

February 2013

Inside Story: New Italian reorganisation provisions – will they be enough?

This month's Inside Story is brought to you by Giorgio Cherubini (giorgio.cherubini@studiopirola.com), Partner Pirola Pennuto Zei & Associati, Rome, Italy.

In an effort to re-launch the economic growth, with Law no. 134 dated 3 August 2012, conversion of the Law Decree No. 83/2012 so called "Decree on Development" dated 22 June 2012 Italian Bankruptcy Law has been deeply impacted with several new rules aimed at simplifying the access to alternative procedures to bankruptcy ("fallimento").

It must be noted that since 2005 the focus of the Italian Bankruptcy Law moved from liquidation to reorganisation of distressed companies through reorganisation plans or debt restructuring agreements, with a view to preserving the value of the business and allowing it to make a fresh new start.

The main goals of the new rules are to encourage the possibility of finding a solution to the crisis and to enable the debtor to take immediate action in order to overcome the status of financial difficulty and to avoid bankruptcy.

The new law sets forth new provisions concerning the Court-driven composition with creditors procedure ("concordato preventivo") provided for under article 160 of Italian Bankruptcy Law, the restructuring agreements ("accordi di ristrutturazione"), provided for under article 182 bis, the restructuring plans ("piani di risanamento") provided under article 67, paragraph 3 and letter (d), Law, using the experience of Chapter 11 of the US Bankruptcy Code.

The goal envisaged is to allow the debtor to seek immediate protection without wasting time in working out the details of the restructuring plan, as well as to get effective protection against creditors' individual actions and maintenance of the operations of the business: distressed companies are often a risk for their business partners, as in case the company goes bankrupt the payments made by it to its business partners risk of being clawed back.

To avoid this and to create an interest for the debtor's business partners not to stop doing business with it, the law now provides friendlier rules for the debtor.

In the court-driven composition with creditors the company in financial difficulties is requested to submit a plan with the analytic description of the means and timing necessary for the implementation of the proposal and, in order to have more time to prepare it, the company is allowed to only file an application to the procedure together with the last three financial statements and to file the proposal, the plan and the documents necessary at a later stage, within a term from 60 to 120 days and, during such period, the creditors cannot start or continue enforcement and foreclosure proceedings over the company's assets.

During the stay period, the company is empowered to carry out urgent acts for its extraordinary and ordinary management subject to authorisation of the Court while the claims originating from the performance of such acts have a “super-priority” ranking (“prededucibilità”).

Any judicial mortgage registered in the ninety days prior to the filing of the application with the Companies’ Registry, are ineffective vis-à-vis the creditors existing at the time of filing of such an application.

The law has also introduced a specific case of a composition with creditors procedure aimed at allowing the continuation of the business during its course and, in order to apply for it, a certification by an expert attesting that the business continuation is necessary and vital for the satisfaction of the creditors is requested and a clear identification of costs and incomes expected from the continuation of the business.

Claw back action – new exemptions: any act, payment or security executed after the filing of the application for a Court-driven composition with creditors cannot be subject to claw back action, as well as the sale of property of the company subsequently adjudicated bankrupt in the event that the purchaser uses such property as its main place for carrying on its entrepreneurial activity.

Restructuring agreements: payment of creditors not adhering to the restructuring agreements must occur: (i) within 120 days from the date of the Court’s approval of the restructuring agreements if such claims are overdue; or (ii) within one hundred twenty days from their maturity date in case of claims not yet due on the approval date. The claims deriving from new financing issued to support the filing the request of homologation of restructuring agreements are qualified as deductible costs for tax purposes. The same provisions apply in relation to claims deriving from shareholder’s loan up to a maximum of 80% of their amount.

New finance – Court authorisation: a company in distress who has filed an application for the composition with creditors or a request of approval of a restructuring agreement can seek the authorisation by the Court to enter into a financing agreement to support the recovery plan. The Court’ s authorisation is subject to a certification to be issued by an independent expert attesting that the new financing is instrumental to the satisfaction of the creditors. The relevant credits of the lenders have a super-priority ranking and the relevant activities are exempted from criminal liabilities.

Requirements for the expert’s independence and certification of accountings and feasibility of the Plan: the expert to be appointed must meet the following independence requirements: (i) he cannot be linked to the company in distress through private or professional relationships which may jeopardise his independence; (ii) he has to meet the requirements set forth by article 2399 of the Italian Civil Code for internal auditors of a joint stock company; and (iii) he should have been employed by the company or have taken part in its management and supervisory bodies within the previous five years.

We will see whether, with the introduction of the above mentioned new rules, although it has been announced that the Tribunals are receiving an increasing number of petitions of bankruptcy, their use will become attractive for the entrepreneurs in financial distress to avoid the conclusion of their business activity and to continue to operate also to protect the employees.

It is worthwhile to also briefly mention the current status of ailing state-controlled Italian airline Alitalia SpA which has filed in 2008 a request with the Rome Tribunal for the liquidation of debts by a government-appointed administrator.

According to the targets of the rescue plan enclosed to such request, the restructured Alitalia was expected to return to profit in 2011; in the reality, the results of 2012 appear to be different and rumours about a possible strategic alliance with a European carrier are persistent these days.