The “development decree”: main innovations regarding the composition with creditors procedure, debt restructuring agreements under art. 182 bis B.L. and the certified restructuring plans under art. 67 B.L.

The text of the “development decree” approved by the Council of Ministers on June 15, 2012 introduces significant changes to the Italian bankruptcy law. The decree, which has been published on June 26, 2012, may be subject to further changes (which may also intervene in the process of enactment into law) and will come into force only after the thirtieth day following the publication of the conversion law (the conversion into law shall occur within 60 days as of June 26, 2012) ("Development Decree").

The amendments relate to the so-called composition with creditors procedure ("Composition"), the debt restructuring agreements ("Restructuring Agreements") under art. 182 bis of the Italian Royal Decree n. 267/1942, as subsequently amended ("Bankruptcy Law" or "B.L.") and the certified restructuring plans under art. 67 B.L. ("Plans").

In general, with regards to Composition, such amendments are intended to:

- protect the company from any potential aggressive action that creditors might set forth whilst the company gains access to the procedure;
- enhance the value of the company, also taking into account creditors’ interests, by means of specific provisions relating to the preservation of the business and the going concern of the company;
- allow, within certain limits, a remodelling of the company that acceded to the procedure, through the termination of those contracts that are no longer considered functional to the business purposes of the company.

The new provisions should significantly expand the utilization of the Composition as a way to find a negotiated solution to a crisis, in the context of an enhanced role of the Courts, whenever there is the need to verify that the continuation of the business activity is actually functional to the preservation of the value of the company and therefore to the satisfaction of the creditors expectations.

With regards to Restructuring Agreements and Plans, the changes introduced in the Development Decree aim to:

- empower these instruments, used to solve business crisis situations, as an alternative to bankruptcy;
- clarify those uncertainties that had come up in the application of the legal provisions of the Restructuring Agreements and the Plans, introduced in our system with the bankruptcy law reform in 2005 and 2007.

Please find below, a description of the main amendments introduced to the legislation regarding Composition, Restructuring Agreements and Plans.
1. Composition Procedure

1.1 “Deferred” proposal for Composition

The company may file the request for admission to the Composition, retaining the right to file the complete proposal, the plan and all the related documentation, within a term determined by the Court, between 60 and 120 days (extensible for an additional 60 days). From the date of the filing with the Court of the request for admission to the Composition, once the request is published in the Companies Registry, creditors are prohibited to start or continue enforcement and foreclosure proceedings and seizure over the assets of the company (so-called “automatic stay”).

1.2 Ineffectiveness of judicial mortgages

As a way to strengthen the effects of the so-called “automatic stay”, the Development Decree provides that the judicial mortgages, registered in the 90 days prior to the publication of the request for Composition in the Companies Registry, are ineffective towards the creditors existing before the Composition procedure was enacted.

1.3 Termination of pending contracts

The debtor may, save for certain expressed exceptions, demand the Court to authorize the “termination of the contracts pending at the date of the filing of the request”. The debtor may also ask for the Court to authorize a suspension of a contract for a term of 60 days (deferrable only once). To the contrary, the old regime provided for the continuation of the existing agreements. Therefore, by means of the Composition, it will be possible to “re-design” the company through the elimination of certain contracts, which have become no longer functional to its business purposes.

1.4 “New Finance” Interim agreement and possibility of having an anticipated satisfaction of the “strategic” creditors

In the process of filing of the request of admission to the Composition, the Company may ask the Court authorization (a) to contract pre deductible facilities (“finanziamenti prededucibili”). This is only allowed if a fairness opinion drafted by an expert (so-called “attestatore”) assures that said facilities are “functional to the best satisfaction of creditors” to this end, such facilities might be required to be secured by pledge or mortgage; (b) “to pay previous credits for the provision of goods and services” to the extent that the expert confirms that the provision is “essential for the continuation of the business activity and functional to ensure the best satisfaction of creditors”.

1.5 Composition with going concern of the company

A special regime is provided for the regulation of the Compositions with “going concern of the company”, meaning those Compositions, in which the plan contemplates “the continuation of the business activity by the debtor” or the “sale of the going concern” or the “contribution of the going concern in one or more companies, which may also be newly created”.

In these kinds of Compositions, the proposal provides that creditors’ satisfaction shall derive from the financial flows coming from the continuation of the business activity, rather than from the proceeds coming from the liquidation of the company’s assets.

The Composition plan must contain an “analytical description of the costs and proceeds expected from business activity” and “of the financial resources that are necessary as well as the coverage methods”. The fairness opinion drafted by the independent expert, concerning the feasibility of the plan, must specifically certify that “the continuation of business activity is functional to the best satisfaction of creditors”.

In such a case, a deferral of the term for the satisfaction of preferred creditors is allowed. The payment can be deferred until maximum one year from the Court’s validation of the Composition. This grants the company a significant source of self-financing.
1.6 Suspension of the obligations to recapitalize

The Development Decree provides for the suspension of the obligations provided by the Italian Civil Code, regarding the recapitalization of the share capital of the companies in case of relevant losses. The suspension operates from the date of the filing with the Court of the request of admission to the Composition, to the date the Court finally validates the Composition. Consequently, during the proceeding, directors are no longer subject to the risk of being held liable for having omitted to call the shareholder’s meeting, in order for it to resolve upon such recapitalization.

2. Debt restructuring agreement under art. 182 bis B.L.

2.1 Extension of the deadline for the repayment of the so called “external” creditors, i.e. those not taking part in the agreement

The repayment of “external creditors”, (i.e. those who have not taken part in the agreement executed between the debtor and a group of creditors, representing at least 60% of the total debt) must happen:

- for credits that on the date of the Court’s validation of the Restructuring Agreement, are not yet overdue, in a term of 120 days from the relevant maturity date;
- for credits that instead are already overdue on the date of the Court’s validation, in a term of 120 days from the date of such validation.

These provisions are crucial, because they grant the company the possibility to self-financing through financial flows expected from the business, by means of a moratorium limited to those creditors, with whom it has not been able to reach an agreement.

2.2 Regulation of the “bridge-facilities” whilst the Court’s decision upon the validation of the Restructuring Agreement is still pending

During the phase of the filing with the Court of the request for the formal validation of the Restructuring Agreement, the company may ask the Court for an authorization to obtain pre-deductible facilities, which may also be secured through pledge or mortgage. This benefit is granted as long as there is a fairness opinion drafted by an expert, certifying that said facilities are “functional to the best satisfaction of creditors”.

2.3 The so-called “automatic stay” functional to the Restructuring Agreement

The Development Decree permits to preserve protection from the potential aggressive actions set forth by creditors, obtained through the filing of a request of admission to Composition (the same protection is granted in the case described above, under paragraph 1.1). Specifically, such protection is granted also in case the company files a Restructuring Agreement within a term fixed by the judge between 60 and 120 days following the previous filing for, and as an alternative solution to, Composition. The Restructuring Agreement shall maintain its effects until it is validated by the Court. It is therefore possible, to switch from a proceeding, characterized by a more judicial connotation (the Composition) to a different procedure, (the Restructuring Agreement) mainly based on negotiation, without changing the entity of the interim protection previously granted in order to preserve the company’s assets.

2.4 Suspension of the obligations to recapitalize

The law provides for the suspension of the obligations provided by the Italian Civil Code regarding the recapitalization of the share capital in case of relevant losses. The suspension operates from the date of the filing with the Court of the request for it to issue a formal validation of the Restructuring Agreement, to the date of the validation. Consequently, during the proceeding, the directors are no longer subject to the risk of being held liable for having omitted to call the shareholder’s meeting, in order for it to resolve upon such recapitalization.
2.5 Changes to tax legislation

In the case of a Restructuring Agreement that has been formally validated by the Court, “any reduction of the company’s debt shall not constitute a positive contingency, for the part exceeding the previous and existing losses.”

3. Certified restructuring plans under art. 67 B.L.

3.1 Designation of the professional expert (“professionista attestatore”), independence requirements and criminal sanctions

The professional expert (so-called “attestatore”) shall be appointed by the debtor and must certify the “trustworthiness of the company’s financial data” and the “feasibility of the plan.” In addition, a specific criminal provision has been introduced, regarding the expert who provides false information or omits to communicate relevant information. Stricter criteria have been introduced to guarantee the independence of the expert (“The professional is independent when he is not linked to the company and to those that are interested in the reorganization operation, because of personal or professional reasons, that may compromise the independence of his judgement; in any case, the professional must be in possession of the requirements specified in art. 2399 of the [Italian] Civil Code, and he must not, by his own means, or by means of other individuals, with whom he is associated for professional reasons, have served employment or self employment in favour of the debtor, or have taken part to its board of directors or auditing bodies in the passed five years”).

3.2 Changes to tax legislation

Even with regards to the Plan, (as long as it has been published in the Companies Registry), the law provides that any reduction of the company’s debt due to renounces contemplated by the Plan “shall not constitute a positive contingency for the part exceeding the previous and existing losses”.

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