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The International Comparative Legal Guide to:

Lending & Secured Finance 2015

3rd Edition

A practical cross-border insight into lending and secured finance

Published by Global Legal Group, with contributions from:

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Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

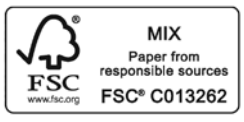
GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Information Press Ltd
April 2015

ISBN 978-1-910083-40-6
ISSN 2050-9847

Strategic Partners



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Country Question and Answer Chapters:

Italy

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Italy?

As a reaction to the credit crunch and the overall economic crisis, the Italian Government has introduced a number of different measures to boost the domestic economy, increase competitiveness of the Italian corporate and financial system and facilitate access by Italian companies to alternative sources of funding. This process started in 2012, when the Italian Government passed a new law to allow access to bond financings by non-listed companies by extending the application of certain favourable provisions originally applicable to listed companies only. Subsequent legislation passed in the following years lifted additional obstacles to the access to the capital market for Italian companies, including by way of private placement transactions. As a result, high-yield bonds have become a viable source of financing for non-listed companies and, during the last couple of years, we have seen in the Italian market a sharp increase of bond-debt deals *in lieu* of, or coupled with, bank-debt transactions.

The Italian Government has recently introduced a number of changes to the Italian regulatory and tax framework, with the aim of making new financing options (alternative to the traditional bank-financing model) available to Italian companies. In particular, a new law enacted in June 2014 has implemented in Italy the Alternative Investment Fund Manager Directive (AIFMD) and Bank of Italy (i.e., the Italian regulatory authority) is now working on the relevant implementing regulation, which is expected to come into force reasonably soon. The new regulatory framework will establish an EEA passporting regime for alternative investment fund managers and allow, subject to certain requirements, direct lending to Italian companies through the establishment of credit funds. In addition, a recent package of measures enacted in August 2014 (the so-called "Competitiveness Decree" (*Decreto Competitività*)) in order to boost the domestic economy and further expand the alternative funding options, has made it possible for insurance companies and Italian securitisation vehicles (i.e., companies established pursuant to the Italian securitisation law) to engage in direct lending to Italian borrowers. The ability to do so is however subject to the issuance of regulations by the respective regulatory authority (i.e., IVASS and Bank of Italy), which will define the relevant requirements. On the tax side, favourable tax regimes and exemptions from withholding tax on interest payments have now been made available to long-term financings granted by banks and other entities established in an EEA state.

1.2 What are some significant lending transactions that have taken place in Italy in recent years?

- GTECH's offering of $5.2 billion (equivalent) multi-tranche senior secured notes to fund the acquisition of International Game Technology;
- GTECH's $2.4 billion (equivalent) multi-currency revolving credit facility and €800 million term loan facility;
- ENEL's renegotiation of its revolving credit facility amounting to approximately €9.4 billion; and
- Wind Telecomunicazioni's refinancing including a new €4 billion issuance of three tranches of senior secured bonds.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, Italian companies can generally guarantee borrowings of other members of their corporate group. However, the availability of guarantees must in practice be permitted by the articles of association of the relevant company and is restricted by corporate benefit (see question 2.2) and financial assistance rules (see question 4.1).

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Generally, any transaction to be entered into by an Italian company (including the granting of security and guarantees) must (i) not be *ultra vires* (i.e., outside the corporate power of the company), and (ii) be instrumental in achieving the concrete business purpose of the company itself (i.e., there must be some direct or indirect benefit to that company). The existence of some actual benefit is ultimately a matter of fact to be addressed and evaluated by the directors on a case-by-case basis. The directors of an Italian company are therefore under a duty to carefully analyse a transaction in order to determine the overall benefit to the company (if any), if it is adequate to the obligations and risk assumed by the company thereunder (for that purpose a monetary cap to the guarantee can be introduced) and whether the transaction is sustainable and there might be an actual or potential prejudice to the company or its creditors by entering into such transaction.

Directors of Italian companies are under the duty to promote the success of the company itself, as opposed to the group's success. This is why corporate benefit is to be assessed at the level of the relevant company on a standalone basis. Thus, it is generally more difficult to establish that a company obtains a corporate benefit from providing an upstream or cross-stream guarantee or security. However, in certain circumstances and subject to specific rules, the interest of the corporate group to which such company belongs may also be taken into consideration.

Generally, resolutions passed by the board of directors in violation of the applicable law and the articles of association of the company, as in the case of transactions *ultra vires*, in the absence of a real and adequate corporate benefit or affected by conflict of interest, may be subject to challenge and annulment. Civil liabilities may be imposed on the directors of the company in those circumstances or in case of failure by the directors to comply with the fiduciary duties they owe to the company or if they did not act in its best interest. In addition, any shareholder found to be exercising undue influence may also 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. However, any challenge is without prejudice to rights acquired by *bona fide* third parties.

2.3 Is lack of corporate power an issue?

Yes, please see question 2.2.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

The granting of financings or other forms of financial support (including guarantees) on a professional basis and *vis-à-vis* the general public is a restricted activity reserved to banks and financial intermediaries duly authorised by and registered with the Italian regulator (i.e., Bank of Italy). However, granting guarantees in support of indebtedness of other members of the same corporate group is generally not considered a restricted activity, and as such it is generally not subject to authorisations or consents by any governmental, judicial or regulatory body or authority nor subject to filings. Guarantees, which must be permissible under the articles of association of the relevant company, are usually approved by the board of directors of the guarantor and shareholders' approval is generally not required. Guarantees must be documented in writing and are usually included directly in the loan agreements. Guarantees documented by a document signed by the parties in the Italian Republic are subject to registration with the competent registration office and thus, unless exempt, subject to a registration tax equal to 0.50% of the amount guaranteed.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

As mentioned in question 2.2, any guarantee granted by an Italian company must be sustainable, adequate and proportionate to the overall direct or indirect benefit that company receives as a whole by entering into the relevant transaction. To that effect a monetary cap quantifying the actual benefit deemed to be received is generally introduced. In addition, with reference to *omnibus* guarantees, i.e., guarantees granted in relation to future or potential obligations, the indication of the maximum guaranteed amount under the relevant guarantee is mandatorily required for the validity of the guarantee.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No Italian exchange control regulations restrict enforcement of guarantees. However, the underlying payment obligations might not be enforceable if contrary to exchange control restrictions imposed by the United Nations or the European Union from time to time.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

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 privileges (*privilegi speciali*) pursuant to article 46 of Legislative Decree No. 385 of 1 September 1993 (the "**Consolidated 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 movable assets registered with public registries (such as motor vehicles, aircraft, ships, etc.) is usually granted by way of a mortgage, while security over all other movable assets (including personal property, IP rights, 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 by way of security. As a general rule, pledges require a written agreement, an "undisputed date" (*data certa*) of the agreement and the delivery of the pledged assets to the pledgee (or a custodian) for security purposes. In order to obtain an undisputed 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 the pledge, delivery can be achieved in different ways.

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

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Floating charges and all-asset security are not available 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 closest instrument to a floating charge that Italian law recognises is the special privilege (*privilegio speciale*) (see question 3.7).

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Security over land and buildings (as well as registered movable assets) is granted by way of a mortgage, while security over all other

movable assets (including machinery and equipment) can be taken by way of a pledge.

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 establishing ranking of security but as an essential requirement for the validity of the security.

See question 3.1 for the general requirements for pledges. However, because of (i) the delivery requirement, i.e., possession of the relevant assets has to pass onto the secured creditor(s), (ii) the need for a (partial) release of security every time an asset subject to security is to be disposed of, and (iii) re-characterisation as an undertaking to grant security of any security over future assets, security over machinery or equipment is rarely taken, unless the special privilege is available (see question 3.7).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security over receivables can be taken by way of a pledge, and delivery/perfection is achieved by notification of the pledge to (or acceptance of it by) the relevant debtor. In both cases an undisputed date of the notice/acceptance is required for enforceability against third parties (including the receiver/liquidator of the pledgor). An undisputed date of the notice is generally achieved by service of the notice by a court bailiff, while an undisputed date of the acceptance is generally achieved by execution of the acceptance before a notary public but alternative routes for both instruments are available (including certified electronic mail).

Alternatively, security over receivables can be obtained in the form of an assignment by way of security of the relevant receivables. On the one hand, similarly to pledge over receivables, the assignment by way of security also requires (i) a written agreement bearing an undisputed date, and (ii) that the security document clearly identifies the receivables subject to security. 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 (as is the case for the pledge). 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, irrespective of the notification to/acceptance by the debtor. This difference makes the assignment a more flexible security and, as a result, it is 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/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 (e.g., event of default) so as to minimise the impact of the security on the company's day-to-day operations, 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 pledgor, 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.

In case the assigned debtor is a governmental entity or the assigned/pledged claims are public sector claims, specific rules apply and additional requirements, including the consent of the assigned debtor and/or the compliance with specific formalities for the execution of the relevant security document, may be required.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Security over bank accounts is taken by way of a pledge over the bank accounts, although technically this is a pledge over the claims *vis-à-vis* the account bank for the payment of any positive balance.

See questions 3.1 and 3.4 for the requirements for a pledge over receivables.

Unless otherwise expressly agreed in the agreement, the right to operate the bank account passes upon execution of the relevant security document from the pledgor to the pledgee by operation of law. However, in order not to impair the ability of the pledgor to conduct its operations in the ordinary course of business, it is market practice to leave the right to operate the operating account with the pledgor until a freezing notice is delivered by the pledgee to the account bank (usually, once an event of default has occurred).

Due to the floating nature of the assets subject to this security interest (i.e., the balance of the accounts), a periodic confirmation of security (with the need for a new notice to be delivered to the account bank (i.e., the assigned debtor)) is strongly advisable in order to preserve the security.

Due to the nature of the asset subject to this specific security which qualifies as financial collateral, security over bank accounts can be governed pursuant to 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 once an enforcement event has occurred under the security document.

3.6 Can collateral security be taken over shares in companies incorporated in Italy? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Italian limited liability companies mainly belong to two categories: *società per azioni* (S.p.A.); or *società a responsabilità limitata* (S.r.l.). While the equity in S.p.A.s is divided up into shares of equal par value, represented by registered share certificates (unless in dematerialised form), equity in S.r.l.s is not divided into shares and each equity holder is the owner of a percentage (quota) of the entire equity of the company.

Due to the need for perfection of the relevant Italian law perfection requirements and the characteristics of the relevant assets, security over both shares and quotas should be taken pursuant to Italian law-governed pledge agreements.

The general rules applicable to pledges described in question 3.1 apply. 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 S.p.A. (or by registering the pledge in the securities account where the shares are held, in case of dematerialised shares in an S.p.A.) or by registering the pledge in the competent Companies Registry in case of quotas in an S.r.l. In each case, the pledge must be recorded in the shareholders' book of the company (if any) 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 S.r.l. has to be signed before a notary public and registered with the competent registration office in Italy. This is not, however, a requirement for a valid pledge over the shares in an S.p.A.

In the case of shares over public companies, which are always in dematerialised form and qualify as financial collateral, security

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 once an enforcement event has occurred under the security document.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Movable 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, 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 (i.e., not available for guarantors) under a loan agreement (or the issuer of notes); (ii) the lender(s) is/are a bank(s) or financial institution(s) duly authorised to carry out lending activity pursuant to the Consolidated Banking Act (or the noteholders are qualified investors); and (iii) the financing has a maturity longer than 18 months.

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.

Due to the floating nature of this security interest and the assets subject to it (i.e., the inventory), a periodic confirmation of security (with the need for a new filing of the list of assets subject to security with the competent court) is strongly advisable in order to preserve security.

As an alternative to the special privilege, security over a class or classes of movable assets can be taken by way of a "revolving pledge". Although very rarely used in practice because of its burdensome procedure and as it is not a well-tested instrument, the revolving pledge can theoretically cover well identified movable assets not subject to a specific regime (mainly the same which can be subject to special privilege) subject to the following requirements: (A) the assets subject to security are to be (i) included in a list, (ii) physically "marked" as subject to security, and (iii) deposited in a well confined area outside the control of the pledgor; (B) the security is to be granted for a maximum agreed amount; and (C) each substitution of the assets must be made with an asset of the same type and of a similar value as the one disposed of.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes. However note the considerations in section 2 above and in this section 3.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

If notarisation is required (see question 3.13), relevant costs depend on value of the agreement and activity requested.

Unless exempt, security documents executed in Italy or registered in Italy at the time of execution (e.g., as a perfection requirement) or at any time thereafter (e.g., for enforcement purposes) are subject to registration tax. Security interests are generally subject to a registration tax equal to (i) Euro 200 when securing the security provider's obligations as a borrower only, or (ii) 0.5% of the amount secured when securing third parties' obligations. Mortgages are also subject to an additional mortgage tax equal to 2% of the amount secured.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Notification requirements are generally not time consuming or expensive, but this depends on the number of notifications (e.g., number of debtors to be notified) or the frequency of the notifications (e.g., monthly notifications to the account banks). Filings and registrations can generally be carried out in a swift fashion but the circumstances may involve numerous filings/registrations (e.g., registration of mortgages in several different land registries). As to registration costs, see question 3.9.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

No regulatory, judicial or similar consents are required for the creation of security by companies generally. Specific assets may be subject to consent either by operation of law (e.g., public sector claims are subject to consent by the relevant governmental entity) or by contract (e.g., security over receivables might be subject to consent by the relevant debtor).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There is no special priority nor concern in case of security for a revolving credit facility.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Notarisation is a requirement for some security only (e.g., mortgages and pledge over quotas in an S.r.l.), while for other security it may be advisable in order to ensure an undisputable date, but other methods are available to achieve this effect.

Powers of attorney ("**PoAs**") are required every time a document is not signed directly by any director of the company duly authorised by the relevant corporate authorisations. A notarised PoA (or a notarised abstract of the board resolutions authorising the relevant director(s)) is required every time a security document is to be signed before a notary public. An apostille, pursuant to the Hague Convention Abolishing the Requirement for Legalisation for Foreign

Public Documents, or similar authentications might be required in case of notarisations coming from a notary licensed in a country other than the one notarising the relevant security document.

Italian law documents cannot be executed as deeds or in counterparts. An Italian law security document can generally be executed by the parties at a physical meeting where all parties sign the same piece of paper or by exchange of commercial mail, where a party signs a proposal of the agreement and posts it to the other side and the other party signs a separate document for acceptance and posts it to the proposing party.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) *Shares of the company*

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 and subject to certain other requirements, there is no exemption 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 (the "**SPV**") with the target. In that scenario, the acquisition facilities are advanced to the SPV under a bridge loan, while the refinancing or new revolving lines (if any) can be advanced directly to the target under a medium term loan, in relation to which security and guarantees by the target can be taken on day one. Before the maturity of the bridge loan (generally, within 12 to 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 or new revolving 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 bond issuance, as bonds usually have a medium to long-term maturity profile. As a result, this limitation makes, to a certain extent, 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/secure any part of the debt which is not used, either directly 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/secured is clearly distinguished and separated from the acquisition debt (e.g., 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 2 as to general limits to guarantees and security.

(b) *Shares of any company which directly or indirectly owns shares in the company*

Yes. See (a) above.

(c) *Shares in a sister subsidiary*

Arguably this is not subject to the financial assistance restrictions. However, as mentioned in question (a) above, due to the punitive nature and wide interpretation of the relevant provisions, it is advisable that the debt for the acquisition of the sister subsidiary be clearly distinguished and separated from the debt for the acquisition of the company's shares or any of its direct or indirect holding companies.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Italy recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Italian law-governed security interests are commonly granted to lenders individually. Although trusts governed by foreign law should be recognised by Italian courts, there are no trusts available under Italian law. As a result, security is not 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 this is the case, registered or notified to the relevant debtor as such) generally 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 interests by any lender of record.

5.2 If an agent or trustee is not recognised in Italy, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Generally, the trustee's role and functions are replicated by appointing the collateral agent/trustee as agent acting in the name and on behalf (*mandatario con rappresentanza*) 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 avoid the requirement that the security be granted, registered (if required) and enforced in favour of each lender individually. The validity and enforceability of alternative solutions to this issue (e.g., parallel debt structure) are untested and highly debated in Italy.

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

5.3 Assume a loan is made to a company organised under the laws of Italy and guaranteed by a guarantor organised under the laws of Italy. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

If the loan is transferred, for the new lender to have a valid claim against the borrower, enforceable against all third parties (including a possible borrower's bankruptcy receiver), as a matter of Italian law, the transfer must be notified to, or accepted by, the relevant borrower and the notification or acceptance must bear an undisputable date.

Guarantees are vulnerable to challenge when the guaranteed debt is amended, rescheduled, extended or otherwise transferred 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.

As to security, please refer to question 5.2.

However, please note that if the loan, the guarantee or the security are governed by a law other than Italian law, different requirements may apply according to Rome I Regulation ((EC) 593/2008).

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

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 26% or the lower rate provided for by any applicable double taxation treaty. However, this general rule is subject to various exemptions. For example, withholding does not apply in respect of: (a) interest paid on an advance from (i) an Italian bank (i.e., a bank or a financial institution duly authorised to carry out lending activity pursuant to the Consolidated Banking Act), or (ii) 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 (*stabile organizzazione*); or (b) interest arising from medium/long-term loans granted by (i) a bank, financial institution or insurance company organised and authorised in the European Union, (ii) institutional investors (including credit funds) established in a white-listed jurisdiction and subject to regulatory supervision, (iii) Italian securitisation special purpose vehicles (subject to implementing regulation by the Bank of Italy not yet in force), or (iv) certain EU credit institutions. The borrower is responsible for accounting to the Italian tax authorities for any applicable Italian withholding tax.

According to one interpretation of the relevant Italian tax provisions, the proceeds of a claim under a guarantee by an Italian guarantor or the proceeds of enforcing security granted by an Italian entity could also be subject to withholding tax as outlined above.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Under Italian law, there are no tax incentives provided preferentially to foreign lenders and there are no taxes applicable to foreign lenders for the effectiveness or registration of loans, mortgages or security documents other than those highlighted above, which apply to all lenders, irrespective as to whether they are Italian or foreign. On the contrary, Italian lenders might take advantage of tax incentives reserved for them such as the withholding tax exemption reserved for the entities listed in question 6.1 or the substitutive tax (*imposta sostitutiva*) regime, which Italian and EU banks, insurance companies, credit funds or Italian securitisation special purpose vehicles (subject to implementing regulation by Bank of Italy not yet in force) may opt for. Pursuant to the substitutive tax regime, all indirect taxation applicable to a transaction (including registration costs for security) is replaced by an umbrella tax equal to 0.25% of the amount of the loan if the loan has a maturity longer than 18 months.

6.3 Will any income of a foreign lender become taxable in Italy solely because of a loan to or guarantee and/or grant of security from a company in Italy?

No, a foreign lender will not become taxable in Italy solely because of a loan to, or grant of guarantee or security from, a company in Italy. However, please see question 6.1 as to withholding tax.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Foreign lenders would be subject to the same costs and notarial fees (if any) as Italian lenders. Costs and notarial fees depend on a number of variables (e.g., whether documents are executed outside Italy, registered in Italy, the type of security, etc.). For further details, refer to the questions above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

If a lender is resident, domiciled or located for tax purposes or acting through a lending office or a permanent establishment (*stabile organizzazione*) in a country or territory listed as having a privileged tax regime or not allowing an adequate exchange of information with the Italian tax authorities, the Italian-resident borrower might

be subject to certain deductibility restrictions on the interest paid under the loan.

7 Judicial Enforcement

7.1 Will the courts in Italy recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Italy enforce a contract that has a foreign governing law?

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 the 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 (e.g., 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).

If an Italian court has and accepts jurisdiction, the foreign governing law will be applied according to its principles in terms of interpretation and application. The law governing the proceeding of an Italian court will however be Italian procedural law. Notwithstanding the above, Italian courts may refuse to apply the foreign law provisions governing the documents or to grant some of the remedies sought (e.g., punitive damages) if their application violates Italian public policy or is contrary to overriding provisions of Italian law. In addition, obligations governed by foreign laws may not be enforceable under Italian law if and to the extent that the same would be illegal, unenforceable or contrary to public policy under the laws of that jurisdiction. An Italian court may also take into account the law of the place of performance in relation to the manner in which performance of the obligation sought to be enforced should have taken place and the steps to be taken in the event of defective performance.

7.2 Will the courts in Italy recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Enforceability in Italy of final judgments obtained in a foreign court is governed by either the Brussels Regulation (EU) 1215/2012) (in the case of judgments from the courts of other EU Member States) or Titolo IV (*Efficacia di sentenze e atti stranieri*) of the Law 218/1995 (*Riforma del sistema italiano di diritto internazionale privato*) if no bilateral treaty applies. Generally, 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 following conditions are met:

(i) the foreign courts which rendered the final judgment had jurisdiction according to Italian law principles of jurisdiction;

(ii) the relevant summons and complaint was appropriately served on the defendants in accordance with the law of the forum and during the proceeding the essential rights of the defendants have not been violated;

(iii) the parties to the proceeding appeared before the court in accordance with the law of the forum or, in the event of default by the defendants, the foreign court declared such default in accordance with the law of the forum;

(iv) the foreign judgment is final and not subject to any further appeal in accordance with the law of the forum;

(v) the foreign judgment is not in conflict with any final judgment previously rendered by an Italian court;

(vi) there is no action pending in the Italian Republic among the same parties and arising from the same facts and circumstances which commenced prior to the action in the country of the forum; and

(vii) the provisions of such judgment would not violate Italian public policy.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Italy, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Italy against the assets of the company?

It is very difficult to give an estimate on proceedings brought in Italy as timing would depend on a number of different factors, including the venue of the proceedings. Looking at some unofficial statistics, from filing of a suit to final adjudication of a matter and enforcement, up to seven years may lapse. Enforcement of a foreign judgment is a much more straightforward exercise, which, assuming no re-litigation of the matters adjudicated upon, takes approximately up to 18-24 months.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

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. Although recent changes in the law to speed up enforcement of real estate assets have made available the use of auction directly managed by the notary public or of computerised auctions, this is the only avenue available for mortgages and special privileges. However, enforcement of a pledge can also be carried out, depending on the type of assets subject to security, through an out-of-court procedure, provided that this ensures a transparent sale process and fair sale price. In this case, the secured creditors have the right, after five days from the service on the debtor of the injunction to pay, to have the secured assets 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 request payment by way of assignment, in whole or in part, of the assets subject to security. The request 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.

To the extent that the relevant assets qualify as "financial collateral" (i.e., financial instruments (including shares in public companies), credit claims (including claims for repayment of money to and loans made by credit institutions) and cash), 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 once an enforcement event has occurred under the security document.

See also question 7.6 as to the effect of the opening of a bankruptcy or similar proceedings on an enforcement process.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Italy or (b) foreclosure on collateral security?

There are no special restrictions applicable to foreign lenders in either case.

7.6 Do the bankruptcy, reorganisation or similar laws in Italy provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

An automatic moratorium begins on the date the Italian company is declared bankrupt or any other insolvency proceeding (*procedura concorsuale*), including a pre-bankruptcy composition with creditors (*concordato preventivo*), is commenced by or 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 *concordato preventivo*, 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" (*concordato in bianco*). 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 (which, subject to certain requirements, may eventually be extended for a further 60 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 (*piano attestato di risanamento*). In the case of a restructuring implemented by way of debt restructuring arrangements (*accordi di ristrutturazione*) 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.

7.7 Will the courts in Italy recognise and enforce an arbitral award given against the company without re-examination of the merits?

An arbitral award made by an arbitral tribunal with its seat in Italy is recognised and may be enforced in Italy in the same manner as a judgment or order of an Italian court and without re-examination on the merits, subject only to the filing of the award with the competent court, together with the agreement under which the parties submitted to arbitration.

Recognition and enforceability in Italy of arbitral awards made by an arbitral tribunal with its seat in a country other than Italy is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, irrespective as to whether the country where the arbitral tribunal has its seat is a party to the Convention or not.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

See question 7.6.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

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

1. 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
   - repayments of debt during the two years before the Relevant Date in relation to which the scheduled due date was on or after the Relevant Date;
2. 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 (i.e., a high standard of proof being required to rebut this presumption):
   - undervalue transactions during the twelve months preceding the Relevant Date, in relation to which the value of the services, goods or undertakings provided by the debtor (now insolvent) was at least 25% higher than the consideration actually received (or to be received) by it;
   - payments in relation to monetary obligations 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 preceding 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
3. 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;
   - transactions for adequate consideration; and
   - security interests or other preferences granted simultaneously with the incurrence of the debt secured.

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

Lastly, transactions may also be 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 arm's-length terms, payments of salary/compensation to employees of the debtor and payments and other transactions made/entered into in connection with certified recovery plans (*piani attestati di risanamento*), debt restructuring arrangements (*accordi di ristrutturazione*) or pre-bankruptcy compositions with creditors (*concordati preventivi*).

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 collateral" (see question 7.4).

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

(i) first, towards costs and expenses for the administration of the insolvency procedure (including fees of the receiver/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 (*pre-deducibili*);

(ii) second, towards secured claims and other privileged claims, in the order of priority provided by law; and

(iii) then, towards unsecured claims *pro rata*, together with secured claims to the extent not satisfied through the proceeds of the secured assets.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Individuals who are not commercial entrepreneurs (*imprenditori*) pursuant to and for the purposes of articles 2082 to 2093 of the Italian civil code are not subject to insolvency (*insolvenza*) or bankruptcy (*fallimento*) as well as any winding-up, administration, insolvency or other similar proceedings (*procedure fallimentari*) affecting companies.

The Bankruptcy Law is applicable, and as a result bankruptcy can be declared, only if a company meets one of the following requirements: (i) net assets (*attivo patrimoniale*) exceeding €300,000 at the end of each of the three most recent financial years; (ii) total gross revenue (*ricavi lordi*) exceeding €200,000 for each of the three most recent financial years; or (iii) total indebtedness in excess of €500,000.

In addition, public interest entities such as state-controlled companies, banks, financial institutions, authorised financial intermediaries, open-ended investment vehicles, management companies and insurance companies are not subject to ordinary bankruptcy proceedings. Instead, these entities are subject to extraordinary administration (*amministrazione straordinaria*) and compulsory administrative winding-up (*liquidazione coatta amministrativa*), in relation to which specific procedures and rules apply.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

See question 7.4 as to the enforcement options. In addition, although not an enforcement proceeding *per se*, creditors may apply for precautionary measures (*misure cautelari*) *vis-à-vis* a debtor for the purpose of preserving the debtor's estate (*mezzi di conservazione della garanzia patrimoniale*) in the event of material adverse change in the debtor's financial conditions.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Italy?

On the assumption that the express submission to the foreign courts constitutes a valid and binding submission under the law governing the relevant documents, the express submission to the jurisdiction of the foreign courts would normally be binding under Italian law. Exceptions to the validity of the submission to a court other than an Italian court are limited and generally do not relate to commercial relationships. However, the express submission to a court other than an Italian court is ineffective if the elected foreign court does not accept jurisdiction or is otherwise incompetent to determine the matter commenced before it.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Italy?

A waiver of sovereign immunity is generally legally binding and enforceable under Italian law. However certain assets are not subject to enforcement due to their nature (e.g., forests, mines, assets of historic or artistic interest, real property used for public office and military stations, arms, aircraft, and ships).

10 Other Matters

10.1 Are there any eligibility requirements in Italy for lenders to a company, e.g., that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Italy need to be licensed or authorised in Italy or in their jurisdiction of incorporation?

Lending, 'including…financing of commercial transactions (including forfeiting)', is an ancillary banking activity under the Capital Requirements Directive 2013/36/EU (CRD). 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 the Consolidated 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, nor for investment firms wishing 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. However, see also question 1.1 as to recent developments.

Agent/security agent services can be performed by non-regulated entities to the extent the agreed role (taking into account all actions which could conceivably be required during the life of the transaction) does not include activities which are regulated in the Italian Republic, in which case prior regulatory authorisation will be required. 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.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Italy?

Among others, the following considerations should be taken into consideration when lending into Italy:

Usury Law

Pursuant to Law No. 108 of 7 March 1996, 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, the related security may be void.

The usury thresholds are updated quarterly by the Italian Treasury Department, in agreement with Bank of Italy, and are based on the average overall effective rate (*Tasso Effettivo Globale Medio*) 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 (Euribor, Libor, etc.), 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% 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, rather than when it is paid.

Compounding of interest

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.

Acknowledgment

The authors would like to acknowledge the assistance of Riccardo Petrelli, associate at Tremonti Vitali Romagnoli Piccardi e Associati, in the preparation of the tax questions of this chapter.

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