Formal & Informal negotiation ASAP!

The panel discussion that took place during the INSOL Europe 2025 Sorrento Congress aimed to compare the methods by which negotiations occur outside the Court in cases of business crises or insolvency in the United States and other Western countries

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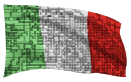

Italy

With the approval in 2022 of the new Crisis and Insolvency Code, the main path for negotiation passes through the NCC – the negotiated crisis composition (*composizione negoziata della crisi*). It is not a procedure, but a negotiation path outside the Court. Nevertheless, the debtor may request some orders from the Court to facilitate the negotiation and benefit from the stay.

This mechanism aims to help entrepreneurs in financial or economic imbalance to recover through confidential negotiations with creditors or the sale of the business as a going concern. To access this mechanism, the debtor must describe and prove their state of financial or economic imbalance and demonstrate a reasonable potential for recovery. Entrepreneurs can use a detailed checklist available on a national e-platform through Ministry of Justice website.

A professional expert with specific expertise in restructuring is appointed to facilitate negotiations between the entrepreneur, creditors, and other interested parties. The expert is selected from a national register by the competent Chamber of Commerce and is chosen by a commission of three effective members. The entrepreneur can apply for the stay and other measures to prevent individual creditors from obtaining securities over the debtor's assets or enforcing their claims.

The request for protective and cautionary measures is published in the Business register, making the composition mechanism public. These measures can be revoked or shortened if they do not meet the objective of ensuring the successful outcome of negotiations. During the negotiations, the entrepreneur retains management of the enterprise and must act in a way that avoids jeopardizing the economic and financial sustainability of the business.

The expert acts as a third party, maintaining professionalism, confidentiality, impartiality, and independence. They may ask for information from the entrepreneur and creditors and use service providers with specific expertise. The expert convenes the entrepreneur and their consultants to assess the prospects of reorganization and proposes intervention strategies. If no real prospects for reorganization are foreseeable, the expert informs the entrepreneur and the secretary general of the Chamber of commerce, who orders the closure of the NCC.

The expert's assignment is considered complete if, after 180 days, no appropriate solution for overcoming the financial or economic imbalance is identified. The assignment may continue for a further 180 days if one of the parties requests it and the expert agrees. At the end of the assignment, the expert draws up a final report, which is entered into the platform and communicated to the entrepreneur and the court.

If a solution for overcoming the financial or economic imbalance is identified, the parties may enter into a contract ensuring business continuity, a moratorium agreement, or an agreement for the performance of certain acts, payments, and guarantees on the debtor's assets. If no solution is identified, the debtor may access the restructuring procedures provided by the Insolvency Code or apply for the simplified composition with creditors for the liquidation of assets.

The Code also mentions several premium tax measures to assist the NCC, including reduced tax penalties and the possibility of an instalment plan for tax debts. Thanks to recent changes in the law, it is now possible to reach an agreement with the Revenue Agency on tax debts, which often heavily impact the liabilities of businesses.

In September 2024, statistical data indicated that in about 19% of cases, negotiations led to a direct agreement, mainly to agree with creditors on the methods of accessing a restructuring procedure.

The UK

Informal negotiation in the UK is a great concept but the problem has always been, how do we encourage directors to take professional advice when they first experience signs of financial distress? How can we get them to the table to negotiate?

In March 2020, R3 (the UK trade body for the restructuring and insolvency profession) initiated a campaign called "back to business". The NHS were saving lives, our plan was to save livelihoods. R3 reached out to credit institutions and the Institute of Directors and gave presentations and wrote guidance, reaching out to over 40,000 directors. The clear message was that the sooner that directors take professional advice, the more options were available to rescue their businesses.

There are around 1600 Insolvency Practitioners in the UK. They assist in the rehabilitation of businesses and assist individuals. They are suitably qualified, regulated and they understand the numbers. They can assist with the financial projections and engage with the key stakeholders and creditors.

There are several informal types of informal negotiation in the UK. These usually involve finding a new source of funding or reaching a negotiated agreement with key creditors. The main ones are:

- Repayment plan - Agreeing to terms of payment.
- Debt refinancing - Replacing the existing debt with a new one on better terms. It can ease short term cash flow difficulties, but what if there are issues with the viability of the business model?
- Debt consolidation - Consolidating loans into one loan. It may reduce outgoings on a month-by-month basis. Lenders may require further security such as personal guarantees.
- Factoring and invoice discounting - Factoring is where a third party provides a cash advance against an invoice value and collects payment from the customer. Invoice discounting is where the company remains responsible for collecting the debt from the customer.
- Capital Venture Funding -This is generally applicable for start-ups and private equity. Risks are assumed for share of profits. It usually requires a new or innovative product.
- Personal loan from company directors- Typically, directors would only be repaid after other creditors are paid in full. Directors do risk their personal assets.
- Injection of funds by a third party in exchange for equity - This involves a cash injection in exchange for shares. The downside is that 3rd parties may then have rights to participate in decisions about the company.
- Sale of part of the business - This will require expert advice and valuations and the sale must be at true value.
- Time to pay arrangements with HMRC - Negotiation of a structured repayment plan over an agreed period of time. IPs often get involved in the negotiations.

Good advice for any UK director facing financial distress is to engage with professionals as early as possible so that introductions can be made, connections explored and negotiations can begin to try and avoid a formal rescue procedure.

The US

In the United States, debtors in financial distress typically favor out-of-court restructurings over formal bankruptcy filings. Negotiated resolutions with key constituencies can be cheaper and more efficient than court proceedings.

If a US company seeking to restructure its debts is solvent on a balance sheet basis, then its directors and officers owe fiduciary duties to the company's owners, its shareholders. But if a company is insolvent, then its board members owe fiduciary duties to the company's creditors.

The fiduciary duties owed to shareholders and creditors are the duty of care, the duty of loyalty, and the duty of good faith. A debtor's counsel will instruct the board members on these fiduciary obligations. A debtor will need to be mindful them as it works through its issues.

A debtor's counsel and financial advisors will analyze the company's capital structure: what secured and unsecured debt exists; the terms and covenants of financial documents; whether defaults and cross-defaults exist; and whether debt has been or can be accelerated. The professionals will analyze the debtor's relationships with key constituents: employees, customers, vendors, and state and federal government.

If an out-of-court resolution is not feasible, then a debtor will consider filing for bankruptcy. The two statutory options for corporations are Chapter 7, where a trustee is appointed to liquidate the debtor's assets, and Chapter 11, where a debtor stays in possession of its business and tries to reorganize to continue as a going concern. If evidence of fraud or other cause exists, a trustee can be appointed to replace current management in Chapter 11. If a debtor is unable to confirm a plan to reorganize its debts and business to remain a going concern, then it will be forced to liquidate. And this can be done in Chapter 11.

When a company files for bankruptcy, an automatic stay takes effect. Creditors are stayed from seeking possession of a debtor's property, filing liens on collateral, starting lawsuits, enforcing judgments, and more. During a bankruptcy case, a debtor might seek to obtain financing, look to sell assets, and decide which unexpired contracts and leases to keep or reject. The bankruptcy court will set a deadline for creditors to file claims. Ultimately, a debtor will seek to confirm a plan of reorganization, with creditors able to vote for or against its terms. In some cases, upon confirmation of a plan, a liquidating trust will be set up, with a trustee responsible for adjudicating claims filed in the bankruptcy case and bringing lawsuits to recover funds for the company's creditors.

In 2005, the US Congress enacted Chapter 15 of the US Bankruptcy Code. This statute is based on the UNCITRAL model law on cross-border insolvency. The law enables a debtor with an insolvency proceeding in another country to seek the assistance of a US bankruptcy court to protect the debtor's assets located in the US. Chapter 15 is not a full plenary bankruptcy proceeding, but one designed to recognize the foreign proceeding and its administrators who – if certain statutory tests are met – will be allowed to utilize a US bankruptcy court for the benefit of the primary proceeding.. ■

> *ACT EARLY*
>
> *SEEK ADVICE*
>
> *GET BACK TO BUSINESS*