"Alert and Assisted Arrangement" Procedures: UK Schemes in Italian "Salsa"?

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On 11 October 2017, the Italian Senate approved the final version of a law aimed at systemically reforming Italian insolvency law, which fundamentally dates from 1942. Law no. 155/2017 (the Law) was published in the Official Gazette on 30 October 2017 and entered into force on 14 November 2017.[1] The reform was based on the preparatory work of the "Rordorf Commission", a group of experts appointed by the Ministry of Justice in January 2015.[2]

Both the Commission and the Government were inspired by the desire to comply with the international best practices set out by UNCITRAL, the World Bank and the EU, though curiously no mention is made of the 2016 Proposal for an EU Directive on Insolvency, Restructuring and Second Chance. The 2017 Law does not *materially* change the current legislation. It gives the government the authority (and a period of twelve months) to amend the law by means of one or more decrees. Their enactment will determine a change in the applicable law. In the current state of political uncertainty due to the increasingly probable general elections, it is not possible to speculate whether these decrees will be enacted in the near future.

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Innovative procedure

One of the most innovative aspects of the Law is the introduction of the "Alert and Assisted Arrangement" (AAA) procedures (Article 4), by means of which the Italian legislature aims to implement the suggestions included in the EU Recommendation on a new approach to business failure and insolvency.[3] Under the Law, AAA procedures will be activated whenever the operational or financial situation of the company is compromised to the extent that any reasonable managing or governing body would raise a red flag over the future existence and profitability of the business.

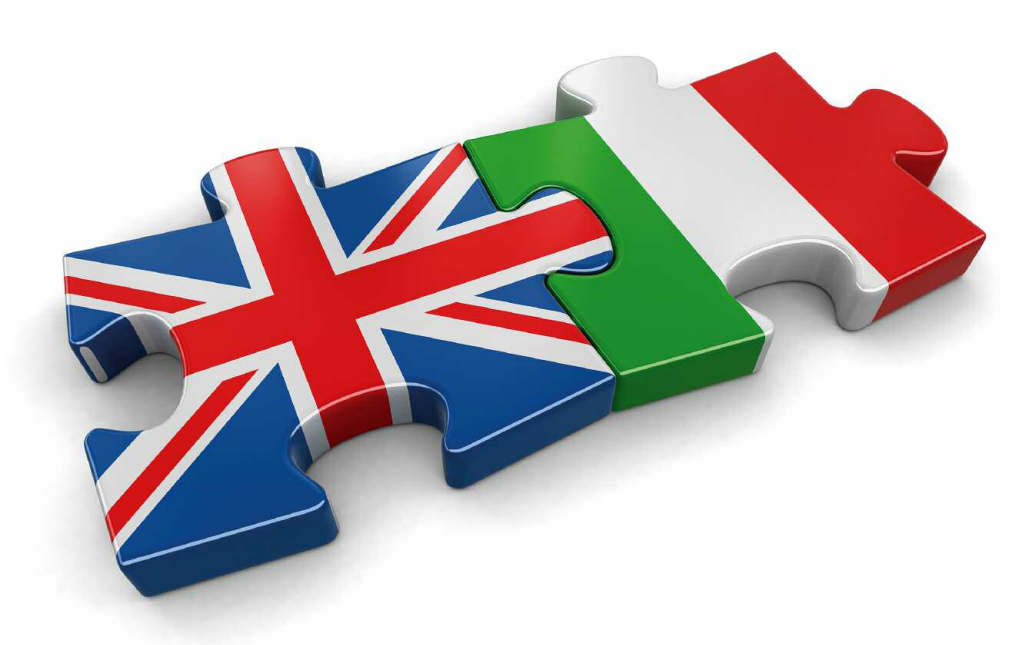
In more prosaic words, AAA procedures are available to solvent companies (with the sole exception of state-owned, large and public ones) in a situation of "crisis", as defined by Article 2(b) of the Law. Provided it is possible to determine with sufficient precision the moment when the company enters into a state of crisis, the management will have 6 months from that moment, to commence any of the procedures mentioned in Article 4(h), including, but not limited to, AAA procedures. Should the management fail to act promptly, the supervisory and corporate governance bodies, as well as some qualified creditors (such as revenue and social security agencies) have the obligation to file for an AAA procedure.

The AAA procedure is entirely non-judicial. It is designed to be confidential and promote an agreement between the debtor and its creditors. It can be used as an alternative or a parallel to the more traditional mechanisms for reorganising a company's capital. As such, it bears a significant resemblance to the UK schemes of arrangement (schemes), as regulated by Part 26 of the Companies Act 2006. The schemes are indeed a valuable and flexible tool for reorganising a company. In essence, they are a compromise or an arrangement between the debtors and their creditors and members (or any class of them). Once the schemes have been approved by the required majorities[4] and sanctioned by the court, they bind any dissenting minority.

Independent authority

Unlike the UK schemes, however, where negotiations are conducted by the solvent debtors (or the professionals they may hire), in AAA procedures negotiations are supervised by an independent authority consisting of three independent experts, one of whom is appointed by the president of the competent "insolvency" court. This aspect of the procedure seems less convincing if it is considered that one of the major criticisms of the schemes is the perception they are "*complex, cumbersome and expensive*".[5] By contrast, however, in the Italian AAA procedures, creditors do not have to be divided into classes or vote on the final proposal.

The AAA procedures, moreover, do not result in an agreement binding upon dissenting creditors. Their failure does not determine the automatic commencement of a formal insolvency procedure, even if the independent authority is obliged to inform the local public prosecutor if it determines that the company has moved from "crisis" to insolvency. During the



> THE ORGANIC REFORM OF THE ITALIAN INSOLVENCY LAW DRAWS HEAVILY FROM INTERNATIONAL BEST PRACTICES

procedures, the debtor may petition the court for any protective measures necessary for achieving a positive outcome. These measures, including the possibility of an automatic stay, can last throughout the negotiations (i.e. for up to 6 months). However, unlike in the UK schemes, the court has no authority to sanction an AAA procedure, hence an absence of finality.

The lack of binding effect of the procedure, as well as the constant interaction with judicial authorities, represent peculiar characteristics of the Italian procedures as compared to the UK schemes. These peculiarities are further underlined by the fact that the documents produced within the AAA procedures can be used as evidence in subsequent formal liquidation or restructuring procedures. This could be a great risk for the management when considering whether to attempt a procedure that might produce the basis for claims in the event of a failure, thus limiting any incentive for doing so.

While the Rordorf Commission and the legislature were guided by the urgency to provide Italian entrepreneurs with efficient turnaround remedies, it was decided to significantly diverge from the models from which they drew inspiration. As such, the view could be taken that the success and frequency of the AAA procedures will largely depend on the behaviour of the "qualified" creditors under a legal obligation to commence procedures whenever they acknowledge the debtor to be in a "crisis". This is because, in the vast majority of SMEs, the management is not supported by corporate governance bodies, while periodic audits by their accountants are unlikely to provide timely warnings of the emergence of corporate distress.

Arguably, the management could be encouraged to timely file for an AAA procedure by reason of the system of rewards and penalties associated with early and late filings. Anecdotal evidence and common sense, however, suggest that the management tends to remain in a "state of denial" about the company's crisis until far too late. It is also questionable whether the average managers will have sufficient knowledge of the provisions included within the Law, which could inform their conduct. This might frustrate the policy objectives pursued by the legislators in crafting the Law.

Conclusion

In summary, the Government is proud to announce that the organic reform of the Italian insolvency law draws heavily from international best practices (including the UK experience). However, there is fear that the AAA procedure, looking more like a UK scheme disguised by a veneer of Italian salsa, might represent a typical example of a dressing spoiling the salad and thus fail to achieve the desired result. ■

Footnotes:

1 Year 158, No. 254.
2 Commissione per Elaborare Proposte di Interventi di Riforma, Ricognizione e Riordino della Disciplina delle Procedure Concorsuali, 'Relazione allo Schema di Legge Delega per la Riforma delle Procedure Concorsuali' (29 December 2015).
3 Commission Recommendation 2014/135/EU of 12 March 2014 on a new approach to business failure and insolvency [2014] OJ L74/65.
4 Section 899(1), Companies Act 2006.
5 *Report of the Joint DTI/Treasury Review of Company Rescue and Business Reconstruction Mechanisms* (2000) at para. 43.

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