



How to ‘turnaround’ in Italy

A simple legal guide to survive in the jungle

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1. History and recent developments

The reform of the Italian Bankruptcy Law has been at stake for a long time and finally it started to see the light on 2005 (D.L. n. 35/2005). These first groups of new rules were mostly focused on the pre-insolvency proceedings changing severely the structure of the R.D. 16 March 1942, n. 267, former “Bankruptcy Law”, too old and anachronistic if compared with the new economy.

The activity of the Italian Parliament on this critical aspect of modern economy did not stop since then and that is why the legal framework was gradually enriched by other new laws on 2006 (D.L. n. 5/2006), 2007 (D.L. n. 169/2007) and with final amendments on February and July of this year.

The jungle of legal provisions (that need to be read together) does not help who leads companies and try to sail the market fighting global crisis.

Nevertheless, the new legal framework, which has taken inspiration from the experience of other countries, foresees tools to the market stakeholders which may be summarised as follows:

- ❖ Simplification and acceleration of proceedings;
- ❖ Limitation of negative consequences for entrepreneur in crisis (criminal charges);
- ❖ Modification of role and functions of proceeding authorities;
- ❖ Alternative solution to deal with insolvency;
- ❖ Limitation of the court proceedings;
- ❖ Evaluation of social costs of liquidation or turnaround.



The new Italian Bankruptcy Law is modular and flexible, with different approach depending from the size of the companies involved, different solutions to the crisis extremely linked to the 'real world' thanks to the required plans evaluated by experts and professionals.

2. Pre-insolvency procedures: the sooner the better

a) Turnaround Plan according to art. 67, letter d, Bankruptcy Code

This plan is a private agreement promoted by the debtor to the creditors and binding within those who approve it. The plan is formed and prepared by the debtor professionals and then attested by an expert who has to declare its 'reasonableness'.

According to the new law provisions all the transfers that incur within the application of the plan will not be voidable not even in case of eventual unsuccessful plan. On the contrary the same treatment is not ruled during the achieving of a turnaround plan.

The plan may last for a maximum of three or four years, it will remain confidential and private unless and until the failure of the plan itself and an eventual consequent bankruptcy declaration of the company.

b) Debt restructuring agreements according to art. 182 bis, Bankruptcy Code

The restructuring agreement is proposed by the debtor and approved by at least 60% of creditors, secured and unsecured. The agreement is based on a plan equally assessed by an expert who will have to verify its 'feasibility'. The plan will have to provide full satisfaction of all creditors not taking part to it.



Notwithstanding its private nature, the agreement has to be filed with the court and then published in the company's register. The law provides a 30 days time period to the dissenting creditors for exceptions.

If the required publicity is considered to be a disadvantage for the adoption of this kind of procedure, the fact that the law provides a stay period of 60 days to the debtor to find better agreements with the creditors, is a very positive recent change whose effects are not measurable yet.

As per the turnaround plans, all transfers accomplished in application of a restructuring agreement will not be subject to claw-back action in case of future and eventual bankruptcy procedure.

The agreement is based on the principle of private determination and is highly ranked on a negotiability without limits. That is why the law does not provide the required content of the agreement which may be built upon a partial withdrawal of the credits or a stand period together with a re-payment through future instalments. The law leaves the debtor free to foresee among the adherent creditors a different treatment and a different degree of satisfaction.

The agreement may also provides for the conversion of the credits into equity, the granting of new liquidity, the change of the short term financing in medium or long term one, or the transformation of guarantee into credit lines revolving. All instruments and means extremely useful to the company and its reorganization.

c) Preventive creditors settlement or composition with creditors proceedings according to art. 160, Bankruptcy Code

The preventive creditors settlement is proposed by the debtor when the company is insolvent and would never be able to respect all its obligations notwithstanding it is still 'alive' and with assets that may be revaluated.



This procedure has been recently reformed and it has gained in flexibility even though it presents several aspects of complexity.

In this case, also, the settlement that the debtor present to the creditors is based on a plan but the proceeding has its own peculiarities that may be highlighted as follows.

The creditors are usually split in classes with similar legal position and homogeneous economic interests. The classes may be treated differently within the plan which may provide different term and condition of satisfaction for each of them.

The settlement needs the approval by the majority of unsecured creditors and by the majority of classes. Once approved the agreement is binding and enforceable over all creditors. The new preventive creditors agreement provides the possibility for the debtor to propose to the unsecured creditors a cram down avoiding the payment in full.

As a pre-insolvency procedure, the debtor keep administrating his own assets without the spoliation typical of the bankruptcy as a liquidation or a winding up procedure.

Once the plan - on which the preventive creditors agreement is based upon – is completed the debtor will not be liable anymore and it is free to start again its activity ('fresh start').

Normally this procedure is faster and with higher expectation of recovery for the creditors than the bankruptcy one.

3. Insolvency procedure: what's up?

a) The new bankruptcy claw-back action according to art. 66 and 67, Bankruptcy law

The *ratio* of the bankruptcy law is to ensure the same treatment to the creditors similar for decree of guarantee or for economy interests. This principle, summarised in the latin words *par condicio*



creditorum, has been rigid for decades until the recent reforms were adopted. The new law has clarified in which cases the action may apply and when it may apply, reducing tremendously the 'lookback' period to 6 or 12 months (from 12 and 24 months) from the declaration of bankruptcy depending from the 'transfers' at stakes.

Nowadays, this general rule find an application which is more practical and economy oriented, with the main goal of granting the stability in economic transactions.

The new claw-back action may be exercised on transaction where the price paid exceed the counter value of 25%, on non cash payments, on guarantees voluntary released for pre-existing debts still not due. The transactions have to be happened during the year precedent to the bankruptcy declaration and a negative burden of the proof relies upon the defendant. The debtor's counterpart will have to prove it was not aware of the debtors' insolvency, and this sometimes is quite difficult to obtain.

A shorter look-back period of 6 months is required for those transactions which occurred in the ordinary course of business if the receiver proves the awareness of the insolvency by the defendant. The same look-back period is required for guarantee released over debts due and payable.

The new law also provides that in specific circumstances the claw-back action may not be moved. These exceptions are related to all payments done in the ordinary course of business and at market conditions, payments to the banks not reducing permanently their exposure, payments of wages and salaries to employees and all transactions provided by turnaround certified plan, preventive composition with creditors procedure and a restructuring agreement ratified by the court.

Considering the above, the changes recently introduced protect all "*lifesaving operations*" with the only intents of granting transparency and certainty as a market value.



b) Extraordinary administration: Think big!

When social interests are at stake, when numbers are big in term of indebtedness and working force, the procedure of the extraordinary administration applies.

The procedure aims to pursue a real restructuring of company or of the group of companies, protecting the superior interests and avoiding as much as possible social direct or indirect costs.

The new provisions establishes the right tools and flexibility upon the Commissioners (named by the Ministry of Economic Development) in order to achieve the stated goals over a period of 2 years time.

4. Conclusion

The reformed law is based upon the concept of "insolvency" to which it has been finally added the principle of state of "crisis", a softer and smoother degree of difficulty, which still allow the entrepreneur to react and to preserve the business continuity with precise and timely interventions. The crisis is still reversible and need to be faced with autonomy in the decision making process and flexibility: these are the key points of a successful turnaround.

Costs and lack of data (still there) are the elements that refrain the pre-insolvency procedures from having a massive applications. Nevertheless, turnaround professionals are gradually more skilled and able to deal either with huge crisis of corporations and groups of company (extraordinary administration), or with small or medium enterprises where the social costs may not be very high.

With the new bankruptcy law, Italy has done the first step towards the reality of distress and turnaround: words that are getting more concrete and dense of meanings day by day.