

**CORPORATE  
RESTRUCTURING:**  
THE BREAKING WAVE

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# SECTION 04

## ITALY: BANKRUPTCY LAW AND REFORMS

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# CHAPTER 25

### Restructuring procedures pursuant to the Italian Bankruptcy Law

The Italian Bankruptcy Law – Royal Decree No 267 of 16 March 1942 – underwent an organic reform by Law 80/2005 and was further amended in 2006, 2007 and 2009 (the Reform). The Reform was mainly aimed at introducing a more efficient regulation of pre-bankruptcy schemes of arrangements and pre-bankruptcy procedures. This chapter focuses on the restructuring procedures contemplated in the Italian Bankruptcy Law following such reform:

- ▶ The pre-bankruptcy agreement (*concordato preventivo*); and
- ▶ The pre-bankruptcy schemes of arrangements:
  1. The debt restructuring agreement, pursuant to Article 182-*bis* of the Italian Bankruptcy Law (*accordo di ristrutturazione dei debiti*); and
  2. The out-of-court debt restructuring plan, pursuant to Article 67, paragraph 3, letter d) of the Italian Bankruptcy Law (*piano attestato di risanamento*).

#### The pre-bankruptcy agreement

In order to benefit from the pre-bankruptcy agreement procedure, the debtor has to be a business enterprise that is eligible for a pre-bankruptcy agreement provided by the Italian Bankruptcy Law. In this respect, the relevant provisions apply to a business enterprise if any one of the following subjective conditions is satisfied:

- ▶ Its assets – on an annual basis – over the last three years are greater than €300,000;
- ▶ Its annual gross revenue over the last three years is greater than €200,000; and/or
- ▶ Its indebtedness – whether due or not – is in aggregate greater than €500,000.

In addition, the debtor has to be in a “state of financial distress” (the objective requirement), a status that is broader than the previously required state of insolvency.

Prior to the Reform, the debtor could only propose to its creditors a pre-bankruptcy agreement that offered a series of guarantees on the satisfaction of at least 40% of its creditors’ unsecured claims and/or pursuant to which the debtor assigned all of its assets to its creditors, provided that such assets were deemed sufficient to satisfy the above percentage of unsecured claims. This no longer stands true.

The pre-bankruptcy agreement under the Italian Bankruptcy Law is now more flexible and the debtor may propose to its creditors a recovery plan that can provide for, among other things, the restructuring of the indebtedness and the payment of claims in any form including the assignment to the creditors of shares, securities or other financial instruments.

The recovery plan can also provide for the assignment of the debtor’s assets, but the aforementioned satisfaction of a minimum percentage of unsecured claims is no longer required, nor does the debtor have to assign all of its assets. The plan can also provide for the assignment of the debtor’s assets (and some of the related liabilities) in favour of an assignee (*assuntore*).

Furthermore, the debtor can now split its creditors into different classes and subsequently treat them differently according to their respective class. Another novelty is that creditors with liens or *in rem* security interests (i.e. *pegno* and *ipoteca*) can be partially satisfied provided that their claims would not be satisfied in a higher measure through the sale of their secured assets.

### **The procedure**

The pre-bankruptcy agreement procedure begins with the debtor filing a petition before the bankruptcy court where the company has its registered office. The Italian Bankruptcy Law now expressly states that the transfer of the registered office in the year prior to the filing of the petition is irrelevant in determining the competent court.

The proposed agreement is subject to a preliminary review of admissibility by such court to verify, among the other things, that the aforementioned subjective and objective requirements are met.

If the proposal passes the preliminary review, the bankruptcy court appoints the bankruptcy judge and the judicial commissioner. It is the judicial commissioner who gives notice to all the relevant creditors of the date of the hearing and the debtor's proposals on which they are required to vote for the approval of the pre-bankruptcy agreement.

The admission to the procedure has several effects on both the debtor and the debtor's creditors. The debtor may continue to manage its business under the surveillance of the judicial commissioner, although transactions of extraordinary nature require the approval of the bankruptcy judge.

With regard to the debtor's creditors, from the date of the filing and until the order of the court becomes definitive, those creditors whose claims arose prior to the date of the judicial approval (as described below) cannot commence or proceed with restraining actions or enforcement proceedings on assets of the debtor.

During the hearing for the approval of the pre-bankruptcy agreement, the judicial commissioner illustrates to the creditors both the report it had drafted – relating to the causes of the financial difficulties, the conduct of the debtor, the proposal of the pre-bankruptcy agreement and the guarantees offered to the creditors – and the final proposals of the debtor.

The proposal of the pre-bankruptcy agreement can no longer be amended once the voting has begun. The pre-bankruptcy agreement is approved by creditors representing the majority of the claims admitted to vote (including privileged or secured creditors regarding those claims to which they have waived their right to security in relation to the procedure or that are not to be satisfied pursuant to the recovery plan).

In the event that the proposal provides for the creation of classes of creditors, the pre-bankruptcy agreement is approved when in the majority of classes a favourable vote is obtained from the majority of the claims admitted to vote in each class.

Should a creditor belonging to a dissenting class disagree with the proposed agreement, the bankruptcy court can still approve the agreement – which becomes binding also for such creditor – if it deems that such a creditor is not disadvantaged compared with a liquidation scenario (a sort of cram-down).

On the other hand, the bankruptcy court declares the proposed pre-bankruptcy agreement inadmissible should the required majorities not be reached. In such a case, the bankruptcy court does not declare the bankruptcy of the debtor unless there is a petition of a creditor or a request of the public prosecutor.

The bankruptcy court grants its judicial approval (*omologazione*) to the pre-bankruptcy agreement approved by the creditors once it has ascertained that the voting procedure has been correctly followed and that the required majority of creditors has been met.

The bankruptcy court must grant its judicial approval to the pre-bankruptcy agreement approved by the creditors within six months from the date on which the debtor initially filed the petition (a term that can be prorogated only once and for a period of 60 days). If the bankruptcy court does not grant its judicial approval, any declaration of bankruptcy will still require a specific petition filed by a creditor or a request of the public prosecutor.

The judicial approval produces important effects for the debtor and the debtor's creditors. Following the approval, the debtor re-acquires the full management of its assets, as transactions of an extraordinary nature no longer require the approval of the bankruptcy judge.

With regard to the creditors, the judicially approved pre-bankruptcy agreement becomes obligatory for all of the debtor's creditors in existence prior to the admission to the pre-bankruptcy agreement procedure.

The creditors – regardless of whether they participated in the vote and approved the proposal – no longer have any rights to the payment of any remaining credit not satisfied by the pre-bankruptcy agreement, in as much as the debtor is discharged from such debt.

Finally, all transactions, payments and security interests carried out or granted pursuant to a judicially approved pre-bankruptcy agreement are not subject to bankruptcy claw-back actions.

## **The debt restructuring agreement**

The debt restructuring agreement pursuant to Article 182-*bis* of the Italian Bankruptcy Law is an out-of-court agreement entered into – without the involvement of a court – by and between an entrepreneur in a state of distress and a number of its creditors representing at least 60% of all claims. Unlike the pre-bankruptcy agreement, the debt restructuring agreement is only effective between the participating parties.

However, such agreement is subject to approval by the bankruptcy court (*omologazione*) where the company has its current registered office. The debtor files the agreement before such court together with, among other things, a report drafted by an expert ascertaining the feasibility of said agreement, particularly with respect to the regular payments of the debts to the creditors who have not entered into the agreement. Following such filing, the debtor publishes the agreement in the companies' registry where the company has its registered office.

From the day the agreement is published in the companies' registry (i) the agreement is effective; (ii) those creditors whose claims arose prior to such date cannot commence or initiate restraining actions or enforcement on the assets of the debtor for 60 days – whereas the pre-bankruptcy agreement procedure provides for a period ending only on the pre-bankruptcy agreement's judicial approval; and (iii) any interested party can oppose the agreement within 30 days.

The bankruptcy court can grant its judicial approval (*omologazione*) to the debt restructuring agreement once it has decided on any oppositions. The relative decree of approval is consequently published in the companies' registry. As for the pre-bankruptcy agreement, all transactions, payments and security interests carried out or granted pursuant to a judicially approved debt restructuring agreement are not subject to bankruptcy claw-back actions.

## **The out-of-court debt restructuring plan**

The Italian Bankruptcy Law also provides some form of protection from claw-back for agreements that are reached between the debtor and any of its creditors where such agreements provide for new finance and the granting of security in light of such new finance or the rescheduling of the indebtedness.

The Italian Bankruptcy Law requires that such agreements shall be based on a restructuring plan prepared by the company – usually with its financial/industrial adviser – pursuant to its Article 67, paragraph 3, letter d) (the Plan). The Plan has to ensure the recovery of the debt exposure and the financial re-balancing of the debtor.

To ensure the recovery of the debt exposure and the financial re-balancing of the debtor, the Plan usually must take into consideration and illustrate all of its elements, including, among other things, an industrial and financial plan, a moratorium, a debt refinancing or rescheduling aspect, and an analytical description of all those transactions, payments and security that, pursuant to the Plan, are to be made or granted in relation to the assets of the debtor.

Finally, prior to entering into the out-of-court debt restructuring agreement based upon the Plan, the creditors require that the Plan be reviewed by an expert accountant who shall issue an opinion that evidences the reasonableness of such Plan in terms of the ability of the debtor to fulfil its payment obligations and reasonable assumptions. The expert opinion should protect the creditors from claw-back actions on those transactions, payments and security made or granted in relation to the assets of the debtor, pursuant to the Plan and the relevant agreements.

The Italian Bankruptcy Law does not expressly require that the Plan and the expert opinion bear a date certain (*data certa*). However, a date certain provides certainty that the Plan is approved and expert opinion granted prior to (i) the transactions, payments and security made or granted in relation to the assets of the debtor pursuant to the Plan and relevant agreements; and (ii) a subsequent bankruptcy of the debtor.



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