

Italy's new debt restructuring rules

June 15, 2012

The Italian Cabinet adopted today a Law Decree (the “Decree”) introducing important measures aimed at stimulating the Italian economy, including significant amendments to the Italian Bankruptcy Act. These amendments are intended to facilitate the restructuring of distressed companies, mainly through quicker access to judicial composition with creditors (“*concordato preventivo*”), *interim* financing and a new special form of *concordato* aimed at ensuring the continuity of the debtor's business (“*concordato con continuità aziendale*”).

The Decree also introduces significant new provisions relating to executory contracts, certified recovery plans, claw-back actions, and loss of share capital.

The new rules will allow quicker management of a debtor's distress, under more transparent and protective conditions for all parties involved.

Within 60 days of publication in the Italian Official Journal (which is expected in the next few days), the Decree must be converted into law by the Italian Parliament.¹ Unlike other sections of the Decree, the amendments to the Italian Bankruptcy Act will enter into force only 30 days after the conversion into Law (presumably in September 2012). The Decree has been adopted “subject to further revisions” and therefore the text may still be amended in the next few days.

I. Quicker access to *concordato preventivo*

Prior to the reform. Under the current regime, a debtor intending to access the *concordato preventivo* must file a *concordato* application along with a proposal to its creditors, a feasibility report from an independent expert, and other documentation. The preparation of this material (and, often, informal negotiations with the main creditors) typically take a long time. While the application and related documents are being prepared, the operations of the debtor and relationships with its creditors are not protected.

¹ Law Decrees enter into force, unless otherwise specified, on the day following their publication in the Official Journal; however, they must be converted into Law by Parliament within 60 days of this publication, otherwise they cease to be effective retroactively.

Only after filing an application may the debtor and third parties benefit from the *concordato preventivo* protections, including a stay of enforcement actions against the debtor's assets, the prohibition to pay pre-petition creditors, and the requirement for the debtor to obtain Court authorization to carry out activities outside the ordinary course.

After the reform. To provide quick access to the *concordato* protections, the new rules allow a distressed debtor to file only the application for admission to *concordato preventivo*. The debtor may file the proposal to creditors and the remaining documentation within a term set by the Court of 60 to 120 days (extendable by up to 60 days.) Alternatively, within the same term, the debtor may apply for Court ratification of an out-of-court restructuring agreement entered into with creditors holding at least 60% of the claims (a so-called "182-*bis* agreement").²

In the event that the debtor does not file either a *concordato* proposal or a 182-*bis* agreement within the prescribed term, any creditor or the public prosecutor may request the Court to verify that the debtor is insolvent and declare it bankrupt.

In essence, the amendments allow a debtor to prepare its restructuring proposal, negotiate with its creditors, and manage its operations in a context that is more transparent and protective of all the parties involved compared to the current regime.

II. *Interim financing and suppliers.*

Other amendments are aimed at preserving the operations of the debtor during the *concordato* proceedings (or pending Court ratification of a 182-*bis* agreement).

Interim financing. Under the new rules, a debtor filing a *concordato preventivo* application (or an application for Court ratification of a 182-*bis* agreement) may immediately seek Court authorization for the financing necessary to fund its ongoing operations during the proceeding.

The authorization application must be accompanied by a certification from an independent expert that the financing would enhance creditors' recovery. Loans authorized

² 182-*bis* agreements are made between a debtor and creditors holding at least 60% of outstanding claims. An independent expert must certify the truthfulness of the underlying data, the agreement's feasibility, and particularly, its suitability to ensure payment in full of creditors who were not a party to the agreement. The debtor must seek Court ratification of the agreement and publish the agreement on the Register of Enterprises (following which, for 60 days, creditors' actions on the debtors' assets are stayed). Actions, payments and security interests carried out, made or granted pursuant to a ratified 182-*bis* agreement are not subject to claw-back actions in case of subsequent bankruptcy of the debtor; certain criminal law provisions also do not apply.

by the Court rank as “super-priority” claims (*i.e.*, they are to be satisfied prior to those of unsecured creditors in the event that the debtor is subsequently declared bankrupt).³

Suppliers. Again, to preserve the operations of a debtor during the proceedings, the reform clarifies that receivables arising from activities “lawfully carried out” by the debtor after filing a *concordato* application (including, arguably, receivables of suppliers for goods or services received in the ordinary course of business) rank as super-priority claims in case of bankruptcy. The Decree also clarifies that the relevant payments are not subject to claw-back actions.

Moreover, as a partial derogation from the prohibition to pay pre-petition creditors, the debtor may seek Court authorization to pay for goods or services received prior to filing the *concordato* application. The authorization is subject to certification by an independent expert that such goods or services are (i) essential to the continuity of the business and (ii) would enhance creditors’ recovery.

III. Judicial composition with creditors aimed at ensuring business continuity

Finally, the Decree introduces a special form of *concordato preventivo* specifically aimed at ensuring business continuity, as opposed to winding down of the business (so-called “*concordato con continuità aziendale*”). A *concordato preventivo* is of this special form if the proposal to creditors provides for (a) the continuation of the business by the debtor, (b) the sale of the business as a going concern, or (c) the contribution-in-kind of the business as a going concern to one or more companies (even if newly incorporated). In these cases, the *concordato* application must include a certification from an independent expert that the continuation of the business would enhance creditors’ recovery.

Under this special *concordato*, secured creditors may be paid up to one year after final Court ratification of the *concordato* proposal and executory contracts may not be terminated because of the *concordato* proceedings (despite any provisions in the contracts to the contrary).^{4 5}

³ Court authorization may also be granted for loans identified only by kind or amount, even if the debtor has not yet negotiated terms. Moreover, the Court may authorize the debtor to grant security interests with regard to such loans.

⁴ For Government contracts, the Decree sets out conditions under which a debtor admitted to *concordato preventivo* may continue performing those contracts or participate in public bids.

⁵ The Decree also sets out certain provisions relating to the loss of share capital. Italian companies that have suffered losses equal to their share capital (as is likely with those seeking entry to *concordato preventivo*), under the current rules, must either recapitalize or wind up their business. Pursuant to the Decree, the obligation to recapitalize (or

This provision, as well as the entire reform, is inspired to the need to protect the continuity of the business and preserve its value during the restructuring process.

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If you have any questions concerning this memorandum, please feel free to contact Roberto Bonsignore in our Milan office (+39 02 72 60 82 30) or Giuseppe Scassellati-Sforzolini in our Rome office (+39 06 69 52 21), or any of our other Italy-based partners and counsel listed under the Bankruptcy & Restructuring Practice Areas under the “Practices” section of our website at www.clearygottlieb.com, or any of your regular contacts at the firm.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

wind-up) is not applicable between the date of filing of a *concordato preventivo* application (or a 182-*bis* agreement) and ratification at the end of the proceeding.

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Bank of China Tower
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299