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The Italian Legislature Confirms the Reform of Italian Bankruptcy Law: Highlights on Refinements and Clarifications to the New Rules on Restructurings

On August 3, 2012, the Italian Parliament converted into Law the Law Decree of June 22, 2012 (the "Decree") containing new rules on restructuring proceedings, aimed at reforming the Italian Bankruptcy system. The general framework and the key principles of the reform set out in the Decree (the "Reform") have not changed. However, the Legislature has refined certain procedural elements and clarified other key aspects of the Reform, including amendments to the early automatic stay procedure to avoid the filing of petition aimed only at deferring the debtor's insolvency, new procedures regarding voting on, or challenging the vote on, a plan of reorganization and new rules to further facilitate the granting of interim and bridge financing.

I. New Procedural Rules

A. Early Automatic Stay

As indicated in our previous publication on the topic, a key elements of the Reform, which aligns the Italian system to US Chapter 11 proceedings, is the possibility for a debtor filing for a *concordato preventivo* proceeding (and indirectly for a debtor proposing an Article 182-*bis* restructuring agreement) to obtain the automatic stay of individual enforcement and protective actions upon the filing of a petition for *concordato preventivo* and its registration in the companies' registry. The filing of a *concordato preventivo* proposal (or of an Article 182-*bis* restructuring agreement) and the other required

documents is then deferred to a term set by the bankruptcy court between 60 and 120 days following the petition date, which the court can extend up to 60 additional days for justified reasons.[1]

This rule, which provides quicker access to bankruptcy protections and maximizes the debtor's leverage vis-à-vis its creditors by granting an appropriate period of time to prepare and negotiate a plan of reorganization, has been maintained. However, to avoid the filing of specious petitions aimed only at deferring the debtor's insolvency, the Law provides that: (i) together with the petition, the debtor must file its financial statements for the preceding three financial years; (ii) the court must impose on the debtor periodic reporting obligations for the period during which the reorganization plan is being prepared and a breach of such reporting obligations will render the proceeding inadmissible; and (iii) a debtor will not be able to access the early automatic stay procedure if, during the two years prior to such filing, it had already filed for an early automatic stay procedure and, following such filing, its proposed *concordato preventivo* or Article 182-*bis* restructuring agreement had not been ratified by the court.

B. Voting Procedures

The Law contains new rules regarding voting procedures in the context of *concordato preventivo* proceedings. In particular, under the new provisions, creditors who did not cast their vote on the debtor's proposed plan of reorganization will be given a period of 20 days following the closing of the voting procedure to file their dissenting vote. Absent such filing, they will be deemed as creditors voting in favor of the debtor's plan of reorganization.

In addition, creditors will be entitled to modify their vote after the conclusion of the voting procedure if the judicial commissioner supervising the *concordato preventivo* proceeding notifies them that the feasibility conditions of the plan changed after the conclusion of the voting procedure.

C. Oppositions to the Ratification of Approved Reorganization Plans

The Law has modified the provisions of Article 180 of the Italian Bankruptcy Law[2], pursuant to which, after the approval of the reorganization plan by the required majorities, each creditor belonging to a dissenting class might file an opposition against the ratification of the plan by the court, and the court could approve the plan notwithstanding such opposition if it was satisfied that dissenting creditors would receive under the plan at least as much as they could recover under available alternatives (*i.e.*, in most cases, under a liquidation scenario). Since the previous rule contemplated only the opposition of creditors belonging to a class which voted against the plan, there was uncertainty as to whether dissenting creditors had standing to file an opposition against a plan that contemplated only one class of credits and was approved.

[1] Pursuant to the Law, such terms are reduced to 60 days (extendable by the court up to 60 additional days only) if a petition for the debtor's bankruptcy is pending while the petition for *concordato preventivo* is filed.

[2] Royal Decree No. 267 of March 16, 1942, as amended.

The new rules clarify that if the plan provides for one class of creditors only, an opposition against the ratification of an approved plan can be filed, notwithstanding the approval of the plan, by creditors representing at least 20% of the total credits admitted to vote.

II. Rules Regarding the Management of the Estate

A. Access to Interim Financing

Access to interim financing has been further facilitated by the Law. Under the new rules, any person[3] will be allowed to provide interim financing with super-priority status and will be exempt from criminal liability in case of a subsequent bankruptcy of the debtor under the terms and conditions of Articles 182-*quater* and 217-*bis* of the Italian Bankruptcy Law.

The Law has also modified the provisions of Article 182-*quater* pertaining to shareholder loans by providing that such loans will enjoy the same super-priority status (up to 80% of their value) and the same exemption from criminal liability, provided that such loans are granted by new shareholders who take equity in the debtor in the context of a *concordato preventivo* proceeding or an Article 182-*bis* restructuring agreement.[4]

Finally, and most importantly, the Law has clarified that super-priority financing granted pursuant to Article 182-*quinquies* of the Italian Bankruptcy Law[5], which is one of the major innovations of the Decree, will be shielded from criminal liability in case of subsequent bankruptcy of the debtor, thus dispelling the uncertainty created by the Decree on the issue and highlighted in our previous publication.

[3] Defined to include any person or entity, as opposed to only banks and other institutions registered in the lists provided by Articles 106 and 107 of the Legislative Decree No. 385 of September 1, 1993 (as set forth by the original language of Article 182-*quarter*).

[4] The text of the rule is not entirely clear. Therefore, while this seems, at a first glance, the preferable interpretation, the provision regarding shareholders' loans needs to be clarified to dispel the uncertainty caused by its actual formulation.

[5] *I.e.*, financing granted by the court with super-priority status upon the filing of a *concordato preventivo* proceeding (or of an Article 182-*bis* restructuring agreement), provided that a third-party independent expert certifies that such financing is instrumental to enhancing the recovery of all creditors.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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