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CRISIS AND CONTROLS: THE ITALIAN MODEL

Roberta Provasi*, Patrizia Riva**

Abstract

The success of any Restructuring Technique is related to the quality of operations that the company has planned to implement. This is the reason why, no matter which of the recovery strategy the company chooses, the law requires that more than one Independent Auditor should analyze the prospective financial data produced by the company and coming as a result of the planned restructuring operations.

Keywords: Traditional Italian Model; Corporate Governance; Supervisory Board; Statutory Board of Auditors; Collegio Sindacale; Auditor; Audit; Assurance; Independent Expert; Attestatore; Court; Pre-insolvency Agreements; Recovery and Resolution Plan; Restructuring Agreement; Crisis; Bankruptcy Law; Insolvency; Turn Around; Flow of Information

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1 Restructuring techniques recently introduced in the Italian law and the renewed need of controls

The reform of Italian Bankruptcy and Business Recovery Law was introduced in 2005 and then reviewed more than once (Paluchowski-Pajardi 2008; Riva 2009; Scarso 2009, Quagli-Danovi 2012). It has deeply changed the philosophy and the basics of the country's business recovery procedures. The new regulations discipline has introduced tools that are oriented toward the maintenance and recovery of the company by agreements' estimation between creditors and entrepreneur, with a greater involvement of the former in management of the crisis (Corno 2009, Provasi-Riva 2013).

To counter the difficulties of the crisis, the government has introduced some specific instruments: Recovery and Resolution Planning (piano attestato ex art. 67 If), Restructuring Agreement (accordo di ristrutturazione ex art. 182 bis), Pre-insolvency Agreements (concordato preventivo ex art. 160 If). These techniques form a continuum based on the degree of judicial intervention and the degree of formality in general (Garrido 2011). Ideas to shape them come from the US Chapter 11 tradition (Stanghellini 2007; Ganuardi 2007, Riva 2001, 2009; Graham-Carmichael 2012) and from United Nations Commission on International Trade Law's (UNCITRAL's 2004) Legislative Guide to the Insolvency Law.

The focal point is that restructuring can help to preserve the business value of debtor enterprises, the interests of other stakeholders and the benefit of

creditors as a whole (Guatri 1995). According to the UNCITRAL Legislative Guide (2005), all debtors that falter or experience serious financial difficulties in a competitive marketplace should not necessarily be liquidated; a debtor with a reasonable survival prospect (such as one with a potentially profitable business) should be given the opportunity to demonstrate that there is a greater value (and, by deduction, greater benefit for creditors in the long term) in maintaining the essential business and other component parts of the debtor.

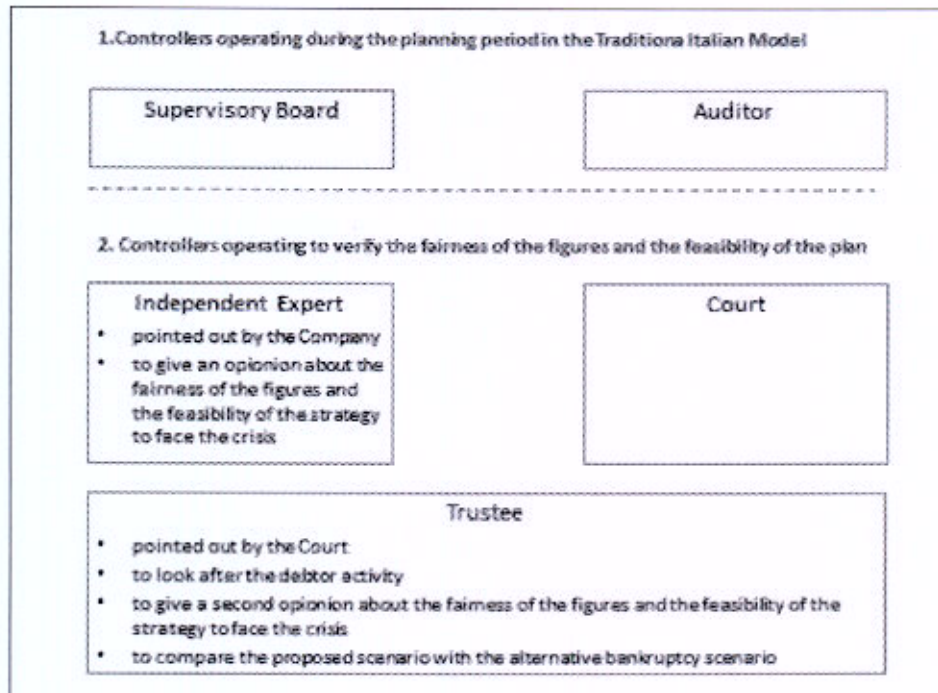
Restructuring and reorganization proceedings are designed to give to the debtor some breathing space to recover from its temporary liquidity difficulties or more permanent over-indebtedness and, as necessary, provides the debtor with an opportunity to restructure its debt and its relations with creditors. If reorganization is possible, generally it will be preferred by creditors if the value derived from the continued operation of the debtor's business will enhance the value of its claims (Riva 2009, Provasi-Riva forthcoming).

The success of any Restructuring Technique is related to the quality of operations that the company has planned to implement. This is the reason why, no matter which of the three new instruments the company chooses, the law requires that more than one Independent Auditor should analyse the potentially prospective financial data produced by the Recovery Strategy. Different specific opinions are required about the feasibility of the project and the fairness of the expected figures. In recovery and resolution planning (art. 67 If) and in restructuring agreement (art. 182 bis If) these are expressed by an Independent

Expert pointed out by the company, while in pre-insolvency agreements with creditors (art. 160 lf) a second opinion is needed from the Trustee pointed out by the Court. In addition the situation is continuously monitored by the Supervisory Board (Collegio

Sindacale), sometimes called Statutory Supervisory Board, the specific watchdog distinguishing the Italian corporate governance system (Stiglitz, 2009) and - depending on the company's size - by the Auditor .

Figure 1. Controls and controller in the crisis



In crisis context timing represents a critical variable to be carefully considered and managed. To get the best results for the company, a good flow of information should be created among the independent experts involved in the process. Being able to walk through the documentation of the Corporate Controllers would be in fact of great help for the Independent Expert exam of the fairness of the figures, and can reduce the timing of his audit work. Unfortunately in the Italian context this is not always possible as our empirical research points out.

2 The specificity of Italian system control: the supervisory board (Collegio Sindacale)

The Supervisory Board (Collegio Sindacale), sometimes called Supervisory Board is the characteristic of Italian system according to the Traditional model of corporate governance provided for by the Italian law. With the enactment of the Commercial Code in 1882 it was introduced a supervisory organ for the compliance control to the law, to the Constitution and to the Statute of the company because after the abolition of Government Supervision it was necessary to entrust the fate of a company not entirely to administrators, whose activity in reality should be controlled to protect the interests

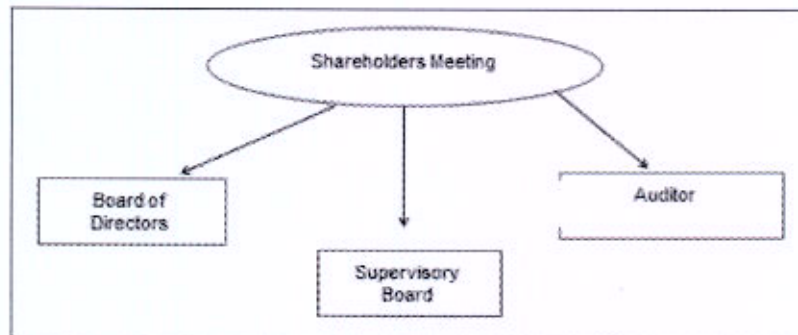
of the company, its shareholders and all the stakeholders.

In fact, among the functions of the Supervisory Board must be emphasized the protection of all the interests. Over time through the different European Directives the Auditor has achieved a substantial improvement especially of quality defects and malfunctions. In particular self-regulation represented by code of conduct issued by National Board of Certified Public Accountants allowed exceeding regulatory gaps relating to the demarcation between the functions of administrative and accounting control.

The administration and control system called "Traditional", as an alternative to the one-tier and two-tier corporate governance model, is the prevalent one in the Italian context. According to article 2380 of the Civil Code the "Traditional" model constitutes the natural system of corporate governance for the management of Italian firms, the application of the two alternative models must be expressly provided in a special provision of the company's Statute. The structure of this model provides an administrative board appointed by Shareholders which is responsible for the management of the company, the Supervisory Board again appointed by Shareholders that carries out the control over the administration and the

external Auditor also appointed by Shareholders which is responsible for the auditing.

Figure 2. Italian Corporate Governance Structure "Traditional Model"



This model allows a precise division of roles: the administrative function is clearly separated from the control function. The Supervisory Board appointed by shareholders is made up of 3 or 5 effective members (plus 2 temporary auditors). One effective member and one temporary Auditor should be enrolled in the register of Auditors. Since the introduction of the Reform of Company (Legislative Decree N. 6, January 17, 2009) the Supervisory Board is responsible to supervise¹:

- the observance of the law and the Statute, the Supervisory Board should verify the compliance of acts and resolutions to the provisions of both law and statute;
- the conformity of the management decisions to criteria of rationality (efficiency and effectiveness of choices) and if management has considered all the information necessary for taking operational decisions;
- the adequacies of the organizational structure that must be suitable to the size, to the nature of the operations and to the strategies planned to achieve corporate purposes.

There is no doubt that the Supervisory Board represents an important element of the Italian experience that should be emphasized in international contexts. The great crisis that has hit the world economy since 2008 could have been avoided if more companies would have adopted an adequate internal control system to ensure the protection of the social interest performing their duties. This hypothesis is supported by a study carried out by the Aristeia Foundation, the Research Institute of Italian Chartered Accountants. Even Joseph Stiglitz - Nobel Prize for economics 2001 - highlighted the criticality and riskiness of governance models based only on external

auditor (typical of Anglo-Saxon models) praising the Italian model based on the structural presence of a typical internal control body that is the Supervisory Board. The members of the Supervisory Board attend the assembly of the Board of Directors assisting directly to the decision making processes and stepping in meanwhile things happen. On the contrary External Auditors operate when everything has already been decided or even implemented. The peculiarity of the Italian System Controls is the joint existence of two levels of controls. A "downstream" control carried out by Auditors in charge of the accounting control and an "upstream" control carried out by the Supervisory Board in charge for the surveillance of managements behavior. In small companies the Supervisory Board can undertake both roles.

3 Controls and controllers in the crisis

In the Italian Model the Controllers operating while the company is trying to solve the crisis it has incurred in are, in more complex situation, the five depicted *supra* in Figure 1) which represents the typical scheme of Pre-insolvency Agreements (*concordato preventivo ex art. 160 lf*). The number of Controllers can shrink up to three in Recovery and Resolution Planning (*piano attestato ex art. 67 lf*), which is the Out of Court way to face insolvency.

3.1 Supervisory Board (Collegio Sindacale)

In March 2011, the CNDCEC (National Council of Certified Public Accountants) in reorganization of the professional standards for the supervision, also to receipt the recent regulatory changes introduced by Legislative Decree no. 39/2010, approved the Rules of Conduct of the Supervisory Board no. 9, no. 10 and no. 11. In particular the new provisions contained in the Rules of Conduct no.11 analyzes the behavior that the Supervisory Board must implement during the period of crisis according the functions assigned to it by law including business continuity testing and

¹ According to Art. 2403 Civil Code, "The Supervisory Board oversees compliance to the law, to the company's Statute to the principles of good management and the adequacy of the organizational, administrative and accounting procedures adopted by the company during its functioning".

the analysis of the adequate tools to establish a negotiation procedures for resolution of corporate crisis. This new Rule of Conduct is very important as it fills the legal vacuum of the Code. The Civil Code in fact merely outline the behavior of the Supervisory Board concerning corporate losses (art. 2447 c.c.) and liquidation (art. 2485 c.c.) while the Bankruptcy Law just consider the contexts in which the members of the Supervisory Board may be subject to an action for damages by the curator (trustee in bankruptcy) (art. 146 LF) or be involved in bankruptcy offenses (art. 223 LF).

Rules of Conduct standard no. 11 highlights the correct behavior of Supervisory Board from the first signs of the company crisis to when they attempt a negotiated solution, until the bankruptcy proceedings.

The state of crisis is undoubtedly one of the most serious evils that can affect the company; companies can get out of the crisis without consequences or the crisis can lead to premature death of the enterprise. The Italian legislature hasn't provide any definition of the corporate crisis, while the Courts have expressed by defining both the status

of crisis and the status of insolvency. According to most shared approaches, status of crisis usually precedes but not necessarily the status of insolvency, which is part at a later time.

The Rule of Conduct no. 11 provides that the Supervisory Board in the performance of its functions, it must report to the administrative board about situations that could compromise the business continuity, suggesting where it is practicable, statutory tools provided by bankruptcy law to deal with the crisis situations. In particular, the Rule no.11 provides that the Supervisory Board gives a time limit to the administrative body to identify the more appropriate intervention actions to resolve the situation, unlike in extreme cases it may be the complaint to the Court according to the article 2409 of the Civil Code. This is because "the time" plays a key role in finding a solution to the company's crisis. The timeliness in deciding and in taking the most suitable actions allow the preservation of key assets such as goodwill, order backlog, human resources, finance leases and to avoid or delay aggressive actions by creditors. The Supervisory Board must:

Table 1. Rule of Conduct no. 11.1 – Prevention and emergence of the crisis

| | |
|----|---|
| 1) | Inform directors when it has identified facts which may impair the business continuity |
| 2) | Invite directors to identify appropriate intervention measures |
| 3) | In case of unjustified delay or omission of Directors, the Supervisory Board shall convene the assembly to inform shareholders about the situation of crisis and the omission of directors (according to art. 2406 c.c.) |
| 4) | In case of Directors' inaction the Supervisory Board can directly propose a procedure of negotiating composition of the crisis introduced by Bankruptcy Law: recovery and resolution planning (art. 67 lf) and in restructuring agreement (art. 182 bis lf) pre- insolvency agreements with creditors (art. 160 lf) |
| 5) | In case of suspect that Directors could have done serious irregularities in management that can damage the company, they shall report to the Court. |

The Rule no.11 has fueled thoughts on the much debated issue in the literature, the ability of the Supervisory Board to carry out a substantive control to the company's operations put in place by the administrative body. This kind of control in accordance to the provisions of the law may be "preventive" in accordance to 2403-bis and 2409-septies c.c., "informative" to art. 2381 c.c. and

"reactive" to art. 2406 c.c., as well as "purposive" according to the articles 2441, sixth paragraph, article 2433-bis, 2378 fourth paragraph and 2409- quater cc. However, the doctrine seems to agree that carrying out a substantive control does not mean checking the quality or appropriateness of corporate operations but only to control the economic management criteria.

Table 2. Types of controls provided by Supervisory Board

| | |
|---------------------|--|
| Preventive control | Art 2403-bis and 2409-septies related to the control of management to search information that is not properly reflected in the financial statement. |
| Information control | Art. 2381 c.c. administrators should regularly inform the Supervisory Board on the general performance of the business and its outlook as well as the most significant transactions made by the company and its subsidiaries |
| Reactive control | According to Art 2406 c.c the convocation of meeting's shareholders, Art. 2408 c.c investigation of the facts reported by the shareholders, art. 2409 c.c the Complaint to the Court. |
| Proactive control | Art. 2441, sixth paragraph, 2433-bis, 2378 fourth paragraph, 2409- quater c.c opinions issued by its report. |

i. Conduct rule no. 11.3 - Role in Recovery and Resolution Plan (art. 67 l. f.) If the Shareholders Meeting adopts decisions to address the status of difficulty the Supervisory Board should always check whether they are the most suitable to overcome the crisis. Often the preferred option, especially in period of financial crisis, is the decision for the implementation of a Recovery and Resolution Plan that is the Out of Court Agreement with the creditors. Such an agreement could have the purpose to spread payments to suppliers, to reform the banking conventions deferring the payment of mortgage payments, dividing into installments the payment of insurance contributions or reducing the total amount of debts asking the approval for the payment of a percentage in settlement and in write-off. The advantages of such agreements are represented by their convenience and the simplicity by the saving intervention costs of professionals and the speed of the transaction conclusion. The drawbacks are, however, of various natures. All creditors must adhere to and if there is someone who may disagree, it's necessary to comply with him the agreed terms of payment. The transactions that took place in the out-of-court settlement are subject to revocation in the event of a future failure of the company. In the event of bankruptcy, civil and criminal liability could be ascertained on the part of both the directors and the Supervisory Board, for non-compliance of equal treatment of creditors. The Supervisory Board must therefore pay the utmost caution before giving consent to such assignment. It should at least ensure that the payments take place in accordance with the order of first refusal if the same happens in more installments or that all creditors are consenting to the agreement in the case of simultaneous payment.

In the event that the Shareholders Meeting decides for an agreement and precisely like the Rule no. 11 provides, the Recovery and Resolution Plan in accordance with subparagraph d) of the third paragraph of Article 67 L.F., the Supervisory Board will monitor the setting and the evolution of the procedure. The Recovery and Resolution Plan puts the creditors under the condition to adhere more easily to the proposals of the debtor assuring that the various operations specified by the law remain valid without the possibility, in the event of bankruptcy, to be revoked. It is not, however, recognized the pre-emptibility of credit and so, in a subsequent bankruptcy proceedings, the credit accrued will be privileged only if they are assisted by guarantees. The agreement being governed by law that doesn't have criminal implication for the Supervisory Board so its function in this case will be easier and less burdened with worries though, as in the out-of-court settlement, it is good that precautions are taken to avoid any possible civil liability. The Supervisory Board must control the preparation of the plan, then subject to an examination by the Court, that should

appear as specifically established by the norm, suitable to allow the recovery of the debts of the company and to ensure the balance of the financial situation. The Supervisory Board is not required to declare that the plan, as prepared by the debtor, is "reasonably" appropriate to achieve the purposes prescribed because such proof is left to the Independent Expert, the professional appointed for this purpose, but it is certain that it cannot escape from the recognition that the plan is able to achieve consolidation of debts and achieve financial balance. The Supervisory Board shall therefore examine both law enforcement and compliance with the obligations of behavioral correctness the substantive control, if with the unilateral proposal prepared by the debtor it will be able to achieve the purpose of preserving the continuity of the enterprise and its survival and also the reliability of the accounting data for used in preparing the plan. Practically to the Supervisory Board is requested to express its opinion if by way of remission or reduction of the outstanding debt or by revising the payments, as proposed by the debtor, the company will be able to achieve the restoration of financial stability. The Rule no.11 doesn't provide who should appoint Independent Expert, but establishes that the same should be recorded in the register of auditors, with the requirements referred to the art. 2501-bis, paragraph 4 of the Civil Code.

ii. Conduct rule no. 11.4- Role in Restructuring Agreements (art. 182-bis l.f.) The Restructuring Agreement provided by the art. 182-bis of the L.F., represents a real bankruptcy proceedings. The Rule No. 11.4 governs the monitoring actions of the Supervisory Board during the Restructuring Agreements. In particular the Supervisory Board should look after all formal requirements necessary for the approval by the Court and the execution of the plan with particular attention to the payment of external creditors. Even for the debt restructuring agreements the task of the Supervisory Board will be to evaluate the plan, to monitor the implementation period, paying attention to situation leading to changes of the planned actions. Great care must be given specially to the evaluation and monitoring of financial flows foreseen in the plan.

iii. Conduct rule no. 11.5- Role in Pre-insolvency Agreements (art. 160 l. f.) () Pre-insolvency Agreements with creditors are the more common way to compose a state of crisis or insolvency. With the recent bankruptcy reform a more private character - rather than the previously existing public one - has been recognized to Pre-insolvency Agreements. A major relevance to the decision of the creditors has been introduced. Creditors, and not the Court, have the right to choose between the pre-insolvency agreements and bankruptcy declaration. In case of Pre-insolvency Agreements the Supervisory Board will primarily carefully examine the causes that have produced the crisis or insolvency and then will

express its opinion about the choice. The Supervisory Board shall cooperate with the entrepreneur for the fulfillment of all the formal requirements provided by law, including the assumption of the prior deliberation to be carried out in accordance to the art. 152 If. It should be noted that during the procedure the company's assets are left available to the borrower and that the Supervisory Board, in all its possibility, has to make sure that subtractions or loss of assets doesn't occur. Likewise, it should be noted that, during the procedure, regular accounting must be kept by the company so that the Supervisory Board must exert periodic inspections and prepare the report to the financial statements. This task has to be done even after the closing of the procedure, even if the approval phase is followed by the liquidation of the assets and not by a going concern situation.

3.2 Auditor

In bigger companies figures are controlled by an Auditor (an Audit Firm or a Registered Auditor). When this happens duties are no more all on the shoulders of the Supervisory Board, as it happens in smaller entities, but they get split between the Auditor and the Supervisory Board.

Both Auditor and Supervisory Board, carry out relevant controls activities that should be able to help identifying early symptoms of the crisis.

Members of the Supervisory Board are, as already pointed out, entrusted with supervising the areas: compliance with the law and the by-laws of the company; correct administration and internal controls; adequacy and reliability of the organizational and administrative structure; adequacy and reliability of the accounting system. The members of the Supervisory Board report to the Board of Directors their considerations on the company situation leading them to think about the consequences of decisions to be taken on the going concern of the firm. This takes place directly during Board of Directors meetings meanwhile decisions are taking.

The Auditors - instead - are called to monitor and measure the impact of decisions on balance-sheet items and results, but audit, of course, takes place after decisions have been taken. The ordinary audit activity in crisis contexts indeed includes, exactly as in ordinary contexts, preparing quarterly and annual audit expressing on these bases the opinion on the financial statements. Procedures and principles that are implemented by the Auditor do not change even if it is necessary more attention and investigation to identify risks and to evaluate critical items.

What characterize the Italian context is the common co-existence in companies of the continuous *ex ante* - on decisions - and *ex post* controls - on figures generated by decisions - which should build up, when fitting and well implemented, a strong corporate governance structure. The recalling and the warnings of both bodies represent essential tools that

should help the Board of Directors to realize the coming of the crisis from the first signs and to be consequently able to identify on time a structured strategy to overcome it.

The model certainly requires professional involved to prove a great level of competence, but professionalism is not enough particularly in special contexts. Cooperation with full transparency and consistent information exchange between the two governance bodies is needed. If the cooperative approach is relevant in growth or steady situation, it becomes a key factor when the crisis begins to arise. Italian law - with art. 2409 septies c.c. - and auditing standards require it and specify that a useful collaboration is not only a matter of fair professional behavior, but must be considered a compulsory and necessary procedure and must be mutual and prompt.

3.3 Independent Expert (Attestatore)

Reformed bankruptcy law recognizes a key role of the Independent Expert who is asked to render an opinion on the feasibility of the plan. The Expert must be a registered auditor. This introduces a relevant novelty in the Italian tradition. The company must appoint an Independent Expert, named *Attestatore*, who will examine the proposed agreement, audit the financial data on which the plan is built and examine, in accordance with recognized assurance standards, the plans the company declares it is able to implement. The Independent Expert (*attestatore*) must be appointed by all companies that approach one of the three procedures introduced in the Italian context. In the context of hybrid procedures (Art. 182bis) and of formal reorganizations (Art. 160, Art.186bis) the report of the independent auditor (*attestatore*) is the first document, together with the debtor application, from which the court learns about the agreement. He is not an advisor, as his role is to safeguard creditors' interests. His point of view correspond to the Court and the Creditors' one, as his findings and conclusions will be the main information on which the Court will take its decision to open the procedure. The reform of September 2012 provided a requirement for strict independence, including a long cooling-off period. To be considered independent, the Expert and his partners cannot have been advisors of the company or part of the management or supervisory board or Supervisory Board (*collegio sindacale*) in the last five years; and relevant criminal sanctions in case of unfair and untrue disclosure: if the independent auditor exposes false information or otherwise does not report important information, is punished with detention or important penalties. If the events are committed in order to achieve an advantage for himself or for others and if from the act is achieved an offense to creditors sanctions may be increased.

The feature of total non-involvement in company matters puts the Independent Expert (*Attestatore*) in a position characterized by information asymmetry

towards the company. This makes crucial the relationship with company's controllers - Supervisory Board and Auditor - who have knowledge of the company situation and that, for first, have - or at least should have - monitored the crisis signs and the failing of going concern. Once more cooperation with full transparency and consistent information exchange becomes a critical factor. The Independent Expert (Attestatore) needs to confront with the two pre-existing governance bodies even if its position must remain separated and free-standing. Their dialogue must start in fact from the consideration of their respective roles and responsibilities.

In this perspective, the audit carried out on the annual reports by the Auditor, seems to represent a logical starting point for the Independent Expert (Attestatore) audit of financial data the plan is built on. However, unfortunately, Auditors - in particular Audit Firms - are not likely to agree with this point of view. The Italian Auditors Association (Assirevi) is in these days outlining a document draft in which it is claimed:

- that the aims of the Auditor annual opinion and the aims of the Independent Expert due diligence on the figures which represent the starting point of the plan to get out from a crisis period are different;
- that consequently, even if the Independent Expert and the Auditor happen to audit the same figures for the same company for the same period, they should follow separated patches;
- that audit evidence collected and the Audit Documentation by the Auditor shouldn't be made available for the Independent Expert.

This statements do not promote the idea of building up good flow of information among the independent experts involved in the process and introduce, as pointed out by the data here examined, a fence difficult to overcome.

3.4 Court and Trustee

In Pre-insolvency Agreements (*concordato preventivo ex Art. 160 lf and 186bis lf*) the Court verifies compliance between the law provisions and the debtor's formal reorganization (or liquidation) plan together with the Independent Expert's opinion on the feasibility of the plan and on the fairness of the figures on which the plan was built. If the results are adequate, the Court opens the procedure and appoints a Trustee to look after the debtor activity². He supervises his behavior while the debtor goes on managing the company during all the reorganization period, he checks the list of creditors and debtors provided by the company and draw up an inventory of

the assets. The Trustee communicates to creditors his opinion about the proposed Pre-insolvency Agreement in a special public report. This document is made available to the creditors some times before the day they are called to vote so that they can take an informed decision. He chairs the creditor's meeting during which creditors are called to express their vote on the proposed agreement.

Some of the contents of the Trustee report are similar to the one of the Independent Expert as both audit the company's figures and give an opinion on the feasibility of the plan. From a technical point of view the Trustee should verify the activities carried out by the Independent Expert. He can choose to repeat all of them or - if he considers the Independent Expert job enough structured and reliable - he can choose to only analyze a sample them in order to validate them.

The Trustee goes then on with his analysis going through a fraud audit procedure and comparing the proposed scenario with the alternative bankruptcy scenario. This means that he has to try to imagine and describe a picture of this second situation. The Trustee necessarily has, hence, to include in his report considerations about the likelihood to successfully implement different legal actions and an estimation on one side of the controversy value and on the side of the time necessary to get the goals considered. Litigations can be drowned for instance against, managers, Auditor and statutory auditors if the Trustee considers them to have some responsibilities having had a role in the worsening of the situation.

It is important to highlight that the point of view the Trustee has to share is the creditors' one, as his findings and conclusions will be the main information and elements on which creditors will take their vote decision. Being appointed by the Court the position from which the Trustee operates is stronger than the one from which has operated the Independent Expert at the beginning of the procedure. Even if this last has perfectly behaved, roles are different. The Independent Expert faces his difficult due diligence equipped by his professionalism, competence and moral strength. The Trustee has additional and delicate duties, but he is also given, thanks to his functionary status, the power necessary to go through them.

It is possible to affirm that the Independent Expert, the Trustee and the Court are all interested in reaching the same goal, which is to inform creditors about the debtor's offer in a reliable way. The sustainability of the hypothesis on which the plan is based is somehow "guaranteed" by their auditing, assurance and investigation. It is up to creditors whether or not to accept the agreement.

As all of them are working to protect the same interests it should be expected them to cooperate or at least to exchange information and documents.

² As already pointed out, this does not happen in Recovery and Resolution Plans (*piano attestato ex art. 67 lf*) which are Out of Court procedures, while in Restructuring Agreement (*accordo di ristrutturazione ex art. 182 bis*) the Court verifies compliance but does not appoint a Trustee.

4 First results of the research

In June 2012 a group of Italian researchers from different Universities together with the President of the Bankruptcy Judges of Milan Court started an important research aiming at analyzing *Art 160 lf* procedures³. The aim is to understand the trends developed in Lombardy major Court from 2007, that is supposed to be representative of the first applications, to nowadays. It is important to say that Milano Court is - together with Rome - the most relevant Italian Court. Each *Art 160 lf* dossier have been analyzed cover to cover. As shown in Figure 3, up to now all 2011 and almost all of the 2012 dossiers have been processed. This means that we 284 dossier representing the all population of procedures presented in Milano Court in the period considered have been analyzed. Some of the first research processing and results are presented in the following pages using a simple approach as a descriptive analysis.

Data shows that not all applications were admitted: 32% were refused by the Court as the documents of the application were considered noncompliant with the formal standard. Much more interesting is the final results of the admitted procedures admitted. Only 26% of the them have been successful. This is a surprising result and suggests that much has to be done by professionals to build adequate agreements and by standard boards and academia to help professionals and companies reaching their goals.

The focus is here on the Controllers behavior observed in the selected situations and particularly on the flows of information among Corporate Controllers and the Independent Expert involved in the first part of the process. As already pointed out being able to walk through the documentation of the Corporate Controllers and to have access to the evidence already collected and analyzed by them can be of great help for the Independent Expert exam of the fairness of the figures. More important this can reduce the timing of his audit work which is usually expected to take a long period as, if not supported, he can't avoid to implement all audit procedures from the top. The analysis does not consider the flows of information among on one side the three mentioned Controllers appointed by the Companies and on the other side the Trustee and the Court. The choice is linked to the strongest empowerment of the last two roles and to

the consequent duty for the first to exchange information and giving access to any documentation with the second.

First of all the research confirms that the corporate governance model preferred by Italian companies is what we have called in the first pages the "Traditional Italian Model" where the Supervisory Board is up and running. In fact in about 87% of the dossier considered the analysis of the official historical data of the companies included in the sample has pointed out the presence of the board of directors together with the Statutory Auditors Board. The relevance of this result is highlighted by the fact that only 1% results having implemented the monistic model and it seem totally not implemented the dualist one. In addition as no information were found in 12% of the dossier it cannot be excluded that some more companies effectively adopt the traditional model.

In almost 60% of the cases implementing the Traditional Italian model, the Statutory Auditors Board not only watch out for Board activities but also audits the annual report. This means that in most cases the Statutory Auditors Board is responsible for both: i) on one hand for supervising the compliance to the law, the observance of correct administration principles, the organizational structure adequacy, the presence of a fitting control system; ii) on the other hand for controlling the accounts implementing all the auditing procedures necessary for the release of the opinion on the annual report. In the remaining cases an Auditor is selected to look after the second class of activity, that is the auditing one.

The research points out that communication flows among the Supervisory Board, the Auditor - if existing - and the Controller selected by the company to be able to implement the procedure, that is the Independent Expert, seems to be too weak.

Only in 30% of the Independent Expert Opinions it is possible to find out that there have been an exchange of information between the Independent Expert and the Supervisory Board. The percentage falls to 19% if the Auditor is considered consistently with to the approach suggested by the Auditors firm Association. In all other dossier no news about contacts among controllers have been found meaning that either effectively there have been no connection among controllers or that any relevance has been given to information received from pre-existing controllers by the Independent Expert. At this level the setting of the query was general to be able to consider all the possible evidence of the structuring of a contact.

³ The research has been implemented by: Riva P. (Università del Piemonte Orientale, SAF Scuola di Alta Formazione Dottori Commercialisti Milano), Danovi A. (OCRI Università Bocconi, Università di Bergamo), Bianco C. (SAF Scuola di Alta Formazione Dottori Commercialisti Milano) together with La Manna F. (President of the Bankruptcy Judges of Milano Court), Fontana R. (Bankruptcy Judge of Milano Court). The research is not sponsored and has been implemented on voluntary basis.

Figure 3. The Sample – Pre-Insolvency agreement Dossier analyzed

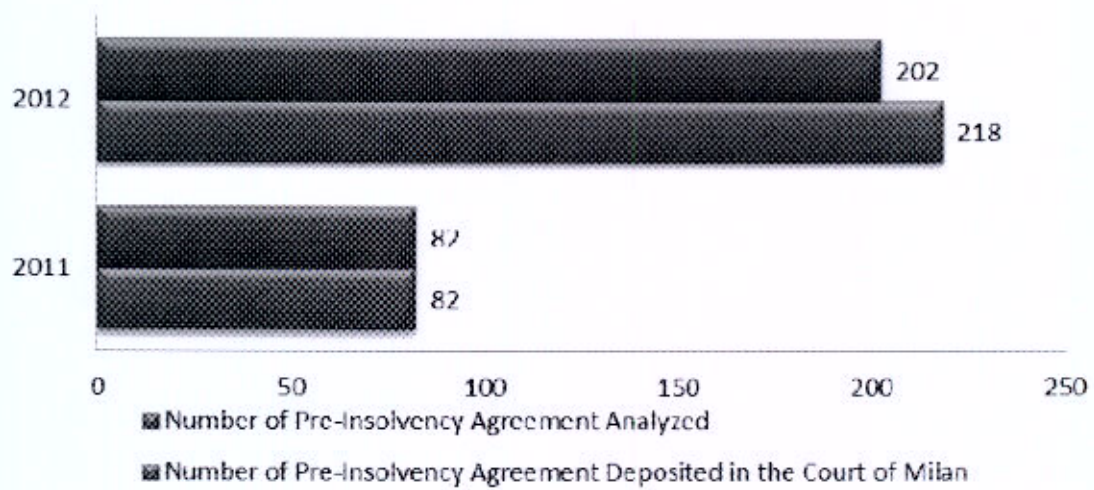


Figure 4. Corporate Governance of companies included in the sample



Figure 5. Exchange of information between the Independent Expert and the Supervisory Board

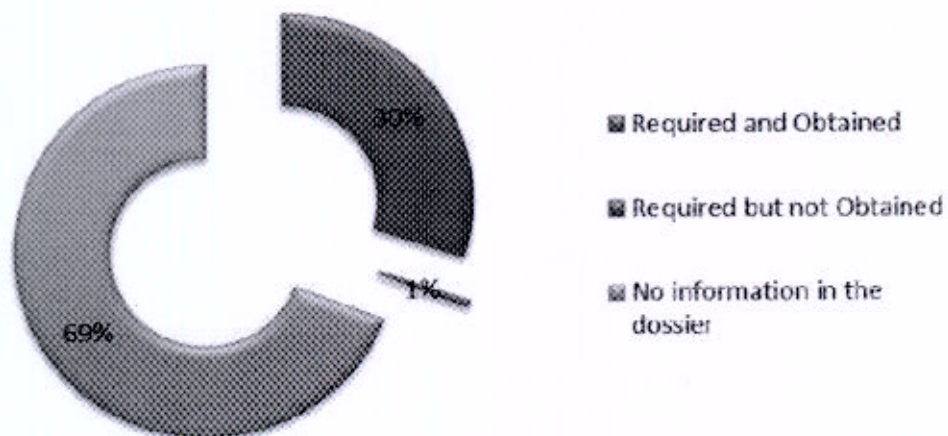
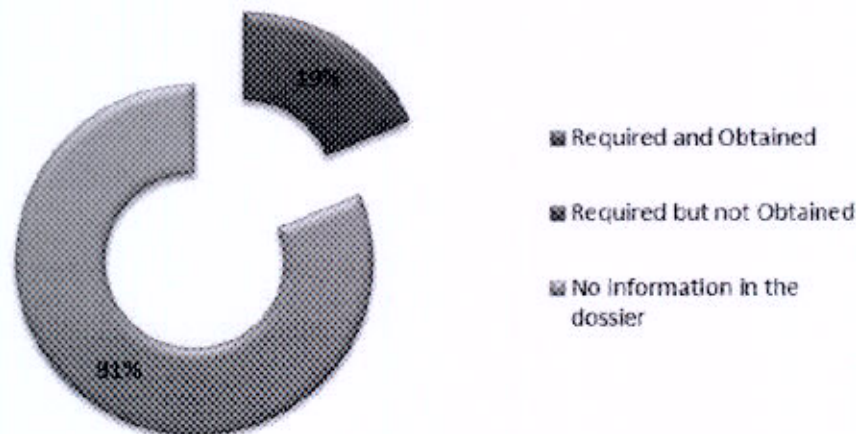


Figure 6. Exchange of information between the Independent Expert and the Auditor if existing

To understand the nature of the flow of information registered, more attention has been hence given to the content of the opinion produced by the Independent Expert. The exchange of information in fact could consist in "simple conversation" about the business, the crisis situation and the strategy planned to solve it, or it could go over this asking the Corporate Controllers to produce their Documentation. The analysis gives an interesting result as the behavior of on one hand the Supervisory Board and on the other hand the Auditor seem again to be different.

Only in the 14% of dossier analyzed results that the Supervisory Board has given access to its documentation. This means that in more than 50% of the situation where the Independent Expert has declared to have had a positive contact with the Supervisory Board - 30% of dossier, see Figure 5 - he has obtained only "simple conversation", but not

sharing of evidence. This can be explained by structural reasons as in almost all these cases the Statutory Auditor Board is not involved in the audit of the figures which is delegated to the Audit Firm.

In 17% of dossier analyzed results that the Auditor has given access to its documentation, in 1% of dossier the Auditor has denied the access and the Independent Expert has reported in his opinion about this behavior. This means that in almost all situation where the Independent Expert has declared to have had a positive contact with the Auditor - 19% of dossier, see Figure 6 - he has obtained the sharing of audit evidence. In other terms when Auditor decides to disclose they seem to move in full transparency.

Anyway both outcome turn out to be significant of a gap between what is needed and what effectively takes place.

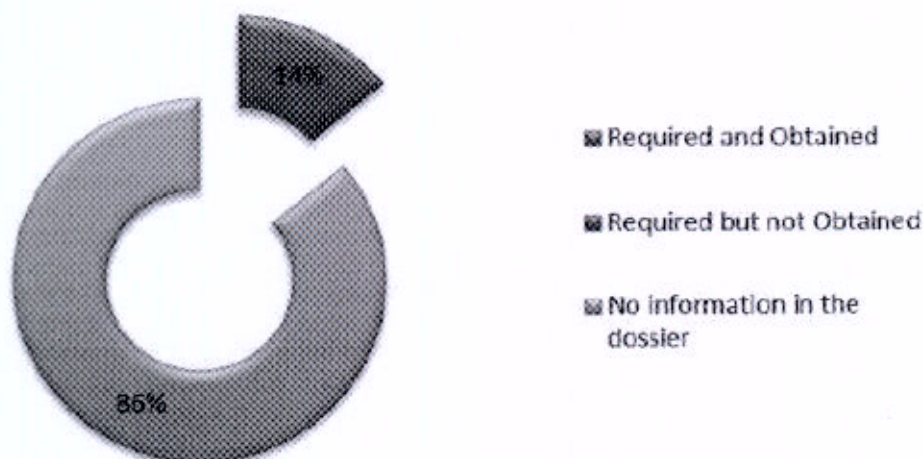
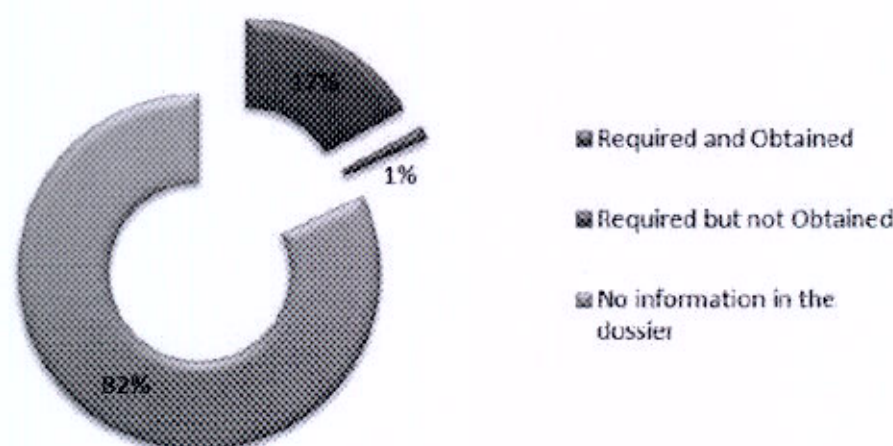
Figure 7. Independent Expert Using the Work of the Supervisory Board

Figure 8. Independent Expert Using the Work of the Auditor

5 Conclusions and future objectives

The introduction in the Italian context of tools to help companies face difficulties in crisis periods has represented a "cultural revolution" for the Italian context. Formerly, the main aim of Italian bankruptcy and business recovery used to be the protection of creditors, while now the goal is claiming priority to safeguard companies and reduce their difficulties (Riva P., Provasi R., forthcoming). In spite of this, data from the empirical analysis show that first application results, referred to a sample of Pre-insolvency Agreements are not satisfactory as the number of successful procedure is not adequate. Much has to be done by professionals to build adequate agreements and by standard boards and academia to help professionals and companies reaching their goals. All Actors involved in the process with a Control role need to behave rigorously to be able to test the quality of the operations planned. Different roles and different duties are defined by the recently reformed bankruptcy law. Each professional involved is committed to face his own responsibilities.

The analysis that this demand for serious engagement seems to have been frequently interpreted as a reason to ban professional exchanging of information and sharing of relevant documents among different Controllers. This happens especially in the first delicate period when time is a precious resource as the strategy is being defined and the application is being composed. Only in a minor percentage of the procedures analyzed the Independent Expert has found support and has had access to the work of the Supervisory Board and of the Auditor.

Results seem hence to show a possible path useful to improve efficiency, but also efficacy, in managing successfully the Restructuring Techniques newly introduced in the Italian model.

References

1. AICPA, "Guide on Prospective Financial Information", (Aicpa 2009).
2. Altman, E.I., "Financial Ratios, discriminant analysis, and the prediction of corporate bankruptcy", *Journal of Finance*, Vol. 23, Sept. 1968, pp. 589-609.
3. Altman, E.I., Haldeman, R., and Narayan, P., "Zeta Analysis: A New Model to Identify Bankruptcy Risk Corporation", *Journal of Banking and Finance*, Vol. 32, June 1977, pp. 29-54.
4. Corno G., "Italian Insolvency Regulations", in Otto (ed.), *World Insolvency Systems: a comparative study*, Thomson Carswell (Canada), 2009.
5. Fabozzi, F.J., *Handbook of Finance: Investment Management and Financial Management*, John Wiley & Sons, 2008.
6. Gabuardi, C.A., *I sistemi di insolvenza nel subcontinente nordamericano [Insolvency in north america]*, 2007.
7. Garrido, J.M., *Out-of-Court Debt Restructuring (2011)*, Retrieved from <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/OutOfCourtDebtRestructuringBeforeTypesetting.pdf>
8. Graham L., Carmichael, D.R., *Accountants' Handbook*, Vol. 2, "Special Industries and Special Topics" (11th ed., John Wiley & Sons, 2012).
9. Guatri, L., *Turnaround: Declino, crisi e ritorno al valore [Turnaround: Decline, Crisis and Return to Value]*, Egea, 1995.
10. Paluchowski A., Pajardi, *Manuale di diritto fallimentare 2008[Insolvency regulation]*, Giuffrè, 2008.
11. Quagli A., Danovi A., *Crisi aziendali e processi di risanamento [Crisis and turnaround]*, 3th ed., Ipsoa, 2012.
12. Provasi R., *L'evoluzione dei sistemi di controllo alla luce del D.Lgs n. 6/2003 [Evolution of corporate governance controls after D.Lgs 6/2003]*, in AAVV, *L'evoluzione del controllo di gestione. Modelli ed esperienze*, pag. 658-673, Milano, Franco Angeli, 2004.
13. Riva P., Provasi R., *An Overview Italian Companies And The Financial And Economic Crisis. A Cultural*

- Revolution, forthcoming on International Journal of Economics & Business Research.
14. Riva, P., Informazioni non finanziarie nel sistema di bilancio: Comunicare le misure di performance: Analisi empirica. [Nonfinancial Information in (Italian) Annual Reports: Disclosure of Performance Measures: An Empirical Survey] (Egea, 2001).
 15. Riva, P., L'attestazione dei piani delle aziende in crisi. Principi e documenti di riferimento a confronto. Analisi empirica [Auditing and Assurance for Recovery and Resolution Planning, Restructuring Agreement and Pre-Insolvency Agreement: Standards and Other Reference Documents: An Empirical Survey] (Giuffrè, 2009).
 16. Scarso A.P., Debt Restructuring in the new italian insolvency law, *Studia Iuridica Toruniensa*, 2009, 5-19.
 17. Stiglitz J., Il sistema di governance societaria anglosassone ha fallito. Ora guardare al modello italiano [Anglo-Saxon corporate governance system has failed. It is time to have a look to the italian model], (CNDCEC, Comunicato Stampa, 2009).
 18. Stanghellini, L., Le crisi di impresa fra diritto ed economia: Le procedure di insolvenza [The Company Crisis between Law and Economy: Insolvency Procedures] (Il Mulino, 2007).
 19. Teodori, C., Modelli di previsione nell'analisi economico-aziendale [Forecasting Models in Economic- Business Analysis] (Giappichelli, 1989).
 20. United Nations Commission on International Trade Law (UNCITRAL), Legislative Guide to the Insolvency Law, Part One: II. Mechanisms for Resolving a Debtor's Financial Difficulties (United Nation, 2004).