

# Goffredo Caverni

Dottore Commercialista  
Via del Castello, 5  
Pugnano  
56017 San Giuliano Terme (PI)  
Italy  
Tel. 0039 +050 +533076  
Fax. 0039 +050 +533384  
Email caverni@tin.it

## Insol Europe Survey

### Insolvency Regulation in ITALY

#### 1. Types of Insolvency Office Holders

Until 2005, Italian insolvency law was "liquidation oriented", in the sense that the main objective being pursued was the liquidation of the distressed company.

Our old law focused on creditors' rights and disregarded the chances for the debtor company to be rescued as a going concern.

Starting from 2005, thanks to many interventions of the Parliament, Italian insolvency law was deeply modernised and we now have a legal framework that is more "rescue oriented".

The IOH are called differently according to the various existing procedure in Italy:

#### **Bankruptcy "Fallimento"**

The bankruptcy is the insolvency procedure which applies to companies carrying on a commercial activity and are insolvent. The IOH is called "curatore fallimentare"

#### **Extraordinary administration of the large companies in financial difficulty**

"Amministrazione straordinaria delle grandi imprese in crisi"

The extraordinary administration of the large companies in financial difficulty is the insolvency procedure which applies to big insolvent companies. The aim of the extraordinary administration is the complete restructuring of the company assets and the protection of the employment levels, through the adoption of a recovery plan.

The IOH is called "commissario giudiziale"

#### **Composition with the creditors or Rescue plan "concordato preventivo"**

The new regulations of the 2005 have amended the existing regulations concerning preventive creditors settlement proceedings. More specifically, the debtor's proposal must be grounded on a rescue plan which may provide for the restructuring of payment obligations and the satisfaction of creditor's claim by any means, such as the sale of debtor's assets, the assumption of debts of others, the transfer to the creditors of shares, bonds eventually convertible into shares and transfer of the company's assets to a third party. The IOH is called "commissario giudiziale"

#### **Composition agreement "Concordato fallimentare"**

The proposal for the composition agreement can be filed with by the bankrupt, the creditors or by a third party before the judgement of conclusion of the bankruptcy proceedings. The IOH is called "curatore fallimentare"

#### **Certified plans "Piani attestati"**

The debtor files a plan, either unilaterally or agreed with the creditors, aimed at reducing its liabilities and rebalancing its financial position. The IOH is called "professionista delegato".

#### **Restructuring agreements "Accordi di ristrutturazione"**

The restructuring agreements, which can be used by debtors facing financial difficulties, consist of an arrangement with their creditors representing at least 60% (by value) of the claims, published in the Company House register. Such agreement are effective from the date of publication in the Company House register and bind

those creditors who approved it, once they are validated by the competent Court. The IOH is called "professionista delegato".

**Compulsory administrative liquidation** "liquidazione coatta amministrativa"

The compulsory administrative liquidation is an insolvency procedure whose effects are similar to those of the bankruptcy and it applies to certain types of companies, even to not commercial concerns and it is provided exclusively by the administrative authority, which by law, exercise control over such companies. The IOH is called "commissario liquidatore".

**Law for over-indebtedness** "Procedura da sovraindebitamento".

This law provides that a debtor, including the consumer, who has undertaken obligations for reasons not part of his/her entrepreneurial or professional activity, who is ineligible for insolvency procedures, may negotiate his or her debt position through a procedure similar to the debt restructuring arrangements. The IOH is called "professionista delegato"

**2. Size of the profession**

In the Institute of chartered accountants there are about 27.000 IOHs. I do not know the total number of IOHs in the Bar association. According to a survey of the University of Urbino, 80% of the IOH in Italy are chartered accountants, only 20% are lawyers . The majority is composed by men (76%) and they are between 40 and 50 years old. The majority of them (74%) declares to work alone without the collaboration of office assistants.

**3. Practicing norms:**

The profession is developed individually because the bankruptcy law excludes the substitution of the IOH and its functions cannot be delegated as art.30 and 32 Italian bankruptcy law. There are some limitations and incompatibilities (e.g. conflict of interests, who have previously contributed to the insolvency /crisis of the company). In addition to the provisions of law set forth by the Italian Insolvency Law, the regulation of IHOs is provided by certain fiscal and administrative laws. The IOHs appointed by the court are public officer.

**4. Qualification, training and entry in the profession**

There is not a University faculty or a special course to have access to the profession. In the university studies of law and economics, the students have to pass exams of bankruptcy law but they do not get a specific qualification to become IOH.

**5. Professional bodies**

The IOH belong to Institute of chartered accountants (dr. commercialisti ) or Bar Association (avvocati).

The professionals who belong to the Institutes of chartered accountants can be nominated by their competent court after having presented them specific demand and being members of their Institute for three years. The registration to the corresponding institute happens after having passed the professional State examination. The activity of IOH is just one from the various functions of the chartered accountant (administrative activity, accountancy, balance-sheets, valuation of firms, revision, tax litigation, etc.).

According to art 28 of the bankruptcy law , other persons can develop the activity of IOH such as those who have had functions of administration, management and

control in S.p.A. limited companies and given proof of adequate managerial capacities, but up to now there have not been nomination of that kind. The Institute of chartered accountants and the Institute of Lawyers are competent for the respect of the deontology and ethics and for the application of disciplinary sanctions a.o. The Institute of chartered accountants was founded in the 1906.

**6. Continuing professional education (CPE)**

There is not a special CPE to exercise the functions of IOH although there is a compulsory continuous education on various matters for the members of both institutes.

**7. Body corporate or individual**

In Italy the IOH cannot be corporate bodies because the corporate bodies generally carry out business and no professional activities so that there are only individual insolvency office holder

**8. Sanction for acting as IOH without proper authorization**

It is not possible in Italy because the IOH is nominated by the bankruptcy Court

**9. Bonding and insurance**

Every professional either lawyer or chartered accountant must have a professional indemnity insurance and such an insurance in general covers him also in his activity as IOH.

**10. Appointment of IOH**

The method of appointment of office holders in Italy lies in the hands of the Courts, with which the office holders also have to work. It is therefore difficult to be independent.

Although the Courts appoint the IOH in a fairly honest way, as far as I can judge, the process still is far from transparent. The attribution of mandates does not respect the rules of democracy and it is too often limited to the same group of professionals.

Besides it could be possible to nominate two or more office holders for one big insolvency case to give the opportunity the small office to grow.

If the appointment of IOH could not be in the hands of the Courts but in the hands of a separate institution, who also supervises the quality of the professionals, the relationship between the delegated Judge and the IOH could be more professional because the IOH could have a more independent position. The IOH does not have to fear repercussions for future appointments or remuneration if he or she opposes to the views of the Judge on a certain matter. In the end the Judge will of course have the final say, but the discussion becomes more of a level playing field.

The Judges will of course report to the appointing body, so the evaluation of the quality of the performance will also be decided by the Judge, but indirectly.

It often happens that the same professionals are nominated for big insolvency case and other professionals do not get any nominations or few. There have been unfortunately several scandals in various Italian Courts .

Italy has a modern and competitive legal system to face not only insolvency, but especially, the financial crisis. Nevertheless, the legislative decree 83/2015 has been

the first attempt of regulation of the nomination of the IOH but it has not been satisfactory . Some guidelines have been set up for the nomination in particular the obligation to present every 6 months a report of all the activities developed since the first relation, together with the management account. This rule has been object of critics because considered superficial, inadequate and not exhaustive for the nomination of IOH.

The recent Italian legislative decree no. 83/2015 has created in the frame of the Ministry of Justice a national register of IOH where are registered all the nominations from the judicial authority.

To get the charge of IOH one must belong for at least three years to its Institute of chartered accountants.

#### **11. Remuneration**

Ministry of Justice Decree no. 30/2012 regulate expressly the method of the remuneration that may be charged by the IOH appointed by the court, according to various percentages on active realized and recovered assets. The court approves the remuneration and it changes from one Court to the other.

#### **12. Personal Liability of IOHs**

In Italy the IOH as public officer is subject to civil and penal rules for the performance of his duties.

IOH in bankruptcy proceedings have the responsibility of the procedure and of the management of the insolvent entity, under the supervision of the delegated judge and the creditors committee. In particular, the IOH need authorization by the creditors committee for the performance of certain acts (e.g. any acts exceeding the ordinary course of business). The IOH are requested to draft a liquidation plan, which shall be approved by creditors committee and by the delegated judge.

In composition with creditors proceedings the debtor remains in possession and continues to manage the company, under the supervision of the judicial commissioner appointed by the court and upon judicial authorization for any acts exceeding the day-by-day management. The IOH appointed as judicial commissioners are entitled to inform the court of any fact which may cause revocation of the composition (e.g. fraudulent acts, hiding or diversion of assets), with subsequent possible insolvency declaration.

#### **13. Release of IOHs from Liability**

In our legal system there is no release from liability for IOH

#### **14. Independence**

The impartiality from IOH towards the debtor as towards the body of creditors induces its independence from both.