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Bankruptcy, Insolvency & Rehabilitation 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 rehabilitation proceedings has recently been reformed on February 14, 2019. On this date, the New Code of Business Crisis and Insolvency was published in the Official Gazette (Legislative Decree 12 January 2019 No. 14), replacing the Royal Decree n° 267/1942.

This is a reform with deferred efficacy, since it was partly entered into force on March 16, 2019 and partly will enter into force on August 15, 2020.

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

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

The main differences which allow the classification of the procedures mentioned above into 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 aforementioned 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 with regard to the treatment of creditors. In fact, while an agreement with the 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 carry out 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 August 2020, 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's protection of, 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 activity within the limits of what is needed for him and his 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 aforementioned 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) With regard to 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 protection of the debtor has provided the possibility to the debtor to ask the Court the authorization to terminate contractual relations if they are still in progress, (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 in order 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 in August 2020.