CLEARY GOTTLIEB

ALERT MEMORANDUM

JUNE 30, 2015 clearygottlieb.com

Italy's New Restructuring Rules

On June 23, 2015, the Italian Government approved important amendments to the Italian Bankruptcy Act. These amendments follow a major reform in 2012, which introduced U.S. Chapter 11-style proceedings in Italy by modifying the pre-existing *concordato preventivo* proceedings. The amendments are meant to address issues that have arisen in the three years following the 2012 reform.

The new rules: (a) allow creditors to file competing plans in the context of a *concordato*, thus offering voting creditors an alternative to a debtor's plan; (b) introduce specific provisions applicable to a sale of assets by a debtor in a *concordato* and to so-called "stalking horse" offers; (c) facilitate the grant of urgent financing to support the business of a debtor in a *concordato*; and (d) introduce proceedings similar to English law "schemes of arrangements" to allow the out-of-court restructuring of financial claims with the support of creditors holding at least 75% of the relevant claims, thus overcoming *de facto* vetoes by minority financial creditors.

The new rules have been introduced by means of a Law Decree (the "Decree") which entered into force on the day of its publication in the Official Journal (June 27, 2015) and will need to be ratified by Parliament within the following 60 days.[1]

I. Competing plans in a *concordato*

Prior to the Decree, a debtor accessing so-called *concordato preventivo* (*i.e.*, a procedure similar to US Chapter 11 proceedings) was entitled to file a restructuring plan on an exclusive basis. Creditors therefore could only reject or approve the debtor's plan. Faced with such alternative, creditors were often forced to approve suboptimal plans to avoid bankruptcy liquidation.

The Decree seeks to address this issue by allowing creditors holding at least 10% of the overall debt to file a competing plan (unless the debtor's plan ensures payment of at least 40% of unsecured claims, in which case no competing plan is allowed).

Creditors proposing a competing plan may vote on the plan only if they are included in a separate class. Competing plans are submitted to the creditors' vote along with the debtor's plan and the most voted plan is then presented to the Court for ratification.

In case the Court ratifies a competing plan, should the debtor not cooperate in the implementation of the plan, the Court may assign the necessary powers to the judicial commissioner or a judicial administrator. In the event that the plan envisages a capital increase,

[1] In case Parliament does not ratify it within 60 days, the Decree will cease to be effective retroactively.

© Cleary Gottlieb Steen & Hamilton LLP, 2015. All rights reserved.

This memorandum was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Throughout this memorandum, "Cleary Gottlieb" and the "firm" refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term "offices" includes offices of those affiliated entities.

the judicial administrator may adopt the necessary corporate resolutions, thus effectively replacing the debtor's shareholders or board of directors.

II. Competing bids and "stalking horse" offers in a *concordato*

In *concordato preventivo* proceedings, the debtor's restructuring plan is often based on a third party's offer to purchase the debtor's business. In such cases, there is no guarantee that the offer maximizes the value of the business and creditors' recovery.

To address this issue, the Decree provides that the Court – upon request of the judicial commissioner – may order the launch of a competing bid process, allowing interested third parties to conduct due diligence on the relevant assets. Moreover, the initial offer (similarly to what happens with so-called "stalking horse" offers in U.S. Chapter 11 proceedings) may provide for reimbursement of the expenses incurred to prepare the offer in case a competing bidder prevails. Such reimbursement may not exceed 3% of the original offer price.

III. Urgent financing in a *concordato*

With a view to increasing the chances of success of *concordato* proceedings,[2] the Decree introduced new provisions on urgent financing. Under the new rules, a debtor may request the Court to authorize financing to fund urgent business needs up to the filing of the plan.

In general, under the pre-existing rules, a debtor may request the Court to authorize interim financing for the duration of the entire proceedings, provided that an independent expert certifies that such financing is in the best interest of creditors. In practice, however, Courts have been reluctant to grant the authorization before the *concordato* plan is filed.

Under the new rules for urgent financing, there is no need for a certification from an independent expert. The debtor however needs to show that without the financing during the period leading up to the filing of the plan its business would suffer serious and irreparable harm.

The Court must decide on the request within 10 days and, to such end, it may hear the judicial commissioner, if already appointed, and the main creditors.

IV. The Italian way to "schemes of arrangement"

Under Article 182-*bis* of the Italian Bankruptcy Act, a debtor may enter into an out-of-Court debt restructuring agreement with creditors holding at least 60% of overall liabilities, provided that creditors who are not a party to that agreement are satisfied in full. This is a purely consensual arrangement and therefore individual creditors may often exercise a *de facto* veto on the restructuring, even when a large majority of creditors holding claims of the same nature have already accepted the terms of the restructuring.

[2] Equivalent provisions are set out in relation to out-of-Court debt restructuring agreements under Article 182-*bis* of the Italian Bankruptcy Act.

Inspired by English law schemes of arrangement, the Decree seeks to address this issue with respect to the restructuring of financial claims by providing that the debtor[3] may ask the Court to extend the effects of the restructuring agreement to dissenting creditors, provided that consenting creditors hold at least 75% of the debt included in the relevant class.[4] The Court must ascertain that the dissenting creditors were effectively given the chance to participate in the restructuring negotiations and that treatment of their claims under the restructuring agreement is no worse than under any available alternative.

* * *

If you have any questions concerning this memorandum, please feel free to contact Roberto Bonsignore or Carlo de Vito Piscicelli in our Milan office (+39 02 72 60 81) or Giuseppe Scassellati-Sforzolini in our Rome office (+39 06 69 52 21), or any of your regular contacts at the firm.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

[3] Such option is available only to a debtor whose financial debt amounts to at least 50% of its overall liabilities.

[4] A similar provision is set forth in relation to standstill agreements, in order to bind creditors with whom restructuring negotiations are ongoing and who do not intend to become a party to such agreements.

Office Locations

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
Cleary Gottlieb Steen & Hamilton (Hong Kong)
Hysan Place, 37th Floor
500 Hennessy Road, Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Cleary Gottlieb Steen & Hamilton LLP
45th Floor, Fortune Financial Center
5 Dong San Huan Zhong Lu
Chaoyang District
Beijing 100020, 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

ABU DHABI
Al Sila Tower, 27th Floor
Abu Dhabi Global Market Square
Al Maryah Island, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T:+82 2 6353 8000
F:+82 2 6353 8099