

INSOL WORLD



4TH QUARTER 2019

FOCUS: Latin America



The Quarterly Journal of INSOL International

US\$25

The Italian Code of Business Crisis



**By Giorgio Cherubini
and
Giovanna Canale**
EXP Legal
Italy



In Italy, restructuring matters have to date been governed by the Royal Decree n°267/1942. However, the current legislation has been the subject of an important revision, since, on January 12, 2019, The Code of Business Crisis and Insolvency (the "Business Crisis Code") was enacted by Legislative Decree n° 14 of, published in the Official Gazette dated February 14, 2019. The Decree implements the Law n° 155 of October 19, 2017¹.

The Legislative decree consists of 391 articles: a code of considerable complexity, the aim of which is, first of all, to allow the timely detection of a crisis that could affect a company, and secondly, to protect the entrepreneurial business during such a crisis.

The Business Crisis Code contains certain provisions that came into force just 30 days after the publication of the Legislative Decree in the Official Gazette, while others will come into force in August 2020.

In this article, we examine only the provisions that came into force immediately, which are the following:

> **Article 356**, which provides for the establishment at the Ministry of Justice of a Register of Experts who will perform, if appointed by the Court, the functions of receiver, judicial commissioner or liquidator, in the procedures provided for in the Business Crisis Code. This provision is intended to ensure that the relevant mandates are assigned to experts of proven experience and integrity.

> **Article 375**, which introduces new provisions in respect of the organizational structure of a company and reformulates the wording of article 2086 of the Italian Civil Code on the management of a company. Regarding directors' liabilities, the new provisions require directors to apply a higher degree of attention in a situation of crisis, in order to help exempt them from the criminal provisions foreseen by the legislator.

> **Article 378**, which introduces changes regarding directors' liabilities as amendments to articles 2476² and 2486³ of the Italian Civil Code.

A new paragraph in article 2476 of the Italian Civil Code introduces a provision by which the directors of limited liability companies can be liable to the company's creditors in circumstances in which the assets of the company are insufficient to satisfy their claims.

The objective of the new provision is to help ensure the directors act more responsibly in carrying out their duties to preserve the company's assets.

Article 2486 of the Italian Civil Code governs the directors' powers in the period between the occurrence of a dissolution and the time at which the assets of the company are delivered to the liquidators.

> **Article 378** of the Business Crisis Code provides that, in the event the liability of directors is established, and absent evidence of an amount being available to compensate the damage caused by

the directors' actions, the director must pay an amount equal to the difference between:

- a) the net worth of the company at the time the director ceases his/her duties; or
- b) the net worth of the company at the date of opening of the judicial liquidation procedure,

and, in either case, the net worth at the time a cause for dissolution occurs.

All costs incurred and to be incurred are deducted from this difference and, if the company's accounting records are missing or its net worth cannot be determined because of irregularities in the records or for other reasons, damages are liquidated in an amount equal to the difference between the company's ascertained assets and liabilities.

> **Article 379** of the Business Crisis Code introduces important changes the effect of which is to extend the circumstances in which the controlling body or the auditor are required to be appointed by limited liability companies.

With regard to the previous wording of Article 2477 of the Italian Civil Code – which prescribes the circumstances in which limited liability companies must appoint a controlling/auditing body – the thresholds of total assets, revenues from sales and services, and average number of employees during the last year are reduced and, according to the new provisions, the appointment of the controlling body or the auditor indicated at article 379 becomes mandatory for companies which have exceeded at least one of the following limits for two consecutive years:

- two million euro of assets;
- two million euro of revenues; and
- ten employees employed during the year.

The objective of these changes is to facilitate the detection and timely management of a crisis.

It will be clear from the above discussion that the purposes underlying the reforms are to help preserve the company as a going concern and to facilitate the taking of affirmative action by companies and their directors at an earlier stage, in order to prevent crisis situations deteriorating into insolvencies. 🚫

¹ The contents of which was drafted by the "Rordorf Commission", established by the Minister of Justice by a Decree dated October 5 2017.

² Article 2476 Italian Civil Code: "The directors are jointly liable towards the company for damages deriving from non-compliance with the duty imposed on them by law and the articles of association for the management of the company. However, the liability does not extend to those who prove to be without fault and, being aware that the act was to be carried out, have expressed their dissent. Shareholders who do not participate in management have the right to receive from the directors up-to-date information about the position of the business and to consult, including through appointed professionals, the company's books and records relating to management of its business. The liability action against the directors is promoted by each shareholder, who may also request, in the event of serious irregularities in the management of the company, that a precautionary order of revocation of the directors be adopted... Unless otherwise provided in the articles of association, the liability action against the directors may be the subject of a waiver or settlement by the company, provided that a majority of the shareholders representing at least two-thirds of the equity vote in favor and provided that members representing at least one-tenth of the equity do not oppose.

The provisions of the preceding paragraphs do not prejudice the right to damages of each shareholder or a third party who has been directly damaged by wilful or negligent acts of the directors..." Please note that this is the wording of the article before the reform.

³ Article 2486 Italian Civil Code - Directors' powers - : "Upon the occurrence of an event of dissolution and until time of the delivery referred to in Article 2487-bis, the directors maintain the power to manage the company for the sole purpose of maintenance of the integrity and value of the corporate assets. The directors are personally and jointly liable for any damage caused to the company, the shareholders, the creditors of the company and third parties for action or omissions in breach of the provisions of the previous paragraph."