ORRICK

Restructuring & Insolvency Law Alert

JULY 2015

MATERIAL CHANGES TO THE ITALIAN BANKRUPTCY LAW

By the Italian Restructuring & Insolvency Department

Daniela Andreatta
dandreatta@orrick.com

Federico Perego
fperego@orrick.com

On June 27, 2015 the Italian government enacted the law decree no. 83 (the "**New Decree**") that, among others, includes material changes to the Italian bankruptcy law (Royal Decree 267/1942, the "**IBL**"). The New Decree must be converted into law by the Parliament within 60 days from its enactment (i.e. by August 26, 2015) but some of its provisions are already effective.

The changes affect in particular the in-court restructuring proceedings (*concordato preventivo*) and the semi in-court restructuring proceedings under article 182bis of the IBL (the "**182bis Proceedings**") and aim at facilitating restructurings by (i) granting more powers to creditors and (ii) eliminating the so called hold-out creditors.

This newsletter sets out briefly the main changes to such proceedings (the other changes to the IBL introduced by the New Decree will be addressed in a separate newsletter).

A. (The changes to the in-court restructuring proceeding (*concordato preventivo*)

A.1. *Creditors' alternative plan*

In a *concordato preventivo* scenario the restructuring plan (and the proposal to be submitted to creditors) is prepared and filed by the debtor with the bankruptcy court. Before the New Decree, creditors could only approve or reject the plan (with certain majorities) but not amend it.

Thanks to the New Decree, creditors representing at least 10% of the overall indebtedness of the debtor are now entitled to put forward an alternative restructuring plan, provided that under the debtor's plan the payment offered to unsecured creditors is lower than 40% of the respective claims.

The creditors' plan must be filed with the bankruptcy court at least 30 days before the date set by the bankruptcy

court for the creditors' vote on the debtor's plan; no expert opinion on the feasibility of the alternative plan is required, unless the alternative plan covers aspects that the court-appointed receiver has not reviewed.

The alternative plan may contemplate an investment by third parties in the borrower also by way of a capital increase (it is not clear whether the consent of existing shareholders is necessary).

Should classes of creditors be created under the alternative plan, such classes need to be reviewed by the bankruptcy court before the alternative plan is communicated to creditors. Creditors filing the alternative plan are allowed to vote on the plans, provided they are inserted in an independent class.

To allow creditors to present alternative plans the court-appointed receiver is requested to deliver to the creditors that so request (subject to confidentiality arrangements) information in his/her possession on the estate and the borrower.

Creditors vote on all plans (i.e. the one filed by the debtor and the possible alternative ones) and the plan approved with the highest majority (in amount of claims) prevails. In case of equality of votes, preference goes to the plan of the debtor and in case of equality of votes among alternative plans to the plan that was filed earlier. Should none of the plans reach the required majorities, the bankruptcy court submits again to the creditors' vote the plan that reach the highest number of votes.

These new rules will become effective following conversion into law of the New Decree.

A.2. Pre-packaged plans

Although certain bankruptcy courts oppose this practice, it is frequent in Italy that debtors file pre-packaged plans, i.e. plans providing for the sale or lease of the debtor's assets to a third party investor based on agreements executed by the debtor and the third party investor prior to filing.

This practice has been materially affected by the New Decree with the aim at mitigating the risk of pre-packaged deals prejudicial to creditors.

According to the New Decree, the court-appointed receiver may ask the bankruptcy court to authorize a competitive procedure for the sale of the debtor's assets (regardless of the binding agreement between the debtor and the third party investor) whenever he/she believes that - based on non binding offers delivered to the receiver - the pre-packaged deal filed by the debtor is not in the best interest of the creditors. Should the assets be sold to a third party different from the original investor as a consequence of the competitive procedure, the original investor has the right to be reimbursed of the costs incurred in connection with the agreement reached with the debtor up to an amount equal to 3% of the price of the assets agreed therein.

These new rules are already in force.

B. Changes to 182bis Proceedings

B.1. Drag along of dissenting financial creditors

182bis Proceedings are semi in-court proceedings based on debt restructuring agreements executed between the debtor and at least 60% (in amount of claims) of its creditors (usually financial creditors). 182bis Proceedings cannot bind creditors non-adhering to the debt restructuring agreement that must be paid in full within 120 days of confirmation thereof by the court (or 120 days of the due date of the relevant claim if falling after confirmation of the plan).

Because of their consensual nature, these proceedings are often complicated or even blocked by the resistance of minority creditors that do not accept to adhere to the restructuring agreement.

The New Decree has addressed this issue by creating a special procedure with respect to debt restructuring agreements involving (mainly) financial creditors.

Thanks to the New Decree the debtor can now claim the extension of the effects of an executed debt restructuring agreement also to the minority dissenting/non-adhering financial creditors, provided that:

a) at least 50% of the debtor's overall indebtedness is of financial nature;

b) the financial creditors that have executed the restructuring agreement represent at least 75% of the debtor's overall financial indebtedness;

c) the dissenting/non-adhering creditors:

- **(i)** have been informed and invited by the debtor to participate in the debt restructuring negotiations;
- **(ii)** have legal positions and economic interests homogenous to those of the adhering creditors;
- **(iii)** have been provided with complete and updated information on (a) the economic situation and financial position of the debtor and on (b) the contents and implications of the debt restructuring agreement;
- **(iv)** are offered a treatment that is not worse than the one they would receive in any practicable alternative scenario (usually a bankruptcy scenario).

The dissenting/non-adhering creditors can oppose this extension whenever the conditions above are not met by filing a formal objection with the bankruptcy court within thirty days from the service upon them of the debt restructuring agreement.

These new rules are already effective.

B.2. *Extension of the standstill to dissenting/non adhering financial creditors*

In addition to the above, the New Decree provides for a similar procedure to extend to dissenting/non-adhering

financial creditors also the effects of any out-of-court standstill agreed by the debtor with the majority of its financial creditors, provided that:

a) more than 50% of the debtor's overall indebtedness is of financial nature;

b) the financial creditors that have agreed to the out-of-court standstill represent at least 75% of the debtor's overall financial indebtedness;

c) the dissenting/non-adhering creditors:

(i) have been informed and invited to participate to the relevant negotiations;

(ii) have legal positions and economic interests homogenous to those of the adhering creditors to be confirmed by an independent expert appointed by the debtor.

The dissenting/non-adhering creditors can oppose this extension whenever the conditions above are not met by filing a formal objection with the bankruptcy court within thirty days from the service upon them of the executed standstill agreement.

These rules are already effective.

C. Changes to criminal provisions

The New Decree extends to 182bis Proceedings carried out pursuant to the new rules under paragraphs B.1 and B.2 above the criminal liability regime applicable to debtors in the context of in-court restructuring proceedings (*concordati preventivi*) in connection with past wrongdoings (for example corporate crimes) or illicit behaviours in the course of the proceedings.

This new rule is already effective.