

LOANS GRANTED BY SHAREHOLDERS OF DISTRESSED COMPANIES - THE ITALIAN SUPREME COURT CONFIRMS THAT ARTICLE 2467 OF THE ITALIAN CIVIL CODE ALSO APPLIES DURING THE ORDINARY COURSE OF BUSINESS OF THE COMPANY

The Italian Supreme Court decision No. 12994 of 15 May 2019 provided further clarifications on the scope of application of Article 2467 of the Italian Civil Code, the main provision governing the subordination of loans granted by shareholders of distressed companies.

The Italian Civil Code provides that loans granted by shareholders are subordinated to the satisfaction of all other creditors, to the extent that there exists a material imbalance between the company's equity and its indebtedness or a financial situation that would suggest an equity injection as being more reasonable than a loan.

It has always been controversial whether shareholder loans are to be treated as subordinated claims only in an insolvency scenario or whether the rule also applies to the repayment of loans during the ordinary course of business of the distressed company. With the above decision, the Italian Supreme Court has clarified that the provisions set out in Article 2467 of the Italian Civil Code shall also apply during the ordinary course of the business of the company, provided that the conditions described in the paragraph above are still satisfied at the time of the shareholder's request of the reimbursement.

The decision of the Court is based upon a strict interpretation of the reasons underlying the subordination of shareholder loans granted to distressed companies. In particular, it has been argued that the intention of the regulation is not to set a ranking of creditors in an insolvency scenario.

The regulation intends to postpone the repayment of shareholder loans after the satisfaction of external creditors, in order to reduce the risk that shareholders of undercapitalised companies provide financing to the company through a loan rather than a share capital increase, thereby transferring business risks to companies' creditors and other stakeholders. The other reason of such treatment is that shareholders, unlike the other creditors, have access to all the information related to the company, and thus they should be better aware of the financial situation of the company.

On the basis of such reasoning, the Supreme Court concluded that a shareholder loan granted in the above-mentioned circumstances may not be reimbursed during the ordinary course of business of the company (and thus even before the opening of an insolvency proceeding), if the company's directors ascertain that at the time of the shareholder's request the company is still experiencing the situation of excessive indebtedness referred to in Article 2467 of the Italian Civil Code. Hence, the shareholder loan may be reimbursed only when the company ceases to fall within the scope of the provision.

The Supreme Court pointed out that the same assessment is to be carried out by the judge in a proceeding brought by a shareholder petitioning the repayment of the loan granted to its company. The judge must therefore reject the request of reimbursement if it appears that at the time of the judicial decision there still exists a situation of excessive indebtedness and, therefore, the company still meets the conditions referred to in Article 2467.