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*Il valore dell'impresa in crisi:
modalità e prospettive di valorizzazione dell'azienda nei
trasferimenti precedenti l'omologa del concordato preventivo*

ABSTRACT

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ABSTRACT

The thesis aims to examine, through a comparative approach with the U.S. legal system, the centrality of the principle of maximization of the going concern value within the Italian bankruptcy law after the enactment of the recent reforms.

In order to try to explore one of the option of valorization of the business assets in a distressed enterprise, the main characters of a business activity and the intrinsic risks connected therewith have firstly been described to then analyze how such risk could, for internal and external factors, evolve in a business crisis, involving a deterioration of the values of the business assets and requiring the entrepreneur to decide, according to the criticalities of a given context, the “best option” to handle the crisis in the most efficient (that is to preserve as much as possible a positive balance between the functioning value (valore di funzionamento) of the business and the liquidation value (valore di liquidazione) of the same), timely (that is being able to promptly detect the crisis to make the selected option the most efficient) and fair (concept that recalls the basic principles of the “par condicio creditorum” and of the “absolute priority rule”) manner. To handle the crisis in the best manner should in turn be translated in the necessity that the value of the business remains appealing and is not further deteriorated. In fact, in a situation of distress the value of the business enterprise tends to decrease rapidly so that an incorrect (or better inefficient) option to handle such crisis could cause a reduction of the economic value of the business activities and create a further damage to any stakeholder. Therefore, in these situations, the choice of a correct option aims to preserve or consent a better valorization of the distressed enterprise that – in particular after the reforms of the last decade – can be said as the main scope for the restructuring procedures provided by our legislator to better protect the interests of creditors and the value of the distressed

assets. Before, in fact, the rigidity of the restructuring procedures could irreparably prejudice the extraction of the maximum value from each of the business assets through use of disjointed liquidations aiming at a merely punitive approach toward the insolvent debtor.

In this regard, the reform of the bankruptcy laws has introduced different instruments finalized to valorize and maximize the going concern value instead of pursuing a mere liquidation of the assets “on a piecemeal basis”.

As a confirmation of the importance of such principle of valorization of the business the main traits of the restructuring procedures that – pursuant to the reform – have been clearly addressed to the maximization of the going concern instead of asset liquidation have been described. Such procedures are generally oriented to solve distressed situation which can still be reversed and that have not reached a clear insolvency state. The legislator, in this respect, in addition to the insolvency status requirement, has acknowledged relevance to the state of crisis (an elastic and broad concept that – even though not specifically defined by the same legislator – is deemed to include the insolvency state)¹.

After having understood the reach of the above principle, the analysis hinges on the fact pattern of the business transfer of a distressed enterprise taking place prior to confirmation within a preventative composition with creditor procedure (*procedura di concordato preventivo*). To this end, the thesis offers an analysis of the Chapter 11 regulation (focusing in particular on the Chrysler case and on the provisions contained in §363 of the U.S. Bankruptcy Code) and, thereafter, focusing on the admissibility of such fact pattern within our legal system. The intention is to draw the main characters of this fact pattern, as possible option to handle the business crisis

¹ This is true unless a definition is taken from the proposed definition contained in the project of the Commissione Trevisanato pursuant to which “crisis indicates the assets, economic, financial situation of a business enterprise as such to determine a risk of insolvency.”

that, ensuring the maximum valorization of the business assets, could, for this reason, become also the best option possible for the debtor and for the satisfaction of the creditors' claims.

The U.S. analysis within the second chapter wishes to introduce some comparative considerations regarding the legal institutes that, more or less similarly to the U.S., have been provided by the Italian legislature, highlighting also the criticalities that within the U.S. system have been debated by judges and academics. We cannot ignore, in fact, that certain U.S. legal institutes have inspired our legislator in the work of modernization of the restructuring procedures provided under our legal system and in particular of the preventative composition with creditors. Therefore, differences existing between the U.S. context and the Italian context offer points of comparative analysis under both a legal and market perspective. In this regard, by recalling what has been wisely affirmed by Rossi², the attractiveness of the bankruptcy law often makes such law subject to study by comparativists who, in transferring in Italy models created overseas, are not worried and forget to analyze the underlying logics, and/or potential effects that such models could eventually entail. Therefore, it could be said that a close analysis of the U.S. laws in relation to the transfer of a business belonging to a distressed enterprise and of the underlying logics could be a first instrument to support interpretation and implementation of same or similar provisions of Italian bankruptcy law. To this end, the analysis of the second chapter has concerned Chapter 11 regulation and the rules regarding the pre-confirmation business transfers indicated under §363 of the U.S. Bankruptcy Code, to later touch, after a close exam of the most relevant provisions regarding U.S. confirmation, the analysis of the Chrysler case, as an example of pre-confirmation transfer of a distressed business where the complexity of situation was further worsened by an intrinsic conflict of interests deriving from the involvement of the federal government.

² See, Rossi G., *Il fallimento nel diritto americano*, Cedam, 1956.

The result of the analysis has confirmed the nature of the Chapter 11 as instrument where negotiation, is subject, upon occurrence of certain circumstances, to broad spaces of intervention of the court for purposes of protection and maximization of the going concern. In this regard, in Chrysler (as well as in other cases of pre-confirmation business transfers) the procedure of Chapter 11 has been used to pursue a scope that - at times - has been in “potential” conflict with the formal requirements that would have guided the judge in an ordinary phase of confirmation, moving, in principle, the balance of the judicial scrutiny from the protection of the creditors’ claims to the maximization of the value of the business assets. The flexibility of such compliance has therefore been mixed with a superior aim: that aimed at transferring a business at a pre-confirmation stage in order to pursue the maximization of the going concern value and, in an economic perspective, to guarantee efficiency, timeliness, and (even though more difficultly) fairness.

The third and last chapter of the thesis has analyzed the fact pattern of the pre-confirmation business transfer within the preventative composition with creditors procedure. After having ascertained the theoretical admissibility of such fact pattern within our legal system and having highlighted the main criticalities connected therewith, it has been pointed out the potential relevance that, similarly to the U.S., could result from a major development of such restructuring option.

In light of the above analysis, however, there is still a doubt that, within the current market, such kind of transfers do not represent (still) that “best option” (mentioned above) by which it is possible to maximize the business values of a distressed enterprise in an efficient and timely manner. This is due to the necessity - in the absence of a market for distressed assets not yet sufficiently developed – that such transfers should be admitted after implementation of competitive bidding procedures capable (i) to ensure the best valorization of the business and also (ii) to avoid the arbitrary and potential abuses by the debtor and by judges who – in such cases –

could not guarantee the best satisfaction of creditors. If in the U.S., such determinations are possible and are characterized by a major objectivity for the existence of a specific market of distressed assets (which also in case of cram down guides the judge in the definition of the adequate interest rate to protect the classes of dissenting creditors pursuant to the minimum guarantees provided therein), in Italy, on the other side, in the absence of a specific market, the judge would be the umpire of a decision based on an expert evaluation that is not supported by any external market references. The result would be to authorize a pre-confirmation transfer at a price that would be a mere number, subjectively determined and not based on any objective reference on the Italian distressed market. The implementation of the said competitive bidding procedures in an anticipated phase of the preventative composition with creditors procedure (since filing of a mere “concordato in bianco”), and possibly under the supervision of a commissioner appointed by the judge and, if that is the case, of a creditors’ committee appointed ad hoc, could represent a possible adjustment to guarantee objectivity to the evaluation, speediness of the process and protection of creditors’ claims.

Therefore, the final expectation of the analysis is to promote the pre-confirmation business transfers as available options to handle the crisis within the Italian system and to render their implementation compliant with the criteria of efficiency and timeliness and fairness throughout the development of a market for distressed assets, which, from the intersection between supply and demand could be able to promptly determine in an objective manner, the best price, in order to extract the maximum value from the business assets at hand.