

THE RECENT ENHANCEMENTS TO THE ITALIAN BANKRUPTCY LAW

On 15 June 2012 the Italian Government enacted the legislative decree known as *decreto sviluppo*¹ (the “Decree”) that, among others, includes provisions enhancing the restructuring proceedings under the Italian Bankruptcy Law (“IBL”)².

The purpose of this reform is to boost the restructuring and reorganization of stressed/distressed undertakings in order to better cope with the current financial crisis. To achieve this objective the Decree has leveraged on three main factors: flexibility of the process, reliability of the restructuring plan and fiscal appeal.

The following paragraphs highlight the main changes.

1. Flexibility of the process

To allow the debtor more flexibility in the preparation and implementation of the restructuring plan the Decree enables the debtor to avail itself of the following new options which partially reflect similar provisions of Chapter 11 of the US Bankruptcy Code.

- 1.1. Automatic stay: upon filing a petition for a *concordato preventivo*³ the debtor is now granted a **60 to 120 days automatic stay**⁴. Under the previous regime the automatic stay was conditional upon the filing of the restructuring plan alongside the petition. Thanks to this new option the debtor can now file the

Italian Restructuring Department:

Daniela Andreatta
dandreatta@orrick.com

This publication is intended for general information purposes only and cannot be anyhow regarded or interpreted as legal advice referred to one or more transactions, adopted or anyhow referred to by whoever, including legal advisors, for any purpose different from the general examination of the topics above discussed.

The reproduction of this document is permitted upon condition of quoting its title and date along with the indication: Orrick, Herrington & Sutcliffe, Newsletter – Italian Restructuring Department.

¹ Legislative decree 22 June 2012 n. 83.

² The Decree has been published in the Official Gazette on 27 June 2012 and will come into force 30 days following conversion into law.

³ A composition with creditors under article 160 of the IBL.

⁴ The actual duration of the automatic stay is decided by the judge according to the characteristics of the case, and can be extended only once for up to 60 days. During the automatic stay the debtor runs the day-to-day business while transactions outside the ordinary course of business must be authorized by the Court.

petition and dedicate the following 60/120 days to the preparation of the plan without being distracted by the often frequent enforcement actions of creditors.

At the end of this automatic stay period the debtor is now also allowed to switch from a *concordato preventivo* to a proceeding under article 182bis of the IBL (the “*182bis Proceeding*”) by filing a restructuring agreement relevant for the purposes of a 182bis Proceeding instead of a *concordato preventivo* proposal. Following this subsequent filing (of either a *concordato preventivo* proposal or an agreement under a *182bis Proceeding*) the automatic stay runs until completion of the proceeding (i.e. confirmation by the Court of either the *concordato preventivo* or the *182bis Proceeding*).

Claims originated during this automatic stay period (as a consequence of valid and enforceable transactions with the debtor) are “super-senior” (*prededucibili*).

- 1.2. Termination/suspension of pending agreements: following the filing of a petition for a *concordato preventivo* the debtor can now be authorized by the Court to terminate pending agreements or alternatively to suspend execution thereof for a 60-day term which can be extended only once. This option can cover any agreement other than labour contracts, preliminary sale agreements of private homes⁵ and lease agreements. The non-terminating party has a right to damages for non-performance: the relevant claim shall be scheduled in the *concordato preventivo* proceeding as an unsecured or secured claim depending on the nature of the terminated agreement.
- 1.3. Delayed payments to creditors: in a *182bis Proceeding* payments to the creditors non-adhering to the restructuring agreement can be postponed for maximum of 120 days from: (a) the date of confirmation of the restructuring agreement with respect to claims overdue on such date; or (b) the relevant due date with respect to claims not yet due on the date of confirmation. Under the previous regime non-adhering creditors had to be paid upon confirmation of the restructuring agreement, if overdue, or on the relevant due dates if not yet due on the confirmation date.
- 1.4. Debtor in possession financing: upon filing a petition for a *concordato preventivo* or a *182bis Proceeding* the debtor can now be authorized by the Court to obtain new credit and to grant collaterals to secure payment thereof⁶. The new debt so incurred ranks “super-senior” (*prededucibile*), provided that an independent expert certifies that the new money is consistent with the plan and instrumental to a better satisfaction of the creditors. The previous regime was somewhat dysfunctional on DIP’s financings because it actually protected only new money extended either prior to filing or following confirmation of the plan⁷.

⁵ For the purposes of this provision private homes are only those where the purchaser has his/her place of primary residence.

⁶ The new credit line does not need to be already under discussion with the lender at the time of the authorization by the Court that can limit itself to establish form and amount of the financing.

⁷ It was technically possible for the Court to authorize a DIP’s financing also during a *concordato preventivo* proceeding, but there are no precedents as the Court was in no position to evaluate whether such financing was conducive to the restructuring process.

1.5. Concordato preventivo on a going concern basis: the Decree has introduced an innovative section dedicated to the *concordato preventivo* on a going concern basis (the “Going Concern Concordato”). This is an important improvement because the previous regulation addressed mainly liquidation plans and hardly supported the continuation of the debtor’s business.

Herein below the main new provisions on the Going Concern Concordato:

- *additional information to be provided by the debtor*: when applying for this type of *concordato preventivo* the debtor shall detail the costs and revenues which are expected to be originated by the business and the available financial resources. An independent expert must certify that the continuation of the debtor’s business is instrumental to the better satisfaction of the creditors;
- *delayed payments to secured creditors*: payments to secured creditors can be postponed up to 1 year as of confirmation of the plan by the Court, unless liquidation of the asset providing the relevant security occurs earlier (under the previous regime (non-impaired) secured creditors had to be paid upon confirmation of the plan);
- *payments to strategic creditors*: the Court can authorize the debtor to pay (in full and at the relevant due dates) claims of strategic creditors originated prior to filing, provided that an independent expert certifies that such payments are essential for the continuation of the business and the best satisfaction of creditors. This expert certification is not required whenever the relevant payments are made with new money extended to the debtor in the form of non-refundable funds or subordinated loans (before the Decree claims of strategic creditors had to follow the process and were thus to be paid only upon confirmation of the plan and often only in part). The new provisions allow the debtor to avail its of this same right also in the context of a *182bis Proceeding*. The payments made to strategic creditors pursuant to this scheme are exempt from claw-back actions;
- *pending agreements*: the filing of a Going Concern Concordato can no longer be a cause for termination of the agreements which the debtor is a party to, including agreements with public entities, provided as to public agreements that an independent expert certifies that the debtor is capable of discharging the relevant obligations. Any agreement to the contrary is not enforceable;
- *participation to public tenders*: a debtor under a Going Concern Concordato process can now bid at public tenders, provided that an independent expert certifies that such bidding is consistent with the plan and that the debtor is capable of discharging the obligations under the contract put out to tender. The bid shall include the written commitment of a qualified third party to step-in the debtor’s position under the agreement in the event of default/bankruptcy of the debtor.

1.6 Negative equity: from the date of filing for a *concordato preventivo* or a *182bis Proceeding* until completion of the proceedings the debtor is no longer required to recapitalize the company to cover possible losses

affecting the corporate capital. The immediate cover of losses is mandatory under Italian laws and has often become an impediment to restructurings which rarely benefit from sufficient new equity.

1.7 Enforceability of mortgages: to deter creditors from creating unilateral securities harming other creditors the new provisions establish that mortgages filed unilaterally by the creditor (*ipoteche giudiziali*) 90 days prior to the publication of a *concordato preventivo* petition in the Register of Companies are not enforceable.

2. Reliability of the restructuring plan

The Decree has also introduced the following new provisions aimed at increasing the confidence which stakeholders can place in the economic/ financial data and projections supporting the plan.

- 2.1. The certification of the expert: the expert is now required to certify that the restructuring plan is feasible and that the accounting data on which it is based are true and correct. The expert who negligently or willfully makes incorrect or false statements faces both civil sanctions⁸ and criminal consequences⁹. This new regime applies to *concordato preventivo* proceedings, *182bis Proceedings* and the restructuring proceedings under article 67, third paragraph lett. d) of the IBL. Under the previous regime the expert was not required to certify the correctness of the accounting data of the debtor but rather the feasibility of the plan¹⁰.
- 2.2. The independence of the expert: the Decree has stressed that the expert must be independent and that to this end he/she cannot have any interest in the restructuring and cannot have had personal or professional relationships with the debtor in the 5 years prior to the filing of the relevant petition. Under the previous regime the expert (although formally independent) was often a previous consultant of the debtor. The new independence requirement applies to any restructuring proceeding under the IBL.
- 2.3. The details of the restructuring plan: with respect to *concordato preventivo* proceedings and *182bis Proceedings* the Decree has clarified that (i) any relevant petition must include an analytical description of the terms and timing of the actions under the restructuring plan and that (ii) in case of material amendments to the restructuring plan the expert must file a new and updated certification.

3. Fiscal appeal

Finally, the new provisions improve the fiscal treatment of restructuring proceedings by stating that:

⁸ Fines in the range from euro 50,000.00 and euro 100,000.00.

⁹ A prison term from 2 to 5 years. These criminal consequences apply only starting from the 30th day following conversion of the Decree into law by the Parliament.

¹⁰ Most of the case law had however silently introduced this requirement.

- reductions of liabilities due to confirmed *182bis Proceedings* or a restructuring agreement under article 67, third paragraph lett. d) of the IBL duly published in the Register of Companies can no longer be deemed a taxable extra-ordinary income (*sopravvenienza attiva*) of the debtor (this rule already applies to *concordato preventivo* proceedings);
- write downs/offs on receivables due to confirmed *182bis Proceedings* qualify as deductible costs for tax purposes of the creditor (till now this deduction was allowed only in connection with write downs/offs originated from *concordato preventivo* proceedings or bankruptcy proceedings).