INSOL International

Small Practices and Consumer Debt Issues

ITALY

April 2014

Small Practice Issues Technical Series

Small Practices and Consumer Debt Issues

INSOL International
6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

Acknowledgement

INSOL International is pleased to present a country study on Italy under its "Small Practices and Consumer Debt Issues Series". The paper was written by Mr. Karl Heinz Lauser, partner and Ms. Chiara Fiorini, associate of Derra, Meyer & Partner.

This paper is based on a standard template of questions that the INSOL Technical Research Committee and the Small Practice Issues Committee have jointly developed. We hope our members find the information about Italy on this topic useful.

INSOL International sincerely thanks Mr. Karl Heinz Lauser and Ms. Chiara Fiorini for preparing this excellent paper.

April 2014

Smaller Practices and Consumer Debt Issues in Italy

RA Karl Heinz Lauser & Avv. Chiara Fiorini*
Derra, Meyer & Partner

1. Consumer Insolvency Regime in Italy

Until 2012, in Italy, there were no insolvency proceedings for private entities, non performing business activity, or for smaller practices (which were not included, by express legislative provision, from the proceedings regulated by the bankruptcy law of 1942 and further amendments). It was only after the enactment of Law no. 3/2012 that the possibility arose for these categories of debtors to access insolvency type proceedings in the event of insolvency. At present however, due to the very recent introduction of the relevant legistlation and consequently due to the lack of implementation of these provisions together with the severe economic crisis that Italy is suffering, there are not many extensive case examples to explain the position in Italy.

2. Available Proceedings

Law no. 3 dated 27.01.2012 provides three separate proceedings for settling the "over - indebtedness crisis" which may be brought against a consumer or small practice, not subject to the insolvency proceedings provided by the bankruptcy law of 1942 due to the absence of the prerequisites (of a subjective nature, type of activity and size) required therein. These are:

a) Restructuring agreement: for the individual consumer or for the smaller practice not able to be declared bankrupt.

b) Consumer restructuring plan: only for the individual consumer;

c) Liquidation of assets: as an alternative, from the outset, to the proceedings referred to in cases a) and b) or as the result of the conversion of one of those proceedings.

The law, according to which it is a matter of a "civil debtor", meaning a debtor not subject and not able to be subjected to insolvency proceedings other than those regulated by the law in question, or a "consumer" (subjective prerequisite), essentially provides two separate routes, namely:

(i) those indicated in paragraph a and b,

(ii) while the liquidation mentioned in paragraph c is a residual case that the other two proceedings may result in.

Consumer means the individual debtor who has accepted obligations exclusively for purposes extraneous to the business or professional activity that may performed.

The distinction between a "civil debtor" and a "consumer" should be functional to preparing more streamlined proceedings for those who do not exercise any professional activity or have not contracted any debt in order to exercise the same. The consumer restructuring plan referred to in point b), in fact, may be approved without the consent of the creditors, where the courts deem it lawful, feasible and appropriate.

An objective prerequisite for bringing the insolvency proceedings regulated by Law no. 3/2012 is the state of "*over-indebtedness*", defined as "the situation of ongoing imbalance between the obligations assumed and the liquid equity readily available to cover them, which leads to significant difficulty in fulfilling the obligations or the definitive incapacity to fulfil them properly". The main indicators of irreversible crisis include: withdrawal of credit lines or suspension of bank credit with demand for immediate return, enforcement proceedings in progress and definitively established tax debts in the process of recovery.

* The views expressed in this article are the views of the authors and not of INSOL International, London.

In the presence of the subjective and objective prerequisites indicated above, the debtor may propose to its creditors the three proceedings mentioned above which, essentially, have the nature of negotiation and are aimed at achieving the judicially controlled repayment of the contracted debts.

a) Debt Restructuring Agreement

- The proceedings are available not only for the consumer, but also for the smaller practice debtor not able to be declared bankrupt according to the bankruptcy law of 1942;
- the content of the proposal to creditors is liberal. Any form of debt restructuring and satisfaction of credits is therefore possible, even by way of transfer of future credits;
- the plan must in any case ensure the due payment of holders of not distrainable credits (maintenance claims, credits deriving from lack of contributions, credits for taxes due to the State, province, municipalities);
- debts for taxes, VAT and tax withholdings must also be paid in full, in relation to which it is possible only to propose a delay in payment
- the proposal may involve the division of creditors into classes;
- guarantees and methods of liquidation of assets may be proposed;
- it is also possible to provide for the intervention of a third party, even as guarantor, in the event that the debtor's equity is not sufficient to guarantee the feasibility of the agreement;
- it is also possible to provide for reduced payments even of secured debts, provided it is only to an extent no less than what is achievable on the proceeds in the case of liquidation, considering the market value of the assets or rights upon which the right of pre-emption exists, as stated by the crisis settlement bodies.

Where the plan is proposed by a smaller practice (not able to be bankrupted according to the bankruptcy law of 1942) and involves the continuation of the business activity, it is possible to propose a moratorium of up to a year from the approval for payment of creditors bearing privilege, lien or mortgage, except where there is provision for liquidation of assets or rights on which the right of pre - emption exists. The filing of the proposal leads to the suspension of the running of statutory or conventional interest for unsecured creditors.

Where the proposal complies with the requirements of form and substance required by law, the Court by decree fixes the creditors' hearing. That decree orders the forms of publicity of the proposal and the decree, therein including registration in the property registers, in the case where the proposal involves the sale or transfer to third parties of registered immoveable or moveable assets, as well as the automatic stay, under penalty of forfeiture, of all individual enforcement actions, attachments and acquisition of pre - emption rights by prior creditors.

In order to be approved, the agreement must be approved by creditors representing 60% of the amount of credits. The rules of "silence-consent" applies. Secured creditors for which full payment is required are not calculated for the purposes of achieving the quorum, unless they give up their privilege.

In the case of a dispute on the suitability of the agreement by the creditors that have not assented or have been excluded or by any other interested party, according to the cram down rule, the court may approve the agreement if it believes that the same offers satisfaction no less than would be achieved by the creditor after the liquidation of assets proceedings referred to in that Law no. 3/2012.

If approved, it becomes binding on all prior creditors at the time of publicising the proposal and decree. Creditors with later title or right, on the other hand, may not proceed with enforcement on the assets subject to the plan.

b) Consumer Restructuring Plan

- The procedure is only available for consumers;
- the proposal may have the same content as the debt restructuring agreement described in paragraph a);
- for the payment of secured creditors, a moratorium of up to 1 year from the approval may be proposed, unless there is provision for liquidation of assets on which the pre-emption exists;
- particularly important functions are provided to a special crisis settlement body (see more in detail at point 4 below); in particular, a detailed report is required outlining the causes of the debt and the diligence of the consumer in taking on the debts, the reasons for the incapacity to repay, the solvency of the consumer over the last 5 years, the completeness and reliability of the documentation and the probable suitability of the plan over the liquidation alternative;
- approval by creditors is not required.

The filing of the proposal leads to the suspension of the running of statutory or conventional interest for unsecured creditors.

If the proposal complies with the requirements of form and substance required by law, the court, having verified the absence of acts in fraud to the creditors, by decree fixes the creditors' hearing.

With that decree the court may also order the suspension of specific enforcement proceedings which might prejudice the feasibility of the plan until the approval measure becomes final. Unlike, therefore, what happens in the procedure illustrated at paragraph a, there is no automatic stay.

Having verified the feasibility and “merits” of the plan and the consumer, and settled any disputes (cram down in the case of disputes on the appropriateness similarly to what occurs in the case of a restructuring agreement), the court approves the plan, ordering a suitable form of publicity of the measure. The plan thus becomes binding for all prior creditors at the time of performing that form of publicity and from the date of approval they may not bring or continue individual enforcement actions or precautionary actions or acquire rights of pre - emption on the assets of the debtor. The creditors with later or right may not proceed with enforcement on the assets subject to the plan.

c) Liquidation of Assets

- This procedure may be proposed as an alternative to the debt restructuring agreement and the consumer plan illustrated in paragraphs a and b or it may be brought on the application of the debtor itself or the creditors during those proceedings;
- personal maintenance credits, salaries / pensions / wages of the debtor to the extent indicated by the court and required to maintain the family, assets in capital endowment funds and proceeds deriving from the legal usufruct of children's assets are not included in the liquidation as not distrainable assets and credits;
- there is provision for the possibility of discharge for the debtor which allows the debtor to free itself, at the outcome of the procedure, from the insolvency debts not fully satisfied as part of the same and in implementation of the respective liquidation programme. The filing of the proposal leads to the suspension of the running of statutory or conventional interest for unsecured creditors.

Where the proposal complies with the requirements of form and substance required by law, the court, having verified the absence of acts in fraud to the creditors over the last 5 years, declares the liquidation proceedings open, appointing a professional liquidator. That same decree orders the forms of publicity of the proposal and the decree, therein including

registration in the property registers, by the liquidator, in the case where the proposal involves the sale or transfer to third parties of registered immoveable or moveable assets, as well as eventually the automatic stay, under penalty of forfeiture, of all individual enforcement actions, attachments and acquisition of pre - emption rights by prior creditors.

3. The Court with Jurisdiction and Other Authorities Involved

Jurisdiction in relation to crisis settlement proceedings is held by the Court in the place of residence of the consumer or in the case of a smaller practice debtor not able to be bankrupted, the Court in the main headquarters of the business.

4. The Role of the Court and the Crisis Settlement Body

a) The fundamental role in crisis settlement proceedings from over - indebtedness is held first and foremost by the Court, which:

- must assess the requirements of admissibility (formal and substantial) of the proposal;
- must assess the absence of acts in fraud to creditors and the “worthiness” of the debtor in the case of a consumer plan;
- orders the decree fixing the hearing and convocation of creditors, including the appropriate forms of publicity and the automatic stay or, in the case of a consumer plan, the suspension of proceedings that might prejudice the implementation of the plan, or opens the liquidation appointing the professional liquidator;
- approves the debt restructuring agreement proposal;
- performs the assessment of suitability (*cram down*) in the case of a dispute by creditors;
- is responsible for revoking the agreement where acts in fraud to creditors emerge or for cancelling and terminating the same in the cases required by law.

b) Alongside the Court, an even more meaningful role, also due to the novelty of the institution, is attributed to the Crisis Settlement Body (CSB), which in the debt restructuring agreement procedure:

- verifies the accuracy of the data contained in the proposal and the attached documents;
- must communicate the proposal, at the same time as filing the same, or at the latest within three days, to the collection agent and to the tax departments with territorial jurisdiction;
- is required to communicate to creditors the date of the hearing for approval of the debt restructuring agreement;
- deals with registering in the property registers the decree where the agreement relates to registered immoveable or moveable property;
- gathers consents from creditors;
- sends to creditors a report on the consents expressed and upon reaching the percentage, attaching the text of the agreement, to allow for any disputes from creditors within the following 10 days;
- upon expiration of the term, sends to the court the report with the disputes received and the final assessment of feasibility;
- oversees the enforcement phase of the agreement and compliance with the same, communicating any irregularities to creditors;
- assists the debtor in amending the proposal in the case of impossibility of implementing the agreement due to causes not attributable to the debtor.

Similarly, in the consumer plan procedure:

- assists the debtor in preparing the plan, verifying the accuracy of the data contained therein and the attached documents;
- drafts the detailed report to be appended to the plan outlining the causes of indebtedness and the diligence of the consumer in taking on the debts, the reasons for incapacity to repay the debt, the solvency of the consumer over the last 5 years, the completeness and reliability of the documentation and the probable suitability of the plan over the liquidation alternative;
- is required to communicate to creditors the date of the hearing for approval of the consumer plan;
- deals with registering in the property registers the decree that approves the plan;
- oversees the enforcement phase of the plan and compliance with the same, communicating any irregularities to creditors.

The key role played by the CSB is accompanied by broad powers, as the CSB, upon authorisation by the court, may access the:

- tax register;
- credit information systems; and
- risks database and other public databases.

The personal data acquired in exercising those powers of investigation may be processed and stored only for the purposes and timescales of the proceedings and is destroyed upon their conclusion or termination (communicating that destruction to the owner, by registered delivery post or public certified e-mail, within 15 days of the same).

The CSBs, which perform a central and dynamic role in settling the crisis and which constitute figures comparable to the Judicial Commissioner in arrangements with creditors according to the bankruptcy law of 1942, are bodies whose institution and functioning are delegated by law to special ministerial regulations that still today have not yet been enacted.

Those CSBs must, however, be registered on an appropriate register kept by the Ministry of Justice, which lists by law, upon request, settlement bodies at the Chambers of Commerce, the social secretariat and the professional associations of lawyers, accountants and accounts experts and notaries as well.

Pending the ministerial regulations, the functions and powers of the CSBs may be performed by professionals, even in associated form, in possession of the requirements to assume the role of trustee in bankruptcy, as well as by notaries, appointed by the Court. In the very limited practice existing to date, the debtor still requests, before submitting the agreement and / or plan proposal, the appointment by the Court of a professional (possibly indicating some alternatives, usually professionals who perform the role of trustee in bankruptcy) to perform the functions of the CSB.

Against the fundamental role of the public nature played by the CSB guaranting the independence and professionalism of its members, the law provides for the criminal liability of the same in the case of false statements in relation to: a) accuracy of the data contained in the proposal or the attached documents, b) feasibility of the plan and c) reports required by law. That offence is punished with the penalty of imprisonment from 1 to 3 years and with a fine btewen €1,000.00 to €50,000.00. The same penalty is imposed on any member of the CSB or professional who causes harm to creditors by omitting or refusing an act in this role.

5. Legal Requirements for Entering into Consumer Insolvency Proceedings

The main prerequisite for accessing the insolvency proceedings regulated by law no. 3/2012 is the state of "over-indebtedness", defined as *"the situation of ongoing imbalance between the obligations assumed and the liquid equity readily available to cover them, which leads to significant difficulty in fulfilling the obligations or the definitive incapacity to fulfil them properly*". The main indicators of irreversible crisis include: withdrawal of credit lines or suspension of bank credit with demand for immediate return, enforcement proceedings in progress and definitively established tax debts in the process of recovery.

Further prerequisites, of a subjective nature, are provided in a negative sense, as the restructuring agreement and consumer plan proposal are not admissible if the debtor:

a) has made recourse to one of the crisis settlement proceedings from over - indebtedness within the last 5 years;

b) has suffered, for reasons attributable to the same, the cancellation, revocation or termination of the agreement or the plan;

c) has provided documentation that does not allow for the full reconstruction of his economic and capital situation.

6. Disclosure and Other Formal Requirements

The debtor who formulates a crisis settlement proposal from over - indebtedness in accordance with one of the proceedings regulated by the new law is required to give complete "disclosure" of everything that forms his equity.

With the restructuring agreement proposal, the following must in fact be deposited:

- list of creditors with indication of the sums due;
- list of assets of the debtor;
- disposal acts completed in last 5 years;
- certification of feasibility of the plan;
- list of current costs for sustaining himself and his family;
- indication of members of family unit with civil status certificate;
- in the case of a smaller practice debtor not being able be declared bankrupt according to the bankruptcy law of 1942 (thus not a consumer) accounts records for the last 3 financial years with a declaration certifying compliance with the original.

  With the consumer plan proposal, in addition to the documentation indicated above, a detailed report by the CSB must be filed outlining

- the causes of indebtedness and the diligence of the consumer in taking on the debts;
- the reasons for the incapacity to repay;
- the solvency of the consumer over the last 5 years;
- the completeness and reliability of the documentation and the probable suitability of the plan over the liquidation alternative.

The approval of the consumer plan, based upon the fact that, unlike what occurs for the debt restructuring agreement, creditors are not asked to express any consent to it, requires an opinion by the court on the "worthiness" of the consumer, based upon criteria of reasonableness (the court must assess if the consumer has taken on obligations without the reasonable expectation of being

able to fulfil them or otherwise) and of diligence (the court must assess whether the consumer has culpably caused the over - indebtedness).

Where it emerges that there are initiatives or acts in fraud to creditors prior to approval of the plan, at the hearing for appearance of creditors, the court must revoke the decree opening the proceedings. The agreement and the plan may also be cancelled or revoked where the debtor's wilful misconduct or gross negligence emerges with a view to increasing or reducing the liability or removing part of the assets.

7. Exemptions and Discharge from Residual Debts

a) Assets excluded from the proceedings

There are assets that are not, in any case, touched by the proceedings in question. In particular, with reference to the asset liquidation proceedings, the law orders that the following are not included in the liquidation:

- not distrainable assets and credits;
- maintenance credits;
- salaries / pensions / wages of the debtor to the extent indicated by the court and required to maintain his family;
- assets in endowment funds and proceeds deriving from the legal usufruct of children's assets.

a) Discharge

The law, similarly to what is already provided by the bankruptcy law of 1942, provides at the outcome of the liquidation proceedings the possibility of discharge for the debtor: the debtor is therefore permitted to free himself from the insolvency debts not fully satisfied as part of the same and in implementation of the respective liquidation programme.

The initiative for obtaining that benefit is the responsibility of the debtor who, within a year following the end of the liquidation, may make an appropriate application.

The discharge requires certain "worthiness" of the debtor who:

- must have cooperated in the proper and effective conduct of the proceedings, providing all useful information and documentation, as well as taking steps to ensure the successful conduct of the operations;
- must not have delayed or contributed to delaying the conduct of the proceedings;
- must not have benefited from other discharges within the last 8 years;
- must not have been convicted by a ruling passed in court of any of the offences provided by the same law;
- must have performed in the four years of duration of the proceedings income - producing activity with respect to his own skills and the market situation or, in any case, sought a job and not refused employment offers without reason;
- must not have given rise to the over - indebtedness with recourse to culpable credit disproportionate to his equity capacity;
- must not have put into place within 5 years prior to the opening of the liquidation or during the course of the same acts in fraud to creditors or payments or other acts of disposal of his own equity with the aim of favouring some creditors to the detriment of others.

On the application of the debtor, the court, having verified the existence of the conditions of admissibility and subject to hearing from the creditors not fully satisfied, may issue a discharge order.

8. Priority of Secured and Preferential Claims

The debt restructuring agreement and consumer plan:

- must in any case ensure the due payment of holders of not distrainable credits (maintenance credits, credits deriving from lack of contributions, credits for taxes due to the State, province, municipalities);
- must in any case ensure the full payment of debts for taxes, VAT and tax withholdings (only delay is possible);
- may involve the division of creditors into classes and reduced payment even of secured creditors, provided that this is to an extent no less than what is achievable on the proceeds in the case of liquidation, considering the market value of the assets or rights upon which the pre-emption right exists, as stated by the crisis settlement bodies.

9. Consumer Credit Counselling

There is no form of "*credit counselling*" provided by the law in Italy. There are, however, geographically dispersed organisations, often an expression of consumer movements, which, through their help desks, deal with assisting consumers in situations of over - indebtedness.