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Banking & Finance

Italy

Law & Practice
and
Trends & Developments

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Giliberti Triscornia e Associati

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ITALY

Law and Practice

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1. Loan Market Panorama

1.1 Impact of Regulatory Environment and Economic Cycles

Before the COVID-19 pandemic, the loan market in Italy was quite vital, and several new leverage finance transactions were taking place, despite the difficult regulatory environment.

The pressure generated by the new rules approved by EU regulatory bodies is forcing the Italian banks to limit the granting of new loans with a higher degree of risk.

The situation is helping the development of an alternative loan market, which is strongly encouraged by the Italian legislator.

As a matter of fact, co-operation between traditional banks and the so-called "challenger banks" or alternative lenders is not rare in the market.

1.2 Impact of the COVID-19 Pandemic

A lot of new deals have been momentarily placed on hold.

Refinancing or restructuring transactions that did not need new finance were, if possible, accelerated in order to avoid the beginning of bankruptcy or pre-bankruptcy procedures.

In the last six months, a lot of the so called "COVID loans" (ie, loans granted by the Italian Republic through SACE S.p.A. and Fondo Centrale di Garanzia) were negotiated and granted by the banks, especially to clients with sound financial credentials.

1.3 The High-Yield Market

The high-yield market has also expanded, thanks to the positive trend of the economy and the development of an alternative loan market, although such kind of financing is mainly used by large companies, which are a minority in the Italian economic environment.

1.4 Alternative Credit Providers

The alterative loan market has seen significant growth in Italy due to the increasingly severe regulations regarding traditional banks and the new provisions of law approved by the Italian legislator. Small and medium-sized companies are using bond and mini-bond financing structures more than ever before.

1.5 Banking and Finance Techniques

Banking and finance techniques are trying to evolve in order to profit from recent amendments in the Italian legislation aimed at promoting alternative lender structures, such as loans granted by credit funds or by securitisation vehicles.

1.6 Legal, Tax, Regulatory or Other Developments

On 22 March 2019, the Italian Supreme Court issued decision no 12777, which basically stated that financing-fronted structures implemented to allow foreign non-authorised entities to lend money in Italy are illegal. The decision also set out certain principles with which fronted structures should comply in order to be permitted. As a consequence, the primary syndications of loans involving non-authorised entities are no longer carried out in the Italian market; syndications are now made mostly on the secondary market, and only in such a way as to comply with the above-mentioned principles.

2. Authorisation

2.1 Authorisation to Provide Financing to a Company

As a rule, lending in Italy on a professional basis vis-à-vis the public is reserved to licensed banks and financial intermediaries registered with the register provided under article 106 of Legislative Decree No. 385 of 1 September 1993 (as amended and supplemented – the "Consolidated Banking Act").

Italian Banks

Italian Banks have to be registered with the register held by the Bank of Italy pursuant to article 13 of the Consolidated Banking Act. In order to be registered, the banks have to fulfil certain conditions set out in the Consolidated Banking Act and in the relevant regulatory provisions issued by the Bank of Italy, including:

- being incorporated in the form of a joint stock company;
- having a registered office and headquarters in Italy;
- having a minimum amount of corporate capital equal to EUR10 million or the higher amount necessary to carry out the activities set out in the relevant programme of activities;
- submitting the deed of incorporation, the by-laws and a programme relating to the initial activities;
- the relevant shareholders having authorisation under article 19 of the Consolidated Banking Act; and
- the relevant directors being eligible according to article 26 of the Consolidated Banking Act.

Italian Financial Intermediaries

Financial intermediaries have to be registered with the register held by the Bank of Italy pursuant to article 106 of the Consolidated Banking Act. In order to be registered, the relevant financial intermediaries have to fulfil certain conditions set out in the Consolidated Banking Act and in the relevant regulatory provisions issued by the Bank of Italy, which are in part similar to the conditions to be fulfilled by banks. The main difference is the minimum corporate capital requirement, which is equal

to EUR2 million or EUR3 million with respect to financial intermediaries that intend to carry out the activity of providing financing through the issue of guarantees.

EU Banks

Pursuant to article 15, paragraph 3 and article 16, paragraph 3 of the Consolidated Banking Act, foreign banks whose registered office is within the EU and which are authorised to carry out banking activities in accordance with the laws of their country of incorporation ("EU Banks") may carry out lending activities in Italy either:

- by establishing a branch office in Italy, in which case the competent authority of the country of incorporation has to send a two-month prior notice to the Bank of Italy; or
- under the free provision of services system, without the need to establish any legal structure in Italy, in which case the Bank of Italy only has to be informed by the competent authority of the country of incorporation of the EU Bank's intention to conduct lending activities in Italy.

Non-EU Banks

A bank which is neither an Italian bank nor an EU Bank may operate in Italy upon the Bank of Italy's prior authorisation either under the free provision of services system, or by establishing a branch.

EU Financial Intermediaries

Financial intermediaries regulation is not harmonised at an EU level. Therefore, the regime set out for EU Banks under article 15, paragraph 3 and article 16, paragraph 3 of the Consolidated Banking Act will apply only with respect to those EU financial intermediaries that are controlled by EU banks whose registered office in the same country.

Alternative Lenders

According to certain amendments introduced into the Italian legislation in recent years, and subject to particular conditions and requirements provided by the applicable laws and regulations, lending activity in Italy can also be carried out by:

- Italian insurance companies;
- Italian securitisation vehicles;
- Italian alternative investment funds; and
- European alternative investment funds.

3. Structuring and Documentation Considerations

3.1 Restrictions on Foreign Lenders Granting Loans

Under Italian legislation, lending on a professional basis vis-à-vis the public is a reserved activity that can be carried out only by certain entities. Unauthorised lenders (whether foreign or domestic) are prevented from granting loans.

3.2 Restrictions on Foreign Lenders Granting Security

No specific restrictions are set out with respect to the granting of security or guarantees to foreign lenders.

3.3 Restrictions and Controls on Foreign Currency Exchange

There are no specific restrictions or controls on foreign currency exchange; there are only reporting requirements.

3.4 Restrictions on the Borrower's Use of Proceeds

Under Italian law, there are no general restrictions on the borrower's use of proceeds from loans or debt securities, except for subsidised loans, which are subject to specific terms and conditions. Recent examples of subsidised loans are the so-called "COVID loans" made available by the Italian government.

3.5 Agent and Trust Concepts

The agent concept exists under Italian law under the form of the *mandato*, while the trust concept has been officially recognised through the ratification of the HCCH Convention on the Law Applicable to Trusts and on their Recognition 1985 (Hague Trusts Convention) under Law no 364/1989.

The only structure commonly used in Italian law financing transactions is the *mandato*, which is a private agreement whereby a party (*mandatario*) undertakes to execute one or more legal acts in the name or on behalf of one or more third parties (*mandanti*). Given that the *mandatario* can act for many *mandanti* and can hold and manage assets on their behalf, there is no need to use a trust structure.

The trust structure is normally used for asset protection and succession purposes.

3.6 Loan Transfer Mechanisms

Receivables Transfer Agreements

The loan transfer mechanisms in the Italian jurisdiction consist of the execution of receivables transfer agreements.

The purchase of receivables is a restricted activity that can only be pursued by entities such as banks, financial intermediaries,

credit funds, securitisation vehicles and other authorised entities.

Different Type of Transfers
The transfer of receivables can be implemented under the following:

- the Italian Civil Code provisions on the transfer of receivables or contracts;
- Article 58 of the Consolidated Banking Act, which allows the purchase of receivables portfolios by banks; or
- the Italian securitisation law, which allows the purchase of receivables portfolios or single names by SPVs.

In order to be effective and enforceable against third parties, a transfer of receivables that is carried out under the Italian Civil Code requires a notification to be made to the assigned debtor(s), while a transfer under the Consolidated Banking Act or the Italian Securitisation Law only needs a publication in the Italian official law journal (*Gazzetta Ufficiale*).

Transfer of Security Package
Any relevant security or guarantee is transferred together with the relevant receivables.

If the transfer of receivables is carried out under the Italian Civil Code, the transfer of the relevant security package will require certain specific formalities in order to be effective (eg, the annotation of the transfer in the land registry, in respect of a mortgage).

If the transfer of receivables is carried out under the Consolidated Banking Act or the Italian securitisation law, the publication in the *Gazzetta Ufficiale* will be sufficient.

3.7 Debt Buy-Back
No specific prohibitions are set out under Italian law with respect to debt buy-back.

Nevertheless, given that the purchase of receivables is a restricted activity, no purchase of receivables under a loan agreement would generally be allowed.

As a consequence, a borrower under a loan agreement may simply repay such loan, and in the event that a shareholder of the borrower intends to substitute the current lender, the preferred structure would be to grant a shareholder's loan to the borrower in order to provide them with the funds to repay the existing debt.

3.8 Public Acquisition Finance
An offer for the acquisition of a public company can only be launched if the bidder is in the position to fulfil its payment obligations in respect of cash consideration, or can adopt all the reasonable measures to ensure that the obligations in respect of non-cash consideration are met. In particular, pursuant to Law Decree No. 58 of 24 February 1998, as amended and supplemented, and CONSOB regulation no. 11971/1999, as subsequently amended and supplemented (the "CONSOB Regulation"), where an offer is for cash or includes cash (even as an alternative), the bidder must file proper documentation with CONSOB evidencing that it has sufficient funds available to it to pay the maximum amount of consideration that may become due pursuant to the offer, by no later than the day before the publication of the tender offer document. Where the consideration includes securities, a copy of the resolution approving their issue must be sent to CONSOB within the same timeframe.

The CONSOB Regulation mainly requires the cash consideration to be secured by a cash confirmation letter (CCL) in a form acceptable to CONSOB. Such CCL usually takes the form of a letter from the debt providers confirming that the relevant funds are available under the relevant tender offer facility.

4. Tax

4.1 Withholding Tax
As a general rule, no withholding tax is applicable to interest or other payments made to resident lenders. Withholding tax (generally at a rate of 26%) is chargeable on interest payments made by an Italian company to a non-tax resident lender. The withholding tax can be reduced under the double tax treaty applicable between Italy and the country of residence of the beneficial owner of the interests.

An exemption from withholding tax may apply in certain circumstances, such as if the loan is a medium-term loan (ie, a loan whose duration is at least 18 months plus one day) and the lender is authorised to carry out lending activities in Italy and is either a bank established in the EU, an insurance company established and authorised in accordance with the laws of an EU Member State, or an institutional investor incorporated in a country that allows an adequate exchange of information with Italy and subject to prudential control therein.

4.2 Other Taxes, Duties, Charges or Tax Considerations
Registration Tax
Under Italian law, all notarial deeds are subject to registration tax (*imposta di registro*) and stamp duty (*imposta di bollo*),

which can be a fixed amount or a proportional amount, depending on the type of the transaction.

It is mandatory to execute the following security documents through a notarial deed:

- a deed of mortgage;
- a deed for the granting of a floating charge;
- a deed of pledge over quota;
- a deed of pledge over intellectual property rights; and
- an endorsement of share certificates.

The registration of a mortgage is subject to an overall registration tax of 3% of the secured amount. This tax also covers any acknowledgement of any amendment to the secured obligations and the ultimate cancellation of the registration of the security.

Generally, a security (other than a mortgage) granted by notarial deed for the purpose of securing a guarantor's obligations is subject to a fixed registration tax (normally EUR200). If the security is granted to secure the obligation of a third party, the registration tax is 0.5% of the secured amount.

These taxes do not apply if the borrower opts for the substitutive tax regime.

The "Substitutive Tax"

A substitutive tax equal to 0.25% of the borrowed amount can be applied, at the option of the relevant borrower, on medium to long-term loans (18 months plus one day).

The substitutive tax covers all other relevant documentary taxes that should be applicable to any security granted in respect of the loan (such as stamp duty or registration fees for a mortgage), so it is usually applied where the loan is secured by a mortgage or another type of security requiring the execution of a notarial deed.

Exchange of Correspondence

In order to avoid the application of registration taxes and stamp duties, any agreement or deed that is not to be mandatorily executed in the form of a notarial deed can be executed by an exchange of correspondence (*scambio di corrispondenza commerciale*).

Loan agreements that are not secured by a security to be granted through a notarial deed (eg, personal or corporate guarantee, assignment of claim, pledge overs shares) are usually executed by exchange of correspondence.

4.3 Usury Laws

Under Italian usury law, the overall cost of the loan for the borrower cannot exceed a specific threshold, which is set out by law for each type of loan or facility and published each quarter by the Italian Ministry of Economy and Finance.

Non-compliance with the usury thresholds may result in criminal liability for the lender and in no interest or fees being due in connection with that debt.

5. Guarantees and Security

5.1 Assets and Forms of Security

Real Estate Assets

Definition

Under Italian law, real estate assets include the soil and the surface, any building on the soil and any other asset that is incorporated in the soil.

Certain registered movable assets (such as ships, aircrafts and cars) are treated as real estate assets for the purposes of the transfer and creation of security.

Forms of security

The typical form of security over real estate assets is the mortgage (*ipoteca*).

A mortgage over a real estate asset is often taken together with a pledge or an assignment of receivables deriving from insurance policies relating to the same real estate asset.

Formalities

A mortgage is created by a deed of mortgage in notarial form.

The mortgage then has to be registered with the competent local real estate register.

Such registration could take one or two weeks, depending on the relevant register office.

A mortgage that is not properly registered is not effective vis-à-vis third parties.

Tangible Movable Assets

Definition

All assets that are not real estate assets can be considered as tangible movable assets. Typical tangible movable assets include machinery, stock, equipment, devices and similar items.

Tangible movable assets also include registered movable assets such as aircrafts, ships and cars, although these are treated as

immovable assets for the purposes of the transfer and creation of security.

Forms of security

The pledge is the typical security taken over tangible movable property.

A special lien (*privilegio speciale*) can also be granted, subject to certain conditions (such as the duration of the loan/bond being higher than 18 months and one day).

Formalities

The possessory pledge is granted by way of a deed of pledge with a date certain at law (*data certa*).

The relevant assets then have to be delivered to the relevant pledgee or to a third party acting as custodian. The pledgor cannot maintain the possession of the pledged assets.

Failure to deliver the relevant assets would make the pledge null and void.

The non-possessory pledge has recently been introduced into Italian law. It can be granted over movable goods, including intangible goods, or credits pertaining to the company's course of business, in each case both present and future, and it has to be registered in the relevant digital register (*registro dei pegni non possessori*) held by the Italian Revenue Agency (*Agenzia delle Entrate*).

The registration remains valid for ten years and can be renewed for an additional ten years before the completion of the original ten-year period, either through the mutual agreement of the creditor and debtor or through a judicial order.

The non-possessory pledge cannot yet be used because the digital register to be held by the Italian Revenue Agency has not yet been created (such pledge could not be effective against third parties without the relevant registration).

The special lien (*privilegio speciale*) is granted by way of a notarial deed and must be registered on the register held by the local competent judicial court.

Such registration could take from one to three weeks, depending on the relevant court.

The special lien would become effective against third parties only upon such registration.

Shares and Other Financial Instruments

Definition

Under Italian law, the corporate capital of a joint stock company is divided into shares, while the corporate capital of a limited liability company is divided into quotas.

Other financial instruments used as security in respect of a financing transaction typically include bonds, fund units and derivative instruments. However, any other instrument negotiated on a regulated market, multilateral trading facility or organised trading facility can be used.

Forms of security

The pledge is the typical security taken over quota, shares or financial instruments. The pledge over the relevant securities account can be used where the relevant financial instruments are in dematerialised form.

Formalities

A pledge over financial instruments is created by way of a deed of pledge with a date certain at law (*data certa*).

The deed of pledge over quotas has to be executed in notarial form and then registered in the relevant companies register.

If the shares of the instruments are represented by physical certificates, the relevant certificate shall be endorsed, or the pledge shall be annotated thereon. The relevant certificate must then be delivered to the pledgee.

If the instruments are in dematerialised form, the pledge must be notified to the relevant agent and depositary bank, and registered on the relevant register and depository account.

Security over financial instruments is regulated by Legislative Decree No 170/2004, which has simplified the perfection and enforcement formalities.

The registration in the companies register should take not more than one week, while the registration in the relevant register of dematerialised instruments should take no more than one day.

Failure to perfect the above formalities would make the pledge ineffective vis-à-vis third parties.

Claims and Receivables

Definition

Claims and receivables can include, for example, debts or rights under contracts, present or future, including receivables arising out of bank accounts agreements.

Forms of security
The typical forms of security over claims and receivables are the pledge or the assignment by way of security.

The most common form of security over a cash deposit is a pledge over the relevant bank account.

Formalities
Both types of security are created and perfected by way of a deed of pledge or assignment with a certain date at law (*data certa*).

The deed of pledge or assignment must be in notarial form where the receivables under the security derive from certain types of agreements, such as a lease of over three years and contracts with a public authority.

The pledge or assignment must then be notified to or accepted by the relevant debtor.

The pledge over a bank account must be notified or accepted by the relevant depository bank.

If the credit standing on the balance of the relevant bank account increases or decreases, a new perfection notice or acceptance is required.

A notification made through the court bailiff should not usually take more than two weeks, but a notification made through certified electronic mail is obviously much faster.

Failure to perfect the above formalities would make the pledge ineffective vis-à-vis third parties.

Intellectual Property
Definition
Intellectual property includes patents, trade marks, copyright and registered designs.

Forms of security
The common forms of security over intellectual property rights are the pledge over the relevant intellectual property rights, and the assignment by way of security of the receivables deriving from the intellectual property.

Formalities
A pledge on intellectual property rights must be executed through a notarial deed.

The pledge and the assignment have to be registered on the Italian Office of Patents and Trademarks in order to be effective vis-à-vis third parties.

Such registration should not take more than two weeks.

Failure to perfect the above formalities would make the pledge ineffective vis-à-vis third parties.

5.2 Floating Charges or Other Universal or Similar Security Interests
The special lien (*privilegio speciale*) and non-possessory pledge described in **5.1 Assets and Forms of Security** can be considered floating charges over certain specific present and future assets of the grantor.

Under Italian law, it is not possible to create a security over all present and future assets of a company.

5.3 Downstream, Upstream and Cross-Stream Guarantees
The granting by an Italian company of a security or guarantee for obligations undertaken by companies of the same group requires the guarantor to receive a direct or indirect corporate benefit.

This principle applies equally to downstream, cross-stream and upstream guarantees and security granted by Italian companies. Whilst the existence of corporate benefit for a downstream guarantee or security is often self-evident, the actual benefit of a guarantor giving an upstream or cross-stream guarantee or security should be specifically indicated in the relevant company's acts.

5.4 Restrictions on Target
According to Italian law provisions on financial assistance, a target company is not allowed to grant loans, guarantee or security over its own assets in order to provide the funds, or secure any financing, for the acquisition of the target corporate capital, subject to the following exceptions contained in the Italian Civil Code:

- Whitewashing – financial assistance is allowed subject to a procedure that requires:
  - (a) an extraordinary resolution of the general meeting;
  - (b) specific reports and statements from the directors; and
  - (c) compliance with a maximum threshold equal to the aggregate amount of the distributable profits and reserves of the target company.
- Employees – subject to certain conditions, the prohibition does not apply to loans or guarantees granted to the employees of the company to promote the acquisition of its own shares.
- Merger in the context of leveraged buyouts – such transactions are allowed subject to a specific procedure set out in the Italian Civil Code.

5.5 Other Restrictions

According to Italian law, directors must act in the best interest of the company and have a duty to avoid conflicts of interest, being bound by fiduciary duties towards the company since they act in its name and on its behalf.

To this end, directors with a potential interest in a company's transaction, on their own behalf or on behalf of a third party, are obliged to disclose the presence of the interest to the other directors and the auditors, and to specify the nature, terms, source and value of the interest.

Directors with a potential conflict of interest are not prevented from voting in favour of the transaction, but they are required to adequately explain the reasons, opportunity and convenience of the transaction for the company to the board of directors.

If the director with the conflict of interest is a managing director, he or she must refrain from carrying out the transaction.

5.6 Release of Typical Forms of Security

Generally, the formalities required to release a security are the same as those required to create it. For example, if a notarial form is required for the security documents for the creation of the security, the release is perfected by signing a deed of release in notarial form.

5.7 Rules Governing the Priority of Competing Security Interests

The Italian Civil Code sets out the rules governing competing security interest and acts of disposal in general. Basically, the prevailing security interest would be the one in respect of which the relevant formalities are completed before (eg, the mortgage which has been registered before or the assignment of receivables which has been notified in advance to the relevant assigned debtors).

The following methods of subordination are frequently used in the Italian market:

- contractual subordination, which is usually achieved by the junior lender providing a commitment not to collect junior debt, and the borrower and other obligors providing commitments not to pay the junior lender, until the senior debt has been paid in full;
- structural subordination, which can be simply achieved by lending money to the holding company of the borrower of the senior loan; and
- inter-creditor arrangements between lenders and other finance parties, such as hedging counterparties, which are very common in the Italian lending market and are usually entered into to set out and clarify the following issues:
  (a) the seniority positions between different lenders of the borrower;
  (b) the enforcement procedure for the security;
  (c) profit sharing;
  (d) loan subordination;
  (e) the appointment of agents; and
  (f) waivers and decision processes.

Contractual subordination provisions that conflict with the order of priority set out in the Italian Bankruptcy Law would not survive the insolvency of a borrower incorporated in the Italian jurisdiction.

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

Conditions for Enforcement

According to the provisions of Italian law, a secured lender can enforce its collateral upon the occurrence of certain events that cause its right to accelerate the relevant debt (eg, debtor's insolvency or reduction of general guarantees), withdraw from the relevant contract (eg, illegality), or terminate the same contract (eg, non-payment or other breach of contract).

The parties can also agree on the right to accelerate, withdraw from or terminate the loan agreement on the occurrence of certain specific events of default (such as breach of financial covenants, change of control, cross-defaults, etc).

There are no specific formal requirements for enforcement, other than prior written notice must be provided to the debtor (for example, a written request for payment must be made five days in advance in order to enforce a pledge).

Enforcement of a Mortgage or Assignment of a Real Estate Asset

The enforcement of a mortgage is carried out through a judicial procedure aimed at selling the relevant real estate at an auction, which must be started by the secured creditor. If the value of the relevant real estate asset is equal to or lower than the amount of the claim, the creditor can require the asset to be assigned to it. If the registration with the land registry has been duly carried out, the enforcement can also be started against a third party purchaser that has acquired the real estate asset after the mortgage registration.

A simplified enforcement procedure was introduced in 2016 for loans granted by banks or other authorised financial intermediaries registered under Article 106 of the Consolidated Banking Act that are secured by a transfer of a real estate asset. Such a transfer is then conditional only on the:

- payment default of the borrower;
- notification of the transfer to the owner of the real estate asset and any other creditors with rights over the same real estate asset; and
- delivery of an opinion on the value of the real estate asset by an expert appointed by the competent court and payment of the relevant balance amount by the lender, if the value of the real estate is higher than the amount of the debt to be repaid.

Enforcement of a Special Privilege
A lender can enforce a special privilege through a judicial procedure aimed at selling the relevant assets by auction under Article 46 of the Consolidated Banking Act (which regulates special privileges on specific movable goods for medium to long-term loans).

Enforcement of a Pledge
A judicial procedure is not always required in order to enforce a pledge. If the debtor does not fulfil its payment obligations within five days of the relevant request by the secured creditor, the creditor can immediately ask the court bailiff to sell the relevant asset through an auction, or without an auction if the asset has a market price. The secured creditor can also ask the judge to assign the relevant asset to it as a fulfilment of the debtor's obligations. A simplified procedure (without the need for court bailiff intervention) is set out by Italian Decree No 170/2004 on financial guarantees, which has implemented Directive 2002/47/EC on financial collateral arrangements (Financial Collateral Arrangements Directive).

The enforcement of a pledge over bank accounts is carried out through a notification to the depository bank stating that the pledgor no longer has the right to benefit from the amounts credited on the relevant bank account and a request to retain an amount necessary to fulfil the debtor's obligations.

The enforcement of a pledge over receivables or assignment of claims by way of guarantee is carried out through a notification to the relevant assigned debtors to pay the amounts due to the secured party.

6.2 Foreign Law and Jurisdiction

Choice of a Foreign Law as the Governing Law of the Contract
The choice of a foreign law as the governing law of the contract (or part of it) will generally be upheld by Italian courts, unless there is a mandatory provision that determines the competence of Italian law in accordance with EU Regulation No 593/2008.

Submission to a Foreign Jurisdiction
Provided that the exclusive jurisdiction provisions set forth in EU Regulation No 1215/2012 are complied with, Italian courts will generally uphold a valid contractual submission to the jurisdiction of a foreign court.

6.3 A Judgment Given by a Foreign Court

A final and conclusive judgment given by an EU court that is enforceable in the jurisdiction of origin shall be recognised and enforced by Italian courts without a retrial of its merits, in accordance with the provisions of EU Regulation No 1215/2012.

6.4 A Foreign Lender's Ability to Enforce Its Rights

Generally, there are no specific restrictions that apply to a foreign lender's ability to enforce its right, provided that such foreign lender is authorised to lend money in Italy.

7. Bankruptcy and Insolvency

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

The following rescue and reorganisation procedures are available in Italy outside of insolvency proceedings:

- a recovery plan under article 67 of Royal Decree No 267/1942 (as amended and supplemented – the "Bankruptcy Law") provides for an exemption from claw-back actions for any act, payment or guarantee made in compliance with a recovery plan, the feasibility of which should be confirmed by an independent expert with certain requirements set out by the law. Agreements executed between debtors and lenders to implement such a plan are merely private agreements and do not affect the right of a lender who is not a party to an agreement to enforce its loan, guarantee or security.
- Restructuring agreements pursuant to article 182bis of the Bankruptcy Law must be executed by creditors representing at least 60% of the company's debt. They must be formally approved by the competent court and their feasibility has to be confirmed by an independent expert. Following the publication of the relevant agreement in the competent companies register, all enforcement and precautionary actions are suspended for 60 days and can be definitively forbidden on approval by the court. This protection can also be implemented before the execution of the agreement, upon the request of the debtor.
- A pre-bankruptcy agreement (*concordato preventivo*) under article 160 et seq of the Bankruptcy Law is a more complicated procedure that is directed by a judge and also requires the appointment of a judicial commissioner. Under Article 161 of the Bankruptcy Law, a company can obtain early protection of its assets by depositing only a request for pre-bankruptcy agreement without the relevant restructuring plan and agreement proposal (which must then be

submitted within 60 to 120 days). Such request could then be amended in order to file a restructuring agreement under article 182-bis of the Bankruptcy Law. In the event that no such restructuring agreement or pre-bankruptcy agreement is reached among – and/or approved by – the relevant parties, the company will be declared bankrupt and an insolvency procedure will automatically start.

Article 57 of Legislative Decree No 14/2019 (the new "Crisis Code", the implementation of which has been postponed to 2021 due to the COVID-19 pandemic) sets out new provisions on restructuring agreements, but these are substantially in line with current provisions.

7.2 Impact of Insolvency Processes

Under the Italian Bankruptcy Law, an insolvency procedure is commenced by a declaration of insolvency of the relevant company by the competent judge. The issue of such decision prevents creditors from starting or continuing an individual enforcement action. Upon the start of an insolvency procedure, all the debt of the insolvent company must be dealt with in accordance with the provisions of the Bankruptcy Law, which sets out the order of priority of the different claims.

7.3 The Order Creditors Are Paid on Insolvency

According to the Italian Bankruptcy Law, the proceeds of the liquidation of the assets of the bankrupt company are paid to the relevant creditors in the following order:

- Pre-deductible claims – these are statutory claims (such as tax or other government claims or claims for professional services) or claims that arise during the insolvency procedure. Creditors with pre-deductible claims should be paid entirely (or pro rata, if the assets of the insolvent company are not sufficient to pay them all).
- Preferential claims, which include:
  - (a) claims with a general or special legal privilege (such as tax claims) over all or some of the assets of the insolvent company. Creditors with a special privilege over a real estate asset (such as due to environmental claims) are preferred to creditors with a mortgage on the same asset, but a special privilege over a movable asset cannot be detrimental to a claim secured by a pledge over the same asset. The order of priority of privileged claims is set out by the law; and
  - (b) secured claims, the order of priority of which depends on the timing of the perfection of the formalities of each security (the first to perfect the formalities is paid first).
- Unsecured creditors – if privileged or secured creditors are not fully satisfied through the proceeds of the sale of the assets that are subject to the relevant security, they should participate in further distribution pro rata with the unsecured creditors.

7.4 Concept of Equitable Subordination

Article 2467 of 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 disproportion 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. In decision No. 12994 of 15 May 2019, 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 above are still satisfied at the time of the shareholder's request of the reimbursement.

7.5 Risk Areas for Lenders

Under Italian bankruptcy law, the main risk for the lenders in the insolvency of the borrower, security provider or guarantor is the starting by the relevant receiver of a claw-back action that can lead to the revocation of a payment or cause the non-effectiveness of the security interest or guarantee vis-à-vis the insolvency estate and the creditors.

Another risk area relates to the possibility of the relevant lender being accused of having contributed to worsening the financial situation of a company by granting a loan to a borrower in a difficult situation, which should have filed for a bankruptcy procedure instead. Such accusation could lead to the criminal liability of the relevant lender.

8. Project Finance

8.1 Introduction to Project Finance

In Italy the project finance scheme is still implemented for both public projects and private deals, with a specific focus on infrastructure (such as highways, subways, airports, hospitals and water services) and the energy sector (with a marked preponderance of deals related to renewable assets).

The development in Italy of the project finance scheme was also due to the strong presence of entities like the European Investment Bank and the Italian development finance institution, Cassa Depositi e Prestiti, which in several ways have facilitated

the structuring and granting of loans and facilities within projects in both the infrastructure and energy sectors.

The Italian legal framework regarding the issuance of bonds has recently been amended so that it is now possible and easier (also in terms of tax implications and structuring of the appropriate security package) to finance public and private projects by issuing project bonds.

For these reasons, it is not unusual to see projects in Italy that are financed (exclusively or with traditional banks) by alternative lenders (eg, credit funds, insurance companies, pension funds).

Considering that the recovery plan approved by the Italian Government to mitigate the economic impact of the COVID-19 crisis and revive the economic system provides for the construction of a large amount of new infrastructures, it is foreseeable that Italy will experience a significant increase in project finance deals.

8.2 Overview of Public-Private Partnership Transactions

The main regulation on PPP transactions in Italy is contained in Legislative Decree no. 50/2016, which provides for the so-called *Codice dei Contratti Pubblici* (Public Contracts Law), as amended from time to time.

The main obstacles to the development of PPP transactions in Italy are mainly represented by the administrative risk (ie, the uncertainty of the outcome and timing of the authorisation procedures) and sometimes by the inertia of the public entities.

For these reasons, the Italian Government recently amended the Public Contracts Law by enacting Law Decree No 76/2020 on 16 July 2020 in order to simplify certain authorisation procedures and incentivise private initiative in order to carry out new projects and infrastructures, pursuant to the PPP scheme.

8.3 Government Approvals, Taxes, Fees or Other Charges

In Italy, project finance transactions are not subject to any specific governmental approvals, except for the permits and authorisations that are required to carry out the specific projects (eg, environmental impact screenings or building titles), and the banking or financial licence for the lenders.

In project finance deals, certain transaction documents may need to be registered for tax reasons, or filed with public authorities in order to be valid and enforceable (eg, perfection filings of the security documents).

8.4 The Responsible Government Body

With respect to the oil and gas, power and mining sectors, the main responsible government body is the Ministry of Economic Development (*Ministero per lo Sviluppo Economico* – MISE), which is responsible inter alia for the security of the relevant national pipelines and grids and of the mining and energy sources, for the energy supply on a national basis and for the authorisation of the construction and management of the big plants for the production of electricity.

In addition to MISE, the Italian Regulatory Authority for Energy, Networks and Environment (ARERA) carries out regulatory and supervisory activities in the sectors of electricity, natural gas, water services, waste cycle and district heating. ARERA was established by Law No. 481 of 1995 as an independent administrative authority, and operates to ensure the promotion of competition and efficiency in public utility services and protect the interests of users and consumers.

8.5 The Main Issues When Structuring Deals

The main issues that need to be considered when structuring a project finance deal are related to the correct identification of the relevant risks of the project and their appropriate allocation in order to ensure that the project finance contractual architecture complies with the bankability requirements.

In Italy, these main issues are typically related to authorisations and permits (eg, are they still revocable or subject to claims by a third party?), the standing and reliability of the sponsors and the other contractors and operators involved within the transaction, the plants that benefit from feed-in-tariffs, the existence of any and all requirements provided under the law applicable to the relevant tariff, etc.

Usually, the project companies are special purpose vehicles incorporated as a joint stock company (*società per azioni*) or a limited liability company (*società a responsabilità limitata*).

In general terms, the incorporation, management and operation of project companies are provided under the Italian Civil Code (articles 2325 – 2506-quater). With specific reference to public projects, the project companies could be subject to further specific provisions of law (eg, honourability of the shareholders and directors).

For the sake of completeness, it is worth noting that, pursuant to Italian Law Decree No. 21 dated 15 March 2012, subsequently passed, as amended, by Italian Law No. 56 dated 11 May 2012, extraordinary transactions concerning companies operating in the defence and national security or the communications, energy and transport strategic sectors are subject to prior approval by the Italian Government, which is also entitled to impose

specific conditions. During the COVID-19 emergency, these "golden powers" of the Italian Government were expanded by Italian Law Decree No 23/2020, with the aim of protecting strategic Italian assets and technologies from becoming controlled by foreign investors during the market disruption caused by the COVID-19 pandemic.

8.6 Typical Financing Sources and Structures for Project Financings

Depending on the specific project risks, the typical financing sources may vary from private debts (banking loans and project bonds – see **8.1 Introduction to Project Finance**) to public debts (eg, funds deriving from EU bodies) and governmental grants, or a combination thereof.

The use of export credit agencies is quite common in certain projects in Italy, where SACE (the Italian export credit agency, which is 100% controlled by the Italian Ministry of Economy and Finance) also supports domestic and cross-border projects in the strategic sectors of infrastructure and renewable energy (particularly wind and photovoltaic solar power).

Project finance in Italy is usually structured on a no-recourse basis or – depending on the specific risk matrix of the project – with a limited recourse to the sponsor.

8.7 The Acquisition and Export of Natural Resources

Natural resources in Italy are subject to (primary and secondary) legislation that, in general terms, provides that any activity (acquisition, export, exploration, production, sale, etc) involving natural resources is subject to specific permits and concessions being granted by the competent public authorities.

Specific national and local laws, regulations and permits also apply in the natural resources field in relation to health and safety regulations, specific environmental assessments or a preliminary screening by the interested public authorities, the modification of zoning plans, archaeological restrictions, industrial emissions, etc.

Concessions related to natural resources are usually granted on the basis of a public tender, last for a certain period of time (eg, 30 years), provide for a terminal value, and can be revoked upon the occurrence of events of defaults or for any justified reason set forth in the concession agreement. In many cases, the concessions also provide for the payment of royalties to the public grantor.

8.8 Environmental, Health and Safety Laws

The authorisations, construction and management of any projects in Italy are also subject to environmental, health and safety laws, which are largely based on EU Directives.

The main national legislation in Italy is represented by the *Codice dell'Ambiente* (Environmental Code – Legislative Decree No 152/2006) and the *Testo Unico sulla Sicurezza sul Lavoro* (Consolidated Act on Safety Law – Legislative Decree no 81/2008), both as amended and integrated from time to time.

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GILIBERTI TRISCORNIA E ASSOCIATI

Trends and Developments

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Introduction
The COVID-19 pandemic has had a very strong impact on the Italian economy and specifically on M&A transactions and new investments.

Given that Italy was one of the first Western countries to suffer from the spreading of the virus, a lot of projected extraordinary transactions have been placed on hold, in order to allow companies and investors to assess the effects of the pandemic and the following lock-down.

Once it was clear that the COVID-19 pandemic would have a long-lasting impact on the economy, transactions encompassing a higher level of risk (maybe due to the size or to the specific business involved) were often definitively aborted.

Consequently, the relevant financing transactions – both leveraged finance transactions and corporate loans – were cancelled.

On the other hand, transactions regarding specific businesses or market sectors that were not heavily affected (eg, food, IT) and transactions that could not be postponed (eg, refinancing transactions whose timeline was determined by the maturity date of the existing financing) were successfully closed, maybe following an adjustment of the relevant terms and conditions.

Understandably, the situation has been particularly chaotic in the period of time between the end of the lock-down (around mid-May) and the beginning of the summer holidays in Italy (typically the first or the second week of August), when most of the closings were concentrated.

The real estate market was booming at the beginning of 2020, but the COVID-19 pandemic caused the interruption of many transactions. Nevertheless, despite all current difficulties, the market is still vital, with investors concentrating on deals regarding residential and logistic assets, while leaving aside transactions regarding hospitality and commercial and retail buildings.

The distressed assets sector experienced two different types of immediate consequences: certain restructuring transactions where investors were already heavily engaged were urged to close in order not to put investors' money at risk, while other companies were forced to file for pre-bankruptcy or bankruptcy procedures with the competent courts, following the decision of the relevant stakeholders to back down from the investments.

Fortunately, thanks to the measures aimed at supporting business continuity approved by the Italian government, the terms regarding bankruptcy procedures, restructuring agreements and composition with creditors were extended, so as to give companies additional time to assess and address the effects of the pandemic and prepare new restructuring plans to be submitted to the relevant creditors.

Impact on Companies and Relevant Financing Arrangements
The economic crisis created by the COVID-19 pandemic obviously affected the performance of many companies, especially those whose revenues were concentrated in countries that were subject to lock-down measures.

The strong loss of revenues often caused the breach of the financial covenants set out in loan agreements currently in place, especially where the relevant borrowers had high leverage levels.

As a consequence, many borrowers had to file waiver requests with the relevant lenders, or to start negotiations for a complete covenant reset.

Those kinds of transactions were very common following the 2007-2008 crisis but became quite unusual in the years immediately preceding the COVID-19 crisis, when the relevant parties preferred to opt for more effective restructuring techniques (so called "heavy restructuring"), including debt write-off, debt-to equity swap, equity commitments, and the mandatory sale of going concerns/assets.

However, assuming that the COVID-19 crisis will be of a temporary nature, if the situation of the relevant borrower is not so critical, the parties involved are now preferring "light restructuring" transactions.

That is also due to the measures approved by the Italian government for companies that qualify as SMEs, which include a suspension of interest and principal payments on loans falling due before 30 September 2020 (now extended to 31 January 2021) and a mandatory hold of credit facilities by the relevant lenders until the same date.

Although those measures apply only to companies qualifying as SMEs, most lenders did not exercise the contractual remedies available to them in the event of a covenant breach or a payment breach by large companies.

Actually, it could be argued that lenders would be prevented from accelerating or terminating loans in the current situation anyway, given that a borrower might be exempted from complying with its obligations under the relevant loan agreements due to force majeure reasons, or due to the fact that the relevant default was not imputable to the negligence or wilful misconduct of the same borrower.

The same principle could apply to contractual remedies set out in connection with the so-called "material adverse effect" (MAE) or "material adverse change" (MAC) clauses, which can be triggered upon the occurrence of events or circumstances which, even if they are not caused by the borrower and do not relate to its particular sphere, materially affect the economic, financial, legal or equity condition of the borrower, and/or its ability to pay its debts, and/or the validity and enforceability of the relevant finance documentation.

In the current situation, MAE/MAC clauses could hardly be activated by the relevant lenders with the aim of accelerating or terminating a loan, without the risk of being held responsible for damages or for wrongful breach of lending (*interruzione abusiva del credito*), which is an Italian doctrine preventing lenders from cancelling available credit unreasonably and without proper notice.

On the other hand, in the absence of a mandatory hold on commitments for new credit facilities, MAE/MAC clauses could well be activated in order to cancel those commitments and avoid granting new loans that could be a much higher risk than was expected.

For those reasons, MAE/MAC clauses contained in new contracts and/or mandate agreements or term sheets are currently the subject matter of a hard negotiation between prospective lenders and prospective borrowers, with the latter seeking a wording that could narrow as much as possible the possibility of the lender seeking the application of the same clauses or simply excluding the possibility to activate the relevant contractual remedies in the event that the relevant material adverse effect/change is a consequence of the COVID-19 pandemic.

New Trends

The extraordinary measures adopted by the Italian Government with Law Decree no. 18/2020 (the "Cura Italia Decree") and Law Decree no. 23/2020 (the "Liquidity Decree") in order to limit the impact of the COVID-19 pandemic on the economic and financial market also included the following:

- the issue of first demand guarantees by state-owned company SACE S.p.A. in favour of banks, national and international financial institutions and other entities granting loans to Italian companies; and
- the application of more favourable terms and conditions for the issue of first demand guarantees in favour of Italian SMEs by the special fund created with Law no. 662/1996 (*Fondo Centrale di Garanzia*), in each case for new loans granted until 31 December 2020.

Due to the lack of liquidity and the reduced cost of state-guaranteed loans, a lot of companies asked and are still asking banks and other authorised financial institutions for loans granted by SACE or Fondo Centrale di Garanzia.

Unfortunately, given that those guarantees can cover only 70% to 90% of the relevant loan amounts, the granting of any new loan is still subject to the lenders' approval procedures and to the responsibility of the competent bodies (at least for the portion of the loan not covered by the relevant guarantee). This caused a strong delay in the granting of the relevant loans, preventing a lot of companies obtaining the liquidity they desperately needed, especially those with bad economic and financial conditions.

In the context of the conversion into law of the Cura Italia Decree and the Liquidity Decree, the Italian government has extended the benefit of the above guarantees to investors subscribing corporate bonds.

Hopefully, such amendment will further increase the number of bonds and mini-bonds issued in Italy, and will help companies that cannot access bank loans to finance themselves on the debt capital market.

The development of an alternative loan market will become even more important in the near future, as the economic and financial crisis caused by the COVID-19 pandemic is likely to increase the non-performing exposures of traditional lenders, thus substantially limiting the possibility for those lenders to grant new loans to entities with a higher credit risk.

As already happened with the "sub-prime" financial crisis, the number of restructuring transactions to be implemented in the Italian market in the coming months will obviously increase as a consequence of the current situation.

Such trend will be strengthened by many new players entering the market who are willing to invest in distressed situations on the basis of an opportunistic strategy.

The extent of the current economic and financial crisis may also raise concerns on the potential negative effects on Italian securitisations, especially RMBS transactions, and covered bond programmes involving collateral comprised of Italian SME loans. In both cases, the performance of the relevant portfolios could be affected by the reduction of the relevant collections, and by the payment holiday measures approved by the Italian government.

However, it should be noted that Italian legislation already provided for payment holiday measures in favour of individual mortgage borrowers, and several moratorium agreements regarding SMEs have been in place since 2008, although applicable on a voluntary basis. Therefore, the new measures approved with respect to the COVID-19 pandemic do not appear to be causing significant disruption, also taking into account that Italian securitisations provide for a wide range of structural credit enhancements such as overcollateralisation, cash reserves and liquidity facilities.

Finally, given that a big stake of the EU funds that should be awarded to Italy by the so-called “Recovery Fund” should be allocated on new infrastructure projects, it is envisaged that there will be a significant increase in the number of project finance transactions in Italy in the years to come.

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