

New Italian law for over-indebtedness

Giorgio Cherubini discusses the new legal tool allowing for debt discharge in the event of over-indebtedness of private individuals and entities not subject to Italian bankruptcy law



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RISING LEVELS OF DEBTS AMONG PRIVATE INDIVIDUALS HAVE LED TO THE NEED TO DEVELOP A NEW LEGAL TOOL



Italy has been, until recently, one of the few countries not disposing of a law concerning the insolvency of individuals and the need for a procedure allowing a person not subject to bankruptcy proceedings to discharge its indebtedness through a procedure involving the creditors was really needed.

However, in 2005, a reform of the insolvency procedures started and among the main innovations there was the introduction of spaces of negotiation between debtor and creditors in the debt restructuring agreements (Article 182-bis of the Italian Bankruptcy Act), which also include the possibility of a tax settlement (Art. 182-ter the Italian Bankruptcy Act).

Recently, two laws have been implemented in this area: Legislative Decree 212/2011, subsequently enacted as Law 3/2012 and, very recently, Law Decree 179/2012.

Crisis plan

Rising levels of debts among private individuals, as a result of increasing reliance on consumer credit, have led to the need to develop a legal tool allowing for debt discharge in the event of over-indebtedness, when a debtor can no longer meet his or her credit obligations allowing him or her to deal with creditors to restructure the debts.

The law provides that a debtor, including the consumer¹, who is ineligible for insolvency procedures², may negotiate his or her debt position through a procedure similar to the debt restructuring arrangements as foreseen by Article 182 bis of the Bankruptcy Act.

A debtor, among whom agricultural entrepreneurs are also included, who wishes to use this procedure must meet two requirements: one subjective and one objective; more specifically, the debtor needs to be ineligible for any insolvency procedure in force.³

The new law discourages the exploitative use of the procedure by excluding debtors who have used it at any time in the preceding five years.

The objective requirement is that the debtor must be over-indebted; the concept of over-indebtedness is similar to insolvency, since the debtor initiates the procedure by filing a proposal for a debt restructuring agreement which needs to be accepted by some of the creditors only, at a later date.

The proposal must be based on a feasible plan that would allow the debtor to fulfill both the obligations arising from the agreement and those undertaken towards the creditors unwilling to enter into the agreement.

The plan may provide for any available form of satisfaction of creditors and debt restructuring and the division of creditors into classes, as it happens for the other procedures foreseen by the Bankruptcy Act; however, any dissenting or outside creditor must be paid to the full extent of the claim.

Concerning these categories of creditors, the debtor is entitled to propose a payment moratorium up to one year, provided that:

- the plan appears to be adequate to ensure payment when the moratorium expires;
- the plan is placed under the responsibility of a judicially

appointed liquidator, to be nominated by the crisis settlement panel (*Organismo di composizione della crisi*)⁴; and

- the moratorium does not apply to payments due to holders of claims that cannot be pledged.

Where the debtor has insufficient assets and income to make the plan feasible, the proposal must be executed by one or more third parties which agree to contribute sufficient revenues or assets, to secure the performance of the agreement.

The procedure is initiated by filing a formal application with the Court of the debtor's place of residence or business, to which the debtor must enclose a document identifying:

- all creditors and the amounts due to each of them;
- the debtor's own assets;
- relevant disposals in the past five years, complete with the debtor's tax returns for the past three years;
- a plan feasibility certificate; and
- a list of necessary living expenses for the debtor and his or her employees.

If the debtor is engaged in business activities, he/she must file his/her accounting records for the last three years, together with a statement that the records filed are consistent with the originals.

The debtor must file an appropriate certificate issued by the crisis settlement panel, which has the task to supervise the performance of the procedure and to act as intermediaries between debtor, judge and creditors.

Once the debtor's application has been filed, the judge must:



- ensure that the required formalities have been performed;
- issue a decree scheduling a hearing; and
- order that both the debtor's proposal and the decree be notified to the crisis settlement panel.

Pending the homologation of the agreement and unless fraudulent actions are envisaged to the creditors' detriment, the judge may suspend any individual enforcement actions and seizure of the debtor's assets, no writs of attachment may be issued and no preferential rights may be acquired in or against the debtor's assets for a period not exceeding 120 days.

After the homologation by the Court such suspension may be extended by a period not exceeding 12 months.

In this phase of the proceedings, the judge is not required to assess the feasibility of the plan and has no discretion in granting or denying such a term of asset protection.

Each creditor willing to accept the debtor's proposal must deliver a duly executed written notice of acceptance to the crisis settlement panel and, in order for the proposal to be formally authorised, it must be accepted by at least sixty per cent of all creditors.

If an agreement is reached between the debtor and his/her

creditors within the timeframe granted, the settlement panel has the duty to report to each creditor on the acceptance notices received and the attainment of a statutory quorum, along with the wording of the final agreement.

After receiving such report, any dissenting creditor has the term of ten days to raise additional objections and, once this term has elapsed, the crisis settlement panel submits the report to the judge, specifying any objections received and providing its final certification that the proposed plan is feasible.

At this stage, the judge is responsible for establishing that the quorum for consent has been achieved, in addition to the duty to ascertain the grounds for objection and the ability of the plan to ensure full satisfaction of the claims of creditors that it does not cover.

On the basis of this assessment, the judge will decide whether to grant or deny formal approval, taking into account that both kinds of decision may be challenged before the competent local Court. The judge in charge of the procedure may not be a member of the panel hearing the case.

In the implementation phase following formal approval of the plan, the crisis settlement panel must:

- decide upon any issues arising in the performance of the agreement;

- supervise compliance with the contractual provisions; and
- notify the creditors of any breaches detected.

In order to ensure proper performance of the agreement, the law provides for the voidance of payments or disposals of assets made in breach of the plan or agreement. This provision will also discourage the debtor and any other party of the agreement from performing, or assisting in the performance of, a breach of the plan or agreement.

The agreement ceases to be effective mainly in the event of the voidance or termination of the contract. The agreement may be declared null and void by the competent local Court at the request of a creditor where:

- the debtor's liabilities have fraudulently been inflated or reduced;
- a significant proportion of his or her assets have been removed or concealed; or
- non-existent assets have been fraudulently invented.

Termination can be decided where:

- obligations arising from the agreement are not performed;
- promised security interests are not provided; or
- the agreement cannot be performed for reasons outside the debtor's control.

Due to the fact that these provisions are very recent, it is too early to have case law available.

Footnotes:

- 1 The consumer is defined as the individual, according to the Consumer Code, Legislative Decree 2005/2006, who undertaken obligations for reasons not part of his/her entrepreneurial or professional activity.
- 2 Art. 1 of the Bankruptcy Law states the following thresholds for the adjudication of bankruptcy: gross revenues €200,000,00 assets €300,000,00, liabilities €500,000,00.
- 3 This category includes natural persons, individuals engaged in the professions and commercial entities that do not exceed the size limits set forth in Article 1 of the Bankruptcy Act at the time of filing the proposals.
- 4 This new body will be located primarily in the mediation bodies of the Chambers of Commerce and the professional orders of lawyers, accountants and notaries.



THE JUDGE IS NOT REQUIRED TO ASSESS THE FEASIBILITY OF THE PLAN



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