INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

THE QUEST FOR COORDINATION OF PROCEEDINGS IN CROSS BORDER INSOLVENCY CASES

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Report for Italy

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1. **Do you have the notion in you legal system of main insolvency proceedings. Is this notion procedural or substantial? Is this notion purely international or also domestic?**
2. **Do you know the notion of secondary insolvency proceedings? Is this notion purely international or also domestic?**

Italian insolvency law[1] takes into account exclusively local insolvency proceedings and does not provide any specific rule for the coordination of transnational insolvency proceedings.

As far as non-EU insolvencies are concerned, it should be considered that art. 9, second paragraph, of the Italian insolvency law provides that a distressed enterprise having its main seat abroad can be declared bankrupt in Italy even if the bankruptcy has already been declared in a foreign state.

The third paragraph of the said law provision states that the preceding rule does not affect the existing international conventions and European legislation.

In the absence of specific conventions between Italy and other countries, for non-EU insolvencies it is possible to have multiple proceedings in different countries without any specific provision of law providing coordination for the proceedings started in Italy.

However, when different insolvency proceedings are opened in Italy and in other Member States, EU Regulation applies and provides means for coordinating them[2].

Therefore, the subdivision into main and secondary insolvency proceedings is known in the Italian legal system **only** in the international context and, particularly, **within the EU legislative framework** currently outlined by: EU Insolvency Regulation no. 1346-2000, in force since may 2002 – now therefore "**EIR**"; and EU Insolvency Regulation no. 848-2015, coming into force on June 26th, 2017 – now therefore "**EIR II**").

Main proceedings are opened in the State where the debtor has its centre of main interests according to the notion of the so called COMI adopted mainly on the ground

[1] Royal Decree no. 267-1942 and subsequent amendments.

[2] *<< The bankruptcy declaration rendered in Switzerland cannot produce automatic effects in Italy, since EU Regulation no. 1346/2000, which makes the insolvency proceedings opened in any of the Member States fully effective in all the territory of the European Union, is not applicable to the relationships with Switzerland and, therefore, it requires to be recognized through a specific procedure that may give effect to the judgment also within the Italian legal system >>.* Milan Court 30th October 2014

<< The bankruptcy of a company can be declared in Italy under a secondary insolvency proceedings, pursuant to articles 27 and following of EU Regulation no. 1346/2000, if said company carries out a business on the Italian territory with organization of men and means >>. Milan Court, July 22nd 2011, in *Fallimento*, 2011, 10, 1247.

<< On the question of the insolvency declaration by a foreign court according to art. 3, paragraph 1, of the EU Regulation no. 1346/2000, the opening of the main insolvency proceeding is recognized by all other Member States as soon as it produces effects in the State where the declaration has been rendered, without any prior evaluation being admitted from the courts of the other Member States according to artt. 16 and 17 of said EU Regulation >>. Italian Supreme Court of Cassation, Joint Sections, no. 9743 of 14th April 2008.

of the *Eurofood* decision[3] of the European Court of Justice, which has been transposed under art. 3 EIR II.

3. Are the material effects of the main proceedings halted when secondary proceedings elsewhere are opened ? Please specify, if this is not the case, whether or not the law of the State in which main proceedings are opened shall affect certain rights of third parties or have effect in certain contractual relations, e.g. labour contracts.

Since the subdivision between main and secondary proceedings is recognized by the Italian legal system only under the EU insolvency framework, the relationship and interferences between such proceedings are governed exclusively by EU Regulation.

Pursuant to art. 17, first paragraph, EIR, when secondary proceedings are opened in a State, the assets located in such a State can only be affected by the said local proceedings and the liquidator of the main proceedings cannot exercise anymore his powers towards such assets. Under this perspective, it can be affirmed that the main proceedings' effects are halted by the secondary proceedings within the State in which the secondary proceedings are opened.

On the other hand, it should be noted that the liquidator of the main proceedings is granted with certain powers to intervene in secondary proceedings.

Among these, according to articles 33 and 36 EIR, the liquidator of the main proceedings may file a request to the court of the secondary proceedings in order to obtain the stay of liquidation in such secondary proceedings.

Moreover, pursuant to art. 37 EIR, the same liquidator may request the conversion of earlier secondary proceedings into winding-up proceedings.

In this context, it can be affirmed that the main proceedings has a dominant role[4].

The general rule of application of the law of the "State of the opening of the proceedings" set forth under art. 4, EIR, is subject to several exceptions laid down in articles from 5 to 15, EIR, including, among others: third parties rights *in rem*, reservation of title, contracts related to real estate rights, employment contracts, rights subject to registration, patents and trademarks.

4. Shall the creditors have the right to lodge claims in any of the insolvency proceedings (main and secondary)?

Since the subdivision between main and secondary proceedings is recognized by the Italian legal system only under the EU insolvency framework, the relationship and interferences between such proceedings are governed exclusively by EU insolvency Regulation.

[3] Case 341/04, Eurofood IFSC Ltd, ECJ decision of May 2nd, 2006.

[4] Recital 20, EIR.

Pursuant to articles 32 and 39 EIR, creditors have right to lodge multiple claims in any of the insolvency proceedings that may be opened in different States concerning the same debtor.

Creditors may also file petitions for the revocation of claims lodged by other creditors, and may attend to and vote in multiple creditors meetings. Decisions concerning the lodging may be appealed.

5. Are the dividends in all proceedings pooled? In other words, are dividends obtained in proceedings X deducted from dividends to be obtained in other proceedings?

Once again, it must be stressed that the Italian insolvency law does not provide any specific rule to deal with international multiple insolvency proceedings.

However, in the Italian legal system the principle of equal treatment of creditors is recognized and applied pursuant to art. 2741 of the Italian civil code.

Under EU insolvency Regulation, the principle of equal treatment of creditors is ensured through the equalization of dividends.

Pursuant to article 20, of the Regualtion a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

6. If by liquidation of assets in any secondary proceedings it is possible to meet all claims, shall the liquidator transfer any remaining assets to the liquidator in the main proceedings?

Secondary proceedings are recognized by the Italian legal system only under the EU insolvency framework.

Pursuant to art. 35 EIR, if by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings.

7. Does the so-called "dominance" of the main proceedings creates a leading role for the liquidator, appointed in the main proceedings, to coordinate all insolvency proceedings pending against the same debtor?

Since the subdivision between main and secondary proceedings is recognized by the Italian legal system only under the EU insolvency framework, the relationship and interferences between such proceedings are governed exclusively by EU Regulations.

As already mentioned[5], according to EU insolvency Regulation the liquidator of main proceedings is given some specific powers for intervening in concurrent – even earlier – secondary proceedings.

In general, pursuant to article 18 EIR, the liquidator appointed in the main proceedings may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there.

Main Liquidators have power to apply for the opening of secondary proceedings (art. 29, EIR).

Once a secondary proceedings has been opened in another Member State, it has exclusive competence on the liquidation of the assets located in that State.

According to art. 31, EIR, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to and to cooperate with each other. Moreover, the liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.

In this context, one of the problems arising under the Italian insolvency law is that these rule of cooperation only apply to liquidators but are not binding for the courts which have full control and final decision power on every relevant aspect of the insolvency proceedings.

However, new EU Regulation and, more precisely, articles 41-44 EIR II, should address this issue by expressly providing for mutual cooperation and communication between both insolvency practitioners and courts.

Moreover, it should be noted that art. 39 EIR II, introduced the right for the liquidator appointed in the main proceedings to challenge the decision of opening a secondary proceedings if such decision does not comply with the criteria stated under art. 38 of said EU Regulation.

8. How do you think the above mentioned issues have been tackled by the new EU Regulation on Transnational Insolvency? If yes, in which way defective or useful?

The scope of the EU insolvency Regulation has been extended. EIR II rules also cover proceedings that were excluded from the previous Regulation, like hybrid (in which the

[5] Reference is made to answers provided under question no. 3 above.

debtors retain control over their assets) and pre-insolvency proceedings. This should help to enable early restructuring of companies.

As far as annex A is concerned, restructuring agreements pursuant to art. 182bis of the Italian insolvency law are now included.

Secondary proceedings are not anymore limited to liquidation proceedings and can be aimed at rescuing.

In order to enhance the effective exchange of information EIR II provides for the establishment of national insolvency registers which should be made accessible via the European e-justice Portal.

As already mentioned, the introduction of the express duty of cooperation among courts and not limited to the insolvency practitioners, is an another useful innovation.

9. **How do you think the above mentioned issues have been tackled by the UNCITRAL Model Law on Cross-Border Insolvency? If yes, in which way defective or useful?**

Italy has not yet implemented the UNCITRAL Model Law on Cross-Border Insolvency.

The adoption of said Model Law could be useful in order to deal with non-EU transnational insolvencies which are currently not addressed by the Italian insolvency law.

Art. 25 of the UNCITRAL Model Law on Cross-Border Insolvency states the same principle of mutual coordination between judges that has been introduced by article 42, EIR II, which would be useful where implemented in order to deal with transnational insolvencies involving proceedings opened in Italy.

10. **Are there other salient aspects of the EU Regulation on Transnational Insolvency or the UNCITRAL Model Law on Cross-Border Insolvency that are key to answer the need and quest for coordination in cross borders insolvency proceedings?**

11. **Are there other devices that the EU Regulation on Transnational Insolvency or the UNCITRAL Model Law on Cross-Border Insolvency should have regulated or adopted to enhance further coordination in cross borders insolvency proceedings?**

One key aspect which is not addressed by EU Regulation currently in force, neither by the UNCITRAL Model Law on Cross-Border Insolvency, is the providing of a general framework for the consolidated administration of insolvencies involving multinational corporate groups consisting of autonomous legal entities spread in different jurisdictions.

Many important cases, like the Lehaman Brothers case, have been addressed with specific tailored cross-border insolvency protocols, set up after undergoing huge problems of procedural and substantial conflicts and lack of coordination.

EIR II provides for consensual and thus non-binding group coordination. The effects of such provisions are yet to be tested and verified.

Under Italian bankruptcy law the notion of group insolvency is still unknown[6] (except for limited effects considered within the extraordinary administration proceedings).

Therefore, in case of non-EU corporate group insolvencies there is a lack of regulation within the Italian legal system providing for coordination between the different proceedings that will be opened for any legal entity pertaining to the distressed group.

However, draft delegated law no. 3671 currently under discussion before the Italian Parliament addresses the specific matter of the group insolvencies introducing a single proceeding, following EU Recommendations.

Another important topic to be addressed by the EU Regulation, even possibly by making reference to the UNCITRAL Model Law on Cross-Border Insolvency, is the lack of rules governing the cases in which the COMI is located outside the European Union. There is a need for addressing the issue of recognizing at a uniform EU level the non-EU insolvency proceedings and the opening of further proceedings in the Member States and the coordination between these proceedings.

[6] The Italian Court of Cassation in its decision no. 20559 of October 13rd, 2015, dealing with a casa of a pre-bankruptcy agreement proposed by a group of companies, has highlighted that "*current Italian insolvency legal system* [...] *does not know this phenomenon, since it lacks specific rules governing this matter*".

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