# Italy

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## General structuring of financing

**1** What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

Loan and intercreditor agreements are governed by either Italian law, particularly if arranged by Italian banks and intended for the Italian market only, or English law, if the involvement of non-Italian players is envisaged, in order to facilitate the sale or transfer of any interest in the loan.

Subject to exceptions, whether the countries involved are EU member states or not, the Italian courts will apply Rome I Regulation ((EC) 593/2008) on the law applicable to contractual obligations to determine the governing law of a contract made on or after 17 December 2009. The general rule under Rome I is that the contract is governed by the law chosen by the parties. Exceptions include, in particular, circumstances where the choice of law is fraudulent or the application is manifestly incompatible with the public policy of the forum or in case of overriding mandatory provisions of the law of the forum. Subject to certain exceptions, an Italian court would also uphold an agreement made in advance to submit non-contractual obligations (eg, a claim in respect of a misrepresentation made in the course of contractual negotiations) to the law of a particular country, in accordance with the terms of the Rome II Regulation ((EC) 864/2007).

Enforceability in Italy of final judgements obtained in a foreign court is governed by either the Brussels Regulation ((EC) 44/2001) (in the case of judgments from the courts of other EU member states) or Title IV of Law 218/1995 if no bilateral treaty applies. A final and conclusive judgment for a definite sum of money entered by a foreign court in any proceeding should be enforced by the Italian courts without re-examination or re-litigation of the matters adjudicated upon provided that the requirements under Title IV are complied with.

**2** Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

Except as described below, the acquisition of domestic companies by foreign entities is not restricted.

In addition to any antitrust clearances applicable and the disclosure requirements applicable to any acquisitions or disposals of shares in listed companies under the Legislative Decree No. 58 of 24 February 1998 (the Securities Act) and the related regulation issued by CONSOB (the Italian Securities and Exchange Commission), the Securities Act also imposes limitations and requirements in relation to the acquisitions or disposals of holdings in banks and regulated financial services and insurances companies.

The acquisition of assets and companies of 'strategic relevance' for the Italian national interest is also subject to a specific set of rules and limitations. Law Decree No. 21 of 15 March 2012, grants the Italian government veto and other powers in relation to, inter alia:

- the acquisition of any interest from any person in any company operating in the defence and national security sector, if that represents a 'threat of material prejudice to essential defence and national security interests'; and
- the acquisition of a controlling interest from any non-EU person in any company operating in the energy, transport or communication sector, if that represents a 'threat of material prejudice to essential public interests relating to national security, the functioning of infrastructure and the safety and stability of supplies'.

These 'Golden Powers' apply irrespective of whether the Italian government has any interest in the relevant company and, in addition to veto rights, the Italian government can also impose special terms and conditions to the acquisition. All Golden Powers are to be exercised in compliance with the proportionality and reasonableness principles.

There are no specific restrictions on cross-border lending into the Italian Republic. For further detail on the regulatory restrictions applicable to lending in the Italian Republic, see question 6. Nevertheless, any cross-border payments may become subject to restrictions imposed by United Nations, European Union or the Italian Republic sanctions or other similar measures.

**3** What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?

The component parts of debt financing vary depending on the size of the deal. It is common for larger financings to comprise a combination of senior and mezzanine debt or senior debt and high yield bonds. Financings can include senior term and revolving debt, second lien debt in the form of loans or notes, mezzanine term debt, payment-in-kind (or PIK) loans or notes, vendor financing or high yield bonds.

Mezzanine debt, to the extent legally possible, is usually guaranteed by and secured on the same assets as senior debt. Intercreditor arrangements are put in place, pursuant to which in certain circumstances payment on the mezzanine debt is subordinated to the senior debt and the ability of the mezzanine lenders to enforce their guarantee and security package is subject to a standstill. Mezzanine debt is not structurally senior to the senior debt and will be applied to fund the purchase price and acquisition costs of the transaction. While a significant amount of the senior debt will be borrowed by the same holding company as the mezzanine debt, some senior debt may be borrowed at a structurally senior level to refinance existing debt within the target group at closing. In cross-border financings, senior debt that is borrowed at operating company level and which is used to refinance existing debt may benefit from an enhanced

guarantee and security package due to corporate benefit and other legal considerations.

The mezzanine facility matures one year after the latest dated senior debt. Financing structures including second lien debt are similar to mezzanine debt, save that the second lien debt is typically an additional tranche in the same credit agreement as the senior debt but with a maturity date six months later than the other senior loans. Under the intercreditor agreement, second lien debt is contractually subordinated to the other senior bank debt in a similar manner to mezzanine debt, save that the second lien lenders may not have an independent right to enforce in some cases.

PIK debt and vendor financing are the most junior pieces of debt finance in the capital structure. They tend to be lent to or issued by holding companies of the borrowers of the senior and mezzanine debt and tend to have limited, if any, recourse to security and guarantees. They mature after the other debt in the structure. The interest on PIK facilities generally capitalises (but see restrictions described in question 8), but there may be an option for the borrower to pay part in cash, if permitted under the terms of the other debt in the structure.

As pricing and liquidity in the bond markets has been more competitive than the bank markets, acquisitions have also been financed with the issue of secured bonds combined with a revolving credit facility with priority over the realisations of security enforcement, or term debt ranking pari passu. Bond issues are generally only suitable for larger transactions where the debt will not be repaid quickly due to the cost and non-call features. Like for bank financings, the capital structure in the context of a high yield bond issuance may contemplate senior and subordinated debt components through the issuance of different types of notes, with senior secured notes eventually being structurally senior to the subordinated notes. The number of acquisitions entirely funded through a high yield bond issuance is still limited in the Italian market, but we expect a considerable increase of acquisition bond financings in the near future.

**4** Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

In relation to an offer for the acquisition of a public company, the Securities Act and the related regulation issued by CONSOB state that no later than the day before the publication of the offering memorandum the bidder must file with CONSOB proper documentation evidencing that it has sufficient funds available to it to pay the maximum amount of consideration that may become due pursuant the offer. In addition, prior to that, at the time the tender offer is first announced to the market and communicated to CONSOB, the bidder must confirm that it has sufficient funds available to pay the maximum consideration that may become payable under the offer. At this point the bidder therefore requires certainty of financing in relation to the offer.

'Certain funds' provisions have become more and more common also for the acquisitions of private companies. As a result, a lender will only be entitled to withhold funding at closing in respect of events of default relating to the actions or omissions of the acquiring group companies and not the target group. In the lead up to the final bid date, the borrower will also try to satisfy as many conditions precedent to closing as possible (or obtain confirmation from the arrangers that if delivered in the pre-agreed form at closing, such conditions precedent will be satisfied). The borrower will indicate the status of these conditions precedent to the seller to further support the certainty of the funding for its bid.

**5** Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

Loan agreements usually include a purpose clause specifying how the loan proceeds are to be used. See also question 15 in relation to financial assistance.

**6** What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?

Lending, 'including…financing of commercial transactions (including forfeiting)', is an ancillary banking activity under the Capital Requirements Directive 2013/36/EU (CRD) effective as of 1 January 2014. EU member states have discretion as to whether various types of lending may be carried out by entities that are not regulated as banks (credit institutions) or otherwise. Under Legislative Decree No. 385 of 1 September 1993 (the Banking Act) the performance of certain financial activities (including lending) vis-à-vis the public is a regulated activity in the Italian Republic and is reserved to banks and financial intermediaries duly authorised by and registered with Bank of Italy. The EEA passporting regime set out in the CRD permits a bank regulated in one member state to carry out all banking activities recognised under the CRD in other EEA member states. However, the EEA passporting regime does not offer passporting rights for unregulated lenders or for investment firms which wish to engage in lending activities on a cross-border basis. Generally, no licence or registration is required for intra-group lending or financings offered occasionally and non-professionally.

**7** Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?

Repayments of principal are generally not subject to Italian withholding tax. Prima facie, payments of interest by an Italian borrower (or by a non-Italian borrower where the payments are of Italian source interest) are subject to withholding tax at the rate of 20 per cent. However, this general rule is subject to various exemptions, such as interest paid on an advance from: (i) an Italian bank (ie, a bank or a financial institution duly authorised to carry out lending activity pursuant to the Banking Act); (ii) a non-Italian bank or financial institution which is resident for tax purposes in the Italian Republic; (iii) a non-Italian bank or financial institution which is lending through a facility office in the Italian Republic which qualifies as an Italian permanent establishment for which any payment received under the loan is business income; or (iv) a non-Italian bank or other financial institution benefitting from an exemption provided for by an applicable double tax treaty.

The borrower is responsible for accounting to the Italian tax authorities for any applicable Italian withholding tax. The loan agreement will normally allocate day one and change of fact withholding tax risk to lenders, while borrowers are generally only required to gross-up if the withholding arises as a result of a change in law. In large cross-border transactions, baskets for non-withholding-tax-free payments are not unusual in order to facilitate the transfer of any interest in the loan to international players overseas which do not fall in any of the exemptions. Lenders will generally expect to be indemnified for any taxes that arise in connection with the loan other than by way of withholding (excluding any taxes on net income imposed by the jurisdiction which the lender is incorporated or resident in or lends from (if different)).

**8** Are there usury laws or other rules limiting the amount of interest that can be charged?

Pursuant to Law No. 108 of 7 March 2006, lending (whether commercial lending or consumer lending, whether from professional lenders or non-professional lenders) at a rate above the 'usury threshold' is a criminal offence and results in no interest or fees being due, in accordance with article 1815 of the Italian Civil Code. In addition, related security may be void.

The usury thresholds are updated quarterly by the Italian Treasury Department, in agreement with Bank of Italy and the Italian Exchange Office and are based on the average overall effective rate charged by banks and other financial institutions during the quarter ending three months before the relevant period. The average overall effective rates are 'per annum' and include the base rate (eg, Euribor or Libor), margin (in cash or in kind), any mandatory costs, the fees and most of the other costs and expenses (other than taxes and other minor exceptions) relating to the financing. The registered overall effective rates are classified in different types of lending products depending on, inter alia, the nature, purpose, duration and amount of the financing. The usury thresholds are then calculated, for each type of lending product, at a rate of 125 per cent of the relevant average overall effective rate registered, plus an additional margin of 400 basis points. In any case the difference between the relevant average overall effective rate registered and the usury threshold cannot exceed 800 basis points. The applicable usury threshold is the one in place at the time the relevant interest rate is agreed, as opposed to when it is paid.

Compounding of interest is prohibited. Overdue interest can only be capitalised and accrue interest from the date legal proceedings are commenced or pursuant to an agreement entered into between the parties after the date the relevant interest is due. The economic effect of the compounding of interest can be achieved through a revolving line made available to the borrower for payment of interest due.

**9** What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

There are numerous indemnity provisions contained in a credit agreement covering various matters, including: tax, stamp duty, loss arising from participating in the transaction or providing funding, the costs of translation of a payment from one currency into the currency that was due under the finance documents, increased costs protection resulting from a change in law and costs and expenses arising from the transaction, amendments to the documentation and enforcement and preservation of security.

**10** Can interests in debt be freely assigned among lenders?

Typically, following syndication, lenders can transfer or assign participations after consultation with the borrower unless a default has occurred or the transfer or assignment is to another existing lender or affiliate or a related fund, in which case no consultation is needed. Usually no restriction applies to sub-participations. Borrowers usually want to impose some controls over syndicate members and may require that (at least prior to completion of syndication) transfers or assignments are only to lenders on an agreed 'white list' or with the consent of the borrower, particularly for withholding tax purposes. As described in question 20, when secured debt is transferred, express security confirmations are required to allow the transferee of the debt to take the benefit of security.

**11** Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?

Trusts and trustees are not recognised under Italian law. As a result any function performed by any entity acting as administrative or collateral agent or trustee must be performed by such entity as agent in the name and on behalf of the others lenders and finance parties (see also question 20). If the agreed role of the relevant agent (taking into account all actions which could conceivably be required during the life of the transaction) includes activities which are regulated in the Italian Republic, it is likely to require prior regulatory authorisation. Relevant regulated activities include accepting deposits (for which a banking licence is required), arranging deals in investments, advising on investments, dealing in investments as a principal or agent, safeguarding and administering investments and managing investments. Entities carrying on regulated activities in the Italian Republic must generally be authorised by the Bank of Italy under the Banking Act or the Securities Act. See also question 6 regarding licensing requirements.

Where the same entity acts as a security agent and as a creditor, there is a risk of a conflict of interest. As a result, there will need to be clear distinction between information received by the bank in its capacity as a creditor or as security agent. In addition, to mitigate against any potential conflict, the security agency provisions may expressly allow the security agent to engage in other kinds of banking or financial services as if it were not the security agent (and not seek the approval of beneficiaries or account to them for any benefit or income in their doing so). It may nevertheless encounter significant conflicts when there is an event of default (when divided loyalties may arise, even if it is following apparently valid instructions).

**12** May a borrower or financial sponsor conduct a debt buy-back?

For a long time bond buy-backs by issuers have been considered possible under New York law in the bond market, either under the terms of the relevant bond indenture or in line with market practice with bondholder consent. Recently a specific legislative framework governing bond buy-backs has also been introduced into Italian law.

In respect of loans, as a general rule under Italian law, when the capacity as lender and as borrower fall on the same person, the underlying debt is extinguished together with all ancillary rights (including security). However, there is a risk a court would re-characterise such loan purchase as a prepayment, which may be in breach the prepayment provisions or subject to the pro-rata sharing provisions in the loan agreement. To overcome this, a buy-back may be structured as a purchase of the debt by a holding company of the borrower. Whether such purchaser can receive interest on the debt depends on the terms of the intercreditor agreement. A loan buy-back may also be effected by a synthetic route such as a fund sub-participation, total return swap (where the borrower receives the total return on the asset in return for paying the lender a periodic cash flow) or a trust.

In 2008, the Loan Market Association (LMA) published optional buy-back provisions which are now often included in loan agreements. One option prohibits debt buy-backs by a borrower and any member of the group of which such borrower is a member. The second option permits debt purchases by a borrower subject to certain conditions (eg, notification of the facility agent, disenfranchisement of sponsor affiliates and borrowers).

In the context of a debt buy-back by sponsors of Italian targets, the Italian rules protecting creditors against 'undercapitalised companies' should also be taken into consideration. Pursuant to such rules, which are usually widely interpreted, financings and any other form of direct or indirect financial support provided by majority shareholders (or any shareholder in the case of *società a responsabilità limitata*) would be subordinated to all other creditors of the subsidiary and senior only to the equity in that subsidiary, if the relevant financing is made when the subsidiary, also taking into account the type of business it is in, is undercapitalised. In addition, any payment made by the Italian subsidiary with respect to any such loan within one year prior to a declaration of bankruptcy would be subject to claw-back. While the acquisition by a sponsor of debt which was not originally subordinated should not be subject per se to this regime,

a subsequent re-scheduling or restructuring of the acquired debt may however be re-characterised as a form of financial support and therefore potentially subject to equitable subordination principles.

**13** Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

In the absence of case law on the subject, it is uncertain whether under Italian law this would be permissible. However, we see no reason why offering an incentive payment (consent payments) to those voting in favour (but not to those who do not) would not be permitted provided that the offer of payment is made to all creditors openly. Conversely, we see as problematic the typical feature of US restructurings, exit consents; that is a proposal whereby those voting in favour obtain one result and those voting against obtain a different (and prejudicial) result. This could be seen as abuse of rights by the majority.

## Guarantees and collateral

**14** Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

Guarantees must be documented in writing and are usually included directly in the loan agreements. The availability of guarantees is generally restricted by financial assistance rules (see question 15) and corporate benefit, but must also be permitted by the articles of association of the relevant company. Directors of an Italian company are under a duty to promote the success of the company itself, as opposed to the group's success, and this is why it is generally more difficult to establish that a company obtains a corporate benefit from providing an upstream or cross-stream guarantee or security.

Generally, any transaction to be entered into by an Italian company must (i) not be ultra vires (ie, outside the powers of the company) and (ii) be instrumental in achieving the concrete business purpose of the company itself (ie, there must be some direct or indirect benefit for the company). The existence of some real benefit is ultimately a matter of fact to be addressed and evaluated by the directors. The directors of an Italian company are therefore under a duty to carefully analyse a transaction in order to determine the overall benefit for the company (if any), if that is adequate to the obligations and risk assumed by the company thereunder (for that purpose a cap to the guarantee can be introduced) and whether there might be an actual or potential prejudice to the company or its creditors by entering into such transaction. Generally, resolutions passed by the board of directors in violation of the applicable law and the articles of association of the company can be challenged within 90 days by internal auditors, the directors who did not cast their vote in favour of the resolutions passed and, if the resolutions result in a damage to their rights, the shareholders. However, any challenge is without prejudice to rights acquired by bona fide third parties.

Although the Italian Civil Code recognises that parent companies may exercise 'guidance and coordination activities' over their subsidiaries, from a practical perspective (i) all instructions given by parent companies must be reflected in all resolutions (whether of the board of directors or of the shareholders of the company) and properly substantiated and (ii) the reasons for the instructions must be reasonably detailed and not result in a prejudice for the company or its creditors. Any shareholder found to be exercising undue influence may be held liable vis-à-vis the company, its creditors and the other shareholders if the undue influence results in a prejudice for any of them. In any case, directors of Italian companies are never exonerated from liability vis-à-vis the company, its creditors and third parties, including minority shareholders, in case of failure to comply with the fiduciary duties they owe to the company.

In order to prevent undue influence from third parties, particularly holding companies, there is a specific set of provisions under Italian law addressing the conflict of interest of directors. Slightly different rules apply depending on whether the Italian company is incorporated as a *società per azioni* (SpA) or as a *società a responsabilità limitata* (Srl), or whether there is a board of directors or a sole director.

Guarantees are vulnerable to challenge when the guaranteed debt is amended, rescheduled or otherwise extended without the consent of the guarantor. Provisions are usually inserted into guarantees to provide advance consent to such amendments, but the effect of such provisions is limited and a prudent approach is to obtain guarantee confirmations whenever material amendments are made to the guaranteed debt.

Guarantees documented by a document signed in the Italian Republic are subject to registration tax unless exempt. The registration tax (if applicable) is equal to 0.50 per cent of the amount guaranteed.

There are no particular Italian law limitations on the ability of foreign-registered related companies to provide guarantees in an Italian law document.

See also question 31 as to situations where guaranteed claims would be voidable.

**15** Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

The Italian Civil Code prohibits an Italian company from, either directly or indirectly, granting loans, guarantees, or security for the purchase or the subscription of its own shares. The rule is widely interpreted to cover the acquisition of any company directly or indirectly controlling the relevant Italian company and any subsequent refinancing of the acquisition debt. With the exception of circumstances where the assistance granted is for an amount not exceeding the profits payable and the reserves available for distribution, there is no whitewash procedure available. Any agreement in direct or indirect violation of the provision is invalid and unenforceable.

The issue is usually addressed by way of a debt push-down via the merger of the acquisition vehicle (SPV) with the target. In that scenario, the acquisition facilities are advanced to the SPV under a bridge loan, while the refinancing lines (if any) can be advanced directly to the target under a medium term loan, in relation to which security and guarantees can be taken on day one. Before the maturity of the bridge loan (generally, within 18 months from closing of the acquisition) the SPV and the target merge and the acquisition facilities are refinanced under a new medium term loan, or the one used for the refinancing lines (if any). The security package will now extend to the new refinanced acquisition facilities. The described structure cannot however be used where the acquisition is entirely funded through a high yield bond issuance, as bonds usually have a medium to long term maturity profile. As a result, this limitation makes, to a certain extent, the bonds a less suitable instrument to fund acquisitions of Italian targets, requiring a specific analysis and creative solutions to properly address potential financial assistance issues and structure the push-down of the debt.

For this structure to work the statutory merger must comply with the following requirements: (i) the merger plan must identify the financial resources to be used by the company resulting from the merger to meet its debt obligations; (ii) the report of the board of directors must explain, inter alia, the economic reason for the merger, the objectives it intends to achieve and the financial resources it intends to use; (iii) the independent experts (appointed by the court in case of *società per azioni*) must certify the reasonableness of the assumptions and conclusions drawn in the merger plan; and (iv) the independent auditors must provide a report on the merger plan.

It is generally accepted that a guarantee or security granted by an Italian company in order to guarantee or secure any part of the debt which is not used, either direct or indirectly, to acquire the target's

shares is permitted. However, due to the punitive nature and wide interpretation of the relevant provisions, it is advisable to rule out all up-stream guarantees and security and that the non-acquisition debt to be guaranteed or secured is clearly distinguished and separated from the acquisition debt (eg, separate loan agreements or at least separate and independent facilities under the same loan agreement), so as to avoid any argument that any such guarantee or security is in fact indirect financial assistance.

See also question 14 as to general limits to guarantees and security.

**16** What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?

Floating charges and all-asset security are not recognised under Italian law. Separate instruments are required over different types of assets, each subject to a separate set of statutory provisions governing the creation, perfection, registration and enforcement of the relevant security. The most common forms of security are mortgages, pledges (which are governed by different rules depending on the type of assets subject to security), assignments by way of security and special privilege pursuant to article 46 of the Banking Act. With limited exceptions, security under Italian law generally covers existing and well identified assets only. Security over future assets is generally not recognised and is re-characterised as an undertaking to grant security.

As a general rule, security over real estate assets and moveable assets registered with public registries (such as cars, aircraft, ships, etc) is usually granted by way of a mortgage, while security over all other moveable assets (including personal property, shares, bank accounts, receivables and claims) is usually taken by way of a pledge. Security over claims and contractual rights can also be created by an assignment of security. Moveable assets not registered with public registries and reserved for the running of a business (including (i) existing and future equipment, plant, machinery, concessions and instrumental assets; (ii) raw materials, work-in-progress, finished goods, livestock and merchandise; (iii) goods otherwise purchased with the proceeds of the relevant financing; and (iv) existing and future receivables arising from the sale of the assets and goods listed above) can be subject to the special privilege. The special privilege is the closest instrument to a floating charge that Italian law recognises as it covers classes of assets owned from time to time by the borrower or issuers, as opposed to specific assets owned by the grantor at the time the security is granted. However, the special privilege is only available in the limited circumstances where (i) the grantor is the borrower (ie, not available for guarantors) under a loan agreement (or the issuer of notes); (ii) the lender(s) is(are) a bank or financial institution duly authorised to carry out lending activity pursuant to the Banking Act (or the noteholders are qualified investors); and (iii) the financing has a maturity longer than 18 months.

See also questions 17 and 18 as to methods of creation, perfection and registration of the various types of security.

**17** What kinds of notification or other steps must be taken to perfect a security interest against collateral?

Each form of security has its set of rules as to creation, perfection, registration and enforcement and sometimes even the same form of security is governed by different rules depending on the type of assets subject to security.

Mortgages are to be signed before a notary public and registration of security with the competent Land Registry (or the asset-specific registers for vehicles, ships, aircraft, etc) is required not only for the ranking of the security but as an essential requirement for the validity of the security. The mortgage is subject to registration tax (fixed or ad valorem) and mortgage tax (equal to 2 per cent of the amount secured).

As a general rule, pledges require a written agreement, a certified date of the agreement and delivery of the pledged assets to the pledgee (or a custodian) for security purposes. In order to obtain a certified date the document is usually executed before a notary public, but other methods are available. The delivery of the pledged assets has the double function of further strengthening the creditor's right against the pledgor and ensuring the publicity of the security vis-à-vis third parties. Depending on the nature of the assets subject to pledge, delivery can be achieved in different ways.

Italian limited liability companies mainly belong to two categories: *società per azioni* (SpA) or *società a responsabilità limitata* (Srl). While the equity in SpAs is divided up into shares of equal par value, represented by registered share certificates, equity in Srls is not divided into shares and each equity holder is the owner of a percentage (quota) of the entire equity of the company. As a result, delivery of the pledged asset (and therefore perfection of security) is achieved through the transfer by way of security of the certificates representing the shares in an SpA or by registering the pledge in the competent companies registry in case of quotas in an Srl. In each case, the pledge must be recorded in the shareholders book of the company in order for it to be enforceable against the company. Due to the requirement for registration with the competent companies registry, a pledge over quotas in an Srl has to be signed before a notary public and it is subject to registration tax (unless exempt). Registration of the pledge over the shares in an SpA is not required and therefore registration tax is only applicable in certain circumstances.

Pledges over intellectual property rights (eg, patents, designs, trademark registrations and trademarks applications) have to be signed before a notary public and are subject to registration taxes (unless exempt). Delivery of the pledged asset or perfection of security is achieved by registration of the pledge with the competent IP right registry.

For pledges over receivables, claims and bank accounts, delivery or perfection is achieved by notification of the pledge to the relevant debtor (or account bank) or acceptance of it by the latter. In both cases a certified date of the notice oracceptance is required for enforceability against third parties (including the receiver or liquidator of the company). A certified date of the notice is generally achieved by service of the notice by a court bailiff, while a certified date of the acceptance is generally achieved by execution of the acceptance before a notary public but alternative routes for both instruments are available. In relation to these classes of assets, registration of the pledge is not required and therefore registration tax is only applicable in certain circumstances.

The assignment by way of security is an alternative to the pledge as a security in relation to receivables. On the one hand, similarly to pledge over receivables, it too requires a written agreement bearing a certified date and that the security document clearly identifies the receivables subject to security. Contrarily to the pledge, on the other hand, the notification to the assigned debtor (or its acceptance) is only a requirement for the enforceability of the assignment vis-à-vis third parties, as opposed to a perfection requirement of the security. In other words, an assignment by way of security of receivables is a valid security between the parties as of the date of the agreement, irrespectively of the notification to or acceptance by the debtor. This difference makes the assignment a more flexible security and, as a result, more commonly used in the Italian market, as opposed to the pledge. In fact, for a number of commercial and practical reasons, in many circumstances the assignor or pledgor may not be willing to notify its debtors of the security and, with the assignment by way of security, the notice can be postponed to a later moment (eg, event of default) so as to minimise the burden of the security for the company, without impacting on the validity of the security interest. However, it has to be stressed that the enforceability against third parties (including any receiver or liquidator of the company)

requires notice of the assignment. The notice can be served at any time before the insolvency of the company, without jeopardising the security, since the relevant hardening period starts running from the date of the agreement, whereas, in the case of the pledge, the relevant hardening period only runs from the date of the notice.

Special privileges must be signed before a notary public. A list of all equipment, plant, machinery, raw materials, work-in-progress, finished goods, livestock, merchandise and any other goods and claims subject to security must be included in the security document which also must specify the maximum amount secured thereunder. The security document must then be lodged with the specific registry held at the competent court. The special privilege is subject to a registration tax of €200.

**18** Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

Once an Italian law governed security is created and perfected, there is no need to renew the security or the perfection requirements in order to preserve the validity of the security. However, certain events arising post-perfection will require further actions to be taken. For instance, amendments to existing secured documents might require a confirmation of security or new security to be granted depending on the scope of the amendment. Also a change in the parties (eg, the grantor or the beneficiaries of the security (see also question 20)) may require a confirmation of security or new security to be granted depending on the circumstances of the change. Although the grant of new security interests always means new perfection requirements must be satisfied, confirmations do not always require new perfection requirements to be carried out. It depends on the type of security and the reason for the confirmation.

In addition, under Italian law any change or substitution of the assets subject to security generally requires new security with new perfection requirements to be carried out. There are very limited exceptions to this general rule, such as the special privilege (see also question 16) and pledge over balances of bank accounts, which are due to the specific nature of the security and the assets subject to it. A periodic confirmation of security (with the need for new perfection requirements to be carried out) is however strongly advisable in order to preserve the security, even with reference to these exemptions. In all other circumstances the inclusion of new assets requires new security to be taken, with new perfection requirements, even in cases where this was foreseen since the beginning. As mentioned in question 16, future assets are not subject to security but only the subject of an undertaking to grant security.

**19** Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

In the absence of any express agreements with unions or other employee representative bodies which may oblige the employer to obtain consent or consult on this subject (which in practice are likely to be extremely rare), there is no obligation to obtain consents from or consult with a works council, trade union or other employee representative body for the provision by an Italian company of guarantees or security over its assets.

**20** Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

Italian law governed security interests are to be granted to lenders individually. As mentioned, trusts and trustees are not recognised under Italian law. As a result, security cannot be granted to one person only for the benefit of others but instead each creditor must be the beneficiary of the security interest (and registered as such, if registration is a perfection requirement to that security). In other words, only the persons specifically identified in the security documents as beneficiaries of the security (and if the case, registered or notified to the relevant debtor as such) have the rights purported to be created under the security (including enforcement rights). This results in the need for a confirmation of security (and new registrations are required, if the security is subject to registration) upon any assignment or transfer of the interests of any lender of record. Sub-participations are excluded from any renewal or confirmation process as the lenders of record (and therefore the beneficial owners of security) remain the same entities.

Generally, this rigidity is mitigated by appointing the collateral agent or trustee as agent acting in the name and on behalf of the other secured parties pursuant Italian law. Such appointment is normally included in the loan agreement or the intercreditor agreement and allows the collateral agent to sign the security documents (including the security confirmations upon a change of lender) on behalf of the other secured creditors, exercise their rights thereunder and enforce security. This however does not exempt from the requirement that the security be granted, registered (if required) and enforced in favour of each lender individually.

Sub-participation structures, where only one bank (eg, the agent) is the lender of record and all other lenders are sub-participants, are sometimes implemented in order to structure around this requirement. However, sub-participants are not recognised as secured creditors and have no rights under the security. They only rely on the sharing and turn-around provisions included in the intercreditor agreements and bear the risk of the insolvency of the lender of record.

**21** What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

Since security governed by Italian law is to be granted to all lenders individually (see question 20), release of security can only occur upon confirmation from each lender. However, because of the Italian law power of attorney usually granted to the collateral agent from each lender in relation to the Italian law security documents, the collateral agent might be entitled to release security on behalf of all the lenders. However, if that is the case, the relevant authorisation has to be expressly included in the loan or intercreditor agreement and it generally includes the conditions for any release of security.

**22** Describe the fraudulent transfer laws in your jurisdiction.

See question 31 regarding voidable transactions.

## Debt commitment letters and acquisition agreements

**23** What documentation is typically used in your jurisdiction for acquisition financing? Are short form or long form debt commitment letters used and when is full documentation required?

Credit agreements and intercreditor agreements will generally follow the format of the latest LMA English law form for leveraged finance transactions. However, it is usually necessary to tweak parts of the documents in order to deal with specific Italian-law related issues when the documents are governed by English law and the borrower is an Italian company. If the documents are to be governed by Italian law, some parts of the LMA forms will need re-drafting to comply with Italian law.

Credit agreements are usually heavily negotiated. The LMA has published two English law forms of intercreditor agreement (which are generally followed in the Italian market). The first is structured for a senior and mezzanine bank loan financing. The second (published in November 2013) is for super senior revolving credit facility and senior secured high yield notes.

For acquisitions of private companies, a commitment letter attaching a detailed long-form term sheet is generally used.

For acquisitions of public companies, a fully negotiated and executed credit agreement and other ancillary financing documentation would be required to be in place at the time the offer is made in order to satisfy the certain funds requirements of article 37-bis of related regulation issued by CONSOB (see question 4).

**24** What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

Commitment letters usually provide for underwritten debt or for a club of lenders to provide financing. Best efforts commitments are sometimes provided for bond transactions. Where the purpose of the bond issuance is to fund an acquisition, the best effort bond commitment could be backed up by an underwritten commitment to provide bridge bank facilities if certainty of funds is required to complete the acquisition.

**25** What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

Conditions precedent to funding generally include:

- corporate formalities for all borrowers and guarantors (eg, board resolutions, constitutional documents and certificate of incorporation by the relevant companies registry, specimen signatures and certificates certifying no breach of borrowing or grant of guarantee or security limitations);
- executed finance documents (eg, the facility agreements, security documentation, intercreditor agreement and fee letters);
- notices and any other relevant documentation under the security documentation;
- an executed acquisition agreement together with certification that all conditions precedent thereunder have been satisfied;
- details of insurance;
- copies of due diligence reports, including a tax structure memorandum and reliance letters in respect thereof;
- financial projections;
- financial statements;
- a closing funds flow statement;
- a group structure chart;
- 'know your customer' requirements;
- evidence that fees and expenses have been paid;
- evidence that existing debt will be refinanced and security released on closing; and
- legal opinions.

**26** Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

Market flex provisions are sometimes included for financing to be syndicated to other lenders in the international market, particularly for larger deals. When included, such provisions may permit arrangers to increase the margin and fees, move debt between tranches under the same agreement or create or increase the amount of a subordinated facility, remove unusual provisions or impose gross-up on withholding if this appears necessary or desirable to ensure that the original lenders can sell down to their targeted hold levels in the facilities by offering the participation to international players which do not benefit from an exemption on withholding. Market flex is often documented in the fee letter, if not directly in the commitment letter.

**27** Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction?

Securities demands were a very unusual feature in Italy. However, the use of this feature may potentially increase in the future, in relation to acquisitions funded through bonds, in situations where funding is initially secured by back-stop short term bank facilities which ensure certainty of funds for completion of the acquisition in a timely fashion.

**28** What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

For acquisitions of private companies, lenders will wish to benefit from any business material adverse change clause that a buyer negotiates in the acquisition agreement for the target, but generally will not require these provisions to be replicated in the commitment letter or the credit agreement, which will provide instead that the conditions to the acquisition are satisfied and not waived. The lenders will require controls on the ability of the purchaser to amend or waive certain provisions of the acquisition agreement, such as the long stop date, price and the conditions to closing or termination rights.

The lenders will require security over the contractual rights contained in the acquisition agreement that enable the purchaser to seek recourse against the vendor and also that the acquisition agreement can be disclosed to the lenders. The 'drop dead date' for completing the acquisition should match the availability period for the financing.

**29** Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

There is generally no requirement to make commitment letters and acquisition agreements public in respect of acquisitions of private companies or public companies. However, in relation to acquisitions of public companies, commitments letters and acquisition agreements are filed with CONSOB and described in the offering memorandum.

## Enforcement of claims and insolvency

**30** What restrictions are there on the ability of lenders to enforce against collateral?

As a general rule, under Italian law foreclosure is effected through a court supervised procedure culminating in a public auction. As a result, enforcing against collateral can be quite expensive and time-consuming. However, while this is the only avenue available for mortgages and special privileges, the enforcement of a pledge can also generally be done, depending on the type of assets subject to security, though an out-of-court procedure, provided that this ensures a transparent sale process and fair sale price. In this latter case, the secured creditors have the right, after five days from the service on the debtor of the injunction to pay, to have the assets subject to security sold, in whole or in part, in one or more instalments, by auction or by private sale through the security agent, a court bailiff or other authorised persons. The secured creditors also have the right to demand payment by way of assignment, in whole or in part, of the assets subject to security. The demand is to be made to the court and, if granted, the assignment will be made pursuant to a valuation of the asset by way of expert report.

Due to the fungible nature of some assets (eg, bank accounts and shares in public companies), security over these assets can be governed by the Financial Collateral Directive (Directive 2002/47/

EC), as implemented by Italian Legislative Decree No. 170 of 21 May 2004, which greatly simplifies the enforcement process, making it faster and not subject to any stay in the event of insolvency of the relevant grantor.

An automatic moratorium begins on the date the Italian company is declared bankrupt or any other insolvency proceeding, including a pre-bankruptcy composition with creditors, is opened against the company. Once the moratorium has commenced, secured creditors cannot enforce security (other than certain financial collateral arrangements) and no action or proceeding can be started or continued against the company by any creditor (whether secured or unsecured).

In the context of a pre-bankruptcy composition, if certain conditions are met, a debtor may bring forward the automatic stay of all individual enforcement and protective actions by filing (and registering in the Companies Registry) a 'blank petition'. The filing of the relevant reorganisation plan and of the other documents is then deferred to a term set by the Bankruptcy Court between 60 and 120 days after the date of the filing of the relevant petition.

No automatic stay applies in an out-of-court restructuring implemented outside a formal procedure by way of a certified recovery plan). In case of a restructuring implemented by way of debt restructuring arrangements an interim moratorium begins on the date of publication of the agreement in the competent companies registry for a period of 60 days during which creditors may not commence or continue legal actions in relation to claims which arose before the publication. However, both the certified recovery plans and the debt restructuring arrangements may provide for a moratorium or postponement of the claims in agreement with creditors.

No moratorium applies in case of voluntary liquidation of an Italian company.

**31** Discuss any preference periods in which secured claims could be voidable.

Pursuant Royal Decree No. 267 of 16 March 1942 (the Bankruptcy Law), upon the declaration of bankruptcy (or in certain circumstances during an extraordinary administration procedure) certain transactions are considered without effect vis-à-vis the creditors while others are subject to claw-back. In particular:

- the following transactions are without effect vis-à-vis the creditors:
  - transactions entered into for no consideration, during the two years before the commencement of the insolvency proceeding (the relevant date); and
  - payments of debt during the two years before the relevant date in relation to which the scheduled due date was on or after the date the insolvency procedure was opened;
- the following transactions are subject to claw-back unless the relevant third party proves that it had no knowledge of the insolvency status of the debtor (high standard of rebuttal):
  - undervalue transactions during the last twelve months before the relevant date, in relation to which the value of the services, goods or undertakings provided by the debtor (now insolvent) is at least 25 per cent higher than the consideration actually received or to be received by it;
  - payments in relation to monetary debts due and payable not made in cash or through any other customary means of payment during the twelve months before the relevant date;
  - security interests granted during the twelve months before the relevant date for pre-existing unexpired debts; and
  - security interests granted during the six months before the relevant date for pre-existing expired debts; and
- the following transactions, if entered during the six months before the relevant date, might also be challenged, but the bankruptcy receiver has to prove that the relevant third party had knowledge of the insolvency status of the debtor:
  - payments of debt due and payable;
  - transaction for adequate consideration; and
  - security interests or other preference granted simultaneously with the incurrence of the debt secured.

In connection with an extraordinary administration procedure, claw-back periods can be extended to up to five years.

Lastly, transactions may be also challenged by the bankruptcy receiver under the ordinary rules of the Italian Civil Code if entered into in prejudice of the creditors. However, due to the higher standard of proof required for the successful conclusion of such action, this action is rarely brought.

The Bankruptcy Law also provides for a number of transactions which are expressly excluded from claw-back, most notably payments for goods and services in the normal course of business on arms-length terms, payments of salary or compensation to employees of the debtor and payments and other transactions made or entered into in connection with certified recovery plans, debt restructuring arrangements or pre-bankruptcy compositions with creditors.

Following the Financial Collateral Directive, certain insolvency challenge risks and the moratorium on enforcement of security in insolvency do not apply to security over financial instruments, credit claims (including claims for repayment of money to and loans made by credit institutions) and cash.

**32** Does your jurisdiction allow for debtor-in-possession (DIP) financing?

Pursuant to the Bankruptcy Law, a debtor filing a petition for admission to pre-bankruptcy composition with creditors or for approval of a debt restructuring arrangement (see question 35) may also ask the relevant bankruptcy court for authorisation to secure financings with a super-priority status, in order to fund its ongoing operations and the restructuring process. Such authorisation may also be requested for interim and bridge financings granted ahead of the relevant filing but in view, and for the purpose, of it. The relevant bankruptcy court may also authorise the debtor to grant mortgages and pledges as collateral relating thereto. The authorisation, if granted, will qualify the financing as pre-deductible expense (see question 35), which therefore will rank senior to any other pre-petition claims other than secured claims which have priority over the charged assets. In order for the financing to get super-priority, it has however to be certified by a third party independent expert as instrumental to enhancing the recovery by all creditors. In addition, pursuant to a recent change in law, financings granted in connection with the filing of a pre-bankruptcy composition will be granted super-priority status subject to the admission of the debtor by the court to the relevant proceeding. This means that financings granted to debtors before the relevant court ruling will not enjoy super-priority status if the court then declares the petition not admissible.

The same super-senior priority status can also be granted to shareholders' loans granted in compliance with the above requirements, but only up to 80 per cent of the value of the loan. Claims of lenders who become shareholders in execution of a pre-bankruptcy composition or debt restructuring agreement could also benefit from the super-priority status.

**33** During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

See question 30. Under the Bankruptcy Law, there is no equivalent concept as adequate protection. Therefore, as a general rule, secured creditors have no right to ask for relief from the automatic stay of individual enforcement and protective actions. Article 53 of the Bankruptcy Law, however, states that creditors whose claims are

secured over moveable property may realise their security if: (i) the secured property is in the secured creditors' possession; (ii) their claims have been recognised vis-à-vis the bankruptcy estate; and (iii) the sale is approved by the bankruptcy court, which also determines the form and mechanics of the sale.

**34** In the course of an insolvency, can previous payments to lenders be clawed back by a court or other authority? What are the rules for such clawbacks and what period is covered?

See question 31.

**35** In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

The proceeds of the realisation of the assets in a bankruptcy procedure are applied as follows:

- first, towards costs and expenses for the administration of the insolvency procedure (including fees of the receiver or liquidator), the temporary running of the business (when authorised) and the liquidation of the assets, together with any other claims qualified by operation of law as pre-deductible;
- second, towards secured claims and other privileged claims, in the order of priority provided by law; and
- then, towards unsecured claims pro rata, together with secured claims to the extent not satisfied through the proceeds of the secured assets.

Both the bankruptcy proceedings and the extraordinary administration proceedings (whether pursuant to Legislative Decree No. 270 of 1999 or Law Decree No. 347 of 2003) are court-driven (or government-driven in case of the extraordinary administration proceeding under Law Decree No. 347 of 2003) and therefore creditors have no voting rights.

A certified recovery plan, which has the main effect of exempting from claw-back the transactions and payments carried out or made in execution of the plan, is generally a plan voluntarily entered into by the debtor without the agreement of the creditors or court approval. However, the plan may also consist of an agreement entered into by the debtor and all or part of its creditors, in which case it is only binding on the creditors who entered into it.

A debt restructuring arrangement can only be entered into by the debtor with the consent of its creditors representing at least 60 per cent of all its debt. The agreement, which is freely negotiable, must be approved by the competent bankruptcy court and provide for the regular payment of all non-consenting creditors.

Pre-bankruptcy compositions with creditors are put forward by the debtor who files a plan with the competent bankruptcy court. The plan, once admitted by the court, is subject to the votes of the creditors and it is approved if it receives consent from the creditors representing the majority of the claims admitted to vote by the court (or where different classes of creditors are provided for by the plan, if the creditors representing the majority of the claims of a majority of the classes have voted in favour). Priority claims to be paid in full (eg, secured claims) do not have voting rights unless those creditors waive in whole or in part their right of priority. The plan must be approved by the required majority of creditors and ratified by the bankruptcy court. The ratification will render the plan binding on all creditors (whether consenting or non-consenting).

Bankruptcy compositions with creditors are put forward by one or more creditors, third parties or, if within one year from the commencement of the bankruptcy proceeding, debtors. If the plan receives the preliminary approval of the receiver and the creditors' committee, it is subject to the consent of creditors representing the majority of the claims admitted to vote by the court (or where different classes of creditors are provided for by the plan, if the creditors representing the majority of claims of the majority of classes have voted in favour). The plan must be approved by the required majority of creditors and ratified by the bankruptcy court. The ratification will render the plan binding on all creditors (whether consenting or non-consenting).

**36** Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

In the absence of case law on the subject, the effect of contractual arrangements purporting to create an effective subordination of claims is unclear under Italian law. Courts would generally give effect to contractual subordination arrangements so long as they do not override mandatory insolvency laws such as the requirement that unsecured creditors (which are not preferential creditors) are paid pari passu (par condicium creditorium). Therefore, the lenders cannot agree with the borrower that the lenders will rank ahead of unsecured creditors other than through holding security. In addition, it is not clear whether contractual arrangements pursuant to which different groups of lenders agree priority between themselves would be enforceable against third parties (including the receiver). If not, the senior lenders, in order to be satisfied with priority over the junior lenders, would effectively have to rely on the pro-rata sharing and turn-around provisions included in the intercreditor agreements. Structural subordination can be used to give one category of unsecured creditor priority over another.

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**Update and trends**

In June 2012 the Italian government passed Law Decree 83 as part of a package of measures to boost the economy, increase competitiveness of the Italian corporate system and facilitate access to alternative forms of financings by non-listed companies. The new set of rules allows access to bond financing by non-listed companies by extending the application of certain favourable provisions originally applicable to listed companies only. In particular, the new legislation: (i) eliminated the old size restrictions on bond offerings for non-listed companies provided that the bonds are listed on a regulated market or multilateral trading facility or the issue is of convertible or exchangeable bonds; (ii) extended the deductibility of interest regime to non-listed companies provided that the bonds are offered to 'qualified investors' only; and (iii) extended the exemption from withholding tax to interests paid by non-listed companies provided that the bonds are listed in a regulated market or multilateral trading facility. As a result high yield bonds are now a viable method of financing also for non-listed companies and 2013 saw a sharp increase in the Italian market of bond debt deals in lieu of, or coupled with, bank debt transactions.

Another recent development introducing important changes with a view to facilitating access to medium and long-term financing by Italian companies was introduced by the Law Decree 145 of 13 December 2013. In particular, the Law Decree, among other things, makes (i) the favourable substitute tax regime and (ii) the special privilege – both traditionally available to bank financings with maturity longer than 18 months only – available to bond issuances as well. As a result, this recent piece of legislation lifted additional obstacles to enabling access to capital markets financing for Italian companies as, on the one hand, the substitutive tax regime reduces the costs of financing by enabling the relevant borrower or issuer to elect for a 0.25 per cent tax (calculated on the amount of the financing) in lieu of all (higher) taxes which would be otherwise owed in connection with the related security package and, on the other hand, makes a flexible security interest as the special privilege (see questions 16 and 17) available to bondholders.

**37** How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

The general rule states that interest on claims will stop accruing from the commencement of a formal insolvency procedure until after the end of the proceeding.

It is possible that the courts may refuse to allow a part of a claim if it is attributable to the amount of interest which would have accrued between the commencement of the insolvency procedure and the date of payment.

**38** Discuss potential liabilities for a secured creditor that enforces against collateral.

Generally under Italian law secured creditors can be liable only if they enforce the security by stepping in the shoes of the pledgor. For example, secured creditors can incur the liabilities of an owner such as liabilities to clean up environmental contamination if they actually become the owners of the mortgaged land, as a result of the foreclosure. However stepping in the shoes of the pledgor is not that common in Italy as most of the enforcement procedures result in the sale, either through a court supervised proceedings or otherwise, of the assets subject to security. In limited circumstances though the secured creditors have the right to demand payment by way of assignment, in whole or in part, of the assets subject to security.