Italy moves forward amending bankruptcy law

Giorgio Cherubini and Giovanna Canale explain the good intentions of the new Italian restructuring laws

GIORGIO CHERUBINI
Partner, EXPLegal, Rome (Italy)

GIOVANNA CANALE
Associate, EXPLegal, Rome (Italy)

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Since 2005, the focus of the Italian Bankruptcy Law has moved from liquidation to restructuring of distressed companies through the introduction of new insolvency proceedings, among which restructuring plans and debt restructuring agreements have to be mentioned, with a view to preserving the value of the business and allowing it to possibly make a fresh new start.

Most recently, in August 2012, Law no. 134, conversion of the Law Decree No. 83/2012 so called " Decree on Development" has been deeply impacted the existing system introducing several new rules aimed at simplifying the access to proceedings alternative to bankruptcy with an appreciable attempt to fill the regulatory gaps.

The concept of rescue of the business, previously unknown in Italian bankruptcy legislation, has been strengthened with the "*Decree Justice For Growth*" (hereinafter Decree Law) dated June 27th 2015, published in the Official Gazette no 147, which has amended many rules of the existing Bankruptcy, Civil and Civil Procedure Codes and the organisation and functioning of the judiciary.

The above must be converted into law by the Italian Parliament within sixty days from its enactment, i.e. by August 26 2015 although some of its provisions are immediately effective, like those concerning the access to credit and those related to pre-packaged plans, while those related to the restructuring agreements will become effective after the conversion into law of the Decree Law.

The first title of the Decree Law specifically concerns some changes to the Bankruptcy law and consists of ten articles. In the press release issued by the Government it is stated that "*All measures taken move from a common principle: a company with problems risks to drag with it other companies, for example suppliers of goods and services and financial institutions continuing to assume obligations which cannot be satisfied. Promptly addressing the cases of corporate crisis can limit the losses of the economy, both concerning the business and financially, or allow the restructuring of the company with benefits in terms of employment and, more generally, in protecting the entrepreneurial activities*".

The changes, aimed at facilitating restructurings by granting more powers to the creditors, concern mainly the in Court restructuring proceedings (*concordato preventivo*) and the restructuring agreements (*accordi di ristrutturazione*) provided by Article 182 bis of the Italian bankruptcy law.

Requisites for the appointment as receiver

Among the main innovations, some new rules have been introduced for the appointment of insolvency receivers. Firstly, the spouse, relatives and relatives-in law up to the fourth degree of the bankrupt, the creditors and anybody else who has contributed to the bankruptcy of a business in the previous five years, cannot be appointed as insolvency receiver; it must be noticed that the previous provisions foresaw the term of two years, now extended to five.

Moreover, the professional who has previously been appointed Judicial Commissioner in a *concordato preventivo*, should such proceedings be converted into a bankruptcy (*fallimento*), cannot be appointed as insolvency receiver.

Access to credit

Another main innovation is the possibility of access to credit during a corporate crisis. The Court may authorise temporary funding even if a special form of Court restructuring proceedings have been commenced. These are proceedings where the debtor files for admission without enclosing the business plan, considering the urgency to rescue the business, without the requested certification of a professional confirming the feasibility of the plan. This may be a way to avoid the bankruptcy of a company and promote an agreement with creditors.

Court restructuring agreements

The Decree Law also introduces the innovations regarding the rules of Court restructuring proceedings. Before it the creditors could only approve or reject the plan, but not amend it, while now the creditors representing at least 10% of overall indebtedness of the debtor can put forward an alternative restructuring plan, provided that the proposed payment of unsecured credits is lower than 40% of the respective claims.

The creditors vote on all plans, which must be filed in advance at the bankruptcy Court, and the plan approved with the highest majority, in terms of total

amount of claims, prevails. In case of equality of votes, preference will go to the plan filed by the debtor and, in case of equality of votes among alternative plans, to the plan that was filed the first.

Should none of the plans reach the required majorities, the bankruptcy Court submits again to the creditors' vote the plan that reaches the highest number of votes.

Pre-packaged plans

Another innovation regarding the Court restructuring proceedings is the so called "*pre-packaged plan*". In Italy, frequently the debtors file pre-packaged plans, i.e. providing for the sale or lease of the debtor's assets to a third party investor, based on agreements reached by the debtor and the third party investor prior to filing. This practice has been materially affected by the Decree Law with the aim at mitigating the risk of the pre-packaged deals prejudicial to creditors.

According to the Decree Law, the insolvency receiver may ask the bankruptcy Court to authorise a competitive procedure for the sale of the debtor's assets whenever he/she believes that, based on non binding offers received, the pre-packaged deal filed by the debtor is not in the best interest of the creditors.

Should the assets be sold to a third party different from the original investor as a consequence of the competitive procedure above mentioned, the latter has the right to be reimbursed for the costs incurred in connection with the agreement reached with the debtor up to an amount equal to three per cent of the price of the assets agreed therein.

Restructuring agreements

The Decree Law also introduces changes relevant to article 182 bis of bankruptcy law, a proceedings partly in-Court regulated, based on the debt restructuring agreements between the debtor and at least 60%, in terms of amount of claims, of its creditors.

The agreement cannot bind creditors non part of it. Due to the fact that they have a consensual nature, these proceedings are often complicated or even blocked by the minority creditors who do not accept to adhere to the restructuring agreement.

The Decree Law has addressed this issue by creating a special procedure with respect to debt restructuring agreements involving mainly financial creditors.

Following the Decree Law, the debtor can claim the extension of the effects of an executed debt restructuring agreement over the minority dissenting/non-adhering financial creditors, provided that:

- at least fifty per cent of the debtor's overall indebtedness is of a financial nature and
- the financial creditors that have executed the restructuring agreement represent at least seventy five per cent of the debtor's overall financial indebtedness.

In addition to the above, the Decree Law provides for a similar procedure to extend to dissenting/non-adhering financial creditors also the effects of any out-of-Court agreement between the debtor and the majority of its financial creditors.

Finally, the Decree Law extends to 182 bis proceedings carried out pursuant to the new rules regarding the dissenting/non adhering financial creditors above the criminal liability regime applicable to debtors in the context of in-Court restructuring proceedings in connection with past wrongdoings or illicit behaviour in the course of the proceedings.

The reforms that have taken place in the last decade in the bankruptcy/insolvency area were the result of legislative intervention without structural planning; however, having the objective to be, especially the last two interventions, namely Decree Law no. 83/2012 and Decree Law no. 83/2015, the protection of the value "business", perhaps it would be desirable to find a different way to reform the system.

It can be concluded that the attitude to be taken towards the reform is to recognise the effort made by the legislature and to grasp the good points, i.e., the consideration that the procedures to avoid bankruptcy are more affordable and feasible for the debtor who wishes to benefit of them. ■

> **THE REFORMS THAT HAVE TAKEN PLACE IN THE LAST DECADE WERE THE RESULT OF LEGISLATIVE INTERVENTION WITHOUT STRUCTURAL PLANNING**