

Report on the working session: “the Parmalat affair”, organized by the Insolvency Commission at the Paris Annual Congress, 29 August 2008.

Organiser: Giuseppe Scotti
Speakers: Francesco Gianni (Gianni, Origoni, Grippo & Partners, Milan)
Bruno Cova (Paul Hastings, Milan)
Alexander Klauser (BKP Rechtsanwälte, Vienna)

Bruno Cova, appointed as legal counsel by Mr. Bondi, the government appointed commissioner of the Parmalat group, gave an overview of the most impressive facts and figures of the Parmalat affair, considered to be one of the biggest insolvency cases worldwide.

He indicated that the fraudulent mechanisms, causing the insolvency, had started in the early 90'ies after a reverse merger transaction. Small accounting irregularities increased over time to create by 2003 a financial gap of 14,3 billion EUR, involving the insolvency of 200 subsidiaries, resulting in criminal investigations in 10 countries, over 800 litigations, 3 class actions, a claim by the Securities and Exchange Council and many more.

Francesco Gianni, acting as lawyer to Mr. Bondi, explained how this extraordinary insolvency case was approached. We resume in a nutshell:

As an introduction, he indicated that the cause, indicated by many as an excuse, was not the insufficiency of the available legislation. On the contrary, many persons and functions failed to reveal the alleged fraud, despite obvious indications. A clear lack of diligence seems to have caused the alleged fraud and allowed it to persist and aggravate over many years.

The first step in the insolvency was to ensure an adapted legal framework, created by the Marzano law, developed in four days after the break-out of the scandal. This law created the possibility of maintaining the going concern of the Parmalat business, after consolidating all activities worldwide. To preserve the going concern, the production needed to be resumed immediately, consumer confidence needed to be restored and the brand value had to be preserved.

Second, a composition of creditors needed to be organized and approved, problematic, among others, by the bearer shares of Parmalat and the many bonds issued by Parmalat subsidiaries. A special approval mechanism was used to assure the creditors support for the restructuring plan.

Thirdly, a relisting of the Parmalat company on the stock market was needed to carry out the debt/equity swap operation whereby all creditors would become shareholder. For that goal a foundation was created with strict by-laws, respecting corporate governance and creditors rights, through a dividend guarantee. This foundation was to offer the transaction to the creditors and prepared the relisting. The relisting was launched in October 2005, merely 18 months after opening of the insolvency proceedings.

Alexander Klauser made an accurate and scientific approach of the Eurofood arrest

of the European Court of Justice of 2 May 2006, rendered as a preliminary ruling after Irish and Italian courts handed down contradicting judgments opening each main insolvency proceedings over Parmalat's financial subsidiary Eurofood IFCS Ltd, established in Ireland. The Court clarified in its arrest the notion of Centre of Main Interests (COMI), being the key criteria to attribute jurisdiction. Furthermore COMI is to be an autonomous notion interpreted under EU-community law. Finally, the Court excluded the possibility that one main insolvency proceeding would enclose an entire group of companies. Each company, even within a group, has its own COMI. Despite these clarifications, many other questions were left unanswered.

For those interested in more literature on the Parmalat case, a booklet was handed out at the working session, containing an article written by Alberto Cova on “International insolvencies: Parmalat”, published in *Journal of International Banking law and regulation*, Vol. 22, 2007 and copy of a lecture given before the ICC Commercial Crime Services. Copy thereof can be obtained from your president.

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