DEBT COLLECTION, RESTRUCTURING & INSOLVENCY (DCRI)

Banks and financial intermediaries in Italy

Reforms to debt restructuring agreements

By Prof Stefano Loconte and Leonardo Angelastri

Pursuant to Section 182-bis of the Italian Bankruptcy Law, a business that finds itself in severe difficulty and facing collapse can ask the court to approve a debt restructuring agreement reached with its creditors on condition that the agreement in question is with at least 60% of the entire pool of creditors and that those creditors who have elected not to be party to the agreement are guaranteed payment of their debt in full.

The advantages for the business in securing approval of the agreement are as follows: (i) steps taken, payments made and security provided by way of implementation of the agreement that has been approved are exempt from revocation; (ii) when the proposed agreement is filed, the court can be asked to prohibit enforcement action from being taken or pursued against the debtor while the agreement is being negotiated and yet to be formalised; (iii) the debtor can be authorised to take out pre-preferential loans where the purpose of these loans is to satisfy the pool of creditors to a greater extent.

The recent Justice Decree of 27 June 2015 (enacted in law by the Law of 6 August 2015) reformed certain aspects of the Bankruptcy Law, introducing changes in terms of debt restructuring agreements reached with banks and financial intermediaries.

The preliminary objective requirement that the owner of the business must satisfy in order to have access to debt restructuring agreements with banks and financial intermediaries in their new format is that the debts owed by the business to this particular group of creditors represent at least 50% of its overall indebtedness. Having met this requirement regarding the type of debts owed by the business, Section 186-septies of the Italian Bankruptcy Law then requires the banks and financial intermediaries to be subdivided into "homogenous classes on the basis of legal status and economic interests", with this subdivision certified by an expert's report.

In particular, what stands out where these provisions are concerned is the fact that when the court approves the debt restructuring agreement pursuant to Section 182-bis of the Italian Bankruptcy Law, the business can ask for the agreement to be extended, under Section 182-septies, to take effect as against those banks and financial intermediaries who decided against signing up to it. This extension comes into play where each of the following requirements is met: (i) 75% of the banks and financial intermediaries in the same category are in support of the agreement; (ii) in accordance with the principle of good faith, the debtor has notified all of the banks and financial intermediaries that negotiations have been set in motion and has given the banks the opportunity to take part in those negotiations; (iii) as a result of the restructuring agreement, in their position as creditors, the banks and financial intermediaries will be satisfied at least to the same extent as would be the case with other alternative solutions that could, in practice, be adopted.

Another distinctive feature of these provisions is the fact that the banks and financial intermediaries to which

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Prof Stefano Loconte

Leonardo Angelastri

the agreement extends are treated as signatories to the agreement for the purposes of reaching the threshold of 60% of all creditors (meaning not just the banks and financial intermediaries alone) established by the first paragraph of Section 182-bis of the Bankruptcy Law; the business must reach this threshold in order to be able to follow this particular debt restructuring agreement procedure.

Of greatest significance in terms of novelty is the extension of the debt restructuring plan to those banks and financial institutions that did not support the plan tabled by the debtor. This principle is somewhat revolutionary in nature, making those banks and financial intermediaries subject to an agreement that the debtor has reached with other banks and financial intermediaries, being an agreement which, by its nature, will result in the amounts that they are owed being reduced.

Given that a debt restructuring agreement pursuant to Section 182-bis of the Italian Bankruptcy Law is a multilateral contract with a common purpose, these reforms would appear to extend beyond the boundaries of the principle enshrined in Article 1372 of the Civil Code to the effect that a contract is binding in law between the parties to it. The extension of the effects of the agreement to third parties proves to have even sharper teeth when we look at the fact that the banks and financial intermediaries who did not support the agreement are, where the approved debt restructuring agreement is concerned, third parties, and the extension of that agreement by operation of law is of no advantage to them and in fact results in a worsening of their overall financial position.

In introducing these reforms, the Italian Parliament has clearly expressed a preference for keeping the businesses in question intact, viewing this as essential and ranking it over and above the bank or financial intermediary's entitlement to payment. The reasoning by the Italian Parliament on this matter is in line with that of its European counterparts as demonstrated most recently with Regulation 2015/848 where, in establishing rules governing insolvency proceedings on an EU level that come into force on 26 June 2017, it declares that the main objective of the Regulation is to safeguard the assets of the business and employment levels, with this being achieved by adopting the debt restructuring route rather than seeing the company go out of business as a result of its financial collapse.

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Auditing & Accounting, Tax, Law Firm, Advisory, Corporate Finance, Fiduciary & Estate Planning
Bari, Italy
Prof Stefano Loconte
E: stefano.loconte@studioloconte.it
Leonardo Angelastri
E: leonardo.angelastri
@studioloconte.at
W: www.loconteandpartners.it