McDermott Will & Emery

Acquiring Italian Distressed Renewable Energy Assets

Handling Contractual Relationships with Insolvent Companies

July, 2013

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BACKGROUND

Between 2006 and 2011, the Italian renewable energy market experienced a real golden age that was driven by highly remunerative incentives. These included generous feed-in tariffs for the photovoltaic (PV) sector and, for other renewable energy plants, in particular wind and biomass, tradable green certificates that were made valuable by the off-take obligations of the state-owned *Gestore dei servizi energetici S.p.A.* (GSE). Under these incentive systems, Italy has become one of the leading producers of electricity from renewable energy sources. In 2013, Italy reached its national and European targets for electricity production from renewable energy sources, seven years ahead of schedule.

The solar PV sector is the dominant renewable energy technology in Italy, favoured by Italy's advantageous geographic position and sun exposure. Between 2008 and 2011, the number of PV plants installed in Italy more than doubled each year; in 2011, Italy was the largest PV market worldwide in terms of new installations. This growth was not sustainable, however, and the situation started to change in 2011 when the Italian Government introduced a system of periodic tariff cuts that were intended to eliminate any feed-in tariffs by 2016. Only one year later, the Government found these cuts were still not sharp enough, so further reduced the incentives and reached a definitive stop on 6 July 2013.

In a market without incentives, the future of the Italian PV sector relies on grid parity. Despite the favourable geographic conditions and typically high electricity prices, grid parity is still far from being reached. The regulatory framework creates significant obstacles and the unpredictability of future income streams and the difficulty of securing long-term power purchase agreements with solvent off-takers means it is currently impossible to obtain bank financing for grid-parity projects. In addition, there has been a significant increase in module prices since the European Commission launched an anti-dumping investigation against PV modules, cells and wafers imported from China.

While the volume of business in the Italian solar market has shrunk dramatically, competition has increased significantly. As a consequence, not only have the larger market players focused on by the media had to file for insolvency, but so too have countless small and medium-sized companies operating along the entire value chain. If not entirely bankrupt, these businesses are at least struggling hard to survive. Many have to sell assets—often grid-connected PV plants or production units—while others are forced to offer significant discounts and still more will open their capital for equity investors.

This situation presents some interesting business opportunities, in particular on the M&A side. Dealing with distressed companies, however, involves additional risks and, for foreign investors, requires particular expertise in Italian restructuring and insolvency regulation. This *White Paper* provides an overview of the key elements of the relevant regulations, identifies specific risks and opportunities and aims to serve as a guide for transactions involving distressed renewable energy companies.

Restructuring Distressed Companies in Italy

BANKRUPTCY AND THE DEVELOPMENT OF ALTERNATIVE RESTRUCTURING PROCEDURES

Following the insolvencies of large Italian corporations such as Parmalat, Cirio and Alitalia, and pushed by the current financial turmoil, since 2008 the Italian legislature has significantly shifted its approach to favour restructuring distressed companies over liquidating their assets. Italian law now provides more effective tools to ensure the preservation of the company's assets and a higher chance of a successful reorganisation of its business to the benefit of all the parties involved.

At the time of publication, Italian Law no. 134/2012 (conversion law of Law Decree no. 83/2012, the Development Decree) is the last of a series of substantial amendments to Royal Decree no. 267/1942 (the Italian Bankruptcy Law) that introduced provisions aimed at simplifying access to alternative restructuring procedures. In particular, reference is made to the new provisions concerning preventative compositions with creditors (*concordato preventivo*) and restructuring agreements pursuant to Article 182-bis of the Italian Bankruptcy Law. In addition, more private out-of-court restructurings are now being implemented through Article 67 paragraph 3 lett. (d) of the Bankruptcy Law.

In relation to the distressed Italian renewable energy (especially PV) market, this new approach by the Italian legislature has certainly made Italian restructurings more attractive to local and international renewable investors.

THE REALITY GAP

In general, companies delay access to restructuring procedures. This is due to the "reality gap" that occurs when companies enter the distress zone. At this point, management usually releases existing corporate reserves in an attempt to show third parties and the market that the company is healthy and enjoying business as usual. Only when the reserves released exceed the reserves accrued does the crisis surface in the difference between the net reported assets and net actual assets, *i.e.* the reality gap. The longer this process takes, the more likely it is that deterioration or collapse will set in.

This is particularly true for those companies operating in Italy that still recall the old perspective of the Italian legislature, which used to penalise distressed businesses by leading them through an almost inescapable piecemeal liquidation. A delayed entrance into restructuring, both out-of-court and in-court, has historically decreased the chances of a successful reorganisation of the business as a going concern, instead forcing the liquidation of assets to satisfy creditors' claims. This explains the attractiveness of the new provisions set forth by the Development Decree, which may give the market new trust in profitable restructuring opportunities *via* a sale through bankruptcy, or restructuring plans or agreements.

RISK ANALYSIS OF CONTRACTS DURING THE PRE-INSOLVENCY SCENARIOS

Claw-Back Risks I

Under the Italian Bankruptcy Law, in cases of declaration of insolvency, the bankruptcy trustee is entitled to exercise claw-back actions against certain transactions, payments and other actions performed by the bankrupt debtor within a period of time prior to the declaration of insolvency (six months or 12 months, known as the look-back period) in order to make them ineffective.

The period of time between the start of economic difficulties and the filing of any restructuring procedure or insolvency declaration by the court (the pre-insolvency zone) is a grey area with uncertain boundaries. While in this zone, creditors are required to make difficult choices that are often dictated more by the fear of mitigating the claw-back risk than the desire to preserve their business with the distressed company.

As a matter of law, should the creditors decide to enforce their claims and stop doing business with the distressed company, the business will be lost and the crisis accelerated. If, on the other hand, the creditors decide to continue doing business with the distressed company, but on a non-customary basis, there is a higher risk of claw-back if the company is later declared insolvent. The same risks may apply to parties interested in acquiring assets from a company in the pre-insolvency zone.

The Italian Bankruptcy Law provides for specific exemptions from the application of claw-back actions which, although broadened in scope over time, can hardly offer guaranteed solutions to creditors or interested parties dealing with debtors in pre-insolvency. According to the Bankruptcy Law,[1] payments for goods and services made by the distressed company in accordance with "customary terms" in connection with the business are not subject to claw-back actions. The general

[1] Article 67 paragraph 3 lett. (a)

purpose of this exemption is to protect all payments made under customary terms that enable the company to continue operating its business as usual.

Whether or not a term can be considered "customary" and thus shelter a claw-back risk, should be assessed on a case-by-case basis, as Italian law does not offer clear guidance.[2] Certainly, all payments not strictly related to the company's business should be excluded from such shelter and remain subject to claw-back.

The timing of payment is also relevant. According to Italian case law, it could be argued that, in general, advance payments, retainers and delayed payments are all potentially subject to claw-back, with some exceptions.[3]

While waiting for the case law to reach a conclusion, the safest scenario legally seems to favour entering into contractual terms with the debtor within a restructuring process that is expressly exempted from claw-back (see below Article 67 Restructuring Plans).

STAY OF PROCEEDINGS RISK

As mentioned above, the creditor's choice to enforce its claims and stop doing business with the distressed company would cause the acceleration of the insolvency status, which may bring on an insolvency declaration. From that moment, however, all proceedings against the distressed company are legally stayed,[4] in order to allow all creditors to be satisfied on equal terms (*par condicio creditorum*). This means the creditor should think carefully before enforcing its claims and bearing costs and fees to get a Court decision that would eventually become no longer enforceable or useful.

CRIMINAL LIABILITY RISK

In addition to the risk of claw-back actions and the stay referred to above, another issue relates to criminal liability for bankruptcy crimes to which such parties (and creditors in general) interacting with a distressed company within the pre-insolvency zone could be exposed. In fact, should such parties take advantage of the company's distress to be unlawfully preferred and satisfied to the detriment of all other creditors, *i.e.,* in breach of *par condicio creditorum*, these could also be exposed (together with the debtor's management) to criminal liability for fraudulent bankruptcy.[5]

Potential Buyers' and Creditors' Approach within the Insolvency Zone

POTENTIAL BUYERS: ACQUIRING ASSETS FROM INSOLVENT COMPANIES

Sale of Business

Once insolvency is declared, a bankruptcy trustee (or a commissar in case of an extraordinary administration procedure[6]) is appointed, with the general aim of liquidating the company's assets and equally satisfying all creditors according to their priority rankings.

Under the reformed Italian Bankruptcy Law, the bankruptcy trustee should now also pay close attention to the preservation of the value of the company by continuing the business, if at all possible, as a going concern in order to sell it as a whole to potential interested buyers.[7] Only if the business cannot be sold as a going concern will the trustee then consider liquidation on a piecemeal basis.

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[2] While the law does not clearly define "customary terms", commentators are divided between the chronology theory (customary terms mean "on-time payments") and the market theory (customary terms mean those consistently applied under such contracts in the relevant market).
[3] With respect to delayed payments, Italian case law has argued that these could be qualified *in* the broadest sense as financing arrangements that would as such be deemed out of the scope of this provision of law and not benefit from its shelter (see Milan Tribunal sec. II 3 May 2012 no. 5115; Monza Tribunal sec. III 24 April 2012, holding that "delayed payments not made according to the conditions agreed by the parties, with modalities other than those agreed, and under specific circumstances, cannot be considered as customary terms: therefore exclusion set forth under Article 67 paragraph 3 lett. (a) will not apply"). If, however, such delayed/different payments terms are provided within a general contractual arrangement aimed at temporarily helping the distressed company, then the same payments, unless uncommon in the industry practice, could, in principle, not be subject to claw-back, pursuant to Article 67 paragraph 3 lett. (a) of the Italian Bankruptcy Law.
[4] Article 51 of the Italian Bankruptcy Law
[5] See Italian Supreme Court no. 16957/2005 and 41333/2006, holding that, for purposes of bankruptcy criminal liability, the party being paid should be aware of the disruption that such payment may cause to the other creditors, and the potential consequence of it leading to insolvency.
[6] Lgs. Decree no. 270/99
[7] Article 105 of the Italian Bankruptcy Law

This sale procedure could start after approval of the liquidation plan by the creditors' committee. The trustee retains the managing power during this phase by determining the modalities of sale,[8] whilst the bankruptcy judge (*giudice delegato*) supervises the whole procedure.

The main criteria for selecting the best offer are the price and guarantees given that the business will be continued and that value, *i.e.,* the workers, will be preserved.

Within this competitive bidding context, price should be the key factor taken into consideration. Potential buyers interested in pursuing an acquisition as a result of bankruptcy should therefore base their offer on all the available information relating to the business being sold. They should also be aware that final adjudication could be suspended by the trustee if a better offer (10 per cent higher) is submitted prior to execution of the sale agreement, or by the judge for serious and justified reasons upon request by the distressed company, the creditors' committee or any other interested party.

Where there is a significant disproportion in price relevant to the specific market, the judge, upon request by the same parties, is also entitled to impede the legal completion of sales within 10 days of submission of the sale related documentation and results by the trustee.

Pros and Cons of M&A involving Insolvent Companies

Commensurate with the opportunity for greater value, acquisitions involving distressed companies also present greater risk, particularly execution risk. In many instances, the buyer is dealing not with a willing seller, but with a coerced seller that is being forced to liquidate by its senior lenders. The buyer may find the seller's principals to be recalcitrant, making it more difficult to get the deal done. Moreover, the distressed seller's creditors (particularly junior lien holders) may attempt to interfere with the sale in order to gain leverage in their negotiations with senior lenders. Each of these risks can, of course, be managed, but any buyer evaluating a distressed acquisition should bear in mind the following favourable (pros) and unfavourable (cons) factors.

PROS

1. Bankruptcy acquisitions provide a number of benefits that are not available outside bankruptcy. The most significant benefit is that the assets are generally transferred to the buyer free of all claims, liens and encumbrances. According to Article 67, paragraphs 3, 105[9] and 108 of the Italian Bankruptcy Law, the buyer receives a clean title and the benefit of a court authorisation insulating the buyer from successor liabilities and other claims and liens previously associated with the assets. Such buyer safeguards represent a clear incentive for investors to look for insolvent companies with which to make deals that exclude pre-sale liabilities.

2. Although the acquisition is carried out by means of a competitive procedure, bidders generally have opportunities to conclude deals at a discounted price because of the absence of warranties.

3. By offering a court-supervised, transparent procedure that facilitates acquisitions, the reformed legislation is aimed at preserving the value of the assets by clearly preferring the sale of a distressed business as a going concern over piecemeal liquidation.

CONS

1. The purchase of an insolvent company's business requires enhanced due diligence to determine the actual value (the assets and liabilities) of the business being bought and, subsequently, careful drafting of the acquisition contract. The due diligence stage is, therefore, key in deciding whether or not to make a proposal and eventually enter the deal.

2. Due diligence must be executed efficiently and expediently, focusing primarily on the mission-critical aspects of the transaction. Under the typical distressed asset purchase agreement, the buyer is given very little (if any) representations and warranties and related indemnities protections (except against eviction)[10] and there is usually no hold-back or escrow provided to the buyer to protect against a subsequently revealed breach.

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[8] Sale can also take place by means of contribution of the company's business (units) into a company/newco.

[9] As opposed to healthy ordinary business sale whereby, for pre-transfer liabilities, the buyer will be held jointly liable with the seller for all debts resulting from mandatory accounting books under Article 2560 of the Italian Civil Code.

[10] In very few cases, the indemnity can be (partly) replaced by a price adjustment procedure and/or payment of the purchase price by installments based on net equity adjustments and/or occurrence of given material events.

3. Unlike a "healthy" M&A transaction, a distressed asset acquisition is usually not a transaction between the seller and the buyer alone. This is especially true of an acquisition of an insolvent company. A buyer in a distressed sale is often required to negotiate with multiple stakeholders, including senior and junior lien holders, trade creditors and an unsecured creditors' committee, plus a bankruptcy judge. Each of these stakeholders may have its own agenda, which may or may not be consistent with the buyer's objectives in the transaction. Dealing with intransigent creditors requires both flexibility and resilience on the part of the buyer.

HANDLING CONTRACTUAL RELATIONSHIPS WITH INSOLVENT COMPANIES

Whilst potential buyers are subject to the competitive bidding procedures outlined above, the Italian Bankruptcy Law also provides a specific regime applicable to parties to contractual relationships with insolvent companies (executory contracts), which should be fully performed after issuance of the insolvency declaration.

According to the Italian Bankruptcy Law, the general rule is that executory contracts are suspended until the trustee, upon authorisation by the creditors' committee, declares the continuance or the discontinuance of the contracts. In any case, the term of suspension can be shortened by the other contractual party, which is entitled to request that the judge fix a term, up to a maximum of 60 days, within which the trustee should take the decision as to whether or not to continue or discontinue the executory contracts.

The contracting party will have no right to object to the trustee's decision to continue or discontinue—this being a right granted by law—nor the right to request performance guarantees, in cases of continuation, or to claim damages in cases of termination of the contract.

Conversely, and most importantly, if the executory contract is continued, any post-insolvency claims will have super-priority over other pre-insolvency creditors' claims.

In addition, contractual termination clauses triggered by insolvency should be deemed ineffective toward the trustee and bankruptcy estate.[11]

New Restructuring Options And Acquisition Opportunities In Italy

NEW APPROACHES: THE DEVELOPMENT OF ALTERNATIVE RESTRUCTURING PROCEDURES

As noted above, the Italian legislature has been enacting provisions aimed primarily at rescuing distressed companies by incentivising alternative restructuring procedures that distressed companies can use to carry out business sales with potential investors.[12]

The high percentage and characteristics of distressed companies using the new procedures suggest that the Italian legislature has succeeded in urging businesses to face and deal with the crisis at an earlier stage. In fact, these companies, unlike those entering bankruptcy, are generally still operating businesses, and their actual distress appears to be less acute.

As mentioned at the start of this *White Paper*, the newly reformed restructuring procedures are preventative composition with creditors under Article 160 of the Italian Bankruptcy Law (the PCC), restructuring agreements (*accordi di ristrutturazione*) under Article 182 bis of the Bankruptcy Law (Article 182 bis) and restructuring plans (*piani di risanamento*) under Article 67 of the Bankruptcy Law (Article 67).

PREVENTATIVE COMPOSITION WITH CREDITORS

A PCC is now the most frequently used restructuring tool provided by Italian law[13] both for large corporations (see, most recently, Mariella Burani Fashion Group and Fondazione San Raffaele) and small enterprises.

The court-supervised stage of a PCC has elements in common with the United States' Chapter 11 reorganisation process. The process commences with the debtor filing a restructuring plan with the court, along with

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[11] Article 72 paragraph 6 of the Italian Bankruptcy Law

[12] Following the Development Decree, in the first quarter of 2013 an estimated 2,700 applications for preventative compositions with creditors were submitted, which was more than double the number of traditional applications (source: Cerved *Monitor of Bankruptcies, Insolvency Proceedings and Business Closures*, available at http://www.cervedgroup.com/c/document_library/get_file?uuid=fc956c22-4ae5-4ec6-8b06-fe9ddd10b7bf&groupId=20536).

[13] Article 160 et seq. of the Italian Bankruptcy Law

- An updated profit and loss and assets and liabilities report
- A complete list of claims, creditors and indications of guarantees and their priority rankings
- An expert opinion certifying the reliability of the business data and the feasibility of the restructuring plan.

Filing the application with the court triggers a three-phase process whereby the restructuring proposal should i) be admitted by the court, ii) accepted by the creditors holding the majority of the debt and iii) approved by the court. The supervisory powers of the court relate to any transaction outside the ordinary course of business, any major settlement and any payment of a pre-petition claim. The court approval binds all creditors, including those that rejected the plan.

After the proposal has been filed, the court may also ask for further information regarding the filed documentation. Should the further information not satisfy the court nor meet the requirements set forth for admission to a PCC,[14] the court, following a motion from the distressed company, a creditor or the public prosecutor, may, if the requirements are met, declare the company bankrupt. This causes, *inter alia*, the company to lose control over the business and forces the liquidation of all assets to creditors, according to priority rankings.

The distressed company may split creditors into different classes and then differentiate the economic treatment for each class. The classification of creditors cannot, however, alter the priority treatment provided by law and the court must supervise the lawfulness of any classification.

Secured creditors cannot vote on the plan unless the proposal provides for a partial payment of their secured liabilities. In this case, they could vote for the portion of such liabilities that will not be paid.

Similar to the US "cram-down" procedure, the court may approve the plan even if the creditor/s of a dissenting class have filed a motion rejecting the convenience of the voted-for plan, provided that the majority of the classes overall accepted the plan (or, where no classes have been formed, which requires a motion to be filed by 20 per cent of the voting creditors), and the court finds that the dissenting creditors would receive an amount not less than the amount they would receive under any other practicable alternative.

Automatic Stay: The White PCC

If the PCC restructuring plan is admitted by the court, the distressed company enjoys an automatic stay of all claims and pending judicial proceedings as of the date the application was filed.[15]

The automatic stay can now be anticipated by introduction of a *concordato in bianco* (the White PCC). The application to the court for a White PCC is made faster by the distressed company filing the request and attaching only the summary information (the company's last three financial statements and a preliminary list of creditors and respective credits), and not having to file the expert opinion.[16]

By the mere application for a White PCC, the distressed company ensures an automatic stay, for at least 60 days, up to a maximum of 180 days, depending on the court's decision. Distressed companies should use that time to prepare an accurate restructuring plan while sheltered from creditors' enforcement actions, seizures and injunctions. The court does not have the power to stop the automatic stay, but only to limit its effectiveness. To prevent this fast-track option being abused, the court is permitted to request information and immediately appoint a supervisor (*commissario*) to manage the distressed company's activity.

Upon receipt of the application for a White PCC, the court issues a decree providing, amongst other things, the deadline by which all other information and documents should be filed. The time given to companies to meet the deadline ranges from 60 to 120 days, and can be subject to further extensions, if justification is provided, for no more than an additional 60 days. Throughout that time, all actions not in the course of ordinary business must be approved by the court.

[14] Articles 160 and 161 of the Italian Bankruptcy Law
[15] Article 168 of the Italian Bankruptcy Law
[16] The application will, however, be rejected by the court if filed during the two years following a previous application already held inadmissible or not confirmed by the court.

Debtor-in-Possession Financing

Lenders also benefit from a PCC as new legislative provisions grant priority rights in favour of lenders to debtors-in-possession (DIP) if financings are made:[17]

- As a result of the implementation of a restructuring plan (future financings) or for the purpose of admitting the distressed company to a restructuring plan (financings already made), provided these financings have been expressly included in the relevant plans and the court has expressly confirmed the priority shield in favour of lenders.[18]
- To support the distressed company during the restructuring process (interim financing) where such financings are not included in the restructuring plans but are always subject to court approval.

With respect to DIP financing, the following should also be noted:

- Lenders are not required to qualify as banks or financial institutions.
- Court authorisation for interim financing can be requested by the distressed company with respect to financing identified only for amount and type even if still subject to negotiations.
- Owing to the importance of the interim financing needed to support a company until final court confirmation of the restructuring plan, a professional, independent expert is required to certify that this financing—to which priority should be given—can best satisfy the creditors' claims.
- The distressed company is entitled to secure the lender (through a pledge or a mortgage) as guarantee for interim financing only if authorised to do so by the court.

Once granted, the financing will not only enable the distressed company to operate the business safely, but will also allow potential buyers to more effectively negotiate the terms of a possible sale transaction.

Executory Contracts

There are also provisions under the Development Decree with respect to executory contracts and their treatment after the filing of an application for a PCC.

The general principle is that[19] executory contracts to which the distressed company is a party at the date of the filing of an application for a PCC will be honoured. Moreover, and different to the treatment of executory contracts under bankruptcy procedures, clauses of automatic termination provided under such contracts will remain enforceable.

Upon application for a PCC, debtors are now entitled to file a motion with the court to authorise suspension or termination of executory contracts.[20] Suspension can be requested by a distressed company for no more than 60 days and the term can be extended only once.

The motion should be substantiated appropriately, with a minimum of background, and accompanied by an updated financial report that provides a reasonable argument that such suspension or termination helps to preserve the value of the going concern and reduce the costs connected with continuing contracts that are not considered to be in the interests of the distressed company.

Where a company applies for a White PCC, Italian case law has held that only suspension, not termination, is acceptable, owing to the summary and preliminary nature of the White PCC application.[21]

Should the court authorise the suspension or termination of executory contracts, the other parties to the contracts become entitled to an unsecured claim, qualified as a pre-petition claim, the amount of which will correspond with the amount due as compensation for indemnity for non-fulfillment of the underlying executory contract.

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[17] Article 161 and 182 bis of the Italian Bankruptcy Law

[18] Shareholder loans and intra-group loans granted for the implementation of a restructuring plan will also be granted priority and paid off up to 80 per cent.

[19] New Article 169-bis of the Italian Bankruptcy Law

[20] Some categories of contracts, such as employment agreements, financing for a specific purpose (*finanziamenti destinati ad uno specifico affare*) and real estate leases, have been expressly excluded from the reach of Article 169 bis.

[21] See *inter alia*, La Spezia Tribunal of 24 October 2012, and Pistoia Tribunal of 30 October 2012 in which the court held that only suspension is an admissible remedy for executory contracts in applications for access to a White PCC.

These new provisions on executory contracts could be used effectively by potential investors, which could negotiate the termination of certain executory contracts as a pre-condition to entering into an acquisition.

PCCs Supporting Business Continuity

A PCC can be used by distressed companies that are pursuing restructuring by either liquidation of the assets or by continuity of the business operations.

In relation to the business continuity option, the following should also be noted:

- The application to a court for a PCC could, *inter alia*, contain a motion to authorise paying the pre-application creditors, especially strategic suppliers. The main purpose is to ensure that goods or services deemed essential for continuation of the business activities and in the best interest of creditors will still be received during the restructuring process.

- Termination clauses provided under executory contracts will not be enforceable. Distressed companies will, however, be entitled to file a motion asking the court to authorise the suspension or termination of such contracts (see above: Executory Contracts).

- Termination is not enforceable for public contracts awarded in favour of the distressed company, as such contracts are certainly of interest to potential buyers.

Claw-Back Risks II

The risk of claw back discussed above in connection with the actions to be taken while in the pre-insolvency zone is still something to be considered by potential buyers and creditors when dealing with a distressed company applying for a PCC. Claw-back risks could arise if the PCC is not successful and the company is eventually declared insolvent by the court.

The Italian Bankruptcy Law, however, expressly exempts from claw-back all actions performed by the distressed company when applying for, or as a result of, a PCC restructuring procedure.

Specifically,[22] claw back actions cannot be exercised against all acts, payments and guarantees issued as a result of i) the implementation of a plan for a PCC or Article 182 bis, nor ii) any act carried out legally after the filing of a mere application for a PCC. Rule ii) above has resulted in an extension of creditors' protection from potential claw-back actions. In light of this extension, following an application for a PCC, all and any

- Actions in the ordinary course of business

- Actions in the extraordinary course of business, if authorised by the court pursuant to Article 161 of the Italian Bankruptcy Law

- Payments to pre-petition creditors authorised by the court as set out above (see above: PCCs Supporting Business Continuity) and

- Actions, payments, guarantees executed/carried out in compliance with the law

- should now be deemed as exempt from the risk of claw-back actions in case of a subsequent declaration of bankruptcy.

- This exemption from claw-back is also deemed to include exemption from any criminal liability for bankruptcy crimes that such parties (and creditors in general) interacting with a debtor could be exposed to, as set out above (see above: Criminal Liability Risk).

ADDITIONAL ALTERNATIVE RESTRUCTURING OPTIONS

While the use of Article 182 bis and Article 67 alternative restructuring options have been overwhelmed by the success of PCCs in Italy, it is still worth reviewing their features.

[22] Article 67 paragraph 3 lett. (e) of the Italian Bankruptcy Law

Article 182 bis Restructuring Agreements

Article 182 bis of the Italian Bankruptcy Law provides that the company may negotiate and execute out-of-court restructuring plans with creditors holding not less than 60 per cent of claims (including intra-group loans). Once agreed, the distressed company can file the restructuring plan with the Companies' Register and the court. The filing must include a report compiled by a professional, independent expert (appointed by the company) to certify the reliability of the data and feasibility of the agreement to ensure the regular payment of those creditors that did not adhere to, or were not parties to, the plan.

For 60 days from when the plan and report were filed in the Companies' Register, Article 182 bis shelters the distressed company from any third party action. Creditors have 30 days to file an opposition to the plan. Once the court has received the proposed plan (and any oppositions), it examines it and, if it is approved, the debtor then files the court-approved plan with the Companies' Register.

Article 182 bis is generally used by companies with a small number of creditors that hold a significant proportion of their debt. The limited number of creditors helps the negotiation with each creditor to be more efficient.

This procedure became more appealing in 2009, after Risanamento, an Italian real estate company, filed for Article 182 bis during an already initiated (though not yet concluded) bankruptcy procedure. The court held that the filing under Article 182 bis cannot prevent or stop, *per se*, a bankruptcy petition. Even though a petition for bankruptcy had already been filed, the court held that parties must await the outcome of the Article 182 bis procedure, favouring Article 182 bis over the other bankruptcy proceedings.

The recent decline of Article 182 bis should be attributed to the benefits of the White PCC, under which the stay of enforcement/injunctive relief-based actions may be obtained more easily and with less documentation. The Italian legislature has reinforced interaction between White PCCs and Article 182 bis by providing that the filing of an application for a White PCC can be followed either by an ordinary PCC procedure,or a filing for Article 182 bis.

After activating the shelters afforded under the White PCC, the distressed company is therefore entitled to pursue restructuring by filing an Article 182 bis restructuring agreement, which then becomes easier to achieve thanks to the negotiation leverage obtained through such protections.

Article 67 Restructuring Plans

Law allows for an out-of-court settlement and agreement with creditors. Creditors are often cautious about dealing with companies on the verge of insolvency because of the risk that any payments they receive might be clawed back by the debtor after a formal insolvency process is commenced. Pursuant to Article 67, any transactions, payments and issuances of securities relating to a company's assets cannot be subject to claw-back actions, if they comply with a restructuring plan approved by a professional, independent expert. The distressed company cannot, however, prevent the filing of other bankruptcy petitions or claims by interested parties.

Generally, because of its private nature, an agreement is reached only with the distressed company's financial creditors, whereas employees and unsecured creditors are usually paid in full. As a mere claw-back shelter, the settlements will not conform with any mandatory priority scheme imposed by law.

Specific Risk Factors in Acquiring Distressed Renewable Energy Assets

As with the acquisition of distressed assets from any sector, thorough due diligence carried out by experienced legal professionals is the first, vital step. An in-depth analysis of the assets and legal relationships that the buyer is going to acquire is the best protection against unpleasant surprises.

Contractual representations and warranties, in turn, are not an adequate tool for investment protection when dealing with distressed companies. In fact, when selling assets from the insolvent estate, the insolvency administrator will typically not want to give any representations or warranties at all. Representations or warranties given by a company in a pre-insolvency period will offer little protection, as the company might fall insolvent before such warranties can be enforced. As a consequence, the risk is all on the buyer's side, and the buyer should take that into consideration when making an offer and may try to secure itself by retaining part of the purchase price for a stipulated period.

Specifically in relation to renewable energy assets, particularly operational PV plants, the focus of the due diligence is clear. The value of a PV plant is mainly determined by the income stream generated from the sale of electricity and the feed-in tariff incentives. Should a PV plant lose its entitlement to operate, to feed electricity into the grid or to receive the feed-in tariff

incentive, the effects are dramatic and its value immediately plummets close to zero. Determining the validity and enforceability of building permits, grid connection rights, land use rights and feed-in tariff entitlements are therefore the primary object of any due diligence exercise.

The value of a PV plant is further determined by the warranty claims that the purchaser may be entitled to raise against parties other than the distressed seller, *i.e.* the construction company, component manufacturers and the operation and maintenance company. For this reason, any related contracts, and the financial solidity of the respective counter-parties, deserve significant attention.

Permits

In Italy, the construction and operation of renewable energy plants of a certain dimension is typically authorised by the single permit, the *Autorizzazione unica* (AU).

The AU is issued at the end of a complex and rather lengthy administrative procedure, which involves all the authorities/entities having competence over the PV project. To avoid complications and accelerate the authorisation process, developers often tend to make use of simplified authorisation procedures that the law offers for smaller plants—usually those not exceeding 1 MWp—such as the Simplified Authorization Procedure (PAS(or the Certified Notification of Commencement of the Construction Works (SCIA/DIA). Buyers must check carefully if the plant is of the right size to qualify for the simplified authorisation procedure, as this depends not only on the individual plant but on an overall assessment that takes into consideration neighbouring projects. Also, unlike the AU, the simplified authorisation procedures place responsibility on the applicant to check the necessity of obtaining additional permits and involving all competent public bodies. A mistake can result in a loss of the permits even years after the start of operations.

Obviously, the buyer will also have to verify that the building permit has not been challenged, that terms for legal challenge have expired and that there are no reasons for a revocation of the permit, such as non-compliance with conditions and obligations provided in the permit or its annexes.

Entitlement to Incentives

Incentives, whether in the form of feed-in tariffs or green certificates, represent the major source of revenues of a renewable energy plant.

The fact that the GSE has formally confirmed the award of the incentives does not provide sufficient certainty that the respective plant will continue to be entitled to them. The GSE grants the incentives on the basis of certain documents uploaded by the applicant on the GSE's web-portal, but reserves for the entire duration of the incentives the right to make site visits and carry out other controls to check if the plant fulfills all the legal requirements for obtaining the incentives. The GSE is entitled to revoke the incentives and claim back incentives paid in the past, including interest, if it is not satisfied that all conditions are being met. Buyers of renewable energy plants are therefore well advised to carry out their own investigations to ensure the plant fulfills all the legal requirements for obtaining the incentives.

Typical examples of problems that may appear after the initial award of the incentives and may give cause to a revocation of them are as follows:

- Evidence is obtained that the plant had not been completed when the applicant notified the grid operator of the completion of works in order to obtain an early start of operations and entitlement to higher incentives. Buyers should compare the delivery documents of the main components of the plant with the declared date of the completion of works.

- The plant that has applied for the (higher) incentives for small plants turns out to be part of a group of plants that should have been considered as one large initiative, either for purposes of building permits or for purposes of the award of the feed-in tariff. The regulatory framework varies according to the type of plant and has been modified several times in the past, so buyers must verify the compatibility of the specific initiative with the rules applying at the time the permits were issued and operations commenced.

- Compliance with certain new industry standards or recycling obligations is sometimes required on a deferred basis so plants may have been temporarily admitted to the incentives but will lose them if they do not comply with the new standards in the given timelines.

- Plants that have received specific incentives owing to their installation on property owned by the public administration may risk losing their incentives if it turns out the public administration had acquired the land through an unlawful process, or if the public administration transfers the property to a private party.

- Greenhouse PV plants may lose their specific incentives if it transpires that the greenhouse does not exist for agricultural purposes but instead serves only as a mounting structure for the PV modules.

Real Estate Agreements

In Italy, renewable energy companies do not typically purchase the real estate on which production facilities are installed, but instead rent it under a surface right agreement. A surface right entitles the company to build and operate the plant on land owned by a third party without losing ownership of the plant to the landowner. If the land is repossessed for any reason, the surface right remains unaffected.

Attention must be paid that, upon registration of the surface right, no mortgage or other third party rights had been registered on the land. Otherwise, these registered encumbrances would extend to the surface right and the company would not benefit from the protection. The existence of mortgages or other encumbrances on the land, and their extension to the surface right, does not hinder the issuance of the permits, nor the award of the incentives. The buyer of a renewable energy plant cannot, therefore, rely on the public administration having already verified the situation as regards the real estate, but must instead make its own investigation. Typically, this is done by engaging a Notary Public to verify the registration in the real estate register for the past 20 years and to issue a report confirming the absence of prejudicial third party rights. This report should also show whether or not the land has been transferred through inheritance or donation in the past, as such transfers could be challenged by legitimate heirs.

Surface rights typically provide for a payment of the consideration in installments throughout the entire duration of the right, and the land owner has the right to terminate the agreement if the surface right holder fails to pay the installments. Buyers should therefore request evidence of the payment of all installments for the surface right and, ideally, a statement from the land owner that there are no disputes pending in relation to it.

EPC Contract

Different risks may arise in the acquisition of a renewable energy plant from a distressed entity, depending on the status of the project at the time of the filing of the insolvency procedure. Examples include whether or not the plant has been completed and accepted and if there are any development/construction or default/operational risks. In any case, the risk profile for each project will depend on several specific aspects.

Turnkey engineering procurement and construction (EPC) contracts have been used extensively for renewable energy projects in order to achieve financing for the projects and shift the development and construction risks away from the special purpose vehicle and the financing entities. The potential buyer should therefore conduct legal and technical due diligence and a risk evaluation on the EPC contract.

It is very common that the same entity (or part of the same group) serves as supplier, developer, EPC contractor and operator on its own projects, as this allows the principal to obtain guarantees on the entire system from one single entity, without having to identify the precise cause for a malfunction or underperformance of the plant. While this system works well in case of solvent EPC contractors, it carries a higher degree of risk in the event the EPC contractor is insolvent, unless adequate protection is provided in the contract. Specific issues which that should be considered by a buyer include the following

- **Securities:** The potential buyer has to assess whether or not the securities in place are appropriate and ensure that these can be called on effectively in the event of formal insolvency. This is particularly true for the defects and performance warranties that typically have a duration of two years from provisional acceptance of the plant. Relevant securities also include the assignment of all rights vis-à-vis subcontractors, which in turn requires that the subcontracts allow for such an assignment.

- **Suppliers/Subcontractors of the EPC contractor:** An in-depth analysis should be carried out by the potential buyer on the agreements between the EPC contractor and its main subcontractors/suppliers in order to avoid a situation in which subcontractors/suppliers have not been paid by the EPC contractor and therefore might have rights over the plant and/or the supplied components, and/or the guarantees provided by such subcontractor/supplier are invalidated (see below: Component Warranties).

- **Retention of title/transfer of ownership:** In the event the plant has not yet been completed and accepted at the time of purchase, the agreement on the transfer of ownership of works and components should be reviewed, and possible arrangements on the retention of title or pledges, or similar security interests over components in favour of third party creditors, must be checked.

Component Warranties

The identity of the component providers and the content of the respective warranty agreements or certificates are of utmost importance for the buyer. While buyers often tend to look only at the duration of a warranty (often issued for 10, 20 or even 25 years), they are well advised to also give significance to the details of the warranty, in particular the scope and process of enforcement and the included services. In circumstances where the EPC contractor is in a distressed situation, these details are particularly important as the manufacturer's warranties are then the only warranties available to the plant owner.

If the component manufacturer is (also) distressed, the warranties may turn out to be worthless. In fact, if the manufacturer is declared insolvent, valid warranty claims are treated as unsecured receivables during the insolvency proceedings. It is therefore important for the buyer of a renewable energy plant to verify the identity and solvency of the suppliers of relevant components. The risk of the insolvency of component manufacturers and, consequently, the risk of the respective warranties being rendered worthless, can be insured through specific insurance policies. It may also simply be reflected in a discount on the purchase price.

Operation and Maintenance Contracts

The operation and maintenance (O&M) contract is a long-term agreement with an operator (often the EPC contractor) for the operation and maintenance of the plant. Once the plant has been successfully commissioned and accepted by the principal, it is important to make sure that its operation and maintenance will be carried out properly. It is common, and advisable, to have O&M services carried out by the same EPC contractor and to have the O&M contract have a minimum duration of the same length as the warranty period under the EPC contract.

Crucial points of the O&M contract that should be analysed thoroughly are

- A complete scope of preventive maintenance services
- A clearly defined process for corrective maintenance and repair and replacement services
- Clear rules on the services included in the base fee and the additionally reimbursable expenses
- Periodic reporting obligations
- Adequate availability (if not performance) guarantees, combined with liquidated damages in case of breach of such guarantees.

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For more information, please contact your regular McDermott lawyer, or the authors:

Filippo Mazza: +39 06 462024 18 fmazza@mwe.com

Carsten Steinhauer: +39 06 462024 20 csteinhauer@mwe.com

Leonardo Pinta, Valentina Sarrocco, Anna Vesco, associates in McDermott's Rome office and Riccardo Narducci, trainee in McDermott's Rome office also contributed to the article.

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