# THE ROLE OF THE EXPERT WITHIN ITALIAN NEGOTIATED COMPOSITION

Claudio D'Alonzo *

* Faculty of Economic, Political and Social Sciences,
Catholic University "Our Lady of Good Counsel Country", Tirana, Albania

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## Abstract

The aim of this paper is to investigate the role of the expert within negotiated composition under the Italian Insolvency Code. The interest in the research is driven by the recognition that the Italian lawmaker has taken measures to support businesses, aimed at preventing their economic and financial conditions from suffering adverse consequences and degenerating into irreversible collapse (Manzini & Carelli, 2022; Donati, 2020). The purpose of negotiated composition is to implement Directive (EU) 2019/1023 (Insolvency Directive), whose underlying criteria are the so-called rescue culture and the favour for negotiated solutions (Bottai, 2021).

Negotiated composition is an out-of-court process commenced by a debtor and aimed at reorganising a business (Pacchi, 2022), whether corporate or individual (Minervini, 2021). It focuses on addressing a business's economic and financial challenges before they necessitate formal insolvency procedures, meaning the debtor retains control over their assets. This approach ultimately offers various potential solutions to both a business and its creditors, allowing them to choose the most favourable resolution (Pacchi, 2022). Only a debtor may initiate a negotiated composition; creditors cannot activate or influence the process, nor suggest solutions to resolve their debtor's crisis (Manzini & Carelli, 2022). This procedure is open to any business facing asset or financial imbalances that might lead to crisis or insolvency (Fauceglia, 2021). In a negotiated composition, a debtor and their creditors work

collaboratively, engaging in discussions to find a mutual solution to the business's financial and economic difficulties.

The process starts when a debtor submits an application to the Chamber of Commerce in the area where their business is registered, requesting the appointment of an independent restructuring expert. A Commission selects this expert from a designated list, ensuring each candidate meets specific qualifications. Aspirant experts may self-certify their compliance with training requirements and their past negotiation experience, allowing for a carefully considered selection process. Upon receiving the application, the Chamber's secretary must notify the Commission within two days, providing a summary note that includes details on the business's turnover, employee count, and sector of operation. If the proceedings begin without a request for protective measures, both the petition and expert appointment remain confidential. As a result, creditors not participating in the negotiations remain unaware of the ongoing negotiated composition process (Manzini & Carelli, 2022).

This paper aims to analyse the role of the appointed restructuring expert under Italian law, a new position that prompts questions about its precise nature and responsibilities. Although the law specifies qualifications, duties, and guidelines for the expert, the research seeks to clarify this role further. Since business continuity impacts areas beyond economics, the study takes a legal perspective, reviewing relevant legislation and literature, though there are limited case studies available.

The investigation into the figure of an expert starts from the consideration that their presence is essential to facilitate an agreement between a debtor and their creditors (Passantino, 2021). To this end, an expert must meet strict independence requirements as outlined in Article 2399 of the Italian Civil Code (1942) and must have no personal or professional ties to the debtor who requested their appointment. An expert acts as a neutral, independent, and skilled professional in corporate crisis matters, committed to conducting negotiations professionally and confidentially. The parties involved in negotiations have the right to question the independence of the appointed expert and, if necessary, request their replacement. This possibility highlights the relevance of the specific characteristics an expert must be endowed with (Ranalli, 2021). The expert's impartiality reassures creditors and fosters transparency, discouraging all parties from engaging in unethical practices (Greggio, 2022). Unlike previous legislation, Article 14.2 of the Italian Insolvency Code (2019) allows the appointed expert to access online databases for all necessary documents and information to support negotiations. Likewise, creditors may upload relevant information about their claims and provide any requested data via an online platform, which they can access to view documents submitted by their debtor at the start or during negotiations.

However, both the expert and creditors require the debtor's prior consent to access this information. This consent is generally expected, as refusal would hinder the negotiations and could indicate a lack of good faith or misuse of the negotiated crisis resolution tool, potentially stalling or ending the process. To evaluate the role of an expert, it is useful to consider the protocol guiding the conduct of negotiated composition. This protocol allows the petitioner debtor to know in advance how the expert will act (Ranalli, 2021). Essentially, it is a soft law tool, outlining best practices, principles, and recommendations that an expert should follow during crisis resolution negotiations. Article 13.2 of the Italian Insolvency Code (2019) references this protocol, suggesting it functions as a regulatory standard. As such, the protocol's guidelines are not merely advisory but play a crucial role in evaluating an expert's professional diligence, giving them heightened importance when assessing the expert's conduct and adherence to required standards.

The expert's primary role is to facilitate the reorganisation process (Guiotto, 2021). They are required to summon the debtor promptly to assess the feasibility of such reorganisation. This assessment is based on information provided by various parties, including the supervisory body and the statutory auditor (Meo, 2023). The role of the appointed expert is not to verify the specific requirements for initiating insolvency proceedings but rather to gauge the potential for business reorganisation. While timely action is crucial, there is no strict deadline for convening a meeting with the debtor. The expert's specific expertise is paramount, even with the aid of information from supervisory bodies and online platforms (Zanichelli, 2021). It follows that the obligation to convene the debtor is significant as it helps determine if the negotiated solution has been misused or if reorganisation is no longer viable (Fauceglia, 2021).

The negotiated path is a process designed to prevent the disintegration of a business, and it may start when an expert determines the feasibility of reorganization (Cincotti, 2022). However, if reorganisation appears impractical, the expert informs both the debtor and the chamber of commerce, leading to the procedure's termination (Meo, 2023). Despite this, the debtor can request a continuation of negotiations by suggesting new or previously overlooked circumstances. If the expert agrees with these elements, the proceedings may begin or resume. The reorganisation of a business is central to the negotiated settlement from its inception to its conclusion (Minervini, 2022; Abriani, 2022). It applies to businesses that have the potential to continue operations, even through the sale of the entire business or specific branches (Dentamaro, 2022). The verification of the possibility of reorganisation and the complexity of the economic and financial situation of a business is entrusted both to a checklist and a practical test, which impose on a debtor a critical examination of their own situation, highlighting the path to follow (Carnevali & Tirabusi, 2021; Gambi, 2021). Afterwards, the appointed expert oversees the reorganisation process

and conducts negotiations with creditors and interested parties. Both if there is no possibility of reorganising the business and if negotiations go on in vain for one hundred and eighty days from the appointment without any agreement being reached, the expert's appointment is terminated. In such cases, the expert is required to prepare a final report to be shared with the debtor and the court if protective measures have been issued.

The decision to engage in negotiations lies with the appointed expert, who must be highly qualified and make this decision with careful consideration. If negotiations proceed, the expert will determine the parties involved, which may include current creditors as well as third parties, such as employees or suppliers, who may not have claims against their assignor (D'Alonzo, 2022; Manzini & Carelli, 2022). Additionally, the expert may exclude creditors with insignificant claims or those who are opposed to an out-of-court settlement (Zanichelli, 2021). This highlights the importance of the expert's thorough assessment to ensure both the success of the business reorganisation and to avoid potential liability.

During negotiations, there is often a divergence of interests: creditors seek satisfaction of their claims (even though partial), while a debtor aims for the continuation and reorganisation of the business. It is considered appropriate to place these interests at different levels. For suppliers, negotiations may be less challenging, as it is possible to renegotiate and continue the original business relationships under new terms. The appointed expert, acting as a mediator, is required to align the interests of both creditors and the debtor, guiding them toward a mutually acceptable resolution. When dealing with banks and financial institutions, the difficulties connected to the nature of the claim — such as its size, nature, and any changes in its status (e.g., assignment to specialised institutions or management by third parties) — make collective bargaining the preferred approach. In this context, the appointed expert plays a crucial role in fostering trust between a debtor and their creditors, helping them make well-informed decisions (Guiotto, 2021). However, it is also essential that financial creditors engage actively and in good faith in the negotiations, working towards a collective solution to the crisis. The situation is different with reference to employees, as the Italian Insolvency Code places significant emphasis on their rights. Employees must be informed and consulted if key decisions are made during negotiations or the preparation of a crisis or insolvency plan that could affect a large number of them. This ensures that their interests are considered in the process of addressing the business's financial difficulties.

Lastly, a key consideration in the role of the appointed expert is the potential liability that could arise if they fail to perform their duties with due diligence. Liability may occur if the expert's actions prevent or hinder the possible reorganisation of the business (Passantino, 2021). Additionally, if the expert lacks the necessary skills, resulting in

the failure of negotiations and exacerbation of the business's debt, they could be held responsible. Furthermore, if creditors accept a proposal that is not in their best interest due to the expert's failure to provide complete or accurate information, the expert may also be liable. However, if the expert is deemed unsuitable for the task, there is no mechanism for replacing them unless there are issues of non-acceptance or lack of independence. This raises the question of how to address such situations and ensure proper accountability. Although the Italian Insolvency Code does not explicitly address the liability of the appointed expert, their significant role in the reorganisation process raises important questions about the consequences of failing to meet their obligations. Legislative silence on this issue does not mean that the expert's failure to fulfil their duties goes without consequence. In fact, it is reasonable to assume that the general principles of professional diligence and liability apply in this context. As a professional, the expert is expected to adhere to specific standards of care, and failure to do so could result in civil or even criminal liability. If the expert's actions contribute to worsening the debtor's financial situation or to fraudulent bankruptcy, they could be held accountable (Santoriello, 2021). In summary, notwithstanding the legislative silence, it is clear that an expert who fails to perform their duties may be held liable.

The findings show that the expert appointed to lead negotiations between a debtor and their creditors is a new professional, skilled in law, business, and economics (Arlenghi, 2022). Unlike traditional figures in the business crisis landscape, such as a receiver or judicial commissioner, the expert's role is more akin to that of a mediator. An expert must assess the positions of the parties involved in negotiations, facilitate concessions, and propose reasonable solutions. While an expert is not responsible for certifying the accuracy of a business's financial data, they are expected to review documents thoroughly, and they may involve other professionals, such as economic experts or statutory auditors, to assist in the process (Zanichelli, 2022). Importantly, these additional experts must have no personal or professional ties to the parties involved in the restructuring, ensuring their independence. This broad and multi-disciplinary approach highlights the specialised nature of an expert's role in business crisis management. The involvement of an expert in a negotiated composition is essential, and the debtor must fully rely on the expert throughout the negotiations, providing complete transparency about the business's real situation and refraining from withholding any information. While the debtor retains control over the business's management, they are obligated to inform the expert in advance of any extraordinary administrative acts or payments that might contradict the negotiations or the business's reorganization prospects. If the expert determines that such actions are harmful to creditors, the negotiation process, or the reorganisation plan, they must notify both the debtor and the supervisory body. However, the expert's dissent does not bind

the debtor's decision-making; if the debtor chooses to proceed with the act, it remains valid. To protect creditors and third parties, the expert may register their negative opinion in the commercial register, especially if an act by the debtor could harm creditor interests. The key challenge lies in determining the precise criteria for assessing whether an act is truly detrimental, as this judgment must be made with clarity and consistency.

The figure of an expert is relevant also with reference to protective and precautionary measures. They must evaluate whether the measures in place are effective and conducive to the successful outcome of the negotiations. If these measures are deemed unnecessary or obstructive, the expert has the authority to request their reduction or revocation. In situations where the parties involved are at an impasse or have opposing positions, the expert can use these protective measures as a strategic tool to facilitate progress in the negotiations, ultimately helping to create conditions that favour a successful resolution of the business crisis (Tribunale Di Bologna Sezione Quarta Civile e Procedure Concorsuali Decreto N. R.G. 3267/2022). The central role of an expert is confirmed by the fact that in the event of a negative outcome of negotiations and subsequent submission of a simplified composition with creditors application, they must declare that negotiations were conducted fairly and in good faith.

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