MEDIATION IN BANKRUPTCY
Opportunities in Italy

In the new Italian insolvency provisions, came into force on 17th May 2005, the so called "*concordato preventivo*" has become the main juridicial tool to manage with the financial troubles of a company.

These are the typical features of the above mentioned procedure: (i) the starting and its continuos reference points are the business reorganization plan ("*piano di ristrutturazione*"), which is proposed by the debtor and «may provide for debts restructuring and creditors paying off by every form of settlement» (art. 160 Insolvency Law); (ii) the reorganization plan has to be fixed in accordance with the claimants (usually with a strong conflict of interests) will, whose satisfaction should be unequal among them and be fulfilled in different ways; (iii) the function of the judge is strongly narrowed to a legal supervisory, and he rarely goes deeply into specific matters and economic aspects, let to the debtors and to the "*commissario giudiziale*", (iv), who is now the "real drive" of the procedure.

The new Italian set of rules has been highly influenced by the American law that, since a long time, provides for a procedure aimed to the business reorganization, the so called "Chapter 11". Within its limits, always more adopted in the U.S.A. is the mediation run by an independent professional. In fact, the *Alternative Dispute Resolution Act* 1998 provided that each Federal Court empowered the use of alternative dispute resolution ("ADR") «*in all civilian actions, including adversary proceedings in bankruptcy*».

Mediation is a technique of dispute resolution in which an independent third party (mediator) assists the parties involved in a dispute or negotiation to achieve a mutually acceptable resolution on the conflict point. The mediator has no decision-making powers and cannot force the parties to accept a settlement, but he grants a complete confidential nature, if so is provided by the parties, who maintain their role of "*dominae*" of the procedure.

In Italy, the remedy of mediation is still at an initial stage, being barely known and used: there are no mediation courses at the Universities, and it is not required in the formation of judges, lawyers and accountants, who are likely to be hostile to it. The Italian company law reform, in force since January 2004, provided for a specific mediation

procedure, with tax relief and procedural aspects, applicable to commercial, banking, and financial disputes; the following legislation extended this resolution procedure to familiar inheritance agreements relating to trade activities; in July 2006 last decrees were enacted, and they will be applicable at the beginning of 2007. It is likely to represent a new boost to mediation use in Italy. Will it happen also in insolvency law?

The main decisional power of the debtor in the "*concordato preventivo*" procedure and of the agreements between him and his creditors implies conflicts managing (at a multi-level stages and among many parties) between those two last features and between different creditors. The remedy of mediation would be very precious here. Nevertheless, strong legislative innovations since 2004, physiological need of their analysis, comprehension and adjustment by all the implied actors (i.e., judges, lawyers, accountants, business associations, banks – which represent, in Italy, the most relevant creditors in each insolvency procedure) cause uncertainty about the way and the time of mediation use in the "*concordato preventivo*".

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