

NEW PERSPECTIVES FOR THE MANAGEMENT OF
COMPANIES IN CRISIS: THE TRANSFORMATION OF THE
COMPANY IN CRISIS AND THE POTENTIAL EXISTENCE OF
THE TRUST WITH SETTLEMENT PURPOSE

1.Introduction

**THE IMPACT OF THE ECONOMIC CRISIS ON COMPANY
LAW**

The recent economic crisis has had an obvious and inevitable upturn with a negative impact

in the corporate landscape: if the company, as an institution is in our legal system one of the protagonists of the exercise of the activity of a company, the crisis of the firm becomes an inevitable crisis of the business. The problem is not ontologically, since it is peacefully recognized that the business, as a common organization with the purposes of production and of the consequent profit, is a model of organization not replaceable, but of discipline. In front of the strict requirements of this practice, a survey has proved to be necessary- aimed to the concrete formulation of legislative proposals- not only on the creation of more linear and flexible corporate models,

and therefore adaptable to the new demands of the market in crisis but also relating to the phase of extinction of those entities which are unable to operate in the market

economy and to honor the credit received, they should cease to operate as juridical subjects.

If the step towards the formation of the company has been the subject of some new controversial legislative facts that have led to the introduction of new corporate models, such as the simplified Limited liability company, in the role of social capital as a fund of the institution to ensure the

financial liability of the company has been put into question..The final phase was not the subject of specific intervention on the side of the legislature, so that any proposals for modifications or adaptation of the discipline were only subject to doctrinal and law interpretation.

2. THE STREAMLINING OF A SOCIAL STRUCTURE IN SETTLEMENT STEP

The simplification extinction phase of the society is a theme not less important than any other in order to guarantee greater flexibility for the running of the firm: the adoption of streamlined procedures does not only mean cost savings in the procedures, but it also has positive

repercussions in terms of legal certainty, allowing to eliminate from the institution that firm, no longer in bonis, with certainty and rapidity.

To this end it must be emphasized how the existing insolvency procedures, if on the one hand provide a wide spectrum of possibilities aimed not only at the winding up of the institution but also in its possible reintroduction in the market, on the other hand if are involved instead decocted companie, they clash with the need to comply with the procedure provided in the civil code. The settlement phase, placed by the legislator as a guarantee to creditors, is a step in which the company continues to exist by mutating the original social object from the economic activity to the liquidation purpose: the institution retains its complex management structure. There are evident defects of this choice: although the legislator is oriented towards a maintenance of the structure of the organization imagining that can always be possible a withdrawal of the liquidation and a return to the business of the company, if the fate of the latter is the inevitable dissolution, the chosen corporate structure and the corporate bodies responsible for the business of an undertaking are often oversized and too expensive for the management of the mere liquidation phase.

In this regard it is often necessary the remodulation of these

components through the choice of social models leaner and more appropriate for a phase in which it is necessary only to place on the market the existing assets, using the profit in order to pay the creditors and redistribute the residue to the members, without taking strategic decisions for which it is necessary a complex running or control system, which would become superfluous with respect to the person in charge of the insolvency proceedings.

This possibility of having recourse to the transformation of the business is expressly sanctioned by art. 2499 of the civ. cod. which admits the transformation of the society in a competition procedure "provided that there are no incompatibility with the objective or the status of the same".

On this point we need some preliminary reflections. The transformation of the business, understood as a phenomenon of the changing social contract, is often considered by the legislator a residual instrument to use when, having the original social structure had an alteration- such as a reduction of the original team members in order to prevent their function, or, similarly, a significant reduction of the social capital - it is impossible to reconstitute the status quo to resume the proper conduct of the activities of the business: through the transformation into a different entity, the legislature expresses its favor towards the conservation of the institution itself in a different

structure, rather than favoring its dissolution. Therefore if our code sees in the transformation in general a conservative function of bodies according to what stated by art. 2499, which admits exactly the opposite: the transformation can also be finalized to the dissolution of the society, surely with the purpose of making the same phase leaner, more rapid and less costly and compatibly with the protection of the interests of creditors, which is the fundamental aim of the liquidative procedure.

As object of this research project and its following analysis is to analyze the potential that can offer the transformation in a based settlement in order to give a streamline and less costly procedures suitable to eliminate from the sorting the decoption entities. These potentials are in the idea of the writer, definitely superior to those imaginable given by the code itself. If in fact the reference model is one of the cases of the regressive coded homogeneous transformation, through which we can pass from a corporate model to a simplified one, in order to abolish certain units and then simplify the operation and reduce expenditure, it is believed that there are a series of hypotheses not coded that allow to obtain more efficiently the objective of simplification.

With this we want to make reference to hypothesis of heterogeneous transformation, not coded, against not corporate entities, such as for

example the trust, whose structure could prove to be absolutely suitable for carrying out the liquidative procedures and for the disposal of social activities faster and less expensive.

The internal trust established with reference to L. 16.10.1989 n. 364, ratified by the Hague Convention of 1.7.1985, entry into force on 1.1.1992, has found a full legitimation in our law and was the task of the law in the course of the years to fix and delimit the scope of practical application.

Without going into the merits of the discipline of trust, it does not escape to the observer that this institute of Anglo-Saxon origin is nothing more than a hypothesis of asset segregation which adds to the coded hypothesis that the fund assets, goods intended ex art. 2645- civ cod. or assets referred to in article 2447-bis and ss.cod. civ. If we imagine a trust with liquidative functions we recall to mind the other institutes of the civil law in which the sale of goods to the creditors or *cessio bonorum* referred to in article 1977 cod. civ. through which the goods "sold" to creditors are to form, without actual transfer, an autonomous ground but without legal subjectivity aimed at meeting the interests of creditors: we cannot consider configurable the given similarity in our sorting a trust with this purpose. There is no doubt that the constitution of a trust through the transformation of the decoction entities can lead to practical advantages: both when we

imagine that it is constituted by establishing as beneficiaries the creditors and as trustee the curator practically allowing the latter to implement the entire insolvency of the proceedings within the framework of a structure of a not personified entity, both that we imagine the curator as a simple guardian of the trust in which the liquidators are trustee and creditors beneficiaries, either if we think of more drastic hypothesis of trust of purpose.

What should be the object of study is not the convenience in itself such transformation but the legal feasibility: are in fact among the few precedents in regard to this guidelines which tend to be negative in respect of the case prospected.

Therefore the project aims to assume the validity and the convenience of the transformation into trust of the liquidative purposes, to analyze, starting precisely from the objections put forward by the doctrine and the jurisprudence regarding to the feasibility and the configurability of the case studied in our legal system.

The areas of analysis necessary to tackle with this research are essentially two: the first concerning the eligibility of an atypical transformation that is of a society in a subject without legal subjectivity the trust; the second having as its object the configurability and the establishment of a trust on the part of the business which is in a state of crisis.

The instruments chosen for the analysis are obviously taken from the analysis of the doctrine and the case law in order to make a reasoned exegesis of the code aimed at obtaining from the rules themselves a support proof of the case.

The purpose of the research is to be able to produce a coherent discussed support suitable to justify the eligibility in our sorting of this instrument for the simplification of the liquidative phase company or, alternatively, to provide "iure condendo" of the ideas for the positive legislator in order to regulate positively the proposed hypothesis.

3. THE ELIGIBILITY OF TRANSFORMATION IN TRUST

The eligibility of the transformation into trust has as its main objection a given logical data: if the transformation is peacefully intended as a modification of the social contract, where the main feature is the continuity between the subjects is tendentially difficult that it can occur in respect of an institution, the trust which has no legal subjectivity and whose constitution made by transformation would involve the changing of the social contract.

Yet it cannot be denied that the company law reform of 2003 has disciplined with the art. 2500 - septies cod.civ. the regressive transformation from a limited company even against entities and not legal entities such as the union of the company. The ratio's justifying

the eligibility of this transformation is the principle of continuity to be applied, if not to the entity because the Germanic conception of union is, is not in force in our sorting. Therefore, it cannot be an entity to the company assets which in part constitute it. From this point of view it could also include the application by analogy of the norm to the trust: Because it, like the union of the company is not an institution but it ensures continuity to the corporate assets.

The question at this point is whether it is consistent or not with the system the regressive transformation into trust, rather if the hypotheses provided by the above mentioned art. 2500 - septies cod.civ. are to be considered peremptory or not. From this point of view it is possible to notice a difference of opinions between the main doctrine, which considers it absolutely not essential to the proposed list and jurisprudence, oriented in the opposite direction with the exception of an isolated guideline.

From the point of view of the systematic analysis of the law, it is necessary, in order to state the eligibility, to consider the coherence of the transaction examined with the general principles of law and therefore not only the above mentioned principle of continuity, but also the principle of economy of legal acts, which would make it unsuitable to reach a goal through an indirect process when the direct process does not integrate these clearly prohibited cases.

If the compliance of the operation with the second principle is evident, the transformation is an operation that requires homogeneity, with the 2003 reform the legislator has expressly replaced the homogeneity of the cause with the homogeneity of the business.

The intangibility of *affectio societatis* as cause of the contract at the time of processing, is questioned in the case of continuity, although non-causal.

The forcing that the legislator proposes is certainly due to the need to safeguard

the integrity of the social assets that is the instrument of the exercise of the firm even when material needs require a leaner organizational structure. It is a line of reasoning of a practical nature: the company exists when more subjects organise goods and services for the purpose of making a profit i.e. they make a business; if the holders of the productive complex do not run a business it would be mere union of company. But if the owners of the business decided to delegate it to others, the legislator considers that remaining the same the productive complex, dissolving the company giving the assets to the former members with the constitution of the communion

is an indirect useless process. This choice has not only economic consequences, but tax consequences as well: surely the transformation is a leaner procedure and faster than the liquidation and the allocation

of goods, but above all it is, within certain limits, fiscally neutral.

Whereas possible at the time of processing the causal modification of the social contract there are no obstacles to the passage from the social contract that one establishing the trust.

As far as the protection of the interests of the shareholders and creditors, it detects as follows. As regards the formers, their interest is safeguarded by their link with the business complex, in the role of managers or beneficiaries, binding however

that they modulate the processing transformation, commenting on the operation

with the necessary qualified majority and being able to withdraw if they do not contribute to deliberation ex art. 2437 I c.lett. b) cod. civ..

Creditors are safeguarded by the possibility to contrast the operation ex art 2500h cod. civ

What stated above however is susceptible of some significant objections.

The first, obvious is that if the item "minimum" of continuity is given by the existence of an organised complex of productive goods it is obvious that we cannot operate transformation in the trust of companies that are already born as a business cc.dd. "di comodo" where the assets are not expressly intended to production.

The second is that with regard to the ownership of the assets it is

difficult to maintain and respect the idea of continuity with regard to the ownership of the business complex. In the union of the company continuity is represented by objective identity of the complex and the subjectivity of its owners that replaces the non-continuity of the entity. On the contrary the trust is likely that the ownership of the goods is transferred to a trustee, preserving the now former members the role of beneficiaries. In this case the concept of continuity would undergo a further forcing: no continuity in ownership, but in the team of the beneficiaries of the effects of the management, configuring the trustee as a sort of fiduciary property. The solution to the problem, i.e. is the attribution of the quality of the trustee and the beneficiaries at the same partners leads to the negation of the theory because the existence of a trust where the two roles overlap is not possible.

An interesting point which derives from what is stated, however, concerns the hypothesis of a trust of purpose. The trust of purpose is that trust finalized to the pursuit of a foreign object to the satisfaction of the interests of the beneficiaries. This type of trust is seen in a manner which is not too favorable even in the

Anglo-saxon jurisdiction, in order to avoid the formation of assets segregations

with no time limit: in England the trust of purpose is only allowed if the purpose is

charitable while in the United States legislation it is also admitted for different purposes provided that there is an enforcer who obliges the trustee to the fulfilment of its duties.

If our sorting allowed the transformation of the institution into trust for liquidative purposes, that would create a more responsive hypothesis of transformation to the principles of our legal system. The trust would have as trustee the same partners who would confirm the continuity in the ownership of the goods, the person who supervises the insolvency proceedings could assume the role of guardian of the trust by verifying liquidative operations. Also the cause of the social contract that follows the liquidation is no longer the conduct of the business but the liquidative purpose would find its continuity in the contract of trust in which through the transformation the original social contract evolves.

To admit such a framework we should however proceed to the analysis of configurability of the trust for the company in crisis.

4.THE TRUST IN THE COMPANY IN CRISIS

The trust has been the subject of a careful analysis with particular reference to the internal trust, i.e. that trust whose single element of internationality is given by law, because in Italy there are no specific laws.

The case-law has opted for the eligibility of the entity. Particular reference is made to the principles expressed in the Convention of which to the arts. 15, 16 and 18, According to which a trust cannot derogate, respectively, the mandatory rules of the order in which it has to operate and to the laws of necessary application and public order.

The jurisprudence on the subject, as well as emphasising the aspect for which obviously the legislation on liquidation of the company is to be considered as imperative, points out also the practical usefulness of the entity. From a logical point of view a trust with liquidative purposes, could be constituted without being in contrast with the standard mandatory, however they do not see the need to form a new entity with the same purpose of liquidation of the company already dissolved and

that does not provide additional guarantees to the procedure which itself

is able to ensure the clearance of goods and to prevent their dispersal.

From this point of view, the orientation of case law that addresses the topic admits the net asset trust has a valid cause, observable or in the need to use the instrument of trust to

put the company in bonis, that is to save on the costs arising from the maintenance of the social organs.

However the case-law of merit in examination fails in hypothesizing

the establishment of trust on the part of the companies that already poured into bankrupt proceedings, precisely by virtue of the above articles 15, 16 and 18 of the Convention, admitting it only in case the society is merely in crisis and as long as it is provided a safeguard clause providing for the nullity of the trust in the event of the finding of a state of insolvency.

This prudential proposal of judges of merit must be the subject of more specific analysis, and may, according to the writer, can be overcome.

Firstly, by virtue of the same art. 2499 Cod.civ. that admits the transformation of the bankrupt procedure were compatible with the aims of the same without any exception and if it chooses the non binding nature of heterogeneous transformations legislative data contrary to our reconstruction do not occur.

Secondly because the discrimen between a state of crisis and the state of insolvency would in fact return to the notary, that does not have the necessary instruments for evaluation.

Thirdly, if the judges thesis is accepted or the trust is constituted with the forecast of the safeguard clause in the event of insolvency so that it is already null in the Constitution phase, or it is formed without the safeguard clause, hypothesis for which the trust would not be

automatically void. In fact being the trustee a third party and being the partners beneficiary, the failed company failed would no longer be part of the partnership, the bankruptcy liquidator should first think about the

legal nature of the trust and on its completion and opt for an action for a declaration of invalidity, of inefficiency or setting aside.

If we accept the thesis which, considers that the trust now constituted, once declared failed becomes a bare trust, where the trustee is a mere executor of the will of the curator in order to liquidate the trust, we do not see why we should not admit the trust directly even in a liquidative phase, giving the curator itself the role of trustee and allowing him greater freedom of movement. The cause of the contract would be represented by the cost savings that the new organization involves.

5. Conclusions

Therefore the research project aims to reconstruct the profiles of configurability of the hypotheses of transformation in the insolvency proceedings of enterprises, using the exegetical analysis of legislative texts having as its starting point the legal judgments and using the guidelines of professional practice, in particular that of notary who recently is preparing thesis in favor of extraordinary operations

precisely in insolvency proceedings, in order to simplify and reduce the cost.