in possession to obtain new financing upon court authorization, and such financing usually receives


\(^{107}\) See COMPARISON, supra note 20, at 50.

\(^{108}\) See supra Part II.B; note 106 and accompanying text.


\(^{110}\) See Di Sano, supra note 54, at 388.
priority claims on a debtor’s assets, allowing debtors to access credit where lenders would not otherwise lend to a bankrupt company.\footnote{111}

In Italy, obtaining such financing is more complex. As mentioned above, the new restructuring procedures primarily entail private negotiations between a debtor and its creditors.\footnote{112} The courts have a limited involvement in the process, mostly aimed at verifying compliance with the bankruptcy laws. The Royal Decree does not grant priority claim status to debtor-in-possession financing during restructuring procedures, discussed in Part I.B. above.

Therefore, if the restructuring procedures fail and subsequent Ordinary Bankruptcy Proceedings are commenced, there are two possible outcomes: (1) if the restructuring was carried out through Article 67 or Article 182bis, in the case of subsequent bankruptcy, the lender to a debtor in possession would not benefit from any super-priority claim; or (2) if the debtor chose the Concordato Preventivo, only debtor-in-possession loans that have been approved by the court during the procedure are eligible for super-priority claims (“prededucibili”).

In both systems the debtor-in-possession lenders are entitled to priority in distribution if debtor-in-possession loans are approved by a court order. The difference, however, is that two of the three Italian reorganization procedures do not foresee that kind of court involvement, and, therefore, the debtor-in-possession lenders may not benefit from the priority claim status in the case of unsuccessful reorganization and subsequent bankruptcy.\footnote{113}

3. Automatic Stay

As soon as a debtor files a petition for Chapter 11, it becomes eligible to benefit from the automatic stay provisions provided for under the Bankruptcy Code. In Italy, it depends on the type of proceeding: Article 67 does not provide an automatic stay; Article 182bis only provides a limited period of automatic stay (60 days after the publication of the agreement); and the Concordato Preventivo provides an automatic stay from the date of filing of bankruptcy similar to Chapter 11.

\footnote{111. 11 U.S.C. § 364; see § 507(b) (discussing priority of financing obtained under § 364).
112. See supra Part I.F.
113. See COMPARISON, supra note 20, at 60 (noting that Extraordinary Administration allows for priority claims for lenders providing new money). Debtor-in-possession financing granted in the course of Ordinary Bankruptcy Proceedings or Extraordinary Administration is approved by the court and, as such, is eligible for the super-priority claim status. Id.}
4. Debtor-in-Possession Procedures

Reorganization under Chapter 11 is normally a debtor-in-possession procedure, unless fraud or mismanagement has been committed. In Italy, whilst the three new reorganization tools introduced by the Reform (i.e., Article 67, Article 182bis, and Concordato Preventivo) are debtor-in-possession procedures, the reorganization of large corporations under the Extraordinary Administration may be pursued only through a debtor-not-in-possession procedure.

5. Court Scrutiny and Risk of Conversion

While a U.S. bankruptcy court is very involved in a Chapter 11 proceeding, the role of Italian courts in the restructuring proceedings is more limited. Article 67 does not provide for any court involvement; Article 182bis provides for limited court involvement; in the Concordato Preventivo, the role of the court is broader.\[114\]

Court scrutiny may represent a guarantee for certain creditors, but at the same time it diminishes the control of the debtor on the overall process and increases the risk of conversion or dismissal of the case.

In addition, debtors may fear that the courts will find irregularities in the management of the companies or attempt prosecuting illegal transactions and bankruptcy-related crimes. This is why in Italy, after the Reform, debtors tried to pursue business and financial reorganizations through Article 67, which does not provide any court involvement.\[115\]

6. Reorganization Plan Proponents

Article 67, Article 182bis, and Concordato Preventivo may only be proposed by the debtor. In the United States, instead, once the exclusivity period has expired, the Plan under Chapter 11 may by proposed by any party-in-interest. To this regard, one may affirm that, while the Italian procedures introduced new tools under the control of the debtor only, the U.S. legislators extended the benefits of, and the initiative to, third parties and creditors especially.

7. Summary Table

Below I report a table summarizing the key features of the reorganization procedures of the two bankruptcy systems so far examined.

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\[114\] See Di Sano, supra note 54, at 388. Despite the Reform attempting to limit the discretionary powers of the courts in Concordato Preventivo procedures, in recent case law the same courts somehow tried to regain the scrutiny powers they formerly had for such procedures. Id.

\[115\] See id. at 389–90 (discussing debtors’ reluctance to use judicial bankruptcy proceedings).
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C. What Should the Italian Lawmaker Learn from the U.S. Experience?

The Italian government is currently studying a further reform of the bankruptcy system in order to simplify the various procedures and improve the functionality and efficiency of the new reorganization procedures introduced by the Reform.

To this extent, the comparison between the Italian and U.S. bankruptcy systems I have provided herein identifies various U.S. Bankruptcy Code provisions that the Italian lawmakers should consider importing into the Italian bankruptcy legal framework through further reform. Particularly, the following improvements are recommended.

1. Protection of Debtor-in-Possession Financing and Professional Fees

Parties involved in the reorganization procedures provided for under the Royal Decree need to be protected in case of subsequent conversion into Ordinary Bankruptcy Proceedings. At least for the procedure under Article 182bis, which provides for court involvement, there should be a provision in the Royal Decree that, similar to Chapter 11 proceedings, grants to debtor-in-possession lenders and
restructuring professionals priority status with respect to their claims. This would encourage lenders to finance, and professionals to assist, distressed debtors.

2. Automatic Stay

The automatic stay provisions provided for under the Article 182bis procedure should be widened in order to give to the debtor the necessary “breathing spell” (the 60-day moratorium may be too short), which is provided for in U.S. Bankruptcy law.


Provisions similar to the “Safe Harbor Provisions” provided for under Chapter 11 for swap and other financial agreements should be replicated in the Extraordinary Administration procedures to ensure the liquidity of financial markets in the event of a major financial institution’s insolvency. 116

4. Debtor in Possession in the Extraordinary Administration

The Extraordinary Administration procedures should introduce the ability for a debtor to manage its own reorganization as debtor in possession, similar to Chapter 11 proceedings. This would enhance the efficiency of business reorganization, minimize the impact on debtor’s operations, and enhance value for all creditors and other parties in interest.

5. Reorganization Plan Proposals in the Concordato Preventivo

Creditors and other parties in interest should be allowed, after a designated exclusivity period, an opportunity to present a plan for reorganization within a Concordato Preventivo procedure, and even the power to file the debtor company into Concordato Preventivo. This would grant stronger leverage to creditors and potential investors and widen the opportunity for reorganization, and it would significantly reduce the recourse to inefficient Ordinary Bankruptcy Proceedings.

6. Prosecution of Negotiations on the Reorganization Plan in Case of Conversion into Ordinary Bankruptcy Proceedings

A provision similar to section 1125(g) of the Bankruptcy Code\textsuperscript{117} should be included in the Royal Decree. Particularly, at least for the Article 182bis procedure, it should be stated in the law that, in instances of conversion of the case into Ordinary Bankruptcy Proceedings due to involuntary filing, the debtor should be allowed, within a certain period of time, to carry on the negotiations upon the reorganization plan and its implementation, avoiding a liquidation scenario. This would discourage creditors and other parties in interest from jeopardizing the debtor’s attempt to reorganize his operations by filing involuntary petitions for bankruptcy.

CONCLUSION

Although the recent Reform of the Italian bankruptcy system\textsuperscript{118} is largely laudable because it gave rise to a broad renovation process and created the basis for a more competitive system capable of attracting both domestic and foreign investors, still a lot of work needs to be done by the Italian lawmakers. Besides, a further reform of the Italian bankruptcy system will undoubtedly be accompanied by a trial period where professionals, creditors, courts, and investors will likely be reluctant to adapt to new legislation and will probably try to interpret the new laws based on their former and old knowledge of bankruptcy. In other words, what we need in Italy is not only a change in the law, but also a change of the mind and approach of the various distressed market players.

\textsuperscript{117} 11 U.S.C. § 1125(g) (2006); see supra Part II.D.

\textsuperscript{118} See supra Part I.F.