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The new "Restructuring agreement with financial intermediaries", other changes to pre-bankruptcy creditors' compositions (*"concordato preventivo*") and other reforms to Italian insolvency law

The Italian Government has approved Law Decree No. 83/2015 of 27 June 2015, which introduces important new measures on Insolvency Law, Civil Law, Civil Procedure Law and Court Administration. This briefing focuses on the changes affecting Italian insolvency law. For a description of the new measures adopted to streamline and expedite credit enforcement proceedings, please refer to our earlier client briefing on "*New enforcement procedure rules: the reform introduced by Law Decree no° 83 of 27 June 2015*".

The most significant changes to Italian insolvency law introduced by Law Decree No. 83/2015 (the "Decree") are the following:

- **Increased and easier access to interim financing for distressed companies, by allowing the debtor to apply to the Court to seek urgent court authorization to enter into "interim financing" agreements and to retain existing "*linee di credito autoliquidanti*" (trade receivables credit lines). These will acquire legal priority (*prededucibili*), without the need for certification by an expert, even where the debtor has submitted a petition for admission to a pre creditors' composition (*concordato in bianco*) or is involved in negotiations to restructure its debt under Article 182-*bis*;**
- **A new type of debt restructuring agreement has been introduced, to foster early recovery of businesses in distress and prevent minority creditors from blocking the outcome of restructuring procedures. This new restructuring procedure is available when a company has debt towards banks and financial intermediaries in an amount not less than half of its total indebtedness;**
- **Subject to certain conditions being met, there is now the possibility to extend the effects of a standstill agreement to non-approving (or dissenting) financial creditors, if the standstill agreement has been approved by at least 75% of the financial creditors (banks and financial intermediaries);**
- **In order to prevent devaluation of the debtor's assets, there is now the possibility to start a competitive process in the context of a creditors' composition ("*concordato preventivo*"), allowing the submission of competing bids where the commissioner believes that the offer already included in the composition plan is not in the best interest of creditors;**

Main changes

- Easier access to interim financing
- Submission of competing offer by third parties and plan proposals by creditors
- New debt restructuring agreement with financial creditors and extended effects of a standstill agreement
- New provisions governing the appointment of bankruptcy trustees

- **Creditors that represent at least 10% of the debtor's overall financial indebtedness may submit alternative creditors' composition proposals to those of the debtor. This can be done where the debtor's proposal does not provide for payment of at least 40% of the total unsecured indebtedness and is intended to foster the entry of new capital into the business in distress, as well as the correct valuation of the debtor's assets;**
- **More stringent requisites have been introduced for the appointment of bankruptcy trustees, rendering the role of trustee incompatible with the role of judicial commissioner in other procedures. This is intended to strengthen the safeguards aimed at ensuring a bankruptcy trustee's impartiality and independence; and**
- **Measures to hasten the implementation of the liquidation program have also been introduced.**

Interim financing

New access to interim financing

- The Decree amends Article 182-*quinques* of Royal Decree No. 267 of 16 March 1942, as amended (the **"Italian Insolvency Law"**) by allowing a debtor who has filed for the admission to a creditors' composition ("*concordato preventivo*") (including the so-called "concordato in *bianco*"), or who has filed an application to approve a debt restructuring agreement under Article *182-bis* (including during negotiations to restructure its debt), to request authorisation to either receive interim financing or to continue to use existing "*linee di credito autoliquidanti*" (trade receivables credit lines), which h acquire legal priority.
- The Court can authorize such interim financing and credit lines upon request of the debtor, without the prior certification of an independent expert, but after having consulted with the main creditors, provided that:
    1. The financing and credit lines are "functional" to meet urgent operational needs of the business;
    2. The debtor specifies what use will be made of the new financings and credit lines, and that it is otherwise unable to obtain alternative financing; and
    3. The absence of this "new financing" could cause irreparable and imminent harm to the business.

The new debt restructuring agreement with financial intermediaries and standstill agreement

The new debt restructuring agreement

- Under the new Article 182-*septies* of the Italian Insolvency Law, a company which has debts towards banks and financial intermediaries (i.e. financial creditors) for an amount not lower than half of its overall indebtedness can request, at the time it applies for the approval of a debt restructuring agreement under Article 182-*bis* of the Italian Insolvency Law, that the effects of the agreement be extended also to those financial creditors (belonging to the same class of creditors) who have not given their approval, thereby derogating from Articles 1372 and 1411 of the Italian Civil Code, provided that:
    1. All creditors belonging to the same class of creditors have been informed of the start of negotiations with creditors and were put in a condition to participate in the negotiations;
    2. The financial creditors that have approved the debt restructuring agreement represent at least 75% of the indebtedness in that class;
    3. The legal position and economic interests of the financial creditors to which the effects are to be extended and that of the financial creditors that have already approved the plan, have the same nature ("*omogeneità*);
    4. The financial creditors to which the effects are to be extended have received full and updated information on the assets and the economic and financial condition of the debtor, as well as on the plan and its effects; and
    5. The plan "imposed" on the non-approving (dissenting) financial creditors represents the "best alternative" for them, ensuring that the financial creditors will be satisfied in accordance with the plan at least as much as under any other realistically feasible alternative plan.

- The creditors to which the debtor requests to extend the effects of the debt restructuring agreement will be considered as creditors approving the agreement and will be taken into account when calculating the required 60% threshold under Article 182-*bis*; thus introducing a new mechanism for *"*cram-down*"*.
- The debtor will have to serve the application and the documents related to the application for the approval of a debt restructuring agreement under Article 182-*bis* of the Italian Insolvency Law to the financial creditors to which it wishes to extend the effects of the agreement, and these financial creditors can file a motion to challenge as from the date of service.
- The court will validate the debt restructuring agreement after it has ascertained that the negotiations were held in good faith and the relevant conditions were met.
- The law expressly provides that the rights of creditors, other than those of the financial creditors, will remain unaffected.

Extension of the effects of the so-called "standstill agreements"

- Where a standstill agreement is executed by the debtor with one or more financial creditors and the standstill agreement has been approved with a majority of 75% of the credits of the banks and financial intermediaries belonging to the same category of financial creditors, then that standstill agreement will also apply to the non-approving (or dissenting) financial creditors, provided that: (i) the non-approving (or dissenting) financial creditors have been informed of the start of the negotiations; (ii) such financial creditors have been put in a position to participate in the negotiations in good faith, and finally (iii) an expert certifies that the legal position and economic interest of the non-approving (or dissenting) creditors and that of the creditors who approved the standstill agreement, have the same nature ("*omogeneità*").
- The non-approving (or dissenting) financial creditors can challenge the proposed extension by filing a motion requesting that the standstill should not apply to them within 30 days from their receipt of the notice. The Court will decide on the motion with an order setting out the reasons therefor, which can be appealed before the Court of Appeals within 15 days.
- In no event can any such standstill or other similar agreement impose any new obligation on the non-approving (or dissenting) creditors or require that they give any additional performance, grant new financing, continue to render available any financing already granted, or disburse new funds.
- In order to prevent any abuse of these new mechanisms, the new law broadens the scope of criminal liability for fraudulent bankruptcy to cover any fraudulent actions by the debtor in obtaining the approval of the debt restructuring agreement or the execution of a standstill agreement.

The composition plan

The Decree shows greater interest in the role of creditors, making them active participants in the composition with creditors phase as well as ensuring they receive more accurate disclosure, thus rendering the creditors' role more active and informed than in the past.

Concurring offers

- When the commissioner deems that an offer to purchase (from an identified proposed purchaser) in a composition plan, as for example in a pre-packed composition plan, is not in the best interest of the creditors, then a competitive process can be started for the sale of a business.
- The Court will rule on the matter after consultation with the commissioner, and will order the start of a competitive process that takes into account (i) the value of the business or asset to be sold; and (ii) how to satisfy a greater percentage of creditors.
- The order that opens the competitive process will set out the terms for submission of the irrevocable offers, ensuring that: (i) the offers are comparable, (ii) the potential purchasers/bidders meet the relevant prerequisites, (iii) access is granted to material information within appropriate terms, (iv) any limitations to the use of material information are set out in the offer, and (v) the terms and conditions on which the commissioner must disclose the material information to those who request are set out in the offer.
- In case more than one offer is submitted (assuming it is an improvement over the existing offer), the Court will open an auction process among the offerors, which must be completed before the meeting of the creditors. The debtor will then have to amend the proposal and the composition plan to reflect the outcome of the auction process.

- The Decree states that the new provisions governing the competitive offer process will apply to composition procedures that commence after 27 June 2015.

Concurrent offers

- One or more creditors will be able to present a concurrent proposal and related composition plans if, taking into account any purchases made after the filing of the application for a composition plan, they represent at least 10% of the creditors as shown in the debtor's financial statements filed thirty days preceding the meeting of the creditors.
- Concurrent proposals for composition plans are admissible if the composition plan presented by the debtor does not ensure payment of at least 40% of the unsecured creditors.
- The proposal can envisage the involvement of third parties, and for debtors that are joint stock companies or limited liabilities companies (*società per azioni* or *responsabilità limitata*) it may envisage a capital increase transaction without the right of pre-emption or with a limited right of pre-emption.
- Pursuant to Article 172 of the Italian Insolvency Law as amended by the Decree, the commissioner will be required to file its report on the distress at least 45 days before the meeting of the creditors and will have to draft a supplementary report, to be filed and provided to the creditors at least 10 days before the meeting of the creditors. The report must include a detailed comparison of the concurrent proposals that have been submitted.
- When more than one proposed composition plan is subject to a vote, the plan that receives the most favourable vote by the majority of the creditors admitted to vote will be approved; in case of a tie, the plan proposed by the debtor will prevail, provided that in case of a tie among plans proposed by creditors, the plan submitted earlier will prevail.
- If none of the concurrent proposals is approved by the majority, the Court will subject to a new vote solely the proposed plan that has received the most favourable vote by the relative majority of the creditors admitted to vote, and will set both a term within which creditors are to be notified and the start date of the 20-day term during which the creditors will have the right to express their dissent.
- If a plan proposed by a creditor is validated, then the commissioner will have the duty to supervise, ensuring that the debtor performs the acts necessary to implement the plan. If the debtor fails to perform, the commissioner will inform the Court without delay, and the Court may vest the commissioner with the powers necessary to act in the debtor's stead and perform the required acts.
- The Decree states that the new provisions governing concurrent proposals will apply to composition procedures that commence after the Decree is converted into law.

Role and responsibilities of the bankruptcy trustee

Requisites for appointment

- The Decree sets out new requisites for the role of bankruptcy trustee: no person can be appointed trustee if he or she has in the past acted as commissioner in a procedure for composition for the same debtor, or is in a professional association with a person who has so acted.
- The bankruptcy trustee must have available an organized structure and resources that are adequate to allow him or her to draft the liquidation plan within the appropriate term.
- A national register will be created by, and held at, the Ministry of Justice to record the orders appointing bankruptcy trustees, commissioners and liquidators, as well as the orders closing the insolvency procedure and validating composition plans, listing also the assets and liabilities involved in such procedures.

Liquidation plan

- The liquidation plan must be drafted within 180 days from the order of bankruptcy. Failure to comply within such term in absence of justification will lead to the revocation of the bankruptcy trustee's appointment.
- The liquidation plan must specify the date by which the assets will be liquidated, to be not later than two years after the order of bankruptcy, or any such longer period for certain specific assets that the bankruptcy trustee may deem necessary, on condition that the trustee provides reasonable justification for the extension of the term in relation to such assets.

Existing, on-going contracts

- Pursuant to the Decree, the petition to terminate existing contracts for which performance is outstanding or ongoing can be presented upon submission of the application for a composition procedure or thereafter. Article 169-*bis* of the Italian Insolvency Law, as amended by the Decree, expressly provides for these new requirements: that the Court can order termination of a contract, with an order setting out the reasons therefor, after (i) having consulted with the contractual counterparty, and (ii) having obtained any summary information necessary.
- Termination or suspension of the contract becomes effective on the date when the contractual counterparty is informed of the order authorising termination or suspension. The Decree has not amended the legislation that allows suspension of a contract for a term of sixty days, subject to extension once only.
- Pursuant to the Decree, Article 169-bis of the Italian Insolvency Law is amended by the addition of a fifth paragraph, which is a provision specifically governing financial leases. In case of termination of a financial lease, the lender will have the right to receive the asset back and must pay to the debtor any difference between the higher amount at which the asset was sold or otherwise used, and the outstanding amount owed. When paid, any such sum will become part of the bankruptcy estate. The lender will have a claim towards the debtor for a credit equal to the difference between the credit held on the date the application is filed and the revenues derived by way of new use of the asset retaining the priority/date of the original credit.

Our comments

Pending conversion into law of the Decree, and the amendments or adjustments that will inevitably occur upon conversion into law, we believe the following are the most relevant issues:

Giuseppe de Palma, Managing Partner in Italy and Head of Finance & Capital Markets in Italy observes that: "*The possibility for the debtor to access new financing without the need of the expert's certification and the introduction of the new debt restructuring agreement with financial creditors are new and meaningful options to solve certain issues that, in practice, have hindered access to funds by distressed businesses or prevented a debt restructuring agreement from being reached because of the opposition of a minority of dissenting creditors."*

Fabio Guastadisegni, Partner and Head of Litigation and Dispute Resolution comments*: "The new insolvency provisions allow creditors to take on an active, even proactive, role, rather than passively waiting for the procedure to evolve; creditors will now be able to contribute to the success of the debtor's restructuring. This reform will undoubtedly be viewed positively by creditors."*

Prof. Avv. Carlo Felice Giampaolino, Partner in Litigation and Dispute Resolution comments on amended Article 182-*septies* stating that:*"it acknowledges that different types of creditors exist and that the effects of a debt restructuring agreement approved by at least 75% of the creditors in the class must be extended to certain dissenting minorities of creditors. Thus it introduces, although only within the context of insolvency and restructuring procedures, mechanisms for the unilateral amendment of contracts that already exist in Anglo-Saxon countries, such as the Schemes of Arrangement."*

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