

TOPICS COVERED

- Pledge without possession
- Financing of enterprises guaranteed by the condition precedent of the transfer of real estate properties, the so-called Marciano Pact



Italy is “in” securing lending

In this edition of Legal Pulse we analyse recent developments in the Italian lending market. We invite you to read about these legal updates regarding Italy and welcome your thoughts on areas to be covered in future issues.



While Brexit talks are yet to start, Italy enacts new

instruments to boost investors' appetite

UK referendum's outcome, namely UK decision to leave the EU, will likely hit the UK economy and, probably, the global economy. Brexit “leave” decision is creating uncertainty on business, which will last for quite some time, given that the implementation of the “leave” decision will take, at least, a couple of years for the completion of the negotiation procedures.

Also, the new scenario may entail a new role for some EU Member States, since the gateway role into Europe that UK has played so far may be replaced by other EU Members.

However, Brexit is just one, in a long line of factors, that investors have to consider. Despite the initial feeling that this would be the end of the “United Europe”, the public reaction has been driven by a

renewed sense of EU patriotism, pushing to a new wish for structural reforms, including those to boost investments.

During 2016 Italy approved measures to wake up investors' appetite. Last February a law decree (49/2016), already converted into law, introduced provisions aimed at stimulating the Italian economy and increasing the availability of non-bank debt to finance Italian companies, by allowing European Alternative Investment Funds to invest in Italy (also through direct lending) it being no longer required for such funds to have an establishment in Italy and allowing them to take advantage of tax benefits previously reserved to banks and Italian Alternative Investment Funds only.

Alongside this law, on 3 May 2016 Mr. Renzi's government adopted a new law decree (n. 59/2016 **Law Decree**), which was converted into law on 30 June 2016 and entered into force on 3 July last. The Law Decree introduces two new types of securities in our legal system aimed at speeding up some enforcement procedures.

Pledge without possession

The Law Decree has introduced an innovative security similar to the floating charge ruled by the English law which entails that the pledged asset can continue to be used by the company (without entailing the “dispossession” of the asset in order to perfect the pledge, as so far required), also granting the secured creditor new and faster enforcing procedures, besides those until now ruled by the Italian law (the so-called judicial enforcement). The new rules are aimed at accelerating the enforcement of the guarantee by means of conferring to the creditor the possibility, in case of default, to dispose of the pledged asset through its sale, lease or its appropriation in order to satisfy its credit, provided that some measures aimed at protecting the grantor are adopted, as we will examine in the following

paragraphs.

According to article 1 of the Law Decree, entrepreneurs registered with the Italian Companies Register can now create a “pledge without possession” over certain assets used in the course of their business, in order to secure credits granted to them or act as a third party security provider.

Such security has similarities with other securities already ruled under the Italian law.

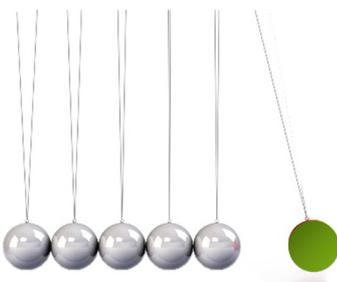
Below is a table showing the main features of the pledge without possession against the special privilege (*privilegio speciale*) currently ruled by Legislative Decree 385/1993 (**Banking Act**) and the pledge over movable assets ruled by the Italian civil code:

Pledge without possession Art. 1 Law Decree 59/2016	Special privilege Art. 46 Banking Act	Pledge over movable assets Art. 2786 Italian civil code
Beneficiary: any creditor.	Beneficiary: only banks or other qualified investors.	Beneficiary: any creditor.
Credits: any kind of credit, current or future, determined or capable of being determined, provided that such credit originates from the conduct of business.	Credits: credits originating from medium-long term loans or bonds.	Credits: any credits.
Pledged assets: (i) non-registered movable assets, current or future, used (<i>destinati</i>) in the conduct of business (including intangible assets provided that they can be determined by global value or by reference to a category of assets); (ii) receivables deriving from or relating to the conduct of business.	Pledged assets: (i) non-registered movable assets, current or future, used in the conduct of business. In particular on current or future equipment and facilities, raw materials, finished or work in progress products, fruit, flock, goods - also purchased with the loan granted; (ii) receivables, current or future, deriving from the sale of the above products.	Pledged assets: (i) non-registered movable assets; (ii) shares, quotas of corporate capital, financial instruments, bank accounts and receivables; and (iii) according to Legislative Decree 170/2004 a limited kind of claims (including banks' pecuniary claims) can be secured by pledges or other financial collateral arrangements applied on shares, cash and financial instruments.

Pledge without possession Art. 1 Law Decree 59/2016	Special privilege Art. 46 Banking Act	Pledge over movable assets Art. 2786 Italian civil code
Registered movable assets that qualify as real estate (such as cars, ships or aircrafts) cannot be pledged		
<p>Grantor remains in possession of the secured asset and, unless differently agreed, can sell, transfer or otherwise dispose of the pledged property. Should this happen, the pledge will transfer automatically to the price or to the proceeds of the disposal. The pledgee may promote actions in case of the debtor's abuse of the pledged asset to secure its credit.</p>	<p>Grantor remains in possession of the secured asset.</p>	<p>The perfection of the pledge requires the dispossession of the assets which may be implemented by means of either the delivery of the assets to the secured creditor or to a third party custodian.</p>
Perfection formalities		
<p>Contract in writing, indicating parties (including the third party granting the pledge), a description of the pledged asset and the maximum secured amount. Assets do not need to be exactly identified.</p>	<p>Notarial deed (bearing <i>data certa</i>). The assets need to be exactly described and identified.</p>	<p>Written deed (bearing <i>data certa</i>) describing the asset pledged.</p>
<p>Pledge can be opposed to third parties and acquires its ranking only upon registration with the online "pledge without possession register" held by the Italian Tax Authority (Agenzia delle Entrate).</p>	<p>Effectiveness towards third parties can be achieved only upon registration of the deed of pledge with the registry of the court of the place where the assets are located.</p>	<p>Depending on the asset pledged some particular perfection formalities may be required.</p>
Enforcement		
<p>Upon occurrence of an event of default, the pledgee can sell, collect or assign the pledged credits, lease or take possession of the asset only after notice in writing to the debtor and the third party pledgor.</p> <p>The grantor, unless differently agreed, is obliged to deliver the pledged asset to the pledgee within 15 days of the receipt of such written notice. Should the delivery not occur, it is not necessary to start a judicial enforcement since the pledgee can enforce the pledge via court bailiff by showing the contract of pledge and its registration in the <i>ad hoc</i> registry.</p> <p>Furthermore, should a judicial proceeding of expropriation be started for any other reason, the pledge can also be executed upon approval of the judge. Even in case of bankruptcy the enforcement of the pledge is admitted provided that the pledgee has been classified as a preferential lien by the bankruptcy court.</p>	<p>It requires a court supervised procedure under which the assets are sold to a third party. The security interest is satisfied by the proceeds of the sale.</p>	<p>Some security interest can be enforced in out of court proceedings, on the basis of procedures agreed by the parties, provided that the law so allows. For example in case of pledge over bank accounts or over receivables, the enforcement can be carried out according to article 2803 of the Italian Civil Code, which allows creditors to cash in the pledged receivables and to apply the proceeds to the part of the secured obligations which have already become due.</p>

One of the main hurdles the new security will have to face is its possible collision with the provisions ruled under article 2744 of the Italian Civil Code, relating the prohibition of forfeiture covenants (*divieto di patto commissorio*). The "*patto commissorio*", or forfeiture covenant, is such agreement that entails the possibility for the creditor to acquire the property of the pledged or mortgaged asset in case of default of the creditor. The Prohibition contained in the Italian Civil Code entails the nullity of such covenant.

In this regard, a recent decision of the Court of Cassation¹ (*Corte di Cassazione*) has focused the ratio of the prohibition of forfeiture covenants by sanctioning with the nullity any covenants entailing a disproportion between the then existing debt and the value of the secured asset. In other words, the prohibition is aimed at avoiding an unfair enrichment of the creditor. Therefore, in any cases where such



disproportion is missing the covenant would have to be deemed as valid. This is the case in the so-called "Marciano pact"

(*patto Marciano*), which provides that an estimate of the value of the secured asset should be made upon the enforcement of the security, so that the secured creditor has to pay the balance to his/her enforced debtor.

In light of the principles stated by the Court of Cassation, the new enforcement procedure introduced for the pledge without possession (as well

as that – see below - ruled for the transfer of real estate properties under condition precedent) seem not to infringe the prohibition of forfeiture covenants, whenever the principles set forth by the Court of Cassation are abided by the private parties.

Financing of enterprises guaranteed by the condition precedent of the transfer of real estate properties, the so-called Marciano Pact

The Law Decree has added a new article (48-*bis*) to the Banking Act, introducing a new instrument to secure "bank" loans granted to entrepreneurs (namely individual entrepreneurs and/or commercial companies).

Transfer of property upon condition precedent: according to the new law provisions, banks and other entities authorized to lend to the public can take security over the borrower's assets by means of a conditional transfer of property over a piece of real estate, or on another real estate right, belonging to the entrepreneur or to third parties (**Security**). The transfer of the property is set up upon the condition precedent that the borrower defaults.

Default: according to the provisions of the Law Decree borrower' failure to honour its payment obligations for more than 9 months is an event of default. Such 9 month term is calculated starting from the default to: (i) at least three repayment installments, also non consecutive, in case the repayment schedule is based on monthly instalments; or (ii) one installment, in case the repayment schedule is based on installments having duration longer than one month; or (iii) the

¹ Court of Cassation decision n. 10986 – 9 May 2013

repayment date, for such loan agreements which provide a bullet repayment date.

The 9 month term is extended up to 12 months in case the borrower has reimbursed 85% of the capital when the default occurs.

Loans secured: the Security can be created, both for new loans as well as for existing loans (in this latter case the security must be provided for in a notarial deed).

Real estate: the Security cannot be set over certain categories of real estate properties, such as the main residence of its owner, the spouse or the owner's relatives (including the *affini*, i.e., the spouse's relatives') within the third degree.

Enforcement: if default occurs, the bank can serve a notice to the debtor declaring its intention to enforce the instrument. After a period of 60 days upon the receipt of the notice, the president of the competent court will appoint an expert appraiser that will carry out an estimate of the property. The condition precedent will be considered to have occurred once

the estimate is communicated to the debtor and to the creditor and therefore the property of the real estate will be transferred to the creditor provided that it pays the borrower the difference (if any) between the estimated value and the amount of the debt due, together with the related expenses to enforce the transfer of the property. The grantor may raise objections to the estimate, but such objections do not affect the enforcement of the transfer but only may affect the balance "if any" to be paid to the grantor.

For publicity purposes, a statement of the creditor confirming that the condition precedent has occurred, which allows the updating of the public real estate registry, is contained in the notarial deed attesting, under the creditor responsibility, the occurrence of the condition precedent (as required under art. 2668, 3rd. paragraph of the Italian Civil Code).

Ranking: for purposes related to the ranking of creditors' competing procedures, the Security is deemed as a mortgage.

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We remain at your disposal for further information on the above legal update

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