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Recent Changes in Italian Restructuring Rules - *facilitating distress management*



Italian lawmakers recently introduced new rules aimed at facilitating efficient solutions for distress management. Law decree no. 83 of June 22, 2012 (the “**Decree**”)⁽¹⁾ made certain amendments to the Italian Bankruptcy Law⁽²⁾ relating to the following restructuring options:

- in-court pre-bankruptcy agreements (*concordati preventivi*) (“**In-Court Pre-Bankruptcy Agreements**”);
- in-court debt restructuring agreements under article 182-*bis* of the Italian Bankruptcy Law (*accordi di ristrutturazione dei debiti*) (“**In-Court Restructuring Agreements**”); and
- out-of-court restructuring plans under article 67, para 3, of the Italian Bankruptcy Law (*piani di risanamento*) (“**Out of court Restructuring Plans**”).

In-Court Pre-Bankruptcy Agreements

The Decree materially changed the procedure for In-Court Pre-Bankruptcy Agreements. In-Court Pre-Bankruptcy Agreements are workout arrangements with creditors achieved through an in-court procedure based on a plan prepared by the debtor involving, for example, the restructuring of debt, the granting of financial instruments to creditors and the sub-division of creditors into different classes. Such procedure requires, *inter alia*, (i) the approval by any such creditors as represent at least 50% of the outstanding indebtedness of the debtor (and the majority of their classes, if any), (ii) a judicial approval (*omologazione*) and (iii) an independent expert’s report. The petition is subject to a publication regime in the Register of Enterprises. During the procedure creditors’ actions are stayed. Once the procedure is completed, dissenting creditors are crammed down and transactions implementing the procedure are exempt from claw-back and bankruptcy crimes.

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The Decree introduced the following amendments to existing rules:

- 1) the debtor may file a petition and, at a later stage (max. 180 days), file the proposal for In-Court Pre-Bankruptcy Agreement (together with the relevant plan and other documents) or, in alternative, switch to an In-Court Restructuring Agreement;
- 2) the plan must include a timetable for implementation;
- 3) any judicial mortgages created in the 90-day period before the publication of the petition are not effective *vis-à-vis* other creditors;
- 4) the debtor may request the court's authorization to terminate or suspend existing agreements (with certain exceptions, e.g. employment contracts) *provided that* the relevant counterparty is duly indemnified;
- 5) in the course of the procedure the debtor may carry out any transactions in the ordinary course of business and, subject to the prior authorization by the court, any urgent extraordinary transactions. Third parties' claims would rank super-senior in a subsequent bankruptcy scenario and no claw-back action is permitted in respect of any transactions legally consummated by the debtor in the course of the proceedings;
- 6) an independent expert must confirm the truthfulness of the data (accounting and possibly other data) and the feasibility of the plan (and any amendments thereto);
- 7) any creditor that does not exercise its vote in respect of the In-Court Pre-Bankruptcy Agreement proposal is regarded as having voted in favor;
- 8) Italian rules relating to negative or quasi-negative equity resulting from losses will not apply to the debtor in the course of the proceedings;
- 9) the debtor may apply for the court's authorization to incur and secure new financing (which will rank super-senior in a bankruptcy scenario) if the expert certifies that it is instrumental to better satisfying the creditors' claims; and
- 10) the debtor may pursue a composition on a going concern basis (*concordato con continuità aziendale*) if the plan contemplates (i) the continuation of business by the debtor, or (ii) the sale of all the assets to, or their contribution into, a new or existing company. The plan must also indicate an estimate of costs, revenues, necessary funding and coverage. The sale of non-core assets may be also provided, together with an up to 1-year *moratorium* of payments to secured/privileged creditors (to the extent the encumbered assets are not sold). Furthermore, the existing agreements are not automatically terminated and the debtor may participate in public tenders subject to certain conditions. Also the debtor may request the court's authorization to pay (with claw-back protection) its debts for prior purchases/services to the extent the expert confirms such payments are of the essence for the continuation of business and instrumental to better satisfying the creditors' claims. No such confirmation is needed if the relevant funds are non-repayable or rank junior to creditors' claims.

In-Court Debt Restructuring Agreements

In-Court Debt Restructuring Agreements may be entered into by a distressed debtor and any creditors representing at least 60% of the outstanding indebtedness of the debtor. By entering into an In-Court Debt Restructuring Agreement, a debtor will enjoy certain benefits such as, for example, temporary protection from creditors' distress orders and enforcement actions, exemption from claw-back and bankruptcy crimes, *provided that*, amongst other things, (i) all the non-consenting creditors are satisfied in full, (ii) an independent expert provides a report and (iii) (subject to creditors' opposition, if any) an approval (*omologazione*) is granted by the competent court. In-Court Debt Restructuring Agreements (and the court's decree approving them) must be filed with the Register of Enterprises.

The debtor may also file a draft agreement during negotiations involving creditors representing at least 60% of the outstanding indebtedness of the debtor, if an independent expert confirms that should such agreement actually be entered into, it would ensure payment in full of the remaining creditors. Following such filing, temporary protection of the creditors' actions would apply.

Pursuant to the new provisions set forth by the Decree:

- 1) the debtor may apply for the court's authorization to incur new financing (which would rank super-senior in a subsequent bankruptcy scenario) if an independent expert certifies that such financing (whether secured or not) is instrumental to better satisfying the creditors' claims. Such new financing need not necessarily be provided by banks or financial intermediaries (as under previous legislation) and may even be provided by shareholders (in which case only up to 80% of the financing would rank super-senior);
- 2) Italian rules as regards negative or quasi-negative equity resulting from losses would not apply to the debtor until the restructuring agreement is approved by the court;
- 3) the independent expert must confirm the truthfulness of the data (accounting and possibly other data) and the feasibility of the In-Court Debt Restructuring Agreement, in particular as regards the payment in full of non-consenting creditors within given mandatory deadlines;
- 4) the debtor may also request the court's authorization to pay its debts (without the risk of claw-back in a subsequent bankruptcy scenario) for purchases of goods or services to the extent the expert certifies that such payment is of the essence for business continuity and instrumental to better satisfying the creditors' claims. No such confirmation is needed if the relevant funds are non-repayable or rank junior to creditors' claims; and
- 5) if the debtor files a draft debt restructuring agreement, it may subsequently opt to switch to a In-Court Pre-Bankruptcy Agreement procedure by filing the relevant petition within the deadline set out by the court.

Out-of-court Restructuring Plans

By averting the risk of claw-back and liability for bankruptcy crimes, Out-of-court Restructuring Plans have become important tools available to debtors in distress and their creditors to ensure business continuity while benefiting from a 'private' out-of-court procedure. To become effective, an Out-of-court Restructuring Plan must be accompanied by an assessment (*attestazione*) prepared by an independent expert.

The Decree has tightened the requirements for accessing Out-of-court Restructuring Plans by providing that:

- 1) the expert must assess the truthfulness of the debtor's data (accounting and possibly other data) and the feasibility of the plan;
- 2) the expert must meet certain specific requirements of independence as regards, *inter alia*, business and personal relationships with the debtor and other stakeholders; and
- 3) the expert may incur criminal liability for providing false information and/or omitting significant information.

The plan may now also be registered with the competent Companies' Register.

The newly enacted rules are expected to significantly boost efficiency and reliability of the restructuring tools by creating a protected environment (including with respect to directors' and lenders' liabilities) for negotiations and interim activities. Such rules will materially impact the way in which distressed situations will be managed.

Such reforms constitute an important milestone in establishing a comprehensive and coherent set of restructuring options to improve distress management.

Notes:

- (1) As converted by law no. 134 of August 7, 2012 published in the Italian Official Gazette no. 187 of August 11, 2012. The changes were effective as from September 11, 2012.
- (2) Royal Decree no. 267 of March 16, 1942 (as subsequently amended).