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Practice Group:
Restructuring &
Bankruptcy

The Latest Reforms to the Bankruptcy Law: The Law No. 134/2012

By Andrea Pinto

(A) Introduction

The law no. 134 of 7 August 2012, published in the Official Gazette on 11 August 2012 (the “**Reform**”), has signed into law, with amendments, the Law Decree no. 83 of 22 June 2012, the so called “Law Decree Economic Growth” (*Decreto Crescita*).

The art. 33 of the Reform amends certain provisions of the Royal Decree 16 March 1942, no. 267 (“**Bankruptcy Law**”) and introduces new ones, acting mainly on the regulation of the composition with creditors and restructuring agreements.

The new provisions, in the intention of the legislator, would have (a) on one side, the purpose to allow companies in crisis faster access to restructuring procedures, granting, among other things, the access to new financial resources and providing certain safeguards already in the preliminary stages of negotiation with creditors and (b) on the other side, the intention to ensure greater severity to the certification of the appointed expert (with related penalties).

The most important changes are about:

- the ability to access the tool of corporate debt restructuring even after the application for the composition with creditors procedure, thus ensuring perfect choice between the two procedures; the chance for the debtor, that is about to present a plan for the composition with creditors or a proposal for the restructuring agreement, to obtain a bridging financing that shall be considered payable before distribution only after the certification of an expert regarding the feasibility and adequacy of the plan during the pending approval by

the competent Court of the composition with creditors and restructuring agreements;

- the introduction of arrangement’s special discipline with business continuity;
- the block of enforcement proceedings and restraining actions from the date of arrangement’s publication in the companies’ register ;
- the duty to certify the truth of the business data by the expert who prepares the reorganization plan pursuant to art. 67, paragraph 3, letter d) of Bankruptcy Law or the explanatory memorandum for the restructuring agreement pursuant to art. 182 bis, paragraph 1 of the Bankruptcy Law, as provided for the composition with creditors procedure.

Essential for the operators is also considering the provisions of the Reform applicable only to composition’s proceedings and to the approval of restructuring agreements introduced by the thirtieth day after the date of entry into force of the Reform (11 September 2012) and also to reorganization plans processed after that date pursuant to art. 67, paragraph 3, letter d) of the Bankruptcy Law.

(B) The Composition with Creditors

(I) Composition with creditors claim

The Reform introduces the possibility for the entrepreneur, who has not yet defined the composition plan, to anticipate the block of the enforcement proceedings (and now also of restraining actions) filing an application containing only the composition claim.

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After the publication of the composition claim in the companies' register, within a period specified by the Court, between 60 and 120 days, extendable for a further 60, the entrepreneur will submit the actual claim, a plan containing a description of the analytical methods and of the time of the proposal's performance and the attached documentation.

Within the same period, the debtor may - alternatively - submit application for approval of the debt restructuring plan pursuant to art. 182 *bis* of Bankruptcy Law.

On the contrary, in case of non-application of composition with creditors claim in the terms set out above, the Court shall declare inadmissible that composition claim and, at the request of the creditor or at the request of the public prosecutor, shall declare the entrepreneur failed, if the conditions do exist.

Ultimately, the new framework allows the debtor who has not submitted a similar claim for composition with creditors in the two previous years: (i) to access the benefits of the composition claim before it is submitted, (ii) to file the claim for such composition without precluding the possibility of requiring later approval of a restructuring agreement pursuant to art. 182-*bis* of Bankruptcy Law, and (iii) to amend the composition's plan or proposal, provided it is presented together with a report from the expert that takes account of the changed parameters.

After the filing of the application and to the decree by which the judge opened the proceeding, the debtor may perform acts of ordinary administration, and - with the approval of the Court - urgent acts of extraordinary administration (with the big advantage to the parties that claims arising as a result of such acts will be made legally payable before distribution).

With regard to the approval process of the composition plan by the meeting of creditors ("*Comitato dei creditori*"), the Reform envisages now that are indicated in the report, also creditors who have not

exercised their right to vote; the last ones will be able to send dissent opinion within twenty days after the end of the report, and if not, they will be considered consenting to the calculation of the majority of credits.

(II) Petition effects

The Reform also affects the regulation of the effects that are produced by the publication of the petition in the companies' register. In fact, besides the extension of the blocking of the pending foreclosures' procedures to the precautionary measures, it has been provided that the judicial mortgages recorded in the ninety days prior to the submission of the application are without effect.

(III) Pending contracts

From today, the debtor may apply to the Court, since the submission of the application for the admission of the composition with creditors, the authorization to terminate the contracts already in execution at the date of submission of the application or, alternatively, ask for the suspension of the execution of the pending contract for no more than sixty days; in both cases, it is expected to pay the other party compensation equal to the damages resulting from the failure to perform, and such compensation shall be considered as a credit born earlier than the date of the composition plan.

The provision does not apply to employment contracts, leases of property, contracts for the financing of a specific transaction, and to the preliminary contracts for the sale of property for residential purposes, intended to be the principal residence of the purchaser or their relatives within the third degree, as well as leases of property for non-residential (regularly transcripts) to constitute the principal place of business of the acquiring.

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(IV) Composition with creditors with business continuity

It is introduced a specific provision for the case in which the composition plan provides for the continuation of the business by the debtor, the sale of the company assets in activity or the transfer of company assets in one or more companies, also including companies newly incorporated.

In this case, the Reform gives power to the enterprise in crisis to suspend payments to creditors, up to one year from the approval of the composition plan by the Court, except the case in which it is provided the liquidation of the assets or rights on which it is granted to somebody a pre-emption right.

In addition, the debtor may apply for authorization to make payments of prior amounts for goods and services (so far may be subject to revocation), if a professional confirms their functionality to ensure the best satisfaction of creditors. The attestation of the expert is not necessary for payments made up to the amount of new funds that are made to the debtor without obligation to return or repayment obligation subordinated to the satisfaction of the creditors.

The admission to the composition with creditors procedure with business continuity does not entail the termination of contracts with the public authority, nor the participation in procedures for the award of public contracts, provided that: (i) the compliance with the plan of the contract and the enterprise's reasonable ability to compliance is attested by the expert, and it is also presented (ii) a declaration of another operator, with all requirements for the reliance of the contract, to which he undertakes to put available the required measures in order to execute the contract and to succeed the company in case the latter goes bankrupt or it is not able to duly fulfill the contract.

The composition with creditors with business continuity, which will also

provide for the liquidation of the assets that are not adequate for the business, must contain an analytical indication of the costs and revenues involved, as well as the necessary financial resources.

Therefore, it seems quite evident (as better explained below) that the role of the expert detects not only on the verification of the initial data and the confirmation of reason in an abstract way, but his work becomes integral and essential in the evaluation and in the support for acts in pending or in execution.

(C) Financing to companies in crisis

- The Reform also sets itself the goal of resolving the so called issue, somewhat controversial, "bridging finance" extending the possibility for the debtor to borrow temporary and necessary financings for the continuation of the business and for supporting the sustainability of the restructuring (both it happens with the instrument of the restructuring agreement pursuant to art. 182-bis of Bankruptcy Law both it is implemented with the composition with creditors).
- The enterprise applying for a composition with creditors, or who files the application for approval of a restructuring plan, may ask the Court to be authorized to borrow the loans (also identified only by type and not yet subject to negotiation), that are considered as payable before distribution, provided that a expert certifies their adequacy to the continuing business activity unless the aforementioned plan is approved by the Court and up to the best satisfaction of creditors.
- The funding requested by the debtor, who has filed only the application for composition with creditor claim, without submitting at the same time the proposal to such composition, the plan and the documentation required by art. 161, paragraph 2, Bankruptcy Law, will be payable before distribution.

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- Unlike in the former legislation, the payment before distribution of the credits does not depend on the nature of the lender, that is no longer necessarily being a bank or a financial intermediary. Are also payable before distribution the shareholders loan if up to the eighty percent of the financings - members.
- In respect of the previous legislation, the fact that these loans are considered payable before distribution is due regardless of their forecast in the composition's plan or in the restructuring agreement and of the publication of the decree of approval.
- A further explanation of a concept to which the industry had reached only with considerable interpretive efforts (and only for certain types and purposes of financing bridge) lies in the provision of art. 182 *quinquies* of Bankruptcy Law in which is provided that the Court may authorize the debtor to grant a pledge or mortgage as security for the same financings.

(D) Debt Restructuring Agreements

The Reform also provides to codify what are the tasks of the feasibility of the restructuring plan according to the art. 182 *bis* of the Bankruptcy Law in terms of satisfaction of creditors who have not been taken part of the restructuring agreement.

While in the previous text of the art. 182 *bis*, the expert has to express about the suitability of the plan to ensure the regular payment of non - participant creditors, the Reform provides specific suggestions, namely, that the restructuring agreement governing the payment of non - participant creditors, in a way that it happened:

- within 120 days from the approval in case of credits past due at the approval's date;
- within 120 days from the deadline in the case of loans not yet due at the time of approval.

The application for the approval of the debt restructuring plan must be accompanied by a report prepared by the expert appointed by the debtor – as is provided for the composition – that must certify not only the feasibility of the agreement, but also that the corporate information are true.

The Reform provides that, for the 60 days following the publication of the restructuring agreement in the Companies' register, the creditors with a title and ground dated back of the date of such publication, they can not acquire any securities of first ranking, if not previously agreed.

As about composition with creditors, the debtor submitting the application for approval of the restructuring agreement pursuant to art. 182-*bis* of Bankruptcy Law may request to be authorized by the Court to make payments of credits even earlier for goods or services, which will not be subject to the so called "*azione revocatoria fallimentare*" ("*action to set aside*") under the art. 67 of the above mentioned law.

(E) Further Changes

(I) The expert and his duties

- The new Reform expressly provides that the expert responsible for preparing the report pursuant to art. 67, paragraph 3, letter. d), shall be appointed by the debtor, and not by the Court, thus solving a major issue of interpretation which had divided the law and the Italian Bankruptcy Courts, that it is not always resolved with unanimous consent, about the necessity to demand to the competent Court the appointment of the expert.
- The Reform also defines additional requirements which must be held by the expert, in addition to those already required by the provision currently in force: among them, the absence of personal or professional relationship with the company that may jeopardize

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the independence of such opinion, and employment relations or self-employment with the same borrower in the previous five years.

- As mentioned regarding the “bridge financing”, the expert appointed to certify the plan is no longer required to certify the “reasonableness” of the plan, but - as provided for the composition - the “feasibility” and the “truth of the companies’ information” on the basis of which is drawn up.
- The Reform also introduces criminal penalties charged to the expert - in reports or certifications required in respect of a composition with creditors, restructuring agreements or rehabilitation plans – who exposes false information or omits to report relevant information. The penalty is the imprisonment from two to five years and a fine from Eur 50,000 to Eur 100,000. The penalties are increased if the trader follows an unfair advantage for themselves or for others; it has increased by half if it causes damage to the creditors.

(II) Winding - up of the companies

- The Reform, in order to contain costs for companies under a restructuring process, provides (see new Article 182-sexies Bankruptcy Act) also that, starting from the date of the application for the admission to the composition with creditors procedure or from the application for approval of the restructuring agreement and until the approval of the same, do not apply the provisions of the Italian Civil Code relating to the companies’ winding – up, and the reduction of the share capital to cover losses over the third or below the legal limit (art. 2446, second and third paragraphs, 2447, 2482-bis, paragraphs fourth, fifth and sixth, and 2482-ter of the Civil Code).

- For the same period the winding – up of the company for loss or reduction of capital referred to art. 2484, no. 4 and 2545-duodecies of the Italian Civil Code does not apply.
- It continues to be applied the provision set forth the art. 2486 of the Italian Civil Code, with regard to the powers of the directors in the period between the occurrence of a winding - up and the liquidators’ appointment, and also prior to the composition claim or of the restructuring agreement’s proposal.

(III) New cases of exemption from the so called “revocatoria fallimentare” (action to the set aside)

The Reform extends the cases of exemptions from the so called “azione revocatoria fallimentare” (i.e. “action to set aside”), changing the letters c) and e) of paragraph 3 of art. 67 of the Bankruptcy Law. Mainly the exemption now includes: (i) the contracts of sale and the preliminary contracts regularly registered which concern non-residential properties constituting the principal place of business of the purchaser, as long as on the date of declaration of bankruptcy such activity is actually carried out or investments are still being made; and (ii) the acts, payments and guarantees legally done after the filing of the arrangement’s petition.

(IV) Pending agreements

As a result of the Reform, the provisions laid down with regard to the pending contracts at the date of declaration of bankruptcy will not apply (in addition to contracts already excluded from the former legislation) to preliminary sales contracts regularly registered that have as their subject matter non-residential landed property constituting the principal place of business of the buyer.

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Author:

Andrea Pinto

andrea.pinto@klgates.com

+39.02.3030.291

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