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Bankruptcy, Insolvency & Restructuring Proceedings in Italy

ILN RESTRUCTURING & INSOLVENCY GROUP

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER ITALIAN LAW**1. Presentation of the judicial liquidation/ insolvency/ rehabilitation proceedings in Italy and their main characteristics.**

The current legislation for judicial liquidation, insolvency and restructuring proceedings has recently been reformed on February 14, 2019. On this date the New Code of Business Crisis and Insolvency has been published in the Official Gazette (Legislative Decree 12 January 2019 No. 14), replacing the Royal Decree n° 267/1942.

The reform was initially to enter into force in its entirety on August 15, 2020, and then due to the pandemic emergency situation, the Law Decree 23 of April 8, 2020, containing *“Urgent provisions to support companies’ liquidity and export”* delayed the entry into force, as stated in article 6, to September 1, 2021, has once again been amended. In fact, in the first place, according to the Law Decree no. 118 - converted into the Law of 21 October 2021 n. 147, - the Company Crisis and Insolvency Code should have entered into force on May 16, 2022. After, according to the Legislative Decree no. 83/2022, the entry into force of the Company Crisis and Insolvency Code was set for July 15, 2022. (Legislative Decree no. 14/2019);

According to the law, the procedures available to debtor and /or to creditors are:

- Judicial liquidation;
- Composition with creditors,
- Restructuring agreements,
- Rescue plans.

The main differences which allow to classify the procedures mentioned above in two macro groups reflect the purpose to which they are directed.

On the one hand, in fact, there are procedures aiming to reorganize the company such as

rescue plans, restructuring agreements and composition with creditors where the business continuity is envisaged. They can be used by the entrepreneur in a state of crisis or the phase of a company’s business life that puts the prospect of the continuation of the business at risk, if however, the rehabilitation is still possible.

On the other hand, there are procedures aimed at the liquidation of the company’s assets such as judicial liquidation and the composition with creditors for liquidation purposes, for the company in a state of insolvency or no longer able to regularly meet its obligations.

Therefore, the procedures respond to different needs depending on the financial condition the debtor intends to use them.

In addition to this difference, it is possible to find others always within the two macro-categories.

In particular, the rescue plan, the restructuring agreements, and the composition with creditors with business continuity differ regarding the treatment of creditors. In fact, while an agreement with creditors is not required in the rescue plan, in the restructuring agreements it is foreseen that the non-participating creditors must be paid in full and in the composition with creditors the approval of the proposal submitted by the debtor by so many creditors which are the majority of the credits admitted to the vote is required.

Furthermore, while in the framework of debt restructuring agreements and the composition with creditors there is the possibility of entering into a so-called tax settlement, i.e., an agreement with qualified creditors for the payment, partial or even deferred, of taxes and related accessories. This possibility is excluded in the rescue plan.

Another difference concerns the control of the judicial authority. In fact, while in the rescue

plan there is no provision for judicial review, both in the composition with creditors and in the restructuring agreements, there is the intervention of the judicial authority and in particular, in the restructuring agreements there are minimal procedural aspects and the Court's control but not in the executive phase; in the composition with creditors there is, instead, a keen control of the judicial authority in every phase.

On the other hand, with reference to judicial liquidation and to composition with creditors for liquidation purposes, the most important difference is that while with the composition with creditors, the entrepreneur keeps the administration of his assets and the business under the supervision of the judicial commissioner, with the judicial liquidation the debtor loses the management of the company that is deferred to the insolvency practitioner appointed by the competent Court.

2. The protection granted to the debtor against its creditors.

From this point of view, it is possible to conduct a joint analysis of the procedures, since the protections put in favor of the debtor towards the creditors are almost applicable to all the procedures.

2.1. Irrevocability of deeds, payments and guarantees.

First of all, the provision for which, in the event of subsequent judicial liquidation, the deeds, payments and guarantees put in place in execution of i) rescue plan, ii) restructuring agreement, iii) composition with creditors cannot be subject to claw back action.

Article 67 letter d) and f) of the Royal Decree, in force until September 2021, in fact establishes that are not subject to the claw back action: *“the deeds, payments and guarantees granted on the debtor's assets if implemented in execution of a*

plan that appears suitable to allow the reorganization of the debt exposure of the company [...] “and the deeds, payments and guarantees put in place in execution of the composition with creditors [...], as well as the approved agreement pursuant to article 182bis, as well as the deeds, the payments and guarantees legally put in place after the filing of the appeal pursuant to article 161”.

2.2. Prohibition to continue or initiate precautionary and executive actions on the debtor's assets.

As a guarantee for the debtor, it is forbidden to continue or to start exercising individual precautionary and executive actions on the debtor's assets.

Preliminarily, it is necessary to clarify what is meant by *“debtor's assets”* and to which creditors the above-mentioned prohibition refers.

With reference to the first aspect, it can be stated that *“debtor's assets”* means the assets and credits of the entrepreneur admitted to the insolvency proceedings acquired to insolvency estate. Otherwise, assets and rights of a strictly personal nature, maintenance payments, salaries, pensions, wages and what the debtor earns with his/her activity within the limits of what is needed for him/her and his/her family, things that cannot by law be foreclosed, etc.

The property owned by third parties, co-affiliated or with guarantors, directed in some way to guarantee the bankrupt's obligations are also excluded from the application of the prohibition.

With regard instead to the individuals to whom this prohibition refers, it is specified by the rules that the recipients are not only creditors who have accrued pre-judicial liquidation credits, but also creditors who become creditors during the judicial liquidation proceedings and this

prohibition does not find the same application in all procedures and does not apply to rescue plans.

In relation to the other proceedings, the effectiveness of this prohibition is regulated differently depending on the procedures and in particular:

- i) With reference to restructuring agreements, the suspension of the precautionary and executive actions on the debtor's assets is valid for sixty days from its publication in the Registry of companies;
- ii) Regarding composition with creditors, both for liquidation and conservative purposes, this prohibition applies from the date of publication of the appeal in the Registry of companies and until the time the decree approving the composition with creditors becomes final;
- iii) Finally, in the event of judicial liquidation, the provision applies from the day of the declaration of judicial liquidation for the entire duration of the judicial liquidation procedure.

2.3. Contracts pending in the composition with creditors.

With reference only to the proceeding of the composition with creditors, the legislator for the debtor's protection has provided the possibility for him/her to ask the Court the authorization to terminate contractual relations if they are still in force, (i.e., not yet fully executed nor by one, or by the other contractor) on the date of submission of the appeal for admission to the composition with creditors. This rule also applies against the will of the performing contractor.

The authorization to the Court can be requested and granted when the suspension or winding up appear necessary or perhaps even only

convenient to execute the composition with creditors plan.

As an alternative to winding up, the debtor can also request the possibility of suspending the contract for a period of sixty days, which can be extended only once.

This is the current situation, that, as said above, will be modified because of the introduction of the new provisions.

2.4. The Italian procedure for negotiated settlement.

With the changes made by the legislative decree n. 83/2022, new measures suitable to promptly detect the presence of a state of crisis have been made more important, first of all, the new provision of the negotiated settlement of the crisis.

This is a new procedure that undoubtedly represents the most significant action in providing a new tool to support companies in difficulties. It is firmly aimed at their recovery and presents the following characteristics. In particular:

- i) This procedure can be used by all commercial entrepreneurs, as well as agricultural entrepreneurs – that normally according to previous legislation cannot be adjudicated bankrupt -.
- ii) The appointment of an “expert” is required. The presence of this professional aims to facilitate negotiations between the entrepreneur, the creditors, and any other interested parties in order to overcome the condition of equity or economic-financial imbalance.

The expert must be registered in a dedicated professional register and also have previous experience of at least five

years in the field of corporate restructuring and business crisis;

- iii) Finally, another essential requirement for access to the procedure is the actual perspective of recovery, which is verified by conducting a test involving a preliminary assessment of the complexity of recovery through the relationship between the entity to the debt to be restructured and the cashflows that could be committed annually to servicing the debt.