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Italy Introduces New Tools for Securing Financings and Strengthens Enforcement Procedures

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On May 3, 2016 the Italian government approved Law Decree No. 59 (the “Decree”) which, *inter alia*, provides for new types of security and introduces streamlined in-court and out-of-court enforcement procedures. In addition, the Decree mandates the setting up of a centralized electronic register for security enforcement proceedings and insolvency and pre-insolvency restructuring proceedings. The Decree aims to facilitate financings and secondary debt transactions by reinforcing creditors’ rights and providing more flexible instruments to lenders and borrowers.

Pledge Without Possession (Floating Charge)

A pledge on movable assets is generally created by the delivery to the creditor of the pledged assets or of the document that grants exclusive title to the same. However, the transfer of possession of pledged assets generally deprives the debtor of assets that may be necessary for carrying out its business.

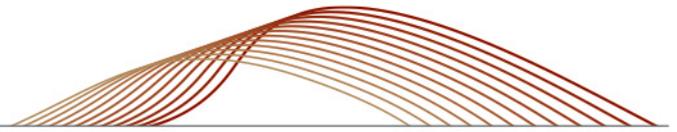
According to the Decree, companies can now create a pledge without possession on their movable assets (other than registered movable assets), present or future, either identified specifically or identified through one or more asset categories or a total value, as security for debt incurred in the exercise of their business.

The pledgor is entitled to dispose of the pledged assets, in which case the security is automatically extended (without any novation effect) to the new asset (in case of substitution) or to the corresponding sale price (in case of sale).

Perfection of the floating charge is obtained through a registration in an electronic register to be held by the tax authority, and is valid for a 10-year period. All relevant formalities and liabilities of such registration will be further detailed in a Ministerial decree to be issued by the Ministry of Economy and Finance (*Ministro dell’Economia e delle Finanze*) within 30 days from the conversion into law of the Decree.

In case of an enforcement event, the creditor will have the following options:

- to sell the pledged assets by means of competitive procedures, also through specialized entities, based on an evaluation made by an expert agreed between the parties or (in case of lack of agreement) appointed by the court, ensuring notice to and involvement of all concerned parties;



- to enforce the claims that are the subject matter of the pledge;¹
- (only where the pledge agreement expressly provides the relevant option and the evaluation criteria and formalities) to lease the pledged assets and use the rents to repay the secured amount; or
- (only where the pledge agreement expressly provides the relevant option and the evaluation criteria and formalities) to appropriate the pledged assets.

Preliminary Transfer Agreement as Security for New Financings ("Patto Marciano")

The Decree also introduces the so-called "*patto marciano*" as security for financings granted to companies by banks or other entities entitled to grant loans. This mechanism allows a financing to be secured by the transfer of title of real estate assets (other than the ones where the debtor or its close relatives are domiciled), in favour of the lender (or any subsidiary). The mechanism is triggered by a debtor's payment default for at least six months from the date in which a payment was due (three missed instalments in case of a monthly amortisation, one missed instalment in case of amortisation on periods longer than a month or no amortisation).

The *patto marciano* can be agreed with respect to both new and existing financings (in which case, where the claim is already secured by a mortgage in favour of the same creditor, the new registration would prevail over other registrations made after the mortgage registration), through a notarised agreement, and should be registered in the land registry.

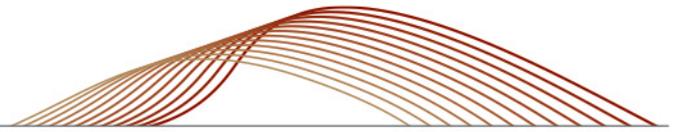
In case of default, the creditor must notify the debtor (and, as the case may be, the third party who has title to the property) and, after 60 days from such notification, is entitled to ask the president of the local court to appoint an expert to assess the value of the property. This procedure applies also in the event of pending enforcement procedures or in a bankruptcy scenario.

The transfer will be deemed completed upon either (i) the notification to the creditor of the expert assessment concerning the value of the property, or (ii) if the value of the property is higher than the secured debt (increased by the taxes and expenses of transfer), the payment to the debtor of the difference between such higher value and the value of the secured debt.

The Electronic Register for Enforcement Proceedings, Insolvency and Pre-Insolvency Proceedings

The Decree establishes the national register of insolvency and pre-insolvency proceedings to be maintained by the Ministry of Justice (*Ministero della Giustizia*), which will contain a variety of information relating to (i) proceedings for enforcement of mortgages on properties, (ii) bankruptcy and other insolvency proceedings and (iii) pre-insolvency proceedings such as *concordato preventivo* proceedings and debt restructuring agreements under Article 182-*bis* of the Bankruptcy Act.²

The information to be provided in connection with insolvency and pre-insolvency proceedings includes: (i) the date of the opening of insolvency proceedings and the competent court, (ii) the type of insolvency proceedings, (iii) the debtor's name, registered office, and identification number, (iv) the name and contact details of the insolvency receiver appointed in the proceedings, if any, and (v) the time limit for lodging claims, if applicable, or a reference to the criteria for calculating that time limit.



The register is an important stepping stone in the creation of the European insolvency register contemplated by the recent reform of the European Regulation on Insolvency Proceedings (see our Client Alert, "[New EU Regulation on Insolvency Proceedings](#)").

Furthermore, the Decree simplifies the rules for attending creditors' meetings both in bankruptcy proceedings and in *concordato preventivo* proceedings. From now on, in fact, creditors may attend the meeting remotely through audio or video conference systems. These new rules are certainly laudable because they facilitate attendance at creditors' meetings by foreign parties and investors and ensure higher attendance (thus voting) rates at such meetings.

The Amendments to the Code of Civil Procedure Concerning Enforcement of Securities

The Decree amends several provisions of the Code of Civil Procedure with the aim of streamlining and making more transparent the process for the enforcement of claims (and in particular claims secured by pledges and mortgages). Notably:

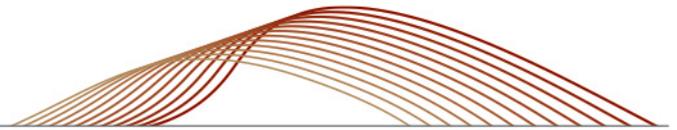
1. In case of attachment of movable assets, the auction process is now limited to three attempts, which must all take place within six months. In case of attachment of real estate assets, after the third auction attempt the property can now be sold at a minimum bid price of 50% of the price determined by the court expert's appraisal.
2. Creditors asking the Court to take possession of the assets attached are now entitled also to identify a third-party assignee within five days from the assignment award. Such provision should increase the number of investors interested in bidding, given the possibility to sell the assets directly to a third party without the costs of a public notary and without the payment of stamp duties for the sale.
3. In case of injunction orders requested by a creditor to a Court for overdue payments, if no objections are raised by the defendant in the proceedings brought against such injunction order, the Court must promptly order the debtor to pay—no longer subject to its discretion—the amount due and not objected to.

Entry Into Force

The Decree came into force on May 4, 2016. As it was adopted as an emergency decree, it will automatically expire unless it is converted into law by Parliament within 60 days. Clients are therefore advised to wait until the conversion of the Decree into law before entering into transactions based on the Decree's provisions.

Conclusion

The pledge without possession, or floating charge, appears to be similar to a security already existing under Italian law, *i.e.*, the special privilege *ex. Art. 46* of the Banking Act.³ However, the new floating charge can be used for any kind of financing (not only medium- or long-term loans), and by any entity entitled to grant loans. It is therefore available not only to banks but also to all alternative money providers operating under the various schemes (such as Italian securitization vehicles and Italian and EU AIFs) introduced in Italian law in the last few years (see our Client Alerts, "[SSM and the Quiet Revolution: Italy to Reform Banking and Finance Legislation Under EU Provisions](#)"; "[Italy 2016: The New Tax and Regulatory Frameworks for Banks](#)"; and "[Alternative Lending in Italy: A Significant Step Forward](#)"). Moreover, in most circumstances the floating charge can be enforced through so-called "private enforcement" mechanisms (*i.e.*, without going through a court).



The *patto marciano* gives a powerful device to the lenders, probably increasing the recovery ratios of future non-performing loans (since the duration of enforcement proceedings is one of the main causes of the current valuations of the Italian NPLs).

Facilitating creditors' participation in voting on *concordato preventivo* proposals will reinforce the ability of creditors to leverage the alternative offer mechanisms introduced by Decree 83 (see our Client Alerts, "[Italy Amends Bankruptcy Act and Other Laws to Facilitate Restructurings and Reinforce Creditors' Rights](#)" and "[Italy Finally Approves Statute Amending Bankruptcy Act and Other Laws to Facilitate Restructurings and Reinforce Creditors' Rights](#)").

The setting up of a national register of insolvencies will greatly assist in increasing market transparency, while streamlining and making enforcement proceedings more transparent will increase predictability and reduce transaction costs, thus increasing the appeal of secured loans.

Some of the provisions of the Decree, or the way they will be implemented in practice, are unclear. Potential lenders and borrowers are advised to delay entering into transactions based on the provisions of the Decree until the instrument is converted into law, hopefully with more clarity provided on certain features of the new rules.



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

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¹ Notably, however, this option does not appear consistent with the scope of the Decree, which only contemplates movable assets and not receivables.

² Royal Decree No. 267 of 16 March 1942 (as amended).

³ Legislative Decree No. 385 of 1 September 1993 (as amended).