

Italy acts to enhance creditors' rights

May 16, 2016

On April 29, 2016, the Italian Government approved a set of provisions aimed at enhancing and expediting the recovery of claims by creditors, as well as increasing the efficiency and transparency of enforcement and insolvency proceedings.

The new rules introduced (a) a non-possessory pledge over movable assets (akin to a floating charge), (b) the ability to agree in advance to the foreclosure of collateral and (c) a register of enforcement and insolvency proceedings.

The new rules have been adopted by means of a Law Decree (the "Decree") which entered into force on May 4, 2016 and will need to be ratified by Parliament within the following 60 days.¹

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

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¹ In case Parliament does not ratify it within 60 days, the Decree will cease to be effective retroactively.



Non-possessory pledge over movable assets

Pursuant to the Decree, claims (whether owed to banks or other creditors) may be secured by way of a non-possessory pledge over the pledgor's movable assets, whether existing at the time the pledge is granted or acquired in the future. The assets comprising the collateral may be identified by reference to asset categories (as opposed to being individually identified) or aggregate values. The pledge may secure existing as well as future claims, provided that a maximum secured amount is specified.

Unless prohibited by agreement, until enforcement of the pledge, the pledgor has the right to continue using or disposing of the collateral in the course of its business. In the event of a disposal, the pledge extends to the proceeds or products of such disposal.

Creation of the pledge requires an agreement in writing, indicating, among other things, the identity of the pledgor, the debtor and the creditor.²

Perfection of the pledge requires registration with a register held at the Inland Revenues Service (*Agenzia delle Entrate*).³ Registration may last up to 10 years but may be renewed.

The Decree also seeks to facilitate the enforcement of such pledge, as secured creditors may, among other things, (a) dispose of the collateral through a competitive sales process run by an intermediary appointed by the parties (or, in case of disagreement, the Court) and apply the proceeds as recovery (and pay any excess amount to the debtor) or (b) foreclose on the collateral up to the secured amount.

Finally, the secured creditor may also enforce the pledge pending bankruptcy liquidation proceedings

² Based on the letter of the Decree, it is unclear how creditors need to be identified in connection with syndicated financings.

³ The establishment and functioning of this register will be governed by a decree of the Ministry of Economy and Finances, which must be adopted within 30 days of the Parliament ratifying the Decree. Until then, in practice, the non-possessory pledge may not be granted.

(*fallimento*), provided that its claims have been admitted in the proceedings as secured claims.⁴

Foreclosure Agreements

Loans granted by banks or other entities authorized to lend in Italy may be secured by way of a 'foreclosure agreement', pursuant to which the debtor or a third party grantor transfers to the lender the ownership of (or other *in rem* rights to) a real property, which transfer is conditioned upon the occurrence of a qualifying payment default on the loan.⁵

In order to enforce its security, the secured lender shall, among other things, request the Court to appoint an appraiser to value the collateral. The excess of such appraised value over the outstanding claim shall be paid to the grantor.

The secured lender may enforce its rights under the foreclosure agreement even though the collateral is subject to enforcement proceedings or the grantor is subject to bankruptcy liquidation proceedings (*fallimento*), subject, in the latter case, to the authorization of the judge overseeing the bankruptcy (*giudice delegato*).

The Decree does not set out the ranking of this new form of security interest against other prior or future⁶ mortgages on the same asset or other claims preferred by law over the proceeds from real property. As a result, further clarifications will be necessary in this respect.

⁴ On the contrary, the Decree does not seem to allow enforcement of the pledge pending other insolvency or restructuring proceedings (such as *concordato preventivo*, a Court-supervised composition with creditors similar to US Chapter 11 proceedings).

⁵ A qualifying default is defined as the borrower being overdue for over 6 months on at least three repayment installments (or on any repayment installment, in case of a loan with repayment installments set at longer than monthly intervals).

⁶ The Decree only indicates that this security interest, if granted for a financing already secured by a mortgage over the same asset, prevails over the security interests registered thereafter.

Other relevant measures

With a view to increasing the transparency of insolvency situations, the Decree also established an electronic register for enforcement proceedings over real estate assets, insolvency and restructuring proceedings. The information in the register will be publicly accessible unless the Court authorizes a restriction with respect to specified information for confidentiality reasons.

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