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Decision of Joint Chambers of the Italian Court of Cassation Put an End to "Supervened Usury"

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The Italian *Corte di Cassazione a Sezioni Unite* (Joint Chambers of the Court of Cassation), with decision N. 24675 of 19 October 2017 has provided clarity on one of the key contentious points concerning the application of the Italian usury legislation (Law N. 108 of 7 March 1996, as subsequently amended and supplemented the "Usury Law"), by stating that an interest rate that was not usurious when agreed upon (i.e., when the relevant agreement was entered into) cannot become usurious after such date as a result of either a change of law or a decrease over time of the thresholds above, which interest rates are considered usurious.

The Legal Framework

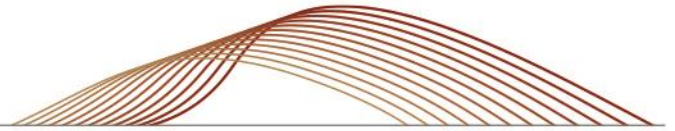
Usury is a criminal offence in the Italian legal system. The Italian criminal code sets out in details the crime of usury and its punishment. Pursuant to the provisions of the Italian criminal code, interest, is usurious when (a) agreed in an amount exceeding applicable thresholds (as set out pursuant to the Usury Law) or (b) even when lower than applicable usury thresholds (i) it is disproportionate based on the specific circumstance, and (ii) the obligor was in economic or financial distress when the interest was agreed upon (the so called subjective usury, *usura soggettiva*). The above Court decision does not deal with subjective usury.

Pursuant to the Usury Law, lenders are prevented from applying interest rates higher than the usury thresholds. Such usury thresholds are determined on a quarterly basis pursuant to a decree of the Italian Ministry of Economy and Finance, based on the average annual interest rate (the "APR") applied during the previous quarter by banks and other financial institutions, taking into account all fees, remuneration, costs, and expenses (excluding taxes) connected with the credit agreements falling within the same type of homogeneous transaction. In more detail, usury thresholds are to be calculated as the sum of (a) 4% and (b) a percentage equal to 125% of the applicable APR, subject to a general cap equal to the sum of (a) 8% and (b) the applicable APR.

The Usury Law, together with the Italian Civil Code, also sets out that the civil (as opposed to criminal) consequences of agreeing to an usurious interest rate are that the relevant clause is null and void and no interest is due.

The Decision

The case that originated the Court's decision concerned the effects that the usury thresholds, which were determined in accordance with the Usury Law, would have on the (higher) interest rate set out by an agreement, which was entered into prior to the entry into force of the Usury Law. The Court, however, seized the opportunity to provide an interpretation applying also to the more



relevant cases concerning agreements entered into after the entry into force of the Usury Law, and it stated that interest rates that were (at the time the agreements were entered into) below the usury thresholds and the effect on such agreements of the usury thresholds being subsequently lowered below the contractual interest rate.

The Court could do so in its role as interpreter of the law when sitting in Joint Chambers, which it does when significant precedents exist of conflicting decisions at (single Chamber) Cassation Court level. Even so, a decision taken by the Joint Chambers of the Cassation Court does not have the power to bind all Italian Courts in the future. However, the force of the precedent set by such a decision is not one that the lower Courts would disregard lightly.

In a succinct but comprehensive pronouncement, the Court outlines the different interpretations followed by existing precedents in respect of the matter at hand and concludes that all the various options (of which there are a few) deriving from the assumption that an interest rate that was not usurious when agreed could subsequently become usurious (as a result of the lowering of the usury thresholds) are not in line with applicable law, thus finding that “supervened usury” interpretations are groundless.

The Court goes on acknowledging that a debtor may have legal instruments to protect its position in cases of interest rates higher than the usury thresholds, but these are those available to parties in general and do not entail the invalidity or ineffectiveness of the interest rate provisions.

Along the same vein, the decision has clarified that the good faith obligation of the parties (which is a key and general principle of Italian law) cannot limit the enforceability of a valid contractual provision, such as that setting out an interest rate which only subsequently is higher than the usury threshold.

Such a clear and articulated decision should be able to provide much needed clarity to the market on this specific point. As a result of this precedent, provisions introducing caps to interest rates based on usury thresholds as reset over time (often used in financing agreements in recent times) should no longer be necessary.



If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings London lawyer:

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