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New trends on Corporate Insolvency Law and challenges to the judicial system

1. Italy reformed his insolvency law in 2005 – 2006, inserting new principles in the old Insolvency Law Act of 1942. Many minor changes were introduced between 2007 and 2016. A Recast of the entire insolvency law will be soon of force trough the Delegation Act of 2017 (155/2017 Act) and the delegated decree that likely will be enacted in the first months of 2019. Also if the Recast changes part of the present discipline, the main lines will be maintained.

Italy has three restructuring proceedings plus the extraordinary administration proceeding reserved to the biggest enterprises[1], a liquidation proceeding in case of insolvency without rescue possibilities, over indebtedness proceedings reserved to minor enterprises[2] and civil debtors. The restructuring proceedings are:

a) composition with creditors: a plan presented by the debtor in possession under the control of a commissioner appointed by the Court. The plan is approved by the creditors and confirmed by the Court.

b) Consensual agreement with creditors. A plan approved by at least the 60% of creditors out of the Court and confirmed by the Court. The creditors who don't approve the plan have to be paid for the full amount of their claims. The plan may be challenged by creditors in the Court.

c) Turnaround plan. A plan formed by the debtor out of the Court and certified as feasible by an independent expert appointed by the debtor. In case of winding up the payments provided by the plan may not been declared avoidable by the Court.

Looking at the restructuring proceedings we may say that Italy has all the tools that normally European countries and U.S. have to deal with the crisis or insolvency. I mean: the restructuring plan presented by a debtor in possession, the automatic stay, deep financing and superpriority for claims arising from deep financing, classes of creditors, absolute priority rule, cram down. The recast of

[1] Enterprises insolvent when there are at least 200 employees and the indebtedness is at least equal to 2/3 of the assets and to 2/3 of turnover.

[2] Enterprises with investments for less than 200.000 euro in capital or gross earnings in the last three years of less than 300.000 euro for each year.

Italian legislation will offer more tools and a systematic review of all the discipline. In this framework the most important reform is the introduction of the alert system. The tax agency and other qualified public creditors will inform a public independent body if an enterprise will not pay taxes or contributions for workers' pensions for a certain period. Also the internal controller of a company will do the same. Before they will inform the board of the company inviting him to take actions to avoid the crisis. The public body will have a confidential colloquium with the debtor and in this occasion the debtor may ask the panel of independent expert appointed to help him in the negotiation with creditors. This system will accelerate the negotiation and the prompt adoption of a restructuring plan.

The alert system complies with the provisions of the early warning system provided by the draft of the European Directive for harmonization of the insolvency law between member countries that could be approved by EU not far more than in the half of next year.

2. The Recast will introduce the discipline of the insolvent group of companies. Italy had already a partial discipline of the insolvent group for biggest enterprises since 1979, but these rules were never extended to the other enterprises. Of course the companies group discipline provided by EIR 2015 in cross border cases has to be applied and enforced also in Italy.

The new group discipline allows the presentation of a group plan for the restructuring of all the group companies and also of the enterprises that do not have the nature of a company. Also the judicial liquidation of a group is allowed. In the first case a unique restructuring plan or connected plans may be submitted to creditors and group. The limit is that the unitary treatment of the crisis or insolvency is in the all enterprises creditors interest. In the case of liquidation the unique plan should offer coordination in the assets selling maximizing the proceeds in all creditors interest.

The Recast provides procedural consolidation, not substantial consolidation. Consolidation is the combination of the assets and liabilities of two or more related companies so that they are treated as a single entity and it's similar to a merge. Procedural consolidation means that enterprises are administratively dealt with together, but without substantively pooling their assets and liabilities. So there will be the unitary plan or coordinated plans of each enterprise. The same administrator or trustee may be appointed in all the proceedings. The same Court will be competent to approve the plan or to deal with the claims brought by the creditors or arising from the insolvency or restructuring proceeding. Also the avoidable actions will be decided by the same Court and the regime of these avoidable actions will be the regulation of revocation actions will be more strict than the ordinary one for transfers between the group companies carried out in the five years preceding the opening of the procedure.

The law permits deep financing or assets transfer between the group entities as restructuring plan provision, but it must be in the interest of creditors of all group entities. Experience shows that often is difficult to meet this condition.

Claims of the parent enterprise against the group enterprises or claims of the groups enterprises against the parent enterprise for financing contracted in the year before the opening of the proceeding are postponed to all other claims. In case of judicial liquidation the monies paid in the year before the opening of the proceeding must be reimbursed. These principles are not applied when the financing is provided by the restructuring plan in the limits of the 80% of the claim.

In the liquidation proceedings the trustee will be able to suit the administrators of all the group enterprises, mainly of the holding company, for wrongdoing in the exercise of the direction and coordination activity of the group enterprises for damages to creditors and to the value of the participation.

The Group notion is not the same of the EIR, but is not so far. The Recast recalls the notion of direction and coordination set forth in article 2497 of the Italian Civil Code, and refers to the set of companies, enterprises and other entities that are subject to the direction and coordination of a company, another entity or a natural person on the basis of a corporate participation or a contract. According to the civil code the control may imply a participation sufficient to exercise a dominant influence in the shareholders' meeting. Art. 2 (14) of the EIR says that "parent undertaking' means an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings". Also according to Italian law like in the EIR an undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of the Council shall be deemed to be a parent undertaking.

The competent Court will be the Court where the enterprise or physical person who carries out the direction or coordination has his seat or otherwise the subject who has the biggest debt exposure. The law refers only to cases where all the groups subject have their COMI in Italy. The crossborder cases will be ruled by the EIR.

3. According to the Italian civil code in case of merger or division of companies the shareholders have the right to challenge the shareholders' meeting decision in the Court in the sixty days from the registration in the public Registrar. In the case of a fusion or division provided by a group restructuring plan it was uncertain until now if the shareholders could use this action, provided by the company law, or if they had to challenge the plan in the judicial framework of the restructuring proceeding. In some cases after the plan approval by the Court shareholders still were trying to challenge the approval through the company law action. The most part of jurisprudence said they had to deal with this last type of proceeding.

Now the Recast will say that any action against the plan or part of the plan, like the fusion or division, must be dealt with in the insolvency proceeding.

Looking more broadly to the protection of shareholders in restructuring procedures, must be said that they don't have special treatment. As creditors of risk capital they are postponed to all other creditors. Since 2006 the application for opening of the restructuring procedure in joint-stock company and limited liability company is approved by the administrators and the law doesn't provide means for the shareholders to contest this decision other than the general provisions set forth in the law to challenge the board of directors decisions that are quite difficult to apply. As matter of fact it never happens that administrators take this decision when it's not necessary, because generally it has heavy consequences for the company and for themselves. But undoubtedly this rapresents a lack of protection of shareholders. Also in the partnership the decision is taken by the majority of associates. The minority doesn't have special tools to challenge the decision.

Actually in the case of a share capital increase that is part of the restructuring plan, reserved to a new equity holder, minority shareholders are deprived of the option right and have little means to oppose this solution. Creditors who represent not less than 10% of claims may present an alternative plan. This plan may contemplate a share capital increase without the option right for shareholders. Also in this case shareholders rights are not contemplated by the law. They will have problems to challenge the plan in the Court because the exclusion of the option right is provided by the law and in the insolvency proceeding their position as creditors is postponed to all other creditors. The Recast will not change these principle.

We can conclude that shareholders in Italy don't have special protection in the insolvency proceeding. In other countries their position is sometimes stronger and it may happen they will abuse of the protection accorded by the law. Until now in the practice we didn't have cases where the reduced protection of shareholders showed critical issues, but undoubtedly scholars think that there could be a grey area to be studied deeper.

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