ItalyEurope24

07 Apr 2017

The Fondo Atlante rescue of two Venetian banks raises complex legal issues

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Two very important regional banks in the Nord-East of Italy are now under the control of Fondo Atlante – an investment fund that is financed by a variety of private and public investors: most notably, Cassa Depositi e Prestiti, Unicredit, Intesa Sanpaolo– and the next step will be to strive for a merger of these two banks: Banca Popolare di Vicenza (BPVI) and Veneto Banca (VB).

Two banks that are traditionally rooted in a region of Italy most commonly known for its rich, industrialized and export-oriented companies. It should also be noted that the impact of this metamorphosis is not merely regional and therefore relevant only to a part of Italy, but – in view of the European bank crisis – could potentially affect the entire country and Europe as a whole.

This quick makeover of the banking system has had far-reaching implications for Italy's civil law system; and the general crisis of the Italian banking system has hit the aforementioned banks particularly hard. The present nominal value per share now amounts to almost zero and the prospect of positive change is unlikely.

In this scenario, Fondo Atlante made a mediation proposal to the shareholders: an indemnity of about 15% of the original price per share (€9 for BPVi and up to €6.1 for VB) for those who had purchased shares in the last 10 years. Thus, as the situation currently stands, 94,000 BPVi shareholders and 75,000 Veneto Banca shareholders decided whether to accept.

In these circumstances, acceptance of the proposal will, on the one hand, enable the recovery of the offered amount, while, on the other, – and much in the spirit of a proper transaction – entail a waiver of any further claims or actions; a decision on these matters was made March 15 2017 (later extended for a week -Ed) which, in addition to the delicate (and consequential) nature of the decision itself, puts time pressure on the investors.

Furthermore, the banks have said the transaction can be executed only if 80% of the shareholders approve it.

The aim of this compromise proposal is to avoid the threat of massive legal action against the financial institutions. The banks are especially exposed to liability stemming from a breach of articles 21 ss. T.U.F. and of the CONSOB regulation, art. 27 ss., reg. CONSOB 11522/1998, which both determine the intermediator's duties.

The main source of liability comes from a violation of information duties: for instance, the bank should have informed the investors of the inherent risks involved in the acquisition

of unquoted shares (listing of said banks only occurred one year earlier). Interestingly enough, the BPVi has already been condemned for the exact same reason by the Bank Ombudsman (cd. Giurì bancario) and ordered to pay damages in favour of the appellant, who sued the bank before the ADR organ (decision 20.10.2016). The challenges being raised in Italian court cases are bound to play out not only on a national stage, but also have to factor in a European and international point of view.

Furthermore, the financial and economic consequences will inevitably be dictated by the choices that judges will make: does the violation of information duties lead to the termination of contracts (with about 169,000 shareholders!) or is legal protection primarily concerned with the maintenance of the contract and therefore allow only for compensation of damages?

The question is sophisticated and connected to the traditional rule of the Italian legal system, which allows for termination only in specific and nominated cases, while not intending it in cases of a general breach of information duties.

However, in the last few years Italian case law has in various occasions shown proof for its appreciation of the general clause of good faith, fair dealing and transparency. The question is whether the breach of information duties may be considered only in terms of a pre-contractual liability – which for the Italian legal system only implies the compensation of damages – or if being in violation of such duties constitutes a proper breach of contract leading to termination.

In practice, the bank and the client conclude a ‘frame-contract' whereby the former must fulfil its information duties towards the latter, taking also into account the client's situation, goals and readiness to assume risks. This ‘frame-contract' should supply the necessary information for all the single financial operations that might follow. While some decisions – like the one I mentioned before – only compensate damages in cases of breach of information duties, in other cases the Italian Corte di Cassazione, or Supreme Court of Cassation, decided to terminate the contracts concerning the single operations because the bank hadn't provided the adequate information in the frame-contract (see Cass. 09.08.2016, n. 16820).

The impact of the choice between these two options is substantial and would lead to diametrically opposed consequences both for the banks and the investors. So, are we very close to a general *revirement* in this crucial field? The world of banking could be on the verge of a revolutionary change.

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