Asset deals: the right choice under Italian law?

October 09, 2011

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When structuring an acquisition, vendors and acquirers often opt for an asset deal, taking into account their respective needs and the advantages offered by this type of structure.

Deal makers are generally quick to see the positives in asset deals. Acquirers tend to assume that such deals allow them to acquire only the going concern that interests them, while ensuring that they do not inherit debts and liabilities deriving from the period before the sale. As a rule, such acquirers tend not to conduct in-depth due diligence in the way that they would do for a share deal, as their aim is to pick and choose which assets to buy. From the vendor's perspective, it obtains the financial benefit of the sale without being compelled to manage the company with a new shareholder. In addition, tax benefits may be available and will be considered by the parties in choosing the form of the deal.

This view of the advantages of asset deals may be justified to some extent. However, certain crucial issues may arise from the fragmentary and ambiguous Italian legislation in this area.

There are few provisions on asset deals in Italian corporate law; they can be summarised in the following main principles:

- Assignment of the agreements - the acquirer acquires all the agreements related to the going concern that it purchases, except for those defined as personal (ie, contracts that were executed for reasons specific to the vendor). The other party to an assigned agreement can terminate the agreement only for just cause and within three months of the sale. However, the vendor is liable in the event of termination.

- Transfer of receivables - the transfer of receivables is effective in respect of third parties from the date on which the asset purchase agreement is registered in the relevant company register.

- Debts related to the acquired going concern - the vendor continues to be liable to third parties for the debts related to the going concern, unless the creditor in question expressly releases it from such obligation. The acquirer is liable for debts which are registered in the mandatory accounts.

- These rules, which are contained in the Civil Code, appear simple; however, they do not adequately regulate a number of key aspects of asset deals. Moreover, conflicting judgments of Italian courts have led to different interpretations of the legal provisions on asset deals, thereby

increasing uncertainty on this matter.

Agreements relating to going concerns are automatically transferred to the acquirer. However, the law fails to clarify two key points:

- Outstanding liabilities that derive from the transferred agreement (eg, unpaid considerations to the counterparty) are either transferred together with the agreement or remain in the vendor's charge. The prevailing case law indicates that such liabilities are transferred; therefore, the acquirer should be liable to the counterparty to the agreement. However, this interpretation has been criticised for apparently contradicting the principle whereby the acquirer is liable to third parties only for debts registered in the mandatory accounting books. The same body of case law suggests that the general principle which limits the acquirer's liability relates only to non-contractual debts, despite the fact that the relevant statute does not differentiate between contractual and non-contractual debts.

- In the event of termination of the transferred agreement by the transferred counterparty, the vendor is liable to either the counterparty or the acquirer. There is considerable uncertainty on this point. One line of case law states that the vendor is liable to the counterparty, which lost profits as a result of the termination of the agreement. However, in other cases the courts have held that the vendor is liable to the acquirer, since the latter acquired (and paid for) an agreement that became ineffective before its expiry date.

Complete uncertainty also surrounds the issue of receivables and debts that relate to the going concern and were incurred before the sale (ie, when the vendor was the owner).

The relevant corporate legislation indicates only the operation of liabilities and debts in respect of third parties. It fails to clarify whether the acquirer inherits liabilities and debts in acquiring the going concern or whether the vendor remains liable for all debts that originated during its ownership.

Here, too, Italian case law has split into two conflicting lines. One argument is that such liabilities are part of the going concern and transfer to the acquirer, and that the purchase price should be calculated accordingly. The opposite interpretation is that each party is liable only for debts that originate during its period of ownership of the going concern. On this analysis, after the execution of the asset purchase agreement, the vendor remains liable for the debts incurred before the sale.

There is a real risk that the gaps in legislation may jeopardise the will of the parties to an asset deal. The different interpretations of the relevant laws make it difficult to predict the potential consequences of an acquisition, especially in the event of litigation arising from the asset purchase agreement. A Supreme Court decision on these issues would resolve the case law conflicts that arise in such disputes, removing uncertainty and providing clear directions to be followed by the judiciary. In the meantime, advisers to acquirers and vendors must make every effort to reflect the will of their clients, drafting the most detailed agreements possible to address all topics that are not clearly governed in law.