



**INSOL
EUROPE**

Insolvency Law in Times of Crisis

ACADEMIC CONFERENCE • DUBROVNIK • 5-6 OCTOBER 2022



The Italian Insolvency Law, Rebooted

Andrea Zorzi

Università degli studi di Firenze /

University of Florence

- Bankruptcy Act 1942
- A season of reforms, 2005-2015
 - various new instruments alongside judicial composition with creditors
 - judicial composition with creditors made more accessible
- Delegation Act of 2017
- 'Code of enterprise crisis and of insolvency' 2019

- The Code of 2019
 - climate: a general suspicion over "abuses"
 - very strict in some respects
 - pervasive judicial control over restructuring
 - liquidation plans disfavoured
 - procedurally complex
 - early warning system (a few carrots and a big stick)
 - no judicial district rearranging (major flaw)
 - some good things, however...

- Years 2020-2021
 - code postponed (originally due for Aug. 2020)
 - the Directive, previously ignored
 - most good things made into law
 - cram down on public creditors
 - composition with creditors for very small businesses, farmers, non traders and consumers
 - broaden scope of Court-confirmed debt restructuring agreement
 - expert-assisted negotiation with creditors (ditching early warning)

- The new Code 2022 and the impact of the Directive
 - most instruments confirmed
 - one new instrument created: 'Restructuring plan subject to confirmation'
 - judicial composition confirmed and reformed, very different depending on whether the plan envisages
 - business continuity (going concern)
 - pure liquidation

- The general framework – available instruments
 1. Assisted negotiation (not ex se an instrument)
 2. Certified plan
 3. Court-confirmed debt restructuring agreement
 4. Restructuring plan subject to confirmation ('PRO')
 5. Judicial composition with creditors



INSOL
EUROPE

Insolvency Law in Times of Crisis

ACADEMIC CONFERENCE • DUBROVNIK • 5-6 OCTOBER 2022



1. Assisted negotiation (not really an instrument) (art. 12 ff.)
 - possible stay (art. 18-19)
 - possible suspension of recapitalise or liquidate rule (art. 20)
 - interim and new financing (art. 22)
 - various benefits
 - reduced percentage for cram down on Court-confirmed debt restructuring agreement (art. 23(2)(b), 61(2))
 - if things go wrong, possible simplified liquidation (incl. sale of going concern) (art. 25-VI, 25-VII)
 - harder to file competing offers in subsequent judicial composition (art. 90-V)
 - tax benefits (art. 25-II)



INSOL
EUROPE

Insolvency Law in Times of Crisis

ACADEMIC CONFERENCE • DUBROVNIK • 5-6 OCTOBER 2022



2. Certified plan (art. 56)
 - no cram down, only voluntary basis
 - no confirmation, only ex-post review



INSOL
EUROPE

Insolvency Law in Times of Crisis

ACADEMIC CONFERENCE • DUBROVNIK • 5-6 OCTOBER 2022



3. Court-confirmed debt restructuring agreement (art. 57-64)
 - with or without (intra-class) cram down (75% or 60%) (art. 61)
 - with BIC test (art. 61(1)(d))
 - possible cram down on public creditors, even if not in a class (art. 63(2-II))
 - with BIC test
 - standard accessories:
 - stay (art. 54-55)
 - suspension of recapitalise or liquidate rule (art. 64(1))
 - interim and new financing (art. 99, 101, 102)
 - + no ipso facto clauses, protection of essential executory contracts (art. 64(3)-(4))

4. Restructuring plan subject to confirmation ('PRO') (art. 64-II, III, IV)
 - no cross-class cram down (art. 64-II(1))
 - free distribution of value
 - with BIC test
 - wages paid in full
 - debtor in possession (almost fully) + insolvency practitioner (art. 64-II(5, 6))
 - standard accessories +
 - acts not made opposable before filing (art. 64(II)(9) → art. 96 → art. 145)
 - executory contracts (art. 64(II)(9) → art. 94-II, 97)
 - interest suspended (art. 64(II)(9) → art. 96 → art. 153-162)



INSOL
EUROPE

Insolvency Law in Times of Crisis

ACADEMIC CONFERENCE • DUBROVNIK • 5-6 OCTOBER 2022



5. Judicial composition with creditors: liquidation plans
 - cross-class cram down (somewhat) (art. 109(1))
 - APR (arg. ex 84(4), 112(2))
 - minimum 20% + 'external resources' (art. 84(4))
 - classes optional (some compulsory) (art. 85(1, 2))

5. Judicial composition with creditors: going-concern plans

- various enabling rules to make plans easier/better, besides standard accessories
 - termination of executory contracts (art. 97)
 - no ipso facto clauses, special provisions for public procurement (art. 95)
 - protection of essential executory contracts (art. 94-II), etc.0
- voting: easier than liquidation plans (art. 109(5))
 - majority of creditors or
 - 2/3 of voting creditors, if a quorum of 1/2
- classes compulsory (art. 85)
- cross-class cram down / RPR
- shareholders?

Class formation

- compulsory classes, in general (art. 85(2))
 - tax credits not paid in full
 - credits guaranteed by third parties
 - non-pecuniary payments
 - related parties, if voting allowed (cfr. art. 109(6))
- compulsory classes, only for going concern plans (art. 85(3))
 - affected secured creditors (as defined: art. 109(5): paid in 180/30 days)
 - unsecured small trade creditors (*very small*, as defined: art. 2(1)(d))

Confirmation of going concern plans (112(2) and (3))

- exactly as art. 11(1) Directive, with no derogation ex art. 11(1), 3rd par.
 - one affected class needed only
- best-interest-of-creditors test: insolvent liquidation value

Distribution of value / cross-class cram down

- BIC test
- "liquidation value": insolvent liquidation waterfall (art. 84(6))
- surplus value:
 - freely distributable, as long as RPR (exactly as defined in 11(c) Directive) (art. 84(6))
 - exception for workers' credits : insolvent liquidation waterfall also for surplus value (art. 84(7))
 - value distribution must respect ranking (art. 85(4)) → otherwise you need a 'PRO'



INSOL
EUROPE

Insolvency Law in Times of Crisis

ACADEMIC CONFERENCE • DUBROVNIK • 5-6 OCTOBER 2022



- Shareholders: before the Code (but after the 2005-2015 Reforms)
 - default: access to judicial composition decided by board, but bylaws could provide differently (art. 152 Ins. Act)
 - value distribution: shareholders could retain interest if going concern plan, in unspecified amount (debated point, but prevalent view in courts)
 - various rules to avoid hold out in implementation, esp. for plans including changes in capital structure

- Shareholders now / 1 (art. 120-II to 120-IV)
 - access to judicial composition decided by board, board cannot be removed (except for cause) (art. 120-II (1, 3, 4))
 - 10% shareholders can file competing plan (art. 120-II(5))
 - shareholders can be included in the plan, and must if (art. 120-III(1,2)):
 - plan directly affects the rights of shareholders, or
 - company is publicly traded
 - voting (art. 120-III(3))
 - proportionally to nominal value of shares
 - deemed consent

- Shareholders now / 2 (art. 120-IV)
 - RPR for shareholders, too
 - if dissenting classes of creditors and shareholders retain or obtain value, confirmation possible if:
 - treatment *(i)* as favourable as equally ranking classes and *(ii)* more favourable as lower-ranking classes *even if all value given to shareholders* were allocated to dissenting class
 - if no equally or lower-ranking classes, if value allocated to dissenting class is higher than value allocated to shareholders
 - of course, always with BIC test (insolvent liquidation), also for shareholders
 - "value"

- Checking for RPR with shareholders – case 1 (art. 120-IV(1) first sentence)

Class	Claim	Liq. Distr.	Vote	APR	RPR	Check Art. 120-IV
Secured	100	100	Approves	100	100	100
Priority 1	100	100	Approves	100	100	100
Priority 2*	100	0	Rejects	100	70	70
Banks unsec.	100	0	Approves	50	50	65 (50+15)
Other unsec.	100	0	Rejects	50	50	65 (50+15)
Shareholders	N/A	0	Approves	0	30	0

* Value of collateral: 0

© Stanghellini

- Checking for RPR with shareholders – case 2 (art. 120-IV(1) second sentence)

Class	Claim	Liq. Distr.	Vote	APR	RPR	Check Art. 120-IV
Secured	100	100	Approves	100	100	100
Priority 1	100	100	Approves	100	100	100
Priority 2*	100	0	Approves	100	70	70
Priority 3*	100	0	Approves	100	60	60
Other unsec.	100	0	Rejects	0	40	40>30=OK
Shareholders	N/A	0	Approves	0	30	

* Value of collateral: 0

based on Stanghellini

Value? (art. 120-IV(2))

'Value reserved for shareholders' means the actual value, resulting from the approval of the proposal, of their shares ..., minus any value they may have contributed for the purpose of restructuring in the form of contributions or non-repayable payments or, for smaller companies [as defined], also in another form.