

NEW RULING ON SHAREHOLDERS' FINANCINGS IN DISTRESSED SITUATIONS

Earlier this month, the Court of Treviso has further extended the interpretation of article 2467 of the Italian Civil Code. Pursuant to such article, the reimbursement of financings granted to the company by its shareholders is postponed after the payment of the other company's creditors and, if it has been reimbursed in the year preceding the bankruptcy of the company, it shall be paid back to the insolvent company.

The financings captured by article 2467 are those made by shareholders, in whatever form, in a situation in which, given an excessive indebtedness of the company, an increase of its reserves or corporate capital would have been more appropriate rather than additional indebtedness.

Though the above provision is contained in the section of the Italian Civil Code which applies to limited liability companies (S.r.l.), several judgments have been issued aimed at applying the relevant principle also to other types of companies, such as the joint stock companies (S.p.A.), to the extent that such companies can be considered comparable to an S.r.l. having a limited number of shareholders and granting them broad access to the company's information.

On the contrary, other rulings have adhered to a stricter interpretation of the foregoing rules, hence denying their extension to companies different from an S.r.l. (for instance, ruling No. 11552 issued by the Court of Milan on 16 November 2017).

On 12 March 2019 the Court of Treviso has further extended the interpretation of article 2467 of the Italian Civil Code by applying it to a financing granted by the ultimate shareholder, i.e. not the direct shareholder of the distressed company but the individual holding a participation in the distressed company's shareholder. According to the Court's ruling, article 2467 of the Italian Civil Code *"is the expression of a general corporate law principle, thus applicable to all situations whereby a sponsor, given its relationship with the company, can take advantage of privileged information not disclosed to other creditors"*.

In light of the foregoing, attention should be paid where financings are made available to distressed companies by their shareholders - either direct or indirect - that can take advantage of information not available to external creditors.