

DOTTORATO DI RICERCA IN DIRITTO ED IMPRESA – XXVIII CICLO

Tesi: Obiettivi del diritto fallimentare e impresa. Un'inarrestabile evoluzione alla prova dell'effettività

Dottorando: Costanza Alessi

SUMMARY

The constant evolution that has characterized the on-going progress of bankruptcy law, from Medieval times to the present day has generally moved in the same direction in all western countries. Bankruptcy systems have shifted from the penalization of entrepreneurs towards favouring reorganization. Moving beyond the goal of punishing the debtor and the elimination of the insolvent company from the market, a general awareness has been reached that, often, the preservation of businesses may determine considerable benefits for different parties (among which are employees, suppliers, customers, tax authorities). This evolution has brought forth the concept of reorganization: a new goal has thus appeared in bankruptcy law, besides the traditional one, which is always present, to a certain extent in all systems, and concerns creditor wealth maximisation.

International organizations and European authorities all agree on the importance of favouring reorganization outcomes, often however without mentioning the complexity inherent in the coordination of two often conflicting objectives. The legislator is thus faced with a complicated task in determining which goals to achieve and what is the most suitable approach to achieve them.

The Italian bankruptcy framework is highly fragmented and incoherent; it is impossible to conduct a thorough analysis identifying its pursued objectives. Each different bankruptcy procedure seems to exist on its own and not as part of a system. Only in the *amministrazione straordinaria* is the goal of maintaining business continuity pursued, with the aim of safeguarding the interests of all the involved stakeholders. In all other bankruptcy procedures, despite appearances and declarations of intent, reorganization is, at most, a tool made available to the parties; stakeholders are never directly protected. It shouldn't therefore come as a surprise that the *concordato preventivo* does not effectively save businesses, but rather operates as a liquidation tool.

In other countries, to which the Italian legislator has often looked to for inspiration in implementing its bankruptcy reforms, the choices have undoubtedly been more resolute.

The United States is historically oriented towards granting discharge. It follows that Chapter 11 is aimed at enhancing value for the debtor (and not as much in general for all stakeholders). Creditors' rights may be partially compressed, in order to ensure

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that going concern value is preserved. Despite various amendments have, over time, increased the rights for the latter, the system is overall skewed towards ensuring reorganization, as the current reform proposal drafted by the American Bankruptcy Institute suggests.

The French experience differs considerably from both the Italian and American one. Main goal of this framework is to safeguard going concern value to the point that the *liquidation judiciaire* operates only when reorganization may not be pursued. Various incentives are introduced to induce the debtor and its creditors to reach an agreement which provides for the continuance of business and allows the *Tribunal de Commerce*, when negotiation is unattainable, to impose waivers upon creditors. If one can disapprove of the choices made by the French legislator, the framework certainly provides an excellent example of one which is coherent, rational and consistent.

In light of the above, the reform of the Italian bankruptcy law, which stems from the study conducted by the Rordorf Commission, serves as a major opportunity. Unfortunately, its current development leads to the conclusion that it represents yet another lost chance. The draft delegation law (*Atto Camera 3671-bis*), which was approved by the Chamber of Deputies on February 1st 2017, was not preceded by a comprehensive debate about the aims that a bankruptcy law should pursue and it lacks a clear and unambiguous approach. The bankruptcy procedure which mostly needed to be revised, especially to achieve greater coherence in the objectives pursued by bankruptcy law, is the one which undergoes less changes: the *concordato preventivo*'s main traits are, indeed, unaffected. The overall framework retains its flaws and peculiarities and additional critical issues are introduced by the proposed novelties (especially with reference to the *misure di allerta*).

Despite the number of changes introduced in the last ten years to the Italian bankruptcy framework, and the ones that are still in the course of being finalized, the latter doesn't seem to have any intention of seriously remodelling itself.